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. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing and Regeneration Bill

During June and July 2008 the Housing and Regeneration Bill was given detailed consideration in the House of Lords at committee stage, report stage and third reading. The bill is expected to complete its parliamentary scrutiny during the present session.

During the Lords' debates, the following issues (among many others) were considered:

- *Registered social landlords (RSLs) as 'public authorities'*: Baroness Hamwee moved an amendment drafted by the Housing Law Practitioners Association (HLPA) designed to define all housing associations and other social landlords regulated under the bill as 'public authorities' (for the purposes of both judicial review and the Human Rights Act (HRA) 1998). The debate took place before the recent decision in *Weaver* (see below) and the amendment was withdrawn in the face of government opposition (see *Hansard*, HL Debates cols GC226–GC233, 11 June 2008).
- *Eligibility for homelessness and housing allocation*: in a belated response to the declaration by the Court of Appeal in *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184; [2006] LGR 81 that Housing Act (HA) 1996 s185(4) is incompatible with the HRA, the government tabled amendments designed to introduce new non-discriminatory eligibility rules for both social housing allocation and homelessness. They were met by opposition amendments simply seeking the repeal of s185(4). The government amendments were carried.
- *The fall-out from* McCann v UK *App No 19009/04, 13 May 2008* (see also page 20 of this issue): the considerable implications of the European Court of Human Rights' (ECtHR's) judgment in McCann were probed in a HLPA-drafted amendment designed to give the judgment immediate effect in UK statute law.
- *Use of Housing Act 1988 Sch 2 Ground 8 (mandatory possession for rent arrears) by RSLs*: Baroness Hamwee moved an amendment designed to prevent social landlords using Ground 8, particularly in cases involving housing benefit delays. The amendment was withdrawn in response to government assurances that a stakeholder group was reviewing the issue urgently (see *Hansard*, HL Debates, cols GC515–GC520, 23 June 2008).

National housing policy

In a conference speech on 17 June 2008, housing minister Caroline Flint MP gave a broad outline of her housing policy objectives. The minister said that she planned to publish a housing green paper before the end of the year setting out proposals to provide housing services 'and options' which encourage independence and social mobility and achieve the aim of 'matching responsibility with opportunity'.[1]

Homelessness

The homelessness statistics for England for the first quarter of 2008 were published on 12 June 2008.[2] Iain Wright MP, minister for homelessness, said the figures showed that the South East, North East and the East Midlands had all achieved the government's 2010 target of a 50 per cent reduction in the numbers of households living in temporary accommodation from the baseline set in 2004: Communities and Local Government (CLG) news release, 12 June 2008.[3] The figures covering Welsh local authorities for the same period were published by the Welsh Assembly Government on 25 June 2008.[4]

The Homelessness Action Team (HAT) at the Housing Corporation has published a June 2008 issue of its journal, *HAT Update*.[5] The HAT has also produced a series of six useful topic briefings on homelessness issues.[6]

Those concerned with homelessness in East Anglia may find a new report, *Forward thinking: the role of housing associations in preventing homelessness in Norfolk. Strategy 2008–2011* helpful.[7] Another new report, *The experience of homeless ex-service personnel in London*, has been produced by the Centre for Housing Policy at York University (2008).[8] The researchers reviewed the circumstances of homeless ex-service men and women in the capital.

Stock transfers

It is not uncommon, in the lead up to a ballot of residents of council housing on a proposal for stock transfer, for prospective purchaser-landlords to make promises to sitting tenants about the rights and services they will enjoy post-transfer. In its May 2008 report, *Monitoring stock transfer promises*, the Housing Corporation offers a thematic review considering whether or not those promises are being kept.[9]

New social housing regulator

The first chief executive of the new Tenant Services Authority (TSA) is to be Peter Marsh, who is currently deputy chief executive at the Housing Corporation: CLG news release, 27 June 2008.[10] The chairperson has already been appointed (see June 2008 *Legal Action* 29). The recruitment exercise for part-time board members (including tenants' representatives) closed at the end of June 2008. The TSA will have jurisdiction over RSLs from April 2009, although for the first six months it is likely to continue using regulatory powers available to the corporation at present.

For its part, the current inspector of social housing providers, the Audit Commission, has announced a move to more 'short notice' inspections of housing association services. The amount of notice given will be cut from several months to just a few days. The commission is to consult on the use of similar short notice inspections of local housing authority housing services and of arms' length management organisations.[11]

Overcrowding

The June 2008 CLG report *Tackling overcrowding in England: lessons from the London pilot schemes and sub-regional coordination* summarises the lessons learned so far from five pilot schemes in London designed to address overcrowding in the capital. It highlights good practice and provides practical support to local authorities and to RSLs in tackling overcrowding.[12] To provide further help to other local authorities addressing issues of overcrowding in properties in their areas, CLG has published *Tackling overcrowding in England: self-assessment for local authorities* (July 2008).[13]

Home loss payments

Occupiers in England who are displaced from their homes by redevelopment or similar action on or after 1 September 2008 will receive increased home loss payments. The new maximum amounts are £47,000 for owners and £4,700 for tenants: Home Loss Payments (Prescribed Amounts) (England) Regulations 2008 SI No 1598.[14]

Disabled children and housing

The Joseph Rowntree Foundation has published *Housing and disabled children* (June 2008).[15] The paper contains a useful summary of available evidence on the housing needs of young disabled people.

