

pending resolution of the dispute (the directions set out which authority must take this role);

■ there will be reimbursement if the secretary of state determines that a different authority is responsible.

- 1 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_076289.pdf.
- 2 See: <http://wales.gov.uk/publications/accessinfo/drnewhomepage/healthdrs/Healthdrs2009/continuingcarecompensation/?lang=en>.
- 3 See: *Guidance on direct payments for community care, services for carers and children's services England 2009*, Gateway reference 12447, available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_104840.
- 4 See *Prioritising need in the context of Putting people first: a whole system approach to eligibility for social care. Guidance on eligibility criteria for adult social care, England 2010*, 25 February 2010, available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113154.
- 5 See 'Community care law update – Part 1', March 2010 *Legal Action* 26 for a summary of the approach taken by the new guidance to some of the issues thrown up by personalisation.
- 6 See: www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/Olderpeople/Preventionpackage/index.htm.
- 7 Gateway reference 11835, 23 June 2009, available at: www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_011113.pdf.
- 8 'Fulfilling and rewarding lives'. *The strategy for adults with autism in England (2010)*, Gateway reference 13521, available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_113405.pdf.
- 9 Gateway reference 13597, available at: www.dh.gov.uk/en/SocialCare/Chargingandassessment/ChargingforSocialCare/DH_079505.
- 10 See: www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/bus-legislation-measures-scc-2.htm.
- 11 Gateway reference 13826, available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113627.



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Recent developments in housing law



Jan Luba QC and Nic Madge 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

Social housing

On 1 April 2010, the Tenant Services Authority (TSA) became the new national social housing regulator for both local authorities and housing associations in England. On that date Housing and Regeneration Act (H&RA) 2008 Part 2, which sets out its full powers, was brought into effect. At the same time, the Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 and the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 extended those powers to social housing provided by local housing authorities and county councils. The orders were approved by both Houses on 16 and 17 March respectively.

With effect from 1 April 2010, the TSA will apply new national statutory standards for social housing management to be observed by both local councils and housing associations: H&RA s194. There is a dedicated website on the new standards.¹ The standards were finalised after a round of statutory consultation on the drafts and were published on 16 March 2010. The TSA has also published the individual responses it received to the consultation on the draft standards.²

It has outlined its priorities for the next three years in the *Draft corporate plan 2010–13*.³ Measures to create a new social housing regulator for Scotland are set out in the Housing (Scotland) Bill presently before the Scottish Parliament.⁴

Housing and anti-social behaviour

The government has launched a new information programme for tenants and residents about the tools and powers available to control anti-social behaviour. This has included media advertising and the delivery of ten million copies of the leaflet *Tackling anti-social behaviour* (February 2010).⁵ The Communities Secretary also issued 'a rallying call for an army of community champions to challenge anti-social behaviour

in their neighbourhoods': Communities and Local Government (CLG) news release, 9 February 2010.⁶ The government has said that £1m is being distributed across 17 local authority areas with particularly high levels of empty housing where derelict homes are a catalyst for crime and anti-social behaviour: CLG news release, 5 February 2010.⁷

The latest issue of *ASB Focus* (issue 8, February 2010) has just been published.⁸ It features articles on the use of drinking banning orders; the terms of prohibitions in anti-social behaviour orders (ASBOs); and the new Magistrates' Courts (Amendment) Rules 2009 SI No 3362 that will apply to civil cases in the criminal courts (for example, ASBO and premises closure order applications) from 5 April 2010.

Legal aid for housing cases

The deadline for submitting tenders to provide legal aid services in housing law beyond October 2010 is 12 noon on 21 April 2010. The tender process for social welfare law advice and assistance (including housing) in England and Wales, to be delivered under a new Standard Civil Contract, is being run by the Legal Services Commission (LSC).⁹ A number of specialist housing law providers are intending to bid as members of consortia with partners who will offer welfare benefits and debt advice. In February 2010 the LSC published information on how new matter starts will be awarded to consortium members: *Consortium arrangements for social welfare law contracts in 2010. Update – February 2010*.¹⁰

Landlord possession claims

In 2009, 136,440 claims for possession were made by landlords in the county court: *Statistics on mortgage and landlord possession actions in the county courts – fourth quarter 2009* (Ministry of Justice, February 2010).¹¹ Of those, 17,023 were brought under the accelerated (paper-only) procedure. Possession orders were made in 92,807 cases.

