■ **R (White) v Blackfriars Crown Court**
[2008] EWHC 510 (Admin), 4 March 2008

The applicant sought permission for judicial review of a decision dismissing his appeal against the imposition of a three-year FBO made under FSA s14A (following conviction for a relevant offence). Under FSA s14E(3), the court was compelled to impose a requirement that he surrender his passport when regulated football matches occurred outside the UK. The facts were that he was a long-time supporter of Millwall Football Club and at the conclusion of a match ran on to the pitch, shouting at the assistant referee and running at him, making some physical contact before being taken to the ground by other members of staff.

His solicitors failed to apply in time for a case to be stated and he therefore sought permission to judicially review the decision to impose the order. He submitted that the court had erred in law in imposing a banning order: his offending act was an extraordinary and isolated incident; the court had failed to assess his conduct and personal circumstances; and it had wrongly based its decision on the general deterrence such an order would have. He further submitted that the imposition of the order was disproportionate in view of the doctrine of proportionality in the context of European Community law regulating free movement of persons (Directive 2004/38/EC).

The Divisional Court held, inter alia, that it was unnecessary to refer to any detail of European Community law or the convention since the compatibility of FBOs with such provisions had already been considered in detail by the Court of Appeal in *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ 351, 20 March 2002; [2002] QB 1213. Directive 2004/38/EC did not effect any fundamental change in the principles of EC law that had been considered on the basis of earlier measures in *Gough*. Applying *R v Hughes* [2005] EWCA Crim 2537, 5 October 2005; [2006] 1 Cr App R (S) 107, the court held that it did not matter that the applicant had not shown a propensity for taking part in football hooliganism or that there was no real risk that he would take part in the future: where the banning order was made under s14A that was not a requirement. Furthermore, the Crown Court had been entitled to take into account and to give great weight to deterrence. That approach was plainly permitted by the wording of s14A(2) and was in line with the legislative policy.

As to the travel restriction, the fact that the restriction was an incident of a FBO, and that an issue might arise about the compatibility of that travel restriction with Directive 2004/38/EC, did not provide a basis for challenging the entirety of the FBO. It could at most relate to the validity of the additional requirement under s14E(3) as to a travel restriction. However, the applicant had not put his case in that way. Therefore, and in particular because the court was bound to follow the approach in *Hughes*, permission to seek judicial review was refused.

The Divisional Court further stressed that it should be slow to entertain an application for judicial review as an alternative to an appeal by way of case stated just because the time limit for an appeal had been missed, even if the fault lay with the claimant's solicitors rather than with the claimant.

1 In force 1 October 2008.
2 Amendment no 19 to the consolidated criminal Practice Direction, available at: www.justice.gov.uk/criminal/procrules_fin/contents/frontmatter/Am_No_19_CCPD_signed_copy_19_March_2008.pdf.
3 See, in particular, *ASBOs: a practitioner's guide to defending anti-social behaviour orders*, Maya Sikand, LAG, 2006, chapter 3.
4 See: http://nds.coi.gov.uk/Content/Detail.asp?ReleaseID=372197&NewsAreaID=2.

Maya Sikand is a barrister at Garden Court Chambers, London and is the author of *ASBOS: a practitioner's guide to defending anti-social behaviour orders*, LAG, 2006, £45 and a contributing author of the text book *Blackstone's Criminal Practice* (Oxford University Press). She is a finalist for Legal Aid Barrister of the Year 2008 (see page 8 of this issue). The author is grateful to Helen Foot, a pupil barrister at Garden Court Chambers, for the research she did for this article.

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 Act 2008

The Act has created two new housing bodies:
■ the Homes and Communities Agency (HCA), to support and finance the development of more housing; and
■ the Tenant Services Authority (TSA), to regulate social housing providers.