Remedies against public landlords

The question of whether or not public bodies, such as local authority landlords and RSLs, should owe a duty of care to those who receive their services is raised in the new consultation paper *Administrative redress: public bodies and the citizen*, issued by the Law Commission in July 2008. The commission invites views on the best methods of redress when tenants and others are failed by public sector providers. The consultation ends on 7 November 2008.[16]

Private rented sector

The review of the private rented sector commissioned by the government from York University is expected to report later this year. Although the reviewers have not called formally for evidence, the local government body LACORS has put in written submissions which suggest that landlords that fail to comply with basic standards and are subject to repeated enforcement measures should be prohibited by law from letting homes: Letter to Dr Julie Rugg, LACORS, 17 June 2008.

HUMAN RIGHTS

Are RSLs public bodies?

■ R (Weaver) v London & Quadrant Housing Trust

[2008] EWHC 1377 (Admin), 24 June 2008

Mrs Weaver was an assured tenant of London & Quadrant Housing Trust (LQHT), a RSL. Its standard terms and conditions stated: 'In providing a housing service we will comply with the regulatory framework and guidance issued by the Housing Corporation'. She challenged LQHT's decision to seek an order for possession against her on HA 1988 Sch 2 Ground 8 (at least eight weeks' rent arrears). As a result of guidance issued by the Housing Corporation in respect of evictions (see, for example, its *Regulatory code and guidance*, August 2005), she argued that LQHT was in breach of a legitimate expectation in failing to pursue all reasonable alternatives before resorting to a mandatory ground for possession. She also argued that LQHT was 'a public authority' and, accordingly, HRA s6(1) made it unlawful for LQHT to act in a way which was incompatible with article 8 and article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention').

The Divisional Court dismissed her claim for judicial review. The management and allocation of housing stock by LQHT was a function of a public nature and LQHT was therefore to be regarded as a public authority within s6(3)(b) (see *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95). In this connection, Richards LJ considered that the nature and extent of public subsidy of the activities of LQHT was of particular importance. The voluntary transfer of housing stock to RSLs from the public sector was also relevant, as was the duty of co-operation with local authorities under HA 1996 s170. It was striking that well over half of LQHT's new lettings were the result of nominations made by local authorities under such arrangements. Furthermore, in so far as a function of LQHT was a public function, it was amenable to judicial review on conventional public law grounds in respect of its performance of that function. However, on the facts of this case, the claimed legitimate expectation was far too tenuous and general in character to be enforceable in public law, and there was in any event no breach of it. Richards LJ said:

> *A legitimate expectation arises where a decision-maker has led someone affected by the decision to believe that he or she will receive or retain a benefit or advantage, whether procedural or substantive, and it is unfair or an abuse of power to thwart that expectation. Since the claimant was not led to believe in this case that LQHT would act differently from the way in which it did act, it is difficult to see how any relevant expectation can be said to be in play* (para 86).

Demoted tenancies

■ R (Gilboy) v Liverpool City Council

[2008] EWCA Civ 751, 2 July 2008

Ms Gilboy was a secure tenant. In June 2006, Recorder Moran QC granted a demotion order on the ground that Ms Gilboy's son had been responsible for anti-social behaviour while living at the property and because of the son's criminal convictions. Later, the council received further allegations of anti-social behaviour and a decision was made to terminate the claimant's demoted tenancy. Ms Gilboy contested the allegations and made a request for a review of the decision to terminate. At the review hearing, a council official heard evidence from a solicitor representing the council and Ms Gilboy, who disputed all of the allegations. After referring to the son's conviction for offences of unauthorised taking of a motor vehicle, breaching an anti-social behaviour order (ASBO) and using a vehicle without insurance or a licence and two witness statements, the official concluded that there had been further breaches of the tenancy within the 12-month period of the demoted tenancy. In December 2006, the council issued a claim for possession. Ms Gilboy sought judicial review, challenging the compatibility of the Demoted Tenancies (Review of Decisions) (England) Regulations 2004 SI No 1679 with article 6 of the convention. Stanley Burnton J dismissed the claim for judicial review. Ms Gilboy appealed to the Court of Appeal.

The Court of Appeal dismissed her appeal. Although there are distinctions between the procedure adopted for demoted tenants and the introductory tenancy scheme considered in *McLellan v Bracknell Forest BC* [2001] EWCA Civ 1510; [2002] QB 1129, essentially the demoted tenancy scheme was modelled on the introductory tenancy scheme. In devising the demoted tenancy regime, the intention was clearly to replicate the introductory tenancy regime and any differences between the two were not a ground for distinguishing *McLellan*. The Court of Appeal was bound by *McLellan*. However, after considering a number of domestic authorities, including *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465, Waller LJ added that: 'There can, as I see it, therefore be no doubt that as a matter of domestic law the scheme considered in *McLellan* to be article 8 compliant has in effect received the approval of the House of Lords' (para 36).

After considering *McCann v UK* (see above), he concluded that: 'There is nothing to indicate that the European Court disapproved as violating article 8 (or indeed article 6) any of the schemes [including introductory tenancies] which make up what the court describes as "a complex system for the allocation of public housing"' (para 44).