Private rented sector

The government has announced a programme of measures to give tenants in the private rented sector additional help and protection. The package includes:

- a new housing hotline offering free help and advice for private tenants;
- a 'TripAdvisor' style, word-of-mouth website comparing different landlords;
- a requirement for written tenancy agreements in all tenancies;
- increasing the number of tenants protected under the most commonly used tenancy agreement;
- a national register of landlords to help tenants make basic checks on their prospective landlords; and
- better regulation of letting and managing agents: *The private rented sector: professionalism and quality – consultation: summary of responses and next steps* (CLG, February 2010).¹²

The government is presently conducting a consultation exercise on measures to encourage investment in the private rented sector: *Investment in the UK private rented sector* (HM Treasury, February 2010).¹³ The consultation closes on 28 April 2010.

Housing pre-action protocol

There are four officially approved pre-action protocols which relate to housing cases (disrepair, rent possession, mortgage possession and judicial review). The Civil Justice Council is conducting a review of the effectiveness of the housing pre-action protocols. It will make further recommendations for reform and offer advice to the Master of the Rolls and the Civil Procedure Rules (CPR) Committee. It invited the Law Society to bring together stakeholders with relevant experience to consider how well (or otherwise) the housing protocols were operating. Practitioners with views on the subject should quickly communicate them to their representative organisations (Housing Law Practitioners Association (HLP), Social Housing Law Association, Law Society Housing Law Committee, etc) so that they can be fed into the review process.

Council house rent increases

On 3 February 2010, CLG issued the *Housing revenue account subsidy determination 2010–2011*.¹⁴ It is intended that this will achieve a guideline rent increase of 3.1 per cent from April 2010.

Housing and discrimination

The Equality and Human Rights Commission has issued draft non-statutory guidance on equality and discrimination in housing matters in anticipation of the enactment of the

Equality Bill.¹⁵ Views on the consultation drafts are invited by 16 April 2010.

Judicial review in housing cases

CPR Part 54 and Practice Direction 54 set out the procedural rules for judicial review claims in the Administrative Court. The Lead Judge of the Administrative Court (Lord Justice May) has established a working party to bring forward amendments to the Rule and Practice Direction for presentation to the Rules Committee. Practitioners wishing to contribute any ideas to the discussions will need to contact the representative from their interest group who is in the Administrative Court Users Group. For example, the HLP representative is London barrister Robert Latham.

Social housing allocation

The minister for housing in England has announced that a further nine sub-regional choice-based lettings (CBL) schemes have successfully bid for a share of the £500,000 start-up funding available to help local housing authorities roll out CBLs: CLG news release, 20 January 2010.¹⁶ Policy recommendations for the improvement of aspects of CBLs and other allocation schemes are contained in *Unlocking the potential of social housing* (The Hyde Group, January 2010).¹⁷ That report is based on a survey of residents' views in London and the South East. A briefing on the report has been prepared for tenants in the North West of England.¹⁸

Homelessness

The Electoral Commission has launched an initiative to encourage homeless people living in temporary accommodation to register so that they are able to vote in the forthcoming general election: Electoral Commission news release, 20 January 2010.¹⁹

The latest statistics for homelessness in Wales were released on 13 January 2010 and cover the period from July to September 2009.²⁰ They indicate falling numbers of homelessness acceptances and reductions in the use of temporary accommodation (particularly bed and breakfast).

The January 2010 *HAT update* from the TSA/CLG Homelessness Action Team covers allocations, regional homelessness strategies, housing association evictions, unlawful subletting, benefits and debt.²¹

Housing standards

The Decent Homes programme was designed to ensure that all social sector housing would be of a decent standard by the end of 2010. A new report by the Comptroller and Auditor General, *The Decent Homes programme* (National Audit Office, HC 212, session 2009–2010, 21 January 2010) indicates that

100 per cent decency will not be achieved until 2018–19 and that 305,000 social sector homes will still be non-decent by the end of 2010.²²