A whole raft of primary and secondary housing legislation must be amended to take account of the establishment of these two new organisations. The first proposed vehicle for that task, a draft Housing and Regeneration Act 2008 (Consequential Provisions) Order 2008, was laid before parliament for approval in October 2008.[1] The second, the Housing and Regeneration Act 2008 (Consequential Provisions) (No 2) Order 2008 SI No 2831 was laid on 3 November 2008.

It seems likely that the TSA will contract-out to the Audit Commission functions relating to inspection of the services of social housing providers. The commission has itself launched a consultation exercise on proposals to undertake future inspections of local authority housing services, and of the activities of arms length management organisations, at short notice.[2] Responses were sought by 1 December 2008 to its consultation paper.

On 16 October 2008, Peter Marsh, chief executive of the TSA, set out the latest timetable for commencement of its operations.[3] On the following day, the government announced the make-up of the board members of the TSA which includes two social housing tenants: Communities and Local Government (CLG) news release, 17 October 2008.[4] A further indication of the direction the TSA would take in its work was given by Anthony Mayer, the authority's chairperson, and Peter Marsh in giving evidence to the CLG Select Committee on 21 October 2008. On 5 November 2008, Peter Marsh wrote to all local housing authorities and registered social landlords to indicate how the transition to full regulation of social housing would be managed once the TSA became operational on 1 December 2008.[5]

The government has announced that

among its new responsibilities, the HCA will take over the distribution of the Gypsy and Traveller site grant, which supplies funding for the provision and refurbishment of such sites: *Hansard* HL Debates col WS162, 29 September 2008.

Help for mortgage defaulters

A series of further measures have been adopted to provide help to those who risk loss of their homes through mortgage default:

■ On 19 November 2008, the new pre-action protocol for mortgage possession cases, drawn up by the Civil Justice Council and approved by the Master of the Rolls (MR), came into effect: *Pre-action protocol for possession claims based on mortgage or home purchase plan arrears in respect of residential property.*[6]

■ On 22 October 2008, the Treasury announced that the government would launch a consultation exercise about giving the Financial Services Authority (FSA) a regulatory role in relation to sale and rent-back schemes being offered to mortgage defaulters: HM Treasury press notice 108/08.[7] The announcement was made in response to the recommendations of the Office of Fair Trading contained in its report, *Sale and rent back: an OFT market study* (October 2008).[8]

■ In response to the practice of some defaulting borrowers, who in seeking a quick solution to difficulties in selling their homes offer them as lottery prizes, the Gambling Commission issued a reminder, on 10 October 2008, that such activity falls under statutory control.[9]

■ In Scotland, ministers have made the Notice to Local Authorities (Scotland) Regulations 2008 SSI No 324. The regulations prescribe the forms of notice to be served on local authorities by mortgage lenders when seeking possession or to enforce securities. The requirement on lenders to give notice to local housing authorities in the prescribed form takes effect on 1 April 2009.

■ The FSA has imposed sanctions on a number of mortgage lenders and brokers, including:
– a fine of £1.12 million for the mortgage lender GE Money Home Lending for systems and controls failings that resulted in 684 borrowers with regulated mortgage contracts suffering financial loss in excess of £2.3 million before redress was later paid to them by the firm: Press release FSA/PN/108/2008, 25 September 2008;[10]
– fines totalling £107,000 for both partners in Jones & Poole Independent Mortgage Specialists for exposing clients to unreasonable risks: Press release FSA/PN/110/2008, 30 September 2008;[11]
– fining the mortgage broker TBO Investments Limited £28,000 for failing to document clearly the explanation of the risks of transactions to its clients. It also failed to make and retain records that demonstrated the suitability of its advice or ensure that its business was conducted in accordance with FSA requirements: Press release FSA/PN/113/2008, 2 October 2008;[12]
– fines of £30,000 each for two directors of Abbey Mortgages Ltd for shortcomings in their mortgage business (a further fine of £50,000 would have been imposed on the firm): Press release FSA/PN/118/2008, 16 October 2008;[13]
– a fine of £34,500 for mortgage broker Orchid Financial Ltd for failing to ensure it provided suitable advice: Press release FSA/PN/119/2008, 16 October 2008.[14]

Private rented sector

In January 2008, the government commissioned an inquiry into the private rented sector from Dr Julie Rugg and David Rhodes of the Centre for Housing Policy, University of York. The report of the inquiry, *The private rented sector: its contribution and potential* (October 2008), recommends a scheme of licensing for landlords and for the regulation of letting agents.[15] The government is likely to include its response to the inquiry report in its forthcoming housing reform green paper. See also page 33 of this issue.