Protection of life and property from natural disasters

■ Budayeva v Russia

App No 15339/02, 20 March 2008

Tyrnauz, a town in the Caucasus Mountains, suffered from mudslides. The authorities built a dam and a mud retention collector. These provided sufficient defences against

mudslides until the dam was damaged in 1999. It was not repaired. Members of the Mountain Institute urged the authorities to set up observation posts to warn against forthcoming mudslides, but this was not done. After a mudslide on 18 July 2000, the authorities ordered the emergency evacuation of residents, but many returned. On 19 July, a more powerful mudslide hit the dam and destroyed it. Mud and debris instantly descended on the town, sweeping the wreckage of the dam before them. The mudslide destroyed part of a nine-storey block of flats, including the flat which Mr Budayev and Mrs Budayeva owned. Mr Budayev was killed when the building collapsed. The family lost all their possessions. The authorities gave housing vouchers with an entitlement to free accommodation to those whose flats had been destroyed. Mrs Budayeva brought an action for damages alleging negligence by the government, but the Baksan District Court dismissed the claim. It found that the authorities were not at fault and that they had taken all reasonable measures to mitigate the damage. Mrs Budayeva complained to the ECtHR that the national authorities were responsible for the death of her husband, for putting the family's lives at risk and for the destruction of their property, and that no effective domestic remedy was provided to them in these respects.

The ECtHR allowed the claim under article 2 (right to life). Article 2 does not solely concern deaths resulting from the use of force by agents of the state. It also lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. There is a positive obligation to implement regulatory measures, to inform the public adequately about any life-threatening emergency, and to ensure that any deaths caused thereby are followed by a judicial enquiry. The choice of particular practical measures to ensure the effective protection of citizens falls within the state's margin of appreciation. An impossible or disproportionate burden must not be imposed on the authorities without consideration of the operational choices which they must make in terms of priorities and resources.

However, in this case, 'the court [saw] no justification for the authorities' failure to prepare the defence infrastructure for the forthcoming hazardous season in 2000' (para 151). There was no explanation for the failure to set up temporary observation posts. The facilities were not maintained adequately and they took no measures at all up to the day of the disaster. The mortal risk was foreseeable. Furthermore, there was a causal link between these serious administrative flaws and the death of Mr Budayev. The ECtHR awarded €30,000 to Mrs Budayeva for the violation of article 2 and the injuries sustained by her and the members of her family.

However, it dismissed her complaint under article 1 of Protocol No 1. In a situation where lives and property were lost as a result of events occurring under the responsibility of the public authorities, the scope of measures required for the protection of dwellings was indistinguishable from the scope of those to be taken in order to protect the lives of the residents.

However, positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature. A distinction must be drawn between the positive obligations under article 2 and those under article 1 of Protocol No 1. The obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances.

Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives. Furthermore, in this case, the housing compensation (ie, vouchers) provided was not manifestly out of proportion to the accommodation lost.

Provision of housing

■ Sitnitskiye v Russia

App No 17701/03,
12 June 2008

The Sitnitskiye family lost their home in a terrorist bomb attack. In November 2002, the Leninskiy District Court ordered the local authority to provide them with a flat. The judgment became binding in December 2002. They did not receive a flat until September 2004.

The ECtHR reiterated that an unreasonably long delay in the enforcement of a binding judgment may breach the convention. In this case, the delay in enforcement (described as one year and six months) was prima facie incompatible with the requirements of the convention, especially since the award was meant to accommodate homeless victims of terrorism. There was a violation of article 6 and article 1 of Protocol No 1. (See too *Shevchenko v Russia* App No 42383/02; 10 April 2008 – delay in payment of judgment for 209,550 Russian roubles awarded against the Ministry of Finance for housing aid. Violation of article 6 and article 1 of Protocol No 1 found.)

■ Lukyanov v Ukraine

App No 11921/04,
19 June 2008

In November 2000, Mr Lukyanov, who was living in a one-bedroom apartment, began civil proceedings to compel the Yalta Council's Executive Committee to provide his family of five with larger housing. In May 2001, the court rejected the committee's allegation that there was no municipal housing available and ordered it to provide accommodation. In December 2002, the Yalta Bailiffs gave the committee until 17 January 2003 to comply with the judgment. In March 2006, the committee allocated Mr Lukyanov accommodation.

The ECtHR, noting that the judgment had remained unenforced for more than three and a half years, found a violation of article 6 in respect of the unreasonable length of time in enforcement of the judgment. It awarded €1,300 in respect of non-pecuniary damage. (For a comprehensive review of ECtHR decisions on housing issues, see *Journal of Housing Law*, 'Housing and human rights – lessons from Strasbourg' [2007] JHL 55, 87, [2008] JHL 14, 47 and 2008 JHL Issue No 5 (forthcoming).)

DISABILITY DISCRIMINATION ACT 1995

■ Lewisham LBC v Malcolm

[2008] UKHL 43,
25 June 2008,
(2008) Times 26 June[17]

Mr Malcolm, a secure tenant, was diagnosed with schizophrenia. Although he was admitted to hospital on numerous occasions, his condition was stabilised by medication. Later, he exercised the right to buy his flat but, before completion, he sublet it, and so he ceased to be a secure tenant (HA 1985 s93(2)). He said that his decision to sublet the flat related to his schizophrenia. Lewisham gave notice to quit and issued proceedings for possession. HHJ Hallon held that the provisions of the Disability Discrimination Act 1995, preventing discrimination by eviction, did not apply because Mr Malcolm had lost his security of tenure and so the court had no discretion to withhold a possession order. She also held that he was not a disabled person and that his actions had not been caused by his disability. The Court of Appeal allowed Mr Malcolm's appeal and dismissed the possession claim ([2007] EWCA Civ 763; [2008] 2 WLR 369). Lewisham appealed to the House of Lords.

The House of Lords allowed the appeal. Lord Bingham accepted that Mr Malcolm was,

at the relevant time, a disabled person. The treatment alleged to constitute discrimination was Lewisham's conduct in seeking possession of the flat.

