Recent developments in housing law

Nic Madge and **Jan Luba QC** continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Homelessness

In August 2009, John Denham, the Secretary of State for Communities and Local Government (CLG), issued a new Code of Guidance on Homelessness in exercise of his powers to give statutory guidance to local housing authorities in England: Housing Act (HA) 1996 Pt 7 s182. The *Homelessness code of guidance for local authorities: supplementary guidance on intentional homelessness* came into immediate effect.[1] Although the code gives general guidance on intentional homelessness (in addition to that in Chapter 11 of the main Code issued in July 2006), it also addresses specifically cases of homelessness among former homeowners, reminding local authorities that when homeowners voluntarily give up possession or decide to sell, those authorities will need to give careful consideration to the substantive causes of homelessness before coming to a decision on intentionality.

In July 2009, the Welsh Assembly Government published its new *Ten year homelessness plan for Wales 2009 to 2019*.[2] It pledges the government to undertake a review of the key areas of homelessness legislation with a view, where necessary, to using the devolved powers of the Welsh Assembly to make necessary changes.

The Homelessness Action Team's *HAT Update* (Tenant Services Authority (TSA), July 2009) focuses on the issue of housing for 16 and 17 year olds.[3]

The UK Borders Agency has launched a pilot scheme to provide street-homeless failed asylum-seekers with immediate accommodation on the same day that their applications are received. The pilot is based in Birmingham. More details of this and other developments relating to 'section 4 support' are given in the July 2009 issue o f the *Asylum Support Appeals Project Newsletter* (issue 17).[4]

Social housing allocation

Following the House of Lords' decision in *R (Ahmad) v Newham LBC* [2009] UKHL 14, the housing minister has published a draft of new statutory guidance on the social housing allocation provisions of HA 1996 Part 6: *Fair and flexible: draft statutory guidance on social housing allocations for local authorities in England. Consultation*.[5] After consultation, the new Code will be issued in November 2009 in exercise of powers under HA 1996 s169, and will partly replace the two current codes of guidance on housing allocation and on choice-based letting for local housing authorities in England. Responses to the draft Code are sought by 23 October 2009. An impact assessment on the draft Code has also been published.[6] The policy behind the new draft guidance is set out in a letter sent to all local housing authorities in England on 31 July 2009 in which the secretary of state explained that:

- the government remains committed 'to giving priority to those in the greatest housing need';
- there is to be no change in the statutory 'reasonable preference' criteria set out in HA 1996 s167(2);
- the presumption of 'cumulative preference' of an applicant's housing needs no longer applies;
- local authorities will be expected to demonstrate that they have involved tenants and residents in framing their responses to the consultation exercise; and
- following issue of the final guidance, all authorities will be expected to review and revise their housing allocation schemes.

Current local authority practice in respect of social housing allocation is outlined in *Exploring local authority policy and practice on housing allocations* (CLG, July 2009).[7] Concerns that social housing might be being allocated disproportionately to ethnic minorities were addressed by two reports in July 2009. The National Housing Federation (NHF) announced on 30 June 2009 that the claim that migrants were increasingly jumping the queue for affordable housing at the expense of local people was a 'dangerous myth'.[8] The NHF found that around 4.6 per cent of housing association lettings in England went to migrants in 2008/09, and the figure was virtually identical in the previous two years. On 7 July 2009, the Equality and Human Rights Commission (EHRC) published a report showing that the vast majority of people who live in social housing in Britain were born in the UK: *Social housing allocation and immigrant communities*.[9] The EHRC study found that less than two per cent of all social housing residents are people who have moved to Britain in the last five years and that 90 per cent of people who live in social housing were born in the UK.

In its August 2009 publication, *Housing practice: new migrants and housing*, the Chartered Institute of Housing noted that only five per cent of social lettings go to foreign nationals. The government has said that: 'There is no evidence of unfair access to migrants in social housing': CLG news release, 9 July 2009.[10]

Housing possession claims

From January to March 2009, over 61,000 possession claims were brought in the county courts of England and Wales and over 38,000 warrants for possession of residential premises were issued. Both figures represented increases against the last quarter of 2008. The details were given in a statistical report issued by the Ministry of Justice on 9 July 2009: *Provisional court statistics Q1 2008 to Q1 2009: Ministry of Justice statistics bulletin*.[11]

Provisional figures for the second quarter (April to June 2009), issued in August 2009, show that a further 26,215 mortgage possession claims were issued and landlords brought a further 34,421 possession claims over those three months: *Statistics on mortgage and landlord possession actions in the county courts – second quarter 2009: Ministry of Justice statistics bulletin*.[12]

Social housing regulator

Housing and Regeneration Act (H&RA) 2008 s114 gives ministers the power, by order, to extend the remit of the new social housing regulator (the TSA) to cover council housing as well as housing association lettings. The government proposes to exercise that power by making the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2009, referred to as the 'Cross Domain Order'. In August 2009, it published a consultation paper suggesting which council functions might come under the TSA's

jurisdiction and seeking responses by 30 October 2009.[13]

H&RA s197 enables the government to give statutory directions to the TSA about the standards the agency sets for social landlords. It proposes to exercise that power in the terms set out in a consultation paper issued in July 2009.[14] Responses are sought by 9 October 2009.