Shared-ownership housing

Some rural shared-ownership housing, which was provided originally with state financial assistance, is being lost to the social housing sector when occupiers buy out the freeholds. The government is proposing to restrict staircasing on shared-ownership properties in certain areas – to be designated as 'protected' – to ensure that such properties remain affordable and available on shared-ownership terms in perpetuity. It has launched a consultation on initial proposals for designation in rural areas. Responses are sought by 31 December 2008 to the consultation paper, *Shared ownership and leasehold enfranchisement and designation of 'protected areas'* (CLG, October 2008).[16] In a separate development, the Housing Corporation has published Circular 03/08: *Amendment of procedures for varying shared ownership leases.*[17]

Housing in the courts

Judicial and court statistics 2007 provides a useful analysis of the housing disputes that end up in the courts.[18] The latest figures cover possession claims and other housing cases in the county courts. The paper contains an interesting area-by-area breakdown of the number of injunction applications. The statistics reveal that, comparing 2007 with 2006:

■ mortgage repossession claims increased by five per cent;

■ the number of charging orders made against properties increased by 45 per cent (bringing the overall increase since 2000 to 901 per cent);

■ social landlord repossession claims fell by 11 per cent;

■ only 6,000 housing claims (other than for possession or an injunction) were brought;

■ 53,700 properties were repossessed by bailiffs; and

■ three court areas were responsible for more than half of all non-family injunctions:
– London: 2,249;
– Greater Manchester: 1,820; and
– Cheshire and Merseyside: 914.

Housing reform green paper

Undaunted by the appointment of the eighth new housing minister since 1997 (Margaret Beckett MP) a team of civil servants at CLG has been working on the housing reform green paper, which is scheduled for publication before the end of 2008 (but see page 33). As a contribution to that work, the local government organisation London Councils has set out its views in *Rethinking housing – a launch pad for opportunity.*[19] The Chartered Institute of Housing has produced *Rethinking housing.*[20]

Gas safety alert

The Health and Safety Executive (HSE) has issued *Safety alert: gas boilers – flues in voids* (HSE, October 2008) which relates to residential premises in which gas central heating boilers have been mounted on internal walls.[21] The purpose of the alert is to raise awareness of a potential poisoning risk.

Enforcing home information pack requirements

A snap inspection conducted by Birmingham City Council's (BCC's) trading standards officers of Home Information Packs (HIPs) for properties being marketed for sale in the city found that five out of six were unsatisfactory because vital information was inaccurate, incomplete or missing: BCC press release 10880, 30 September 2008.[22] In its response, the Association of Home Information Pack Providers said that it welcomed the robust policing of the HIP regulations in Birmingham.[23]

Housing and anti-social behaviour

No one in any of the eight local authority pilot areas testing housing benefit (HB) sanctions for anti-social behaviour has had their HB withdrawn as a result of the pilot. Some of the pilot areas have identified cases where

possession orders have been sought on the ground of anti-social behaviour, and some have introduced details about the sanction into their literature and warning letters: *Hansard* HC Written Answers col 2380W, 29 September 2008.

Youth homelessness

The new guide *Making a difference: supported lodgings as a housing option for young people* (CLG, October 2008) is designed to inform and support local authorities' planning and commissioning of supported lodgings within the context of strategies to tackle youth homelessness.[24] It is based on a review of supported lodgings services in 17 local authority areas in England, and of data collected through the Supporting People programme.