Applying an objective test, the real reason that Lewisham, a social landlord with a limited stock of housing and a heavy demand from those on its waiting list, acted as it did was that it was not prepared to allow tenancies to continue where the tenant was not living in the property. Lewisham's reason for seeking possession was a pure housing management decision which had nothing whatever to do with Mr Malcolm's mental disability. The correct comparator in this case was with persons without a mental disability who had sublet a Lewisham flat and gone to live elsewhere.

On that basis, Mr Malcolm was not treated less favourably than such persons. He was treated in exactly the same way. Furthermore, knowledge, or at least imputed knowledge, of the disability on a landlord's part, is necessary for there to be discrimination. Mr Malcolm accordingly had no defence to Lewisham's possession claim.

Lord Scott, agreeing, stated that if the physical or mental condition that constitutes the disability has played no motivating part in the decision of the alleged discriminator to inflict on the disabled person the treatment complained of, the alleged discriminator's reason for that treatment cannot relate to the disability. He too considered that the appropriate comparators were council tenants who had sublet but whose subletting had no connection with schizophrenia or, perhaps, with any mental condition causally responsible for the subletting. *Clark v TDG Ltd (t/a Novacold)* [1999] EWCA Civ 1091; [1999] ICR 951, CA was wrongly decided. Mr Malcolm's schizophrenia was not in Lewisham's mind when deciding to serve notice to quit and formed no part of its reason. See also page 34 of this issue.

LOCAL AUTHORITY TENANCIES

Mesne profits

■ Merton LBC v Jones

[2008] EWCA Civ 660,
16 June 2008[18]

Merton obtained a possession order against Mr Jones, a secure tenant, based on arrears of rent. He became a tolerated trespasser. He was then shot and wounded at the flat by an unknown assailant and decided not to return to it. He informed Merton and sought to be rehoused by another local authority. A friend visited the flat and removed his possessions. Merton claimed arrears of rent. The judge held that his liability to pay mesne profits as a tolerated trespasser continued until Merton had accepted a surrender of his rights of occupation. He appealed.

The Court of Appeal allowed the appeal. Wilson LJ noted HLPA estimates that there are as many as 750,000 tolerated trespassers in England and Wales, and a survey which suggested that in inner London between 10 per cent and 20 per cent of occupants of local authority housing are tolerated trespassers. He stated that a former tenant who wrongfully remained in possession after the end of an 'ordinary' non-secure tenancy ceases to be liable for mesne profits when possession is given up, irrespective of notice. The law does not treat the extent of the liability of a tolerated trespasser to pay mesne profits differently from that of other former tenants who had wrongfully remained in possession.

Merton's submission that the liability of a tolerated trespasser for mesne profits should continue until the giving not only of possession but also of notification was clearly wrong. Whether or not occupation was synonymous with possession, there was no requirement of any element of notification. Wilson LJ gave the following advice to social landlords:

... distinguish between your tenant and your tolerated trespasser; monitor whether you wish (or, by order, are required) to continue to tolerate your tolerated trespasser; in particular, monitor his payment of sums equivalent to rent; and, if such come significantly into arrears, apply for a warrant of possession. For the rights of your tolerated trespasser will end upon execution of the warrant of possession; and, alternatively, if, on application by your tolerated trespasser, the court should stay or suspend execution or postpone the date of possession, you will know the terms upon which the court has tolerated continuation of his trespass (para 28).

Anti-social behaviour possession claims

■ Ealing LBC v Jama

B5/08/0104
25 June 2008

Mrs Jama was the secure tenant of a two-bedroom property. She lived there with her husband and six children. Ealing sought possession following allegations of anti-social behaviour including noise nuisance, ten instances of flooding, when water had leaked into the flat below, problems with rubbish disposal and urination in the lift. The tenant of the flat below gave evidence. The judge accepted that Mrs Jama had suffered some harassment, but preferred the evidence of the tenant below to that of the defendant. He also accepted the evidence of a plumber that the flooding in Mrs Jama's flat had not been caused by a defective water system. He held that it was reasonable to make an order for possession because there had been two substantial breaches of the tenancy, namely serious and persistent noise nuisance and flooding. Mrs Jama appealed.

The Court of Appeal dismissed the appeal. On the evidence, it was impossible to hold that the noise amounted to no more or little more than domestic noise. The question of reasonableness was very much a matter for the judge at first instance and an appeal court could not interfere unless the judge had gone wrong in law. Accordingly, the judge's decision could not be attacked successfully. Furthermore, the judge's decision not to suspend the order had been clearly right.

■ High Peak BC v Purser

Buxton County Court,
26 November 2007[19]

The defendant was a secure tenant for over seven years. She was the mother of two children and had long-standing problems relating to drug addiction. In January 2006, she was convicted of possession of cannabis resin. In October 2007, she pleaded guilty to three further criminal offences involving drug activity at the property, namely the supply of ecstasy, the possession and supply of amphetamine and the possession and supply of cannabis resin. The offences took place between November 2006 and February 2007. The supply of ecstasy had led to a 16-year-old girl being hospitalised and requiring serious medical intervention.

The defendant received a sentence of nine months' imprisonment, suspended for two years, with 12 months' supervision. She had been fully engaged with professional drug and family support services since a referral at the time of her arrest in spring 2007 and tests for various drugs as part of that engagement had all proved negative.

In subsequent possession proceedings, deputy District Judge Jolly found that it was reasonable to make an order for possession. However, he stated that the evidence before the court indicated that there was 'real hope' for her future. In the circumstances and 'on balance', he considered that it was appropriate to postpone the date for possession for a period of two years, on condition that the defendant comply with her tenancy agreement.