Housing legislation in Wales

At present, the National Assembly for Wales and Welsh ministers have only limited powers to make delegated legislation relating to housing matters. The Welsh Assembly Government has set out ambitious plans to legislate more generally on housing matters in its memorandum: *Proposal for a Legislative Competence Order relating to housing and local government*.²³ The proposed National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010 has been approved by the UK Cabinet and, if passed by the Assembly, will enable devolution of statutory responsibility for homelessness, social housing allocation, security of tenure in social housing, and many other housing matters. The Assembly's Legislation Committee (No 2) has been taking evidence on the need for the Order.²⁴ The parliamentary Welsh Affairs Committee is also reviewing the matter.²⁵

Sites for Gypsies and Travellers

H&RA s318, when brought into force, will extend security of tenure (under the Mobile Homes Act 1983) to residents of official local authority Gypsy and Traveller caravan sites. No commencement order has been made and in February 2010 CLG indicated that ministers have decided that the government would not be able to find parliamentary time for a commencement order to be laid before the general election.

Gypsy and Traveller site grants that fund new social rented sites and the refurbishment of existing ones are distributed by the Homes & Communities Agency (HCA). On 11 February 2010, it announced that its 2010/2011 bidding round would be open until 30 April 2010.²⁶ It has published *Gypsy and Traveller site grant programme. Bidding guidance 2010/11* (February 2010).²⁷

On 12 February 2010, Bob Neill, the shadow minister for local government and planning, outlined the Conservative Party strategy for planning matters which will include commitments:

- to create a new criminal offence of intentional trespass to allow Travellers occupying property without the landowner's permission to be removed quickly; and
- to replace the Human Rights Act 1998 with a British Bill of Rights to 'prevent "human rights" lawyers sidestepping the planning system and demanding special treatment'.²⁸

Shared ownership

From 6 April 2010 a new standard model shared-ownership lease, approved by the HCA, will be used by social housing agencies letting homes on shared-ownership terms: HCA news release, 1 February 2010.²⁹

Separate new model leases have been published for houses and flats.³⁰

The government has published a new guide for local authority landlords which are operating, or are considering operating, the Social HomeBuy scheme: *Social HomeBuy. Guidance for local authorities* (CLG, January 2010).³¹ The guide aims to provide information on the criteria for, and administration of, the scheme and to address the most frequently asked questions.

The government has launched a new low-cost, home-ownership scheme designed to enable members of the Armed Forces to part-buy their first homes – the Armed Forces home ownership scheme (pilot): Ministry of Defence news release, 26 January 2010.³² The £20m pilot scheme will be run by Swaythling Housing Society but is initially only available to service personnel with between four to six years' continuous service who are otherwise unable to afford a suitable home.

PUBLIC SECTOR

Possession claims

■ Croydon LBC v Barber

[2010] EWCA Civ 51,
11 February 2010

Mr Barber was the tenant of a flat. He suffered from learning difficulties and a personality disorder of a permanent nature which qualified him as a disabled person within the meaning of the Disability Discrimination Act 1995. In 1999, Croydon assessed Mr Barber as having a priority need for housing under Housing Act (HA) 1996 Part 7. He was granted a tenancy of a flat as temporary accommodation under HA 1996 s188. This was then continued as a non-secure tenancy. In 2007, Mr Barber threatened, spat at and kicked a caretaker, who needed hospital treatment. The council decided that his behaviour fell within category 3 of its policy on anti-social behaviour which would 'almost always' result in legal action. It claimed possession. Before the possession hearing, a jointly instructed consultant psychiatrist prepared a report stating that Mr Barber's disability was likely to have contributed to his behaviour; that he had been stable from a mental health perspective while he was living in the flat; and that his life would descend into chaos if evicted. Eviction would result in serious deterioration of his physical and mental health. Despite this, the

council's anti-social behaviour team manager stated that it remained proportionate to seek a possession order. In the county court, HHJ Ellis made an immediate order for possession. Mr Barber appealed.