HUMAN RIGHTS

■ R (RJM) v Secretary of State for Work and Pensions

[2008] UKHL 63,
22 October 2008,
(2008) Times 27 October,
[2008] 3 WLR 1023

RJM was eligible for a disability premium as part of his income support. However, the secretary of state ceased to pay disability premium for a period during which RJM was without 'accommodation' within the meaning of the Income Support (General) Regulations 1987 SI No 1967. RJM claimed that the non-contributory premium was capable of being a possession within article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention') and that his right to peaceful enjoyment of his possessions was engaged. He also maintained that withholding the premium as a result of his homelessness was discriminatory on a ground relating to status, contrary to article 14 of the convention, and that the discrimination was unjustified. James Goudie QC, sitting as a deputy judge of the Queen's Bench Division, dismissed his application for judicial review. The Court of Appeal dismissed RJM's appeal. He appealed to the House of Lords.

The House of Lords dismissed RJM's appeal. Following *Stec v UK* (2005) 41 EHRR SE295; App No 65731/01, 6 July 2005, a right to a welfare benefit is a possession for the purposes of article 1, whether or not conditional on the prior payment of contributions. Furthermore, the policy of disentitling persons without accommodation from receiving the disability premium to which they would otherwise have been entitled was discrimination within article 14. If people living in a certain type of home (eg, flats) were treated differently from those living in another type (eg, houses), that would fall potentially within article 14. That would suggest that treating homeless people differently from those with homes would also fall potentially within article 14. However, it was lawful discrimination because it could be justified on policy grounds, namely to encourage homeless people to seek shelter and help.

LOCAL AUTHORITY TENANCIES

■ Birmingham City Council v Qasim

Birmingham County Court,
8 October 2008[25]

An administrative officer employed in Birmingham City Council's housing department arranged for 14 people to be granted tenancies although he had no authority to do so. He created paperwork which showed that all but one had obtained their tenancies through mutual exchanges when, in fact, no such exchanges took place.

An internal audit report established that there had been serious management failures, but also that there was no evidence that any of the tenants was complicit in the officer's fraudulent behaviour. Birmingham sought possession on three grounds:

■ the grant of each tenancy constituted an unlawful allocation and so was a nullity;
■ Housing Act (HA) 1985 Sch 2 Ground 1, relying on the following passages in Birmingham's standard conditions of tenancy namely, 'We can also repossess the property if you have given false information to get the tenancy' and 'We may also repossess the property if someone has given us false information on your behalf to get the tenancy'; and
■ Ground 6 (mutual exchange for a premium).

The tenth defendant applied to strike out the claim on the basis that there were no reasonable grounds for bringing it. He also applied for summary judgment in respect of the latter two grounds on the basis that Birmingham had no real prospect of succeeding in the light of the evidence summarised in the internal audit report. All the other remaining defendants supported the application on the basis that the same issues applied to them and it was heard on the first day of the scheduled trial.

Deputy Circuit Judge Brunning held that:

■ Ground 6 was not available on Birmingham's own case because there had been no mutual exchanges. Also, there was insufficient evidence that any premium had been paid. Therefore, this element of the claim was struck out and summary judgment entered.
■ Ground 1 was also not available because of the lack of evidence. It was also struck out and summary judgment entered.
■ The court was bound to find, in keeping with *Islington LBC v Uckac* [2006] 1 WLR 1303; [2006] EWCA Civ 340, that Birmingham may only obtain possession on one of the grounds in HA 1985 Sch 2, and so it was not possible to rely on an alleged nullity arising from its own unlawful act. Therefore, this element of the claim was also struck out.

The claim was dismissed with costs. Permission to appeal was refused.