Right to buy

■ Hanoman v Southwark LBC

[2008] EWCA Civ 624,
12 June 2008,
(2008) Times 24 June

Mr Hanoman was a secure tenant receiving housing benefit. He exercised the right to buy

a lease of his flat. Initially the local authority disputed his right to buy. He lodged several notices of delay and alleged that as a result of the delay the premium payable on grant of the lease should be reduced to nil under HA 1985 ss153A and 153B. After discussions with the local authority he completed the transaction and paid the premium while reserving the right to take any dispute to the county court. HHJ Simpson held that Mr Hanoman was not entitled to a reduction in the premium because his rent was paid by way of housing benefit. Mr Hanoman appealed. On appeal, Southwark argued that the county court had no jurisdiction to grant the relief sought by Mr Hanoman once the lease had been executed.

The Court of Appeal allowed the appeal. On the jurisdictional point, there was a contract between Mr Hanoman and Southwark, collateral to the execution of the lease, that, notwithstanding completion, Mr Hanoman would be able to enforce any rights he might have to have any outstanding dispute about the exercise of his right to buy determined by the county court. The court rejected Southwark's contention that the collateral contract was unenforceable by reason of Law of Property (Miscellaneous Provisions) Act 1989 s2. In relation to the housing benefit point, the court held that ss153A(5), 153B and 155(3A) apply to rent paid by way of housing benefit on behalf of a tenant in the same way as they apply to rent actually paid by him/her. There is no material difference in legal terms between the payment of rent by a third party and the credit by the housing authority of rent from its housing benefit account to the tenant's rent account. The effect, so far as the tenant is concerned, is the same. There is nothing to limit s155(3A) to those who pay rent other than by housing benefit. Furthermore, s153B does not contain any stipulation about the person by whom the rent should be paid.

ASSURED TENANCIES

■ Governors of the Peabody Trust v Reeve

HC07C02621 (Ch D),
2 June 2008
(2008) Times 9 June

Peabody, an RSL, claimed that it was entitled unilaterally to alter the terms of its tenancies. Clause 5(a) of the standard form tenancy agreement provided that 'the agreement may only be altered by the agreement in writing of both the tenant and the trust'. Clause 5(b) provided the terms might be varied 'by a notice of variation served on the tenant and the provisions of section 103 of the Housing Act 1985 shall apply … as if this tenancy were a secure tenancy'.

Gabriel Moss QC, sitting as a deputy High Court judge, noted that there was doubt about the meaning of clause 5 as a whole and considered the contradictory nature of the sub-clauses. Clauses 5(a) and 5(b) could not be reconciled. He held that, in accordance with the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083 reg 7(2), the interpretation most favourable to the tenant must be adopted. He held that that interpretation must be that there could be no variation to the tenancy agreement without the agreement in writing of both parties. Even if that interpretation were wrong, clause 5(b) allowing for unilateral variation would not be binding on the tenant in view of reg 5(1) because it would have been a contractual term which had not been negotiated individually and, contrary to a requirement of good faith, caused a significant imbalance in the parties' rights and obligations, to the detriment of the tenant as a consumer.

ANTI-SOCIAL BEHAVIOUR

ASBOs: exclusion orders

■ R v Edwards

[2008] EWCA Crim 1172,
16 April 2008

Ms Edwards owned her home. She was involved in 'extreme harassment' of her neighbour, including damage to a car, throwing rubbish and excrement at the house, loud singing and banging. After breaches of an injunction and a restraining order and three sentences of imprisonment, Recorder Rouse made an ASBO which placed various restrictions on Ms Edwards, including one which excluded her from her property for ten years. She appealed.

The Court of Appeal dismissed the appeal. An order which excludes someone from the house s/he owns is very much a last resort, but 'the last resort has been reached in this case'. Although Ms Edwards must live elsewhere, that was the only way of allowing her neighbour's family to live their lives. The order was 'necessary' and proportionate. The Court of Appeal took account of article 8 and was satisfied that the interference with Ms Edward's rights to respect for private and family life was not disproportionate on the facts of the particular case.

Closure orders

■ R (Smith) v Snaresbrook Crown Court

[2008] EWHC 1282 (Admin),
10 June 2008

The Administrative Court rejected a submission that it could be inferred from the structure of Anti-social Behaviour Act 2003 Part 1 that parliament regarded three months as the normal maximum duration for a closure order because it represented the right balance between the benefit to the community of making the order and the prejudice to the occupier. On an application for any extension of an initial closure order, the court should simply ask whether or not it has been proved that an extension is necessary and proportionate to prevent the occurrence of further disorder or serious nuisance, and if so how long the extension should be (subject to the overall maximum duration of six months).

Committal for breach of injunctions

■ Birmingham City Council v Flatt

[2008] EWCA Civ 739,
12 June 2008

Mr Flatt was a secure tenant, aged 69. After various complaints of anti-social behaviour, he was arrested for assault after pouring petrol on a neighbour and threatening to set light to him. He received a community sentence. Birmingham obtained an anti-social behaviour injunction under HA 1996 s153A, restraining him from committing acts of anti-social behaviour in the vicinity of his home. He breached that order by:

- driving a vehicle at a neighbour, causing him injury; and
- making false accusations about his neighbours.

He was arrested for those breaches. At the hearing of the application for his committal, Mr Flatt denied the allegations. He was found to have breached the order and sentenced to four months' imprisonment. He appealed.

The Court of Appeal dismissed the appeal. It does not follow that imprisonment is to be regarded as the automatic consequence of breach of an order and it is common practice to take some other course on the first occasion when someone breaches an injunction.