In a new report, *Choosing choice* (TSA, July 2009), the TSA indicates how it could use its statutory powers to secure more choice for tenants after the process of housing allocation has been completed, ie, in the management of social housing.[15]

The regulator of social housing in Scotland has published the report *Social landlords in Scotland: shaping up for improvement* (Scottish Housing Regulator, July 2009).[16] It records that over half of all social housing tenants in Scotland were receiving poor, or only adequate, housing services from their landlords.

Tenants of mortgage defaulters

In August 2009, the government published a consultation paper on proposals to extend the legal protection of tenants who find themselves facing eviction when their landlords default on mortgage payments: *Lender repossession of residential property: protection of tenants. Consultation* (CLG, August 2009). Responses are invited by 14 October 2009.[17]

Mortgages: second charge lenders

The Office of Fair Trading (OFT) has published new guidance for lenders (and brokers) on the standards to be observed when making loans secured by second charges on residential property: *Second charge lending – OFT guidance for lenders and brokers* (OFT, July 2009).[18]

On 8 August 2009, the Treasury select committee reported that while many mainstream lenders were taking pro-active steps to support consumers in mortgage difficulties, it had concerns at the lack of flexibility and forbearance shown by some lenders in the sub-prime, specialist and second charge sectors towards homeowners in arrears: *Mortgage arrears and access to mortgage finance. Fifteenth report of session 2008–09*, HC 766.[19]

Stock transfers of council housing

Before undertaking a stock transfer of tenanted homes to a new landlord, local housing authorities in England must consult with tenants and the form of that consultation must follow statutory guidance given by the secretary of state: HA 1985 Sch 3A. New statutory guidance under that Schedule was issued in July 2009.[20]

CLG has also published a summary of responses to a consultation exercise it had conducted on the draft guidance.[21]

Strategic housing policies

The measures taken by local housing authorities in England to adopt and implement strategic plans for housing in their areas are subject to inspection by the Housing Inspectorate at the Audit Commission. The commission is now consulting on a new benchmark (an amended *Strategic approach to housing key lines of enquiry*) by which it will inspect such strategic housing activity by local authorities.[22] The consultation exercise closes on 18 September 2009.

Housing and anti-social behaviour

The drinking banning orders provisions of the Violent Crime Reduction Act 2006 Part 1 came into force on 31 August 2009: the Violent Crime Reduction Act 2006 (Commencement No 7) Order 2009 SI No 1840. The procedure for applying for such orders in the county court is covered by Civil Procedure Rule (CPR) Part 65 rr31–36 introduced by the Civil Procedure (Amendment) Rules 2009 SI No 2092. An outline of the new provisions and a case study based on the use of the habitual drunkard order provisions of the Licensing Act 1902 are provided in the August 2009 issue of *ASB Focus* published by the Home Office.[23]

In a speech delivered on 2 July 2009, Alan Johnson, the Home Secretary, announced that he would promote measures to secure a revival in the use of anti-social behaviour orders (ASBOs), and on 22 July 2009 in a joint statement made with Jack Straw, the Secretary of State for Justice, and Ed Balls, the Children, Schools and Families Secretary, he called for a 'crack down on out-of-control families who need to be challenged': Department for Children, Schools and Families press notice, 22 July 2009.[24]

Fire safety in high-rise housing

On 7 July 2009, the housing minister wrote to all local housing authorities providing an update on the investigation into the fire that took place in Camberwell, south-east London on 3 July 2009, and drew attention to measures that social landlords can take to promote fire safety.[25] CLG wrote again on 10 July 2009 identifying a particular feature of similar blocks that may need attention.[26]

The TSA has also written to registered social landlords (RSLs) providing advice to them on practical measures they should take in relation to fire safety in high-rise buildings.[27] A dedicated website indicating the other measures that central government is taking arising from the Camberwell fire has been established.[28] In August 2009, the government published a paper on the issues emerging from the inquiry by Sir Ken Knight into the fatal Camberwell fire, *Report to the secretary of state by the Chief Fire and Rescue Adviser on the emerging issues arising from the fatal fire at Lakanal House, Camberwell on 3 July 2009*.[29] A ministerial announcement was made on publication of that report.[30]

Detecting housing fraud

On 31 July 2009, the Audit Commission announced that the National Fraud Initiative (which enables police, local authorities and central government departments to share data about individuals) is to be extended to embrace housing associations in an attempt to detect those who are occupying social housing fraudulently.[31]

Gypsies and Travellers

On 16 July 2009, the government issued the *Gypsy and Traveller site management good practice guide* (CLG, July 2009) to help council officers and others with the management of Gypsy and Traveller sites.[32] It has also published a *Progress report on Gypsy and Traveller policy* (CLG, July 2009) recording steps taken to meet the accommodation needs of those communities.[33]

Housing dispute resolution

On 16 July 2009, the Ministry of Justice gave the government's response to one of the Law Commission's three papers on reforming housing law: *Housing: proportionate dispute resolution* (May 2008). In a ministerial statement, the government has broadly accepted the recommendations in relation to advice, assistance and mediation/alternative dispute resolution: *Hansard* HC Written Ministerial Statements cols 60WS–61WS, 16 July 2009.[34] However, it rejected proposals to transfer housing disrepair cases to the Residential Property Tribunal Service and give county courts jurisdiction over decisions on whether or not to provide accommodation pending homelessness reviews made under HA 1996 s188(3).