ANTI-SOCIAL BEHAVIOUR

■ Birmingham City Council v Shafi

[2008] EWCA Civ 1186,
30 October 2008

Birmingham City Council sought injunctions under Local Government Act (LGA) 1972 s222 to prevent the defendants from being with a number of named individuals in any public place; from entering a large part of central Birmingham; and from assaulting, harassing or intimidating any person. Much of the evidence used in support of the application was police intelligence rather than firsthand evidence. Birmingham claimed that the defendants had repeatedly behaved in a manner which was criminal and tortious, and amounted to a public nuisance. HHJ MacDuff QC (as he then was) was satisfied that members of the gang, acting together, had in the past committed acts which were both criminal and amounted to a public nuisance; however, on the evidence he could not conclude beyond reasonable doubt that the defendants had participated in those acts. He held that the court had no jurisdiction to grant the injunctions sought and that, even if it did, he would have refused to grant them on the facts. He dismissed the claims and discharged interim injunctions which had been granted. Birmingham appealed.

The Court of Appeal dismissed the appeal. The purpose of s222 is to enable local authorities to bring and defend proceedings in their own names without the involvement of the Attorney-General. It does not give councils substantive powers. It is simply a procedural section which gives them powers formerly vested only in the Attorney-General. The courts have considered the correct approach to the exercise of this power in the public interest in two principal contexts: the restraint of breaches of the criminal law and the suppression of public nuisances. Courts should be reluctant to grant injunctions in aid of the criminal law which, if disobeyed, may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. Where an injunction is sought to restrain a public nuisance, the principles

which the court should apply should be less restrictive than in the case where it is sought to restrain the commission of a crime.

However, in this case, the terms of the injunction sought were identical or almost identical to the terms of an anti-social behaviour order (ASBO). Sir Anthony Clarke MR and Rix LJ stated:

In such circumstances ... where ... parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO ... [the courts] should not now develop a separate but parallel jurisprudence in respect of identical orders (paras 44 and 61).

Although the court had jurisdiction to grant the injunctions sought it would be wrong in principle for the court to exercise its discretion by so doing.

■ Langley v Preston Crown Court

[2008] EWHC 2623 (Admin), 30 October 2008

A magistrates' court granted a 'stand alone' ASBO, ie, one which was not made following a criminal conviction. The magistrates subsequently varied the order by extending its duration. Mr Langley sought to appeal to the Crown Court against that variation. The Crown Court refused to entertain the appeal. Mr Langley sought judicial review.

The Administrative Court refused the application. It held that on the true construction of Crime and Disorder Act 1998 s4, there is no right of appeal against a decision by the magistrates' court to vary or discharge an ASBO. The absence of such right of appeal does not amount to a violation of article 6 of the convention.

■ R (Cooke) v Director of Public Prosecutions

[2008] EWHC 2703 (Admin), 21 October 2008

It is an improper exercise of the court's discretion to grant an ASBO if the defendant lacks capacity to understand the order. Evidence relating to the defendant's mental state or impairment should be given by a psychiatrist, not a psychologist or psychiatric nurse.

ASSURED SHORTHOLD TENANTS

■ Truro Diocesan Board of Finance Ltd v Foley

[2008] EWCA Civ 1162, 22 October 2008

In 1987, the trustees of a church school granted Mr Foley a tenancy of a house. When the Diocesan Board acquired title, it considered that he occupied the property under a protected shorthold tenancy within the meaning of HA 1980 s52. In May 2000, the Diocesan Board brought possession proceedings relying on Rent Act (RA) 1977 Sch 15, Case 19. Mr Foley defended. He maintained that he was a weekly tenant who enjoyed the full protection of the RA. In 2001, the parties agreed a consent order which included a declaration that Mr Foley was a tenant under a protected shorthold tenancy and that there had been no grant of a further tenancy. A schedule to the order provided that the tenancy would be determined by Mr Foley delivering up possession on or before 26 September 2001, when the Diocesan Board would arrange for his dinner, bed and breakfast in a hotel. Mr Foley was to vacate the property for a minimum period of 24 hours and deliver up all keys. On 27 September 2001, the Diocesan Board would grant Mr Foley an assured shorthold tenancy of the same property for a term of five years. Although Mr Foley handed over the keys on September 26, his furniture and belongings remained in the property throughout the 24-hour period. No formal grant of a new tenancy was ever made. In 2006, the Diocesan Board served a Housing Act 1988 s21 notice and began possession proceedings. On the trial of a preliminary issue, HHJ Neligan held that Mr Foley could not bring himself within HA 1988 s34(1)(b) which provides that a tenancy entered into on or after the commencement of HA 1988 cannot be a protected tenancy, 'unless ... (b) it is granted to a person ... who, immediately before the tenancy was granted, was a protected or statutory tenant'. Section 45(1) provides that '"tenancy" includes ... an agreement for a tenancy'. Mr Foley appealed.