However, in this case, Mr Flatt had a history of violent and threatening conduct towards others. He had denied the breaches and shown no remorse. It could not be said that the breach of the injunction had occurred after a long period of compliance since it had been made in June 2007 and breached in November 2007. A sentence of imprisonment was not wrong in principle. Although the length of the sentence was at the top end of the range of sentences available for such a breach, it was not manifestly excessive and the judge had been entitled to take the view that this was not a case for a suspended sentence order.

GYPSIES AND PLANNING INJUNCTIONS

■ South Cambridgeshire DC v Price

[2008] EWHC 1234 (Admin), 5 June 2008

The council applied for a final injunction under Town and Country Planning Act 1990 s187B to evict Gypsies from a site after the secretary of state had upheld an enforcement notice. The Gypsies argued that they had a real chance of success in an appeal against the dismissal of their planning application and that, accordingly, they should not be forced to leave the site while the appeal is pending.

Plender J refused to grant an injunction. He found that the Gypsies had a real prospect of success on their appeal and that there was a real, even if not a good, chance that they might in due course obtain planning permission.

STOCK TRANSFER

■ Atlantic Housing Ltd v Secretary of State for Communities and Local Government

[2008] EWHC 1373 (Admin), 15 May 2008

In 1996, Eastleigh transferred its housing stock to an RSL, now known as Atlantic Housing. In 2006, Atlantic Housing applied for planning permission to demolish six bungalows (to replace them with 32 flats) and to demolish 12 further bungalows (to replace them with 24 bungalows). The council failed to reach decisions on the applications within the prescribed time and they were deemed refused. Atlantic Housing appealed.

The first issue on the planning appeal (which was determined by an inspector on the papers) was whether or not the proposals would breach the article 8 convention rights of the sitting tenants who would be displaced. Some tenants had been secure tenants at the date of transfer and enjoyed 'preserved rights'. Others had become tenants since transfer and had different agreements reserving the landlord's right to redevelop. All forms of tenancy agreement disclaimed an ability to rely on HA 1988 Sch 2 Ground 6 (mandatory ground for possession for redevelopment). The inspector dismissed the appeal as he was not satisfied, on the available evidence, that the article 8 rights of at least the former council tenants would not be infringed.

Collins J allowed a statutory appeal. The inspector ought to have appreciated that Atlantic Housing would only be able to recover possession from any relevant tenant by reliance on the discretionary Ground 9 (suitable alternative accommodation). Displacement would only be available if a court was satisfied both that the tenant was being suitably rehoused and that it was reasonable to order possession. In such a possession claim '[t]he judge would not be entitled to make an eviction order unless satisfied that to do so was not a breach of the individual's human rights' (para 12). Therefore the grant of planning permission itself would not infringe any such tenant's article 8 rights.

■ R (Thompson) v Sunderland City Council

[2008] EWHC 1632 (Admin), 6 June 2008

The council transferred its housing stock to an RSL, now known as Gentoo, in 2001. In March 2007, the council approved a restructuring of the RSL following an exercise in which 30,000 tenants were consulted but only 33 responded. The claimant alleged that the consultation had been inadequate. A claim for judicial review was dismissed on the basis that the consultation had not been unfair and had not breached promises given to sitting tenants at the time of transfer.

HOUSING ALLOCATION

■ X and Y v Hounslow LBC

[2008] EWHC 1168 (QB), 23 May 2008

The claimants were adults with learning disabilities. Y was the secure tenant of a council flat and X was her partner. They lived with two children aged 11 and eight. Over a weekend in mid-November 2000, they were effectively imprisoned in their home by local youths who gained entry to the property and seriously assaulted and abused both the adults and the children. They were subject to appalling degradation during the attack. They brought an action for damages in negligence against their council as landlord and as social services authority for its failure to protect them.

Maddison J treated the claim as made against the council as a whole rather than against separate housing and social services departments. The council had had in place a special emergency accommodation transfer system under which vulnerable tenants could be moved quickly in extreme cases involving severe violence or harassment to temporary accommodation (such as bed and breakfast) on notification from housing to social services. By no later than 20 October 2000 it had become reasonably foreseeable that an incident such as did occur would take place. But the council had failed to invoke or even contemplate using the emergency transfer procedure. In the special circumstances of the case, the council did owe a duty of care to the claimants. It had been negligent in failing to arrange an emergency transfer. Damages and costs were awarded.

HOMELESSNESS

Homelessness prevention

■ R (Cowan) v Lambeth LBC

CO/6424/2006, 9 June 2008[20]

Mr Cowan, a single man in his fifties, was a lodger with a council tenant until the tenant was evicted. He asked Lambeth for assistance in obtaining accommodation. The council operated a rent deposits scheme to enable the homeless to obtain private sector accommodation. The published eligibility criteria indicated that it is restricted to the statutorily homeless, in priority need, with a local connection and not intentionally homeless.

The claimant sought judicial review on the basis that the eligibility criteria restricted the council's discretions to assist under Local Government Act (LGA) 2000 s2 and LGA 1988 s34. Shortly before trial, the council filed evidence that notwithstanding the published criteria it did not in fact restrict its statutory discretions and that council officers were aware that they were not to apply the criteria blindly.