Information about housing

In July 2009, the government published the results of a major study of attitudes to housing covering public perceptions of all types of rented housing: *Attitudes to housing* (CLG, July 2009).[35] A companion publication, *Attitudes to housing: findings from focus groups* (CLG, July 2009), reports the views of 12 regional discussion groups.[36] The reports supplement other publications this year that

record the perceptions of tenants and other consumers of housing, around housing and tenure issues, including *Review of council housing finance: summary of findings from tenant engagement work* (CLG, March 2009).[37]

HUMAN RIGHTS

Article 1 of Protocol No 1

■ Bubić v Croatia

App No 23677/07,
9 July 2009

Mr Bubić and ZG were both employees of the same company, Ceming. In May 1989, Ceming allocated ZG a flat in Split, but that decision was annulled as illegal by the Split Employment Court because ZG already had a house where he lived with his family. In December 1990, Ceming allocated the flat to Mr Bubić and his family. However, they could not move into the flat because it was still occupied by ZG. Mr Bubić argued that he had acquired a specially protected tenancy of the flat and tried to buy it after parliament enacted the Protected Tenancies (Sale to Occupier) Act. However, he was not allowed to proceed with the purchase because he had never obtained a protected tenancy of the flat since he had never moved into it.

The European Court of Human Rights (ECtHR) dismissed Mr Bubić's claim that there had been a breach of article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention'). It was not disputed that Mr Bubić suffered an interference with his right of property which amounted to a 'deprivation' of possessions. However, the steps taken by the state were in line with domestic law. The interference with his rights pursued a legitimate aim, namely, the protection of legality. The findings of the national courts that Mr Bubić had never moved into the flat and refusing him a specially protected tenancy were not arbitrary in any respect.

■ Minasyan and Semerjyan v Armenia

App No 27651/05,
23 June 2009

Ms Minasyan was the owner of an apartment in Yerevan. Ms Semerjyan, her daughter, lived in the flat. In October 2001, the government adopted a decree approving a procedure for taking plots of land and immovable property situated in 'expropriation zones'. In 2004, the Mayor of Yerevan signed a contract with a private company authorising it to negotiate directly with the owners of property which was subject to expropriation and, should such negotiations fail, institute court proceedings on behalf of the state, seeking forced expropriation of such property. The company began proceedings against Ms Minasyan and Ms Semerjyan. In February 2005, the District Court granted the claim and terminated the rights of Ms Minasyan and Ms Semerjyan, and their appeals were dismissed.

The ECtHR found a breach of article 1 of Protocol No 1. First, 'the right of use of accommodation enjoyed by [Ms Semerjyan] in respect of the flat owned by [Ms Minasyan] was a distinct property right which involved a pecuniary interest and therefore constituted a "possession" within the meaning of article 1 of Protocol No 1 (para 56).' Second, the termination of Ms Minasyan's ownership and Ms Semerjyan's right to use the flat for the purpose of implementing construction projects undoubtedly amounted to an interference with their peaceful enjoyment of their possessions.

The termination of their rights amounted to a deprivation of their possessions, and the second sentence of the first paragraph of article 1 of Protocol No 1 was applicable to their case. The court reiterated that the most important requirement of article 1 of Protocol No 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The phrase 'subject to the conditions provided for by law' requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions. The Armenian Constitutional Court stated that private property could be expropriated for public needs only through the adoption of a law in respect of 'the concrete property'. In this case, no law was ever adopted by the Armenian parliament in respect of Ms Minasyan's property, and the entire expropriation process was governed by a number of government decrees. It followed that the deprivation of property was not carried out in compliance with 'conditions provided for by law'. The ECtHR decided that the applicants' claim for damages was not ready for a decision.

Article 6 and delay

■ Waltoś and Pawlicz v Poland

App Nos 28309/06 and 48102/06,
7 July 2009

In August 1997, the applicants filed a claim with the Koszalin District Court against a housing co-operative concerning the amount of maintenance fees to be fixed in respect of their apartment building. In November 1998, the proceedings were stayed pending the termination of parallel proceedings. The court resumed the proceedings in March 2003. In June 2003, the court stayed the proceedings at the applicants' request. They were resumed in November 2004. There were five hearings in 2005, two hearings in 2006 and seven hearings in 2007. The court gave a judgment in October 2007, but it was quashed in February 2009 by the Regional Court. The case was remitted for re-examination. The proceedings were still pending before the first-instance court in July 2009. The applicants complained to the ECtHR that the length of the proceedings was incompatible with the 'reasonable time' requirement in article 6(1) of the convention.