The Court of Appeal allowed the appeal. After referring to *Kay v Lambeth LBC* [2006] 2 AC 465, *Doherty v Birmingham City Council* [2008] UKHL 57 and *Doran v Liverpool City Council* [2009] EWCA Civ 146, Patten LJ said 'a local authority is bound to keep the position under review and to take into account any relevant facts which come to its notice at any stage in the proceedings' (para 18). The council's failure to interview Mr Barber before serving the notice to quit meant that the receipt of the psychiatric report was the first proper opportunity to consider Mr Barber's explanation for the incident. Judged by any ordinary standards, the assault on the caretaker was serious and unacceptable. However, the council's policy on vulnerable people was to explore alternative solutions which might lead to the prevention of anti-social behaviour in the future. It was unreasonable to proceed without applying the policy on vulnerable people. In view of the absence of any misbehaviour before or after the incident relating to the caretaker, and having regard to the psychiatrist's assessment, it had been incumbent on the council to consult other agencies and to take advice about whether some alternative remedy such as an acceptable behaviour contract would solve the problem. The anti-social behaviour team manager appeared to have rejected, without giving reasons, the psychiatrist's view that the incident was linked to Mr Barber's disabilities. There was also no apparent consideration of the possible consequences for him of losing his flat. The council appeared to have treated this as an ordinary category 3 case to which its policies on vulnerable people had no application. That approach was wrong in principle. The decision to proceed was one which no housing authority, faced with the facts of the case, could reasonably have taken. Mr Barber had established a gateway (b) defence (*Kay v Lambeth LBC*) and the possession claim should be dismissed.

PRIVATE SECTOR TENANCIES

Creation of tenancy

■ Kirby v Lynch

[2010] EWHC 297 (QB),
28 January 2010³³

Mr Kirby rented out rooms in a house in multiple occupation (HMO). Mr Lynch had friends living in the HMO and approached Mr Kirby on 19 February 1997 looking for

accommodation. He was receiving welfare benefits. Mr Kirby told him that he could only have a room if he secured housing benefit (HB). The following day, 20 February 1997, Mr Lynch obtained a pre-tenancy HB determination form. Mr Kirby completed the details of the proposed tenancy and both signed it. Mr Lynch moved in the same day. At trial, Mr Kirby admitted that Mr Lynch had exclusive occupation from 20 February 1997. Mr Lynch submitted a HB claim and was awarded HB some six weeks later, backdated to his first occupation. On 28 February 1997, the HA 1996 amended the HA 1988. Before that date, a tenancy was an assured tenancy unless a s20 notice was served. For tenancies starting after that date, the position was reversed so that the tenancy was an assured shorthold tenancy unless a notice stating otherwise was served. In 2007, Mr Kirby began possession proceedings on the basis that Mr Lynch had an assured shorthold tenancy which started on the date HB was received, not when Mr Lynch had moved in. Mr Kirby claimed that he had allowed Mr Lynch to occupy the property between those dates purely as an act of generosity.

HHJ Matheson QC held that Mr Lynch's occupation until HB was awarded was entirely conditional and almost charitable so that the tenancy did not start until the later date. This meant that Mr Lynch had only an assured shorthold tenancy and Mr Kirby was entitled to possession. Mr Lynch appealed to the High Court.

Davies J held that the three hallmarks of a tenancy identified in *Street v Mountford* [1985] AC 809, HL, were present, namely exclusive possession for a term at a rent. The rent and the term were evidenced in the pre-tenancy determination form which was the only written evidence of any of the terms of the tenancy. The county court judge had erred in taking into account the landlord's subjective intention. A contract may be conditional, in the sense that obligations are suspended until the fulfilment of a condition precedent. There was an intention to create legal relations from 20 February 1997 which was when the tenancy began. The appeal was allowed and the possession claim dismissed.

Harassment and unlawful eviction Damages

■ Kalas v Farmer

[2010] EWCA Civ 108,
29 January 2010

Mr Kalas was an assured tenant of Mr Farmer. While he was away from the property, Mr Farmer changed the locks and moved in. Mr Kalas was able to regain entry, but not long after he was sentenced to a term of