By consent, Stadlen J made a declaration that the scheme was to be applied on the basis that it did not prevent those applicants not covered by the published criteria from being assisted. He awarded the claimant his costs because until the evidence had been filed, the council had appeared to be operating the published criteria without exception. The revised scheme criteria now read: 'In exceptional circumstances, we may provide assistance to people who do not fall within these criteria.[21]

Interim accommodation

Local Government Ombudsman

Complaint

■ Haringey LBC

06/A/12508, 30 June 2008

In January 2005, the complainant was physically excluded from her former home with her baby. She was accommodated overnight by social services and the following day applied to Haringey for accommodation. The council initially declined to accept the application on the basis that her circumstances had not changed since an earlier application in November 2004. But, later the same day, it agreed to treat her as having made a further homelessness

application under HA 1996 Part 7 and it began statutory enquiries (ss183–184). It did not provide interim accommodation (s188) before notifying her of a decision, a month later, that the main duty (s193) was owed. The council later explained that this was because its duty to provide interim accommodation did not arise until 'it has reason to believe that a person *is* genuinely homeless' (emphasis added). It obtained an opinion from leading counsel to the effect that it had correctly interpreted the law and invited the Ombudsman to take into account 'custom and practice in councils' administration of the legislation'. This included the 'good practice' that applications should be accepted from those who demonstrated that their homelessness was genuine because they were prepared to pursue their application to an appeal if necessary.

The Ombudsman found that there had been maladministration causing injustice. He said that:

- the council's records were unclear and did not explain what decisions officers were taking, or thought they were taking, at any particular point. Good practice required a clear record of each decision and the reason for it. In particular, the council should have recorded the significant decision that it had had 'reason to believe' that the applicant *may* be homeless because that decision would have immediately triggered the requirement that interim accommodation under s188 had to be provided;
- the council had been wrong to apply a test of whether there had been a change of circumstances since the earlier application. The correct question was whether the later application was based on exactly the same facts (see *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340, [2005] 1 WLR 2103);
- he had concerns about the suggestion that an applicant's willingness to pursue an application through to appeal could or should be a relevant factor in accepting an application;
- while it was not his task to interpret the statute, and the council's interpretation had been supported by leading counsel, it was 'good practice' for councils to apply the low threshold of whether they have reason to believe a person may be homeless for the purposes of both s184 and s188.

Definition of 'homelessness'

■ Harouki v Kensington and Chelsea RLBC

House of Lords,
17 June 2008

An appeal committee of the House of Lords refused leave to appeal against the decision of the Court of Appeal that the council had been entitled to find that an applicant was 'not homeless' despite her accommodation being statutorily overcrowded (see *Harouki v Kensington and Chelsea RLBC* [2007] EWCA Civ 1000).

Priority need (and reviews)

■ Lambeth LBC v Johnston

[2008] EWCA Civ 690,
19 June 2008

Mr Johnston was 42 and had a history of alcohol and drug abuse and rough sleeping. In September 2004 he applied to Lambeth for homelessness assistance and was provided with interim accommodation on the basis that he might have priority need (HA 1996 s188). In October 2004 he was interviewed by a caseworker who recorded on file that he was vulnerable and therefore had priority need. The caseworker took no further action. Eleven months later, having made no further enquiries, a new caseworker notified him of a decision that he was not in priority need (s184). He applied for a review and Lambeth continued to provide accommodation pending review (s202). The decision was confirmed on review but that review decision was quashed on appeal in the county court (s204) on the grounds that it was *Wednesbury* unreasonable on the material before the reviewing officer. Lambeth was to conduct a further review. The reviewing officer interviewed Mr Johnston (without indicating to him or his solicitors that she was the reviewing officer) and, with the assistance of medical reports from NowMedical, reached a fresh decision that he did not have a priority need.

On appeal, a recorder quashed that decision. The original s184 decision had been the result of a material irregularity ie, the failure to make appropriate (or any) enquiries between October 2004 and September 2005 (Code of Guidance para 3.16). That had required the reviewing officer to operate the provisions of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) including the sending of a 'minded to' letter. She had not done so. The council brought a second appeal contending that the reviewing officer had not erred because the applicant and his advisers had had ample opportunity (which they had exercised) to make representations and put in fresh evidence on the second review.

The Court of Appeal dismissed the appeal. Rimer LJ said:

... regulation 8(2) is not a discretionary option that the review officer can apply or disapply according to whether or not he or she considers that the service of a 'minded to find' notice would be of material benefit to the applicant. Regulation 8(2) imposes a dual, mandatory obligation upon the review officer. First, to 'consider' whether there was a deficiency or irregularity in the original decision or in the manner in which it was made. Secondly, if there was – and if the review officer is nonetheless minded to make a decision adverse to the applicant on one or more issues – to serve a 'minded to find' notice on the applicant explaining his reasons for his provisional views. In my judgment, there is no discretion on the review officer to give himself a dispensation from complying with either of those obligations. As regards the first part of it, I have referred to the fact that it is not a purely subjective exercise but that failure to arrive at the right 'consideration' can be challenged on usual public law grounds. As regards the second part, the language of regulation 8(2) is unambiguously mandatory – 'the reviewer shall notify ...' (para 51).

Intentional homelessness

■ Pursonowa v Haringey LBC

[2008] EWCA Civ 709,
5 June 2008

In January 2005 the appellant left her home, rented from a housing association, to travel to Mauritius. In October 2005 she wrote to the housing association giving up the flat and, in February 2006, the association recovered possession. Later, she returned to the UK and applied to Haringey for homelessness assistance. On review, the council decided that she had become homeless intentionally. That decision was upheld on appeal by HHJ Zeidman QC.

The appellant pursued an application for permission to bring a second appeal on the grounds that:

- the judge had been wrong to proceed on the basis that the homelessness occurred in October 2005 because the reviewing officer's decision had referred to the January 2005 departure;
- the council had failed to make inquiries into the appellant's state of mental health in October 2005; and
- the council and the judge had failed to consider whether she had obtained settled accommodation since her return to the UK and before making her homelessness application.