The ECtHR found a breach of article 6. The proceedings had lasted for 11 years and eight months for two levels of jurisdiction. The court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria:

- the complexity of the case;
- the conduct of the applicant and the relevant authorities; and
- what was at stake for the applicant in the dispute.

In this case, the state could not be considered to have shown due diligence in ensuring proper conduct of the claim. The ECtHR has frequently found violations of article 6(1) in cases raising issues similar to those in the present case. The government had not put forward any fact or argument capable of persuading the court to reach a different conclusion in the present case. The length of the proceedings was excessive and failed to meet the 'reasonable time' requirement. On an equitable basis, the ECtHR awarded each applicant €5,000 for non-pecuniary damage.

■ Sokorev v Russia

App No 33896/04,
18 June 2009

Mr Sokorev was an employee of a state-owned company. In 1987, he and his family were granted a room in a shared flat. After his dismissal in 1992, the company sought his eviction. In 1993, he brought proceedings against the company asserting his right to live in the room. In February 1994, the District Court rejected his claim and ordered his eviction. In April 1994, the Regional Court upheld the judgment, but Mr Sokorev obtained a stay of execution. In June 1994, the Presidium of the Regional Court quashed the earlier judgments by way of supervisory review and remitted the case for fresh examination. The District Court then examined the case twice and rendered two judgments. Each time the Regional Court quashed the judgments and remitted the case for fresh examination.

In the meantime, Mr Sokorev resettled and the company withdrew its claim for eviction. In another round of the resumed proceedings, Mr Sokorev confined his claim to asking the court to require the company to provide him with housing. In November 1998, the District

Court ordered the company to provide him with a flat, but in April 1999 the Presidium of the Regional Court quashed the judgment by way of supervisory review and remitted the case for re-examination. In July 1999, the District Court again required the company to provide Mr Sokorev with housing. In December 1999, the Regional Court quashed the judgment on appeal and remitted the case for fresh consideration. There were further hearings, judgments and appeals between 2000 and 2004. In February 2004, the District Court rejected Mr Sokorev's claim. In April 2004, the Regional Court upheld that judgment. Mr Sokorev complained that the length of the proceedings had exceeded the 'reasonable time' requirement under article 6.

The ECtHR considered that the case was not particularly complex. No significant delays could be attributed to Mr Sokorev's conduct. The length of the proceedings was because of the fact that the case was re-examined several times. The ECtHR noted that frequently the remittal of cases for re-examination is ordered as a result of errors committed by lower courts. The repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system. The court stated that it is incumbent on states to organise their legal systems in such a way that their courts can meet the requirements of article 6. As the dispute concerned Mr Sokorev's housing rights, the case required special diligence on the part of the national authorities. The court concluded that the 'reasonable time' requirement was not met. There was a breach of article 6(1).

POSSESSION CLAIMS

Demoted tenancies

■ Manchester City Council v Pinnock

[2009] EWCA Civ 852,
31 July 2009

Mr Pinnock lived with his partner and five children in a house which he had rented for some 30 years from Manchester City Council. After complaints of a number of serious incidents of anti-social behaviour on the part of Mr Pinnock's family (but not himself) at or near the property, Manchester obtained a demotion order under HA 1985 s82A. Subsequently, one of Mr Pinnock's sons was convicted of obstructing a police officer at the premises and another pleaded guilty to causing death by dangerous driving and driving while disqualified near to the premises. In June 2008, just before the date when Mr Pinnock's demoted tenancy would have reverted to being a secure tenancy (HA 1996 s143B), Manchester served notice of proceedings for possession. Mr Pinnock requested a review and was represented at an oral hearing by his solicitor. The panel upheld the decision to terminate his tenancy. Mr Pinnock defended the subsequent possession claim arguing that:

- the procedure for termination of demoted tenancies was incompatible with article 6;
- there had been no breach of the tenancy agreement; and
- the decision to recover possession was an improper exercise of the council's discretion and infringed his article 8 rights.

HHJ Holman made a possession order under HA 1996 s143D. Mr Pinnock appealed.

The Court of Appeal dismissed his appeal. Stanley Burnton LJ said:

The obtaining of possession of a property subject to a demoted tenancy is the second part of a two-stage process, and the whole process must be considered if the landlord's decision is to be fairly and lawfully considered in its context. The first stage is the application under section 82A … for a demotion order. That order is made in a procedure that clearly complies with article 6.

… [W]hen a demotion order has been made, the court has found the removal of security a necessary and proportionate response to the conduct of the tenant or those residing with or visiting him.

… When … the conduct … has been so serious as to justify a demotion order, very little is required to justify the landlord's decision to obtain possession. It would be wholly wrong, and inconsistent with the statutory scheme, to scrutinise the landlord's decision at the second stage with the rigour required of the county court at the first stage.