imprisonment. While he was in prison, Mr Farmer re-entered the property and sold it with vacant possession. Mr Kalas issued proceedings for damages under HA 1988 s27. Mr Farmer defended, arguing that he believed that the property had been abandoned, although his defence did not refer to s27(7)(a). Leighton Williams QC, sitting as a deputy High Court judge, found that Mr Kalas had not abandoned the premises and that Mr Farmer had no reasonable grounds for believing that he had done so. He was ordered to pay damages of £49,500, less a set-off for unpaid rent and costs on an indemnity basis. Mr Farmer appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. There was a perfectly evidential basis for the judge's finding of fact that Mr Kalas had not abandoned the premises or surrendered his tenancy. There was no basis on which Mr Farmer could properly argue that he had reasonable cause to believe that Mr Kalas had done so. Nor had Mr Farmer, in his pleadings or at trial, argued that damages should be reduced by virtue of s27(7)(a). Finally, there was 'ample justification' to award costs on the indemnity basis.

■ **Scott v Vince and Ismail**

[2009] EWCA Civ 988,
8 July 2009

The Court of Appeal refused permission to appeal in a case involving a claim for damages under HA 1988 ss27 and 28. The appeal which the appellant sought to pursue was essentially a challenge to the trial judge's findings of fact.

■ **Islam v Yap**

[2009] EWHC 3606 (QB),
20 November 2009

Mrs Islam applied to Redbridge LBC for homelessness assistance under HA 1996 Part 7. She was offered and accepted a non-secure tenancy. Her immediate landlord was Redbridge but the property was owned by Mr Yap. He had let it to Finefair Consultants Limited which in turn sub-let to Redbridge. By 2007, Mr Yap wanted to sell the house. A purchaser was found and a memorandum of sale was prepared by agents. As a result, Mr Yap wanted vacant possession. Mrs Islam said that 'in all probability he could have vacant possession'. She asked Mr Yap to write a letter to Redbridge to strengthen her hand in getting alternative accommodation for herself and her two children. Mrs Islam made 'conscientious attempts to obtain alternative accommodation' without success. Mr Yap's agent then telephoned Mrs Islam, saying that the locks would be changed the following day and to '[f]orget about the police'. Mrs Islam was upset, and HHJ Wilcox, sitting as a deputy High Court judge, said that '[s]he had

every reason to be', describing it as a 'bullying ... threatening ... disgraceful and unpleasant conversation'. Mr Yap 'must have known' that the agent intended to change the locks. On 26 March 2007, the agent went to the property, said that 'he was prepared to sit-in or squat for a period of time', waited for Mrs Islam's son to come back from school and then changed the locks. Mrs Islam was evicted and had nowhere to go. She left her main possessions in the house. HHJ Wilcox described it as a 'protracted and unpleasant event', which was a 'frightening and intimidating' experience. Mrs Islam did not return to the premises and 'fled to a student room'.

HHJ Wilcox awarded damages from 'the date of her eviction on 26th [March] to the date of the court order ... at the rate of the rental that was chargeable for those premises during that time, [ie.] a daily rate ... of ... just over £36 per day'. He awarded aggravated damages against the agent in the sum of £3,000 and, having regard to Mr Yap's economic benefit, exemplary damages of £5,000. He also awarded special damages of £2,000.

Assured shorthold tenancies

Tenants' deposits

■ **Draycott and Draycott v Hannells Letting Limited**

[2010] EWHC 217 (QB),
12 February 2010³⁴

On 28 February 2008, Derby Build Ltd ('the actual landlords') granted the Draycotts an assured shorthold tenancy for 12 months. Hannells were the letting agents for the actual landlords. The agreement provided that the tenants were under an obligation to pay a deposit of £2,700 to Hannells, which was to hold it as stakeholders as security for the tenants' performance of their obligations under the agreement. The deposit of £2,700 was credited to Hannells' account on 4 March 2008. This was a deposit which was required to be protected under HA 2004. It was registered and lodged with the Deposit Protection Service (DPS) on 19 May 2008. Its terms and conditions provided: 'The landlord or letting agent is responsible for ensuring that deposits are submitted for protection within 14 calendar days of the date of receipt by the landlord.' The tenants were informed of the payment to DPS on 21 May 2008. The tenants claimed that there was a failure to comply with the initial requirements (s213) and brought proceedings under s214(4) for three times the amount of the deposit. Hannells argued that:

■ a s214 claim could only be brought against the actual landlord; and

■ no order could be made under s214(4)

where the tenant commenced a claim at a time when the deposit was in fact protected.