Carnwath LJ refused permission. On a fair reading of the reviewing officer's letter, it described the whole process leading to the loss of possession which simply followed after the departure in January 2005. The 'inquiries' point raised no new matter of principle. The Code of Guidance and previous decisions of the courts provided ample guidance on the adequacy of inquiries. The point about 'settled' accommodation had not

been raised on review or before the judge. It was therefore understandable that neither the reviewing officer nor the judge had dealt with it.

HOUSING AND CHILDREN

■ **R (M) v Lambeth LBC**
■ **R (A) v Croydon LBC**
[2008] EWHC 1364 (Admin), 20 June 2008

The claimants asserted that they were seeking asylum as unaccompanied minors and were entitled to accommodation under Children Act (CA) 1989 s20. The councils to which they applied decided that they were both over 18 and therefore not entitled to children's services.

In judicial review proceedings, Bennett J determined a number of preliminary issues. He held that:

■ the question of the correct resolution of a dispute about an applicant's age for CA 1989 purposes involved no 'civil right' for the purposes of article 6 of the convention or, alternatively, no 'determination' of a civil right. In consequence, article 6 had not been engaged and had not required an independent determination of age by an impartial tribunal;
■ alternatively, decision-making by impartial social workers subject to scrutiny by the courts in judicial review proceedings was sufficient to comply with article 6 (if it was engaged);
■ the decision about an applicant's age did not engage the article 8 convention right to respect for private life and the procedural obligations that engagement of article 8 would entail;
■ the age question was not one of 'precedent fact' for determination by a court in judicial review. The structure of the CA 1989, and particularly s20, left matters, including evaluation of age, to local authorities subject only to judicial review by the courts on ordinary administrative law principles; and
■ local authorities were not bound by decisions on age made by the immigration authorities. Those decisions might properly be taken into account but departed from where appropriate.

■ **R (W) v North Lincolnshire Council**
CO/4620/2008, 3 July 2008, [2008] All ER (D) 34 (Jul)

The claimant was a young man who had been dealt with by the council's social services department for many years as a result of his parents' inability to care for him. He was convicted of offences and sentenced to a detention and training order. On his release, an issue arose about whether he had been dealt with by social services as a 'child in need' (under CA 1989 s17) or as such a child additionally owed an accommodation duty (s20).

On a claim for judicial review, HHJ Mackie QC (sitting as a deputy High Court judge) decided that although the council had sought to rely on s17 it had in fact owed duties under s20. That meant that the claimant was owed further duties as a former 'looked-after' child.

■ **R (Kromah) v Southwark LBC**
CO/2032/2008, 16 May 2008

The claimant arrived in the UK as an unaccompanied minor seeking asylum. She was accommodated by a local authority in its area, initially under the CA 1989 and later as a care-leaver. Later, aged 21, and living in a flat in a different local authority area, she applied to the first authority for help with her rent under National Assistance Act 1948 s21. Both that authority and the local authority for the area in which she was living refused assistance. She sought judicial review.

Underhill J held that, pending a decision by the secretary of state about which of the two authorities owed the claimant a duty, the authority for the area in which she was physically living was subject to a duty to assist.

1 See: www.communities.gov.uk/speeches/housing/charteredinstitutehousing2008.
2 Available at: www.communities.gov.uk/documents/housing/pdf/840317.pdf.
3 Available at: www.communities.gov.uk/news/housing/841442.
4 Available at: http://new.wales.gov.uk/topics/statistics/headlines/housing2008/hdw20080625/?lang=en.
5 Available at: www.housingcorp.gov.uk/upload/pdf/HAT_update_Jun08.pdf.
6 Available at: www.housingcorp.gov.uk/server/show/ConWebDoc.13915.
7 Available at: www.housingcorp.gov.uk/upload/pdf/Forward_Thinking_Norfolk_RSL_Alliance.pdf.
8 Available at: www.york.ac.uk/inst/chp/publications/PDF/HomelessExServiceinLondon.pdf.
9 Available at: www.housingcorp.gov.uk/upload/pdf/thematic_review_-_stock_transfer_V4_20080528171118.pdf.
10 Available at: www.communities.gov.uk/news/housing/865471.
11 See *Watchdog introduces new housing spot checks*, 18 June 2008, available at: www.audit-commission.gov.uk/reports/PRESS-RELEASE.asp?CategoryID=PRESS-CENTRE&ProdID=E31B1758-4D08-4AAD-8B59-9C595452FAAC.
12 Available at: www.communities.gov.uk/documents/housing/pdf/tacklingovercrowdingengland.
13 Available at: www.communities.gov.uk/documents/housing/pdf/overcrowdingtoolkit.pd.
14 Available at: www.opsi.gov.uk/si/si2008/uksi_20081598_en_1.
15 Available at: www.jrf.org.uk/knowledge/findings/housing/pdf/2208.pdf.
16 Consultation paper no 187, available at: www.lawcom.gov.uk/docs/cp187_web.pdf.
17 Robert Latham, barrister, London.
18 Hammersmith and Fulham Law Centre®, solicitors, London and Robert Latham, barrister, London.
19 Helen Dent, solicitor, Keoghs solicitors, Altrincham and John Hobson, barrister, Manchester.
20 David Watkinson, barrister, London and Ziadies solicitors, London.
21 See: www.lambeth.gov.uk/NR/exeres/D4F48BF4-042D-4014-BFBE-9F91F5DB848F.htm.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. He is Legal Aid Barrister of the Year 2007. The authors are grateful to the colleagues at notes 17–20 for transcripts or notes relating to these judgments.