… Proportionality at the second stage is not a high test, and I see no real difference at the second stage between it and the domestic requirement … that the landlord's decision must not be one that no reasonable person would consider justifiable. If on review the landlord considers for good reason … that it is necessary or appropriate to obtain possession of a dwelling-house let on a demoted tenancy, and its decision is one that no reasonable person would consider unjustifiable, the requirement of proportionality will be satisfied (paras 27–30).

In any event, the authorities (*Kay v Lambeth LBC*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465, *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367, *Doran v Liverpool City Council* [2009] EWCA Civ 146 and *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613) establish that the landlord's decision at the second stage is not subject to the requirement of proportionality. Furthermore, HA 1996 ss143D, 143E and 143F are 'quite clear':

If the court concludes the procedure has not been followed, it will not make an order for possession. If it has been followed, it must make the order (para 50).

The county court does not have jurisdiction to quash a decision to serve a notice. Accordingly, if it found that the decision was legally defective applying the *Doherty* test or on other domestic judicial review grounds, it might have no alternative but to dismiss the claim for possession. The result would be, by s143B(4)(b), that the demoted tenancy would become a secure tenancy, even if the landlord, given an opportunity to reconsider its decision, would again decide to seek possession and could do so quite lawfully. However, decisions of the review panels are susceptible to judicial review by the Administrative Court. Stanley Burnton LJ also stated that failure to comply with s143F(6) (completing the review in time) should not of itself invalidate a review.

Public law defences

■ Brent LBC v Stokes

[2009] EWHC 1426 (QB),
10 July 2009

Ms Stokes was an Irish Traveller. She wanted to live on the same Gypsy and Traveller council site as her mother. She was on the waiting list, but, unilaterally, moved her mobile home onto a vacant part of the site. After tolerating her trespass for some time, the council sought possession. The defendant claimed that the site had become her home and that her eviction would infringe her right to respect under Human Rights Act (HRA) 1998 Sch 1 article 8. HHJ Copley refused a request to give directions for trial and made an immediate possession order on the basis that Ms Stokes had no defence to the claim, which was seriously arguable.

After considering *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, *Kay v Lambeth LBC* (see above), *Doherty* (see above) and *Doran* (see above), King J said:

… the approach to be adopted by a county court faced with a public law challenge to the decision of a claimant to seek possession, is that although the basic approach to a judicial review of that decision as explained by Lord Hope in Kay *in paragraph 110 remains intact … the considerations which can be taken into account on a review may be wider than allowed for by a strict adherence to traditional* Wednesbury *grounds and the personal circumstances of the defendant may have a*

role to play in this regard.

... it is still the case that the test of reasonableness by which the decision of the local authority is to be tested in the county court is whether the decision to recover possession was one which no reasonable person would consider justifiable. This is a strong conclusion to have to reach.

... It remains the exceptional case ... which will fall even to be considered as raising a seriously arguable case sufficient for the equivalent of a judicial review of the decision to be undertaken.

... It remains the law ... that ordinarily, absent any statutory obligation to do so, a landowner, even if a local authority, does not have to justify his decision to seek possession in exercise of his property rights and does not have to give any reason for seeking possession, let alone make good such reason (paras 32, 36, 37 and 39).

In this case, HHJ Copley, when considering how to proceed under CPR 55.8 was in a similar position to the single judge in the Administrative Court in having to decide whether permission should be granted to apply for judicial review, save the test was whether or not the ground was seriously arguable, and not, for example, merely capable of argument. This case, in reality, raised no matters of great complexity. The judge recognised the threshold test he had to apply. There was no basis for saying that there was a seriously arguable case that the council's decision to seek possession was so unreasonable and disproportionate as to be unlawful or one 'which no reasonable person would consider justifiable'.

King J also rejected a submission that it was procedurally unfair for the judge to have determined the preliminary question relating to the existence of substantial grounds to dispute the claim simply on the material then before the court, and that he should, before deciding that question, at least have ordered further disclosure of the reasons lying behind the council's decision to seek possession and relating to the matters it took into account. He dismissed the appeal.

■ Wandsworth LBC v Dixon

[2009] EWCA Civ 821,
15 July 2009

In 1983, Wandsworth granted Mr Dixon and his sister a joint tenancy. In 2005, his sister served a notice to quit, determining the joint tenancy. After executing two separate search warrants, police found small quantities of cocaine and herbal cannabis in the flat, resulting respectively in a fine and a caution. In May 2006, Wandsworth wrote that in view of his conviction for an arrestable offence, the council would no longer consider his request for a discretionary tenancy and required vacant possession. In August 2006, District Judge Tilbury made an order for possession on the basis that the defendant was an unauthorised occupant. In March 2007, Wandsworth notified Mr Dixon that he was ineligible for an allocation of housing accommodation: HA 1996 s160A. His claim for judicial review of that decision and a renewed application for permission to appeal were dismissed: ([2008] EWCA Civ 595; July 2008 *Legal Action* 22).