HHJ Lea rejected both arguments. Hannells appealed.

Tugendhat J held that HHJ Lea's interpretation of the meaning of 'landlord' in s214(4) was 'clearly correct'. The words of s212(9) were clear and unambiguous. There was no occasion to look at *Hansard* or to any other extraneous material to interpret s214. The words in s214(3)(a), 'the person who appears to the court to be holding the deposit', were not otiose. They limited the scope of any possible order under s214(3)(a) to the person holding the deposit. They prevented such an order being made against any other person who would come within the statutory definition of the landlord – for example, a letting agent which, at the time of the making of the court order, was not holding the deposit. No such limitation would be appropriate in s214(4). The penalty should be imposed on the person who was responsible for the failure to comply with s213. In this case that was Hannells, not the actual landlord.

After considering the definition of 'the initial requirements' in s213(4), Tugendhat J held that the obligation to make a payment into the scheme was the initial requirement of the scheme, and not the requirement that that be done within 14 days. The time limit of 14 days was a requirement of s213(3). It followed that there was a breach of s213 during the period in which the deposit was not lodged with the scheme. However, it 'would be a strained interpretation' to interpret s214 so that the 14-day time requirement was to be considered a part of the initial requirements of the scheme. If the 14-day requirement was not part of the initial requirements of the authorised scheme, then payment of a deposit into the scheme more than 14 days after its receipt, but before the tenant commenced proceedings, did not come within s214(2)(a), and the court could not make an order under s214(3) or (4). Accordingly, Tugendhat J allowed the appeal.

HOMELESSNESS

Eligibility

■ **Harrow LBC v Ibrahim**

C-310/08,
23 February 2010

Mrs Ibrahim, a Somali national, came to the UK in February 2003 to join her husband, a Danish national, who was working here. They had four children, all Danish nationals (one born in the UK) who went to school here. In January 2007, when neither she nor her husband was working, Mrs Ibrahim became

homeless and applied to Harrow for homelessness assistance: HA 1996 Part 7. The council decided that neither she nor her husband was eligible: HA 1996 s185. That decision was upheld on review but reversed in the county court. On a second appeal, the Court of Appeal referred a series of questions to the European Court of Justice (ECJ) in Luxembourg (see [2008] EWCA Civ 386).

The ECJ ruled that the schoolchildren of an EU national who had worked in the UK, and the parents of such children, had freestanding and unconditional rights to reside in the UK under article 12 of Regulation (EEC) No 1612/68.

■ **Teixeira v Lambeth LBC**

C-480/08,
23 February 2010

The claimant was a Portuguese national who came to the UK in 1989 to work. Her child was born in 1991 and was educated here. The claimant worked intermittently from 1991 to 2007 when she became homeless and applied to Lambeth for homelessness assistance: HA 1996 Part 7. The council decided that, as she was no longer a 'worker', she was not eligible: HA 1996 s185. HHJ Welchman dismissed an appeal against that decision. On a second appeal, the Court of Appeal referred a series of questions to the ECJ (see [2009] HLR 9; [2008] EWCA Civ 1088).

The ECJ again ruled that the schoolchild of an EU national who had worked in the UK, and the parent of such a child, had the freestanding and unconditional right to reside in the UK under article 12 of Regulation (EEC) No 1612/68. That right did not end simply because the child reached 18 but might remain if the child continued to need the presence and support of the parent to complete his/her education.

Suitable accommodation

■ **Norris v Milton Keynes Council**

[2010] EWCA Civ 77,
27 January 2010

The council owed the claimant the main housing duty under HA 1996 Part 7: s193(2). It made her a final offer of what it considered to be suitable accommodation in accordance with the procedure prescribed in s193(7). The claimant visited the premises offered and found it had a bath but no shower. Her disability was such that she required a shower. On the visit she was told that if an occupational therapist was to recommend a shower one would be installed. The claimant sought a review but a reviewing officer upheld the decision that the accommodation was suitable. The reviewing officer's view was that the assurance so given was 'certain, binding and enforceable', ie, an assurance that the

property would be adapted in line with any assessment made the property suitable, although absent such adaptations it might perhaps be unsuitable: *Boreh v Ealing LBC* [2009] 2 All ER 383 at paragraph 27. HHJ Serota QC dismissed an appeal against that decision.