The defendant subsequently applied to set aside the possession order and/or to stay or suspend the execution of the warrant for possession on the basis that an eviction would be an unreasonable interference with his convention rights under article 8. HHJ Bidder QC, sitting as a deputy judge of the High Court, refused the application: ([2009] EWHC 27 (Admin); March 2009 *Legal Action* 23). The defendant applied for permission to appeal to the Court of Appeal.

On a renewed application, Carnwath LJ refused permission. HHJ Bidder QC had made a clear finding on proportionality that rendered all the legal arguments raised academic. He had said:

Even if, therefore, proportionality were to form part of the gateway (b) consideration (whether it be on the review by me of the decision of the claimants or on a determination whether a reasonable authority should have considered the article 8 rights when making its decision whether to bring possession proceedings) I am quite satisfied that the careful decision-making process of the defendants amply accorded with article 8. I also consider that the decision that they made was one to which they reasonably could have come (para 70).

REASONABLENESS AND ANTI-SOCIAL BEHAVIOUR

■ Glasgow Housing Association Limited v Hetherington

Sheriffdom of Glasgow and Strathkelvin,
28 April 2009

Ms Hetherington, a single mother aged 21, was a Scottish secure tenant. She admitted breaches of her tenancy agreement between 2005 and 2008. These included disturbances at the property involving fighting and screaming, parties (one of which lasted from 2 am to 5 pm with loud noise and banging), visitors kicking the door and threatening a neighbour with violence. After two drugs raids, she pleaded guilty to being concerned in the supply of diazepam (with a fine of £300) and possession of cannabis (with a fine of £120). Her landlord sought possession. She accepted that a ground for possession was made out, but said that it was not reasonable to make a possession order.

Sheriff Ian H L Miller adjourned the claim for six months on the conditions that Ms Hetherington complied with the terms of her tenancy agreement and did not commit any criminal offence. He said that:

It is for the defender to show during that entire time that she is able and willing to live at peace with her neighbours and other residents in the locality. If she achieves that it may go some way to healing whatever rifts have developed between her and them as a result of her past conduct (para 17).

He gave the following reasons for adjourning:

- Ms Hetherington was aged 21 and her daughter was almost 17 months old.
- The convictions were for Class C drugs. He inferred from the fines imposed that her 'involvement in supplying was towards the very modest end of the spectrum for that type of offence'.
- There was no evidence of any anti-social behaviour after May 2008. 'The passage of time ... entitles me to conclude that there is scope to consider that she has realised the error of her previous ways not only as regards the criminal law but also as regards her neighbours and other residents in the locality.'

ANTI-SOCIAL BEHAVIOUR

Breach of undertaking

■ Circle 33 Housing Trust Ltd v Kathirkmanathan

B2/09/1306,
16 July 2009

Mr Kathirkmanathan rented a first-floor flat owned by Circle 33. Occupants of the flat below complained of excessive noise. Circle 33 brought a claim to restrain Mr Kathirkmanathan from anti-social behaviour. The judge accepted an undertaking from him not to engage in, or encourage others to engage in, conduct capable of causing a nuisance or noise. After receiving more complaints of noise and nuisance, Circle 33 applied to commit Mr Kathirkmanathan to prison for contempt. He resisted the application on the basis that the noise nuisance had not been caused by him but by visitors to his flat. He claimed that there had been no breach of the undertaking as he had not encouraged the visitors to cause a nuisance.

HHJ Mitchell held that while the undertaking was clumsily worded, and did not

specify that Mr Kathirkmanathan was not to allow or permit activities to take place that were liable to cause noise or nuisance, it was clear that as a tenant he was responsible for ensuring that did not occur. He committed him to prison for eight weeks.

The Court of Appeal allowed his appeal. The language of the undertaking did not cover allowing or permitting anti-social behaviour to take place. The words 'allowing' and 'permitting' did not appear in the undertaking. Accordingly, the judge had misdirected himself in relation to the effect of the undertaking. In any event, there had been no finding that Mr Kathirkmanathan had been personally responsible for any act. The noise had emanated from his flat, but the judge did not find that any specific act of noise was an act of Mr Kathirkmanathan as opposed to anyone else. Finally, even if he had been in breach of the undertaking, the correct sentence would have been a suspended sentence in order to ensure future compliance with the undertaking.

Anti-social behaviour orders

■ Glasgow City Council v Ferguson

Sheriffdom of Glasgow and Strathkelvin, 22 May 2009

The defender was a Scottish secure tenant. Records kept by Strathclyde Police indicated that between 8 April 2007 and 12 July 2008, twenty-six calls were received regarding complaints of noise and disorder emanating from his home. The council applied for an ASBO.

Sheriff John Beckett granted the order. With regards the standard of proof, he considered *R (McCann) v Crown Court of Manchester* [2003] 1 AC 787; [2002] UKHL 39, *Mullan v Anderson* 1993 SLT 835 and *In Re B (Children)* [2009] 1 AC 11; [2008] UKHL 35. He decided that he was bound by *Mullan* (see above), a decision of a five-judge court, which referred to 'the general applicability of the balance of probability as the standard of proof in civil cases irrespective of the seriousness of a defender's alleged conduct' (para 86). He concluded that 'the appropriate standard of proof in an application for an anti[-]social behaviour order is the balance of probabilities' (para 134).