The Court of Appeal gave permission to bring a second appeal on two grounds:
■ the reviewing officer had failed to recognise that the initial decision was necessarily wrong (because it had been taken even before the assurance about the shower had been given) and that the requirements of Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) applied but had not been followed; and
■ the conditional assurance given had not met the degree of certainty or enforceability required by *Boreh*. Following the grant of permission, the appeal was compromised.

Reviews and appeals

■ **Tomlinson v Birmingham City Council**

[2010] UKSC 8,
17 February 2010

The claimants applied to Birmingham for homelessness assistance: HA 1996 Part 7. On receiving adverse decisions, they sought reviews under HA 1996 s202. In the course of those reviews, the council's reviewing officers decided issues of pure fact (such as whether particular documents had or had not been received by the claimants). The claimants could not appeal successfully against those decisions because appeal to the county court is available only on points of law: HA 1996 s204. They complained that they had been denied a determination of their civil rights by an impartial and independent tribunal as guaranteed by article 6 of the European Convention on Human Rights. The Court of Appeal rejected their cases (see [2009] HLR 23; [2009] 2 All ER 501; [2008] EWCA Civ 1228).

On a further appeal, the UK Supreme Court decided that there had been no infringement of article 6. Decision-making on a question about homelessness assistance was so infused by broader policy and resources issues inherent in a national scheme of welfare distribution that it did not amount to a determination of 'civil rights' at all. The earlier House of Lords' decision in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430 had not been undermined by subsequent developments in Strasbourg case-law.

■ **England v Westminster City Council**

[2010] EWCA Civ 106,
3 February 2010

The council accepted that it owed the claimant the main housing duty under HA

1996 Part 7: s193(2). It provided her with accommodation managed by Notting Hill Housing Trust. Following complaints of nuisance, that accommodation was withdrawn. The council decided that it owed no further duty as the claimant had become homeless intentionally: s193(6)(b). On a review of that decision, the reviewing officer was presented with details of the complaints made to the Trust and a denial of wrongdoing from the claimant. The reviewing officer upheld the decision. The claimant appealed on the grounds that the reviewing officer:
■ had, in effect, delegated the decision to the Trust; and
■ had failed to undertake sufficient enquiries.

HHJ Mitchell dismissed an appeal.

The Court of Appeal dismissed an application for permission to bring a second appeal. On the first point, the judge had been entitled to find that there had been no delegation to the Trust but rather the provision by it of information to the reviewing officer. On the second point, the reviewing officer had been entitled to rely on the complaints received without embarking on further investigation of them when she had nothing further from the claimant beyond a bare denial.

■ **R (Cabdi) v Ealing LBC**

[2009] EWCA Civ 1461,
9 December 2009

The claimant was refused permission to apply for judicial review of the council's decision on his application under HA 1996, on the papers. He then made a renewed application for permission. Before that could be heard, the claim was compromised on terms that gave the claimant even more than he had claimed to be entitled to. On his application for costs, Dobbs J refused to order the council to pay the costs on the ground, among others, that in a case with disputed facts, an adverse costs order might deter local authorities from reaching early settlements.

The Court of Appeal refused a renewed application for permission to appeal from that decision. It was not satisfied that the merits were such that the renewed application and the claim would have necessarily succeeded and that a costs order against the council would therefore have followed. However, Toulson LJ said that costs might well be awarded against authorities in other compromised cases:

There might be a case where it is plain and obvious that any defence to a claim would be risible, and in that case to concede to the claim would be merely to admit to that which was at all material times beyond argument ...

There may be a case where a local authority initially denies its responsibilities in a way which the court considers was

unjustifiable on any reasonable view. There might also be a case in which a local authority adopted a cynical approach that it would only meet claims which it knew to be legitimate once litigation was issued, but such matters have to be considered on a fact specific basis (at paras 9–10).

HOUSING AND COMMUNITY CARE

■ **R (Z) v Hillingdon LBC**

[2009] EWCA Civ 1529,
17 December 2009

The claimant was an asylum-seeker awaiting a decision on his asylum application. He was also disabled. He sought accommodation from the council under National Assistance Act 1948 s21. The council decided that he did not need ‘care and attention’ and should be accommodated under the Home Office scheme of support for asylum-seekers. In the Administrative Court that decision was quashed (see [2009] EWHC 1398 (Admin); August 2009 *Legal Action* 37). The council appealed.

The Court of Appeal dismissed the appeal. Applying the approach to the assessment of care and attention set out in *R (M) v Slough BC* [2008] 1 WLR 1808 by Baroness Hale at paragraph 33, Laws LJ said:

The question at the end is as to the council’s view of the facts in the light of paragraph 33 in the M case. I have already summarised the claimant’s needs as the council found them. Some are clearly related to the claimant’s functioning in home surroundings. He is, as I have said, totally blind. While Lady Hale’s approach in paragraph 33 would no doubt not be met by problems that are de minimis, this is far from such a case. The claimant needs others to do what he cannot do for himself to a substantial extent. A reasonable local authority was bound to find that he fell within section 21(1)(a) (para 19).

- 1 Visit: www.tenantservicesauthority.org/server/show/ConWebDoc.20175.
- 2 Available at: www.tenantservicesauthority.org/server/show/nav.14711.
- 3 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20042.
- 4 See: www.scottish.parliament.uk/s3/bills/36-Housing/index.htm.
- 5 Available at: www.communities.gov.uk/publications/communities/tacklingantisocialbehaviour.
- 6 Available at: www.communities.gov.uk/news/corporate/1461758.
- 7 Available at: www.communities.gov.uk/news/corporate/1458623.
- 8 Available at: www.asb.homeoffice.gov.uk/members/article.aspx?id=9848.

- 9 See: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
- 10 Available at: www.legalservices.gov.uk/civil/tendering/civil_contracts_for_2010.asp.
- 11 Available at: www.justice.gov.uk/about/docs/stats-mortgage-land-q4-09.pdf.
- 12 Available at: www.communities.gov.uk/publications/housing/prsconsultresponse.
- 13 Available at: www.hm-treasury.gov.uk/consult_investment_private_rented_sector.htm.
- 14 Available at: www.communities.gov.uk/publications/housing/finalhradetermination201011.
- 15 Available at: <http://ehrc-consult.limehouse.co.uk/portal>.
- 16 Available at: www.communities.gov.uk/news/corporate/1440873.
- 17 Available at: http://corporate.hyde-housing.co.uk/client_files/Tomorrows%20Heartlander%20A5_100108.pdf.
- 18 Available at: www.vsnw.org.uk/files/NWTRA%20Briefing%20Re%20HydeGroup%20research.doc.
- 19 Available at: www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-campaigns/help-homeless-people-register-for-the-general-election.
- 20 Available at: <http://wales.gov.uk/docs/statistics/2010/100113sdr102010en.pdf>.
- 21 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.19984.
- 22 Available at: www.nao.org.uk/publications/0910/the_decent_homes_programme.aspx.
- 23 Available at: www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-legislation-lco-2009-hlg-2.htm.
- 24 See: www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-lc2-agendas.htm.
- 25 See: www.parliament.uk/parliamentary_committees/welsh_affairs_committee/wac

- 0910pn06.cfm.
- 26 See: www.homesandcommunities.co.uk/gypsy-traveller?p=0&f=0.
- 27 Available at: www.homesandcommunities.co.uk/gypsies_travellers.
- 28 See: www.conservatives.com/News/News_stories/2010/02/Ending_exploitation_of_the_planning_system.aspx.
- 29 Available at: www.homesandcommunities.co.uk/shared-ownership-lease.htm.
- 30 Available at: <http://cfg.homesandcommunities.co.uk/model/leases-for-housing-association-use-from-april-2010.htm>.
- 31 Available at: www.communities.gov.uk/documents/housing/pdf/1440401.pdf.
- 32 Available at: www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/NewSchemeToMoveArmedForcesUpThePropertyLadder.htm.
- 33 Hugh Purkiss, Harter & Loveless, solicitors, London and Nicholas Nicol and Tony Ross, barristers, London.
- 34 Paula Heberd, PainSmith, solicitors, Hampshire.



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 notes 33–34 for transcripts or notes of judgments.



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