Comment: Readers should note that this decision has no applicability in England and Wales where it is well established by *McCann* (above) that the criminal standard of proof applies to application for ASBOs.

HARASSMENT AND UNLAWFUL EVICTION

Damages

■ Ogie v Bundhoo

Mayor's and City of London County Court, 25 June 2009[38]

The claimant was the assured shorthold tenant of a bedsit. He shared a kitchen and bathroom with four other residents. He had paid the defendant, his landlord, a rental deposit. The claimant fell into two months' arrears with his rent and was advised by the defendant that he wanted him to leave the premises. The defendant left a letter for the claimant stating that the tenancy had ceased. The claimant contacted the defendant and told him that he could clear the arrears, but the defendant said that he wanted him to leave. The same day, the claimant, after visiting a Jobcentre, returned to find that the lock to the house had been changed and that he was unable to access his room or his belongings. The defendant refused to allow him to re-enter the premises. He did offer to allow the claimant to collect his belongings, which had been placed outside his room, but as the claimant was now homeless he had nowhere to store them. The claimant went to a Citizens Advice Bureau (CAB) but the defendant would not speak to the CAB adviser.

After spending 13 nights in a bed and breakfast (B&B) hotel and seven nights sleeping rough, the claimant instructed solicitors who obtained a without notice injunction. On being served with the injunction, the defendant allowed the claimant back into the premises. In his defence, the defendant accepted liability for the cost of the B&B and for three times the rent deposit because it had not been placed with a rental deposit scheme. He denied that the claimant was entitled to any other damages. The day before trial, the defendant sought an adjournment in a faxed letter to the court. He had already been debarred from adducing evidence for his failure to comply with directions.

HHJ Birtles refused the application for an adjournment. He awarded damages for breach of the covenant for quiet enjoyment and trespass at the rate of £167 per night for the nights that the claimant was in the B&B, and £334 per night for the nights that the claimant was sleeping rough. He awarded special damages of £1,054, made up of three times the rental deposit and the cost of the B&B.

HHJ Birtles awarded aggravated damages of £2,300 and exemplary damages of £1,400. He also awarded interest at the rate of eight per cent on the damages, extended the injunction for a further year and reserved any application to set aside judgment to himself. The defendant was ordered to pay the claimant's costs.

DEFAMATION

■ Clift v Slough BC

[2009] EWHC 1550 (QB), 6 July 2009

Ms Clift complained to the council about the way in which it had responded to a report by her of anti-social behaviour she had witnessed. The council's complaints investigator rejected her complaint, but was concerned about her own behaviour towards council staff, which he considered to be violent and threatening. He added her name to the council's register of violent persons, notified council staff and partner agencies of that fact, and cautioned them to be accompanied when visiting her and to take other measures when dealing with her. The claimant sued for libel and the council relied on qualified privilege, in particular, its duty to protect its staff. She also alleged malice by the complaints officer.

The High Court's judgment contains an exhaustive consideration of the issues, in particular, in the light of the HRA and the Data Protection Act 1998. The jury rejected the claim of malice but also rejected the defence of justification. The jury awarded £12,000 compensation to Ms Clift.

LANDLORDS' AGENTS

■ Office of Fair Trading v Foxtons Ltd

[2009] EWHC 1681 (Ch), 10 July 2009, (2009) Times 29 July

The OFT claimed that certain standard terms used by Foxtons when contracting to provide letting and management services for landlords were unfair. Mann J found that some terms were unfair, namely, those which:

- required landlords to pay commission where tenants continued to occupy property after the initial fixed period of the tenancy had expired, even if Foxtons played no part in persuading the tenant to stay, and did not collect the rent or manage the property;
- required payment of renewal commission even after premises have been sold; and
- allowed Foxtons to receive a full estate agents' commission for sale of the property to a tenant.

HOUSING ALLOCATION

■ R (Boolen) v Barking & Dagenham LBC

CO/646/2009,
31 July 2009

The claimant applied to the council for the allocation of social housing. The council operated a choice-based letting scheme under which applicants were placed in bands. The highest banded bidders with the longest waiting times were shortlisted for each property. The claimant was at the top of the shortlist for a number of properties but they were allocated to other shortlisted bidders with more 'local connection'. She sought judicial review, claiming that the policy on how local connection criteria would be applied by officers to the shortlist was not part of the published scheme. The day before trial, the council amended its scheme to include the criteria.

CMG Ockelton, sitting as a deputy High Court judge, dismissed the claim. The council had not acted unlawfully in not earlier publishing the criteria.

■ R (Joseph) v Newham LBC

[2009] EWHC 1637 (Admin),
19 June 2008

The claimant was a council tenant. As a result of an overpayment of housing benefit in 1999, he owed the council about £900. He disputed that he was liable to repay that sum but had assiduously paid his current rent. The council decided not to take recovery action but to take the debt into account if the claimant sought rehousing. When he applied for a transfer, he was notified that it 'is the policy of this council not to make offers to applicants who owe property-related debts'.

On an application for judicial review of that decision, Stadlen J granted a renewed application for permission. He said:

> *the decision letter … did not say that it is the policy of the council, when receiving applications from those who owe property-related debts, to take that into account and weigh it in the balance against them so that they would be less preferentially treated than other applicants with equal priority who do not owe property-related debts, but actually that it was a blanket policy not to make any offer to an applicant who owed a property-related debt, whether or not there were other candidates who were of equal or lesser priority than them …*
>
> *It seems to me that this is a lamentable state of affairs that after all these years a dispute over this overpayment and the non-repayment of the overpayment should have got to the point where it is continuing to prevent the operation of the council's policy of priority needs to enable Mr and Mrs Joseph to have the benefit of transfer to better property. Either the council is entitled to repayment of that debt or it is not. If it is, then it has been open to it for very many years to go to court and get it resolved* (paras 5 and 9).

HOMELESSNESS

Interim accommodation

■ R (Araya) v Leeds City Council

[2009] EWHC 1962 (Admin),
29 July 2009

The council provided interim emergency housing accommodation for the homeless claimant under HA 1996 s188(1) pending the outcome of her application. When that duty expired, it agreed to continue to provide accommodation pending a review of an adverse decision of intentional homelessness: HA 1996 s188(3). The council then required the claimant to move at short notice to other accommodation designed to provide her with support in her bidding for permanent rehousing. In a judicial review claim, she asserted that the short notice given had infringed her rights under article 8 of the convention and that the new accommodation was unsuitable because it was away from an area in which she had a safe base within an ethnic minority community.

HHJ Grenfell dismissed that claim. The claimant had been fully aware from the outset that she could be required to move from the initial accommodation at very short notice. The several days' notice she had been given did not infringe her article 8 rights. Furthermore, the council had been entitled to conclude that the move-on accommodation was suitable. The move was logical and designed to promote a permanent solution of her housing needs. She could retain a connection with the area in which she had resided previously by using buses.

1 Available at: www.communities.gov.uk/documents/housing/pdf/1304826.
2 Available at: http://wales.gov.uk/docs/desh/publications/090722housinghomelessnessen.doc.
3 Available at: www.tenantservicesauthority.org/upload/amaxus_pdf/amaxus_conWebDoc_18918.pdf.
4 Available at: www.asaproject.org.uk/news/ASAP_newsletter.htm.
5 Available at: www.communities.gov.uk/documents/housing/pdf/1301299.pdf.
6 Available at: www.communities.gov.uk/documents/housing/pdf/1301296.pdf.
7 Available at: www.communities.gov.uk/documents/housing/pdf/1298439.pdf.
8 Available at: www.housing.org.uk/default.aspx?tabid=212&mid=828&ctl=Details&ArticleID=2248.
9 Available at: www.equalityhumanrights.com/uploaded_files/ehrc_report_-_social_housing_allocation_and_immigrant_communities.pdf.
10 Available at: www.communities.gov.uk/news/corporate/1277459.
11 Available at: www.justice.gov.uk/about/docs/court-statistics-q1-2008-q1-2009.pdf.
12 Available at: www.justice.gov.uk/about/docs/stats-mortgage-land-q2-09.pdf.
13 Available at: www.communities.gov.uk/documents/housing/pdf/1307370.pdf.
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22 Available at: www.audit-commission.gov.uk/SiteCollectionDocuments/Consultation/200907draftstrategicapproachtohousingkloeconsultation.pdf.
23 Available at: www.respect.gov.uk/uploadedFiles/Members_site/Documents_and_images/Resources/ASBFOCUS_AUG09.pdf.
24 See: www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2009_0138.
25 Available at: www.communities.gov.uk/documents/housing/pdf/1275732.pdf.
26 Available at: www.communities.gov.uk/documents/housing/pdf/1279954.pdf.
27 Available at: www.tenantservicesauthority.org/upload/amaxus_pdf/amaxus_conWebDoc_18886.pdf.
28 Available at: www.communities.gov.uk/fire/resilienceresponse/camberwellfire/.
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32 Available at: www.communities.gov.uk/documents/housing/pdf/1284475.
33 Available at: www.communities.gov.uk/documents/housing/pdf/1284500.
34 See: www.publications.parliament.uk/pa/cm200809/cmhansrd/chan113.pdf.
35 Available at: www.communities.gov.uk/documents/housing/pdf/1298556.pdf.
36 Available at: www.communities.gov.uk/documents/housing/pdf/1298518.pdf.
37 Available at: www.communities.gov.uk/documents/housing/pdf/1147051.pdf.
38 Robert Barry, Sternberg Reed, solicitors, Essex, and John Beckley, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at note 38 for the transcript or note of the judgment.