The Court of Appeal dismissed the appeal. The agreement was enforceable. Although it provided for the Diocesan Board to grant an assured shorthold tenancy to Mr Foley on 27 September 2001, no such grant was in fact made. Mr Foley went back into possession and both parties treated their relationship as being governed by the agreement. *Dibbs v Campbell* (1988) 20 HLR 374 and *Bolnore Properties Ltd v Cobb* (1996) 29 HLR 202 make it clear that there is nothing to prevent a contractual or statutory tenant from surrendering a tenancy, and with it statutory protection, if the tenant perceives it offers some advantage. One way of achieving that object is for the tenant to surrender possession for a short period of time before the new tenancy is granted, although it is unnecessary for there to be an interruption of physical occupation for such an arrangement to be effective.

Moore-Bick LJ considered whether or not there was a minimum interval between two tenancies which would suffice to prevent the tenant from taking advantage of s34(1)(b); however, he found it difficult to draw any rational distinction between intervals of different lengths without introducing an unacceptable degree of uncertainty into the statutory provisions. In his view, the expression 'immediately before the tenancy was granted' in s34(1)(b) 'should be given its ordinary meaning as being restricted to those cases in which the new tenancy takes effect immediately on the expiry of the old'.

The Court of Appeal rejected Mr Foley's contention that the word 'tenancy' in s34 included an agreement for a tenancy, and that at the time the parties entered into the agreement under which Mr Foley occupied the property from September 27, he was still a protected tenant. Notwithstanding s45(1), the word 'tenancy' in s34(1) does not include an agreement for a tenancy. The Court of Appeal also held that s34(1)(b), if interpreted in accordance with the natural meaning of its words, did not give rise to an infringement of the tenant's rights under article 8 of the convention. The loss of protection under the RA derived from Mr Foley's choice to enter into the agreement at court. There is nothing in the convention which prevents a person entering into a tenancy that relinquishes such protection. By a majority, the Court of Appeal held that the agreement at court did not take immediate effect as a result of *Walsh v Lonsdale* (1882) 21 Ch D 9, but was an agreement for the grant of a future tenancy, from September 27, before which Mr Foley would have vacated for 24 hours. The absence of a new, written agreement did not convert the previous agreement into the grant of a tenancy from its date. The previous agreement provided the legal basis on which a new relationship of landlord and tenant began on September 27.

■ Notting Hill Housing Trust v Deol

Brentford County Court, 10 October 2008

Mrs Deol was an assured shorthold tenant. The tenancy agreement was entered into on 9 June 2005 and the tenancy commenced on 13 June 2005. Mrs Deol argued that it was for a term of six months. In November 2007, her landlord, Notting Hill Housing Trust (NHHT) served a notice purporting to comply with HA 1988 s21. However, NHHT, 'for some reason (perhaps a typing mistake, perhaps because of a well meaning amendment by a lay person with no knowledge of the requirements of section 21(4)), failed to use the form of words specifically approved by the Court of

Appeal in *Notting Hill Housing Trust v Roomus* [2006] 1 WLR 1375'. The notice stated:

Possession is required of the premises … which you hold as tenant at the end of your period of your tenancy or after expiry of two months from the service upon you of this notice.

Dated 15 November 2007.

Notice expires 20 January 2008.

Mrs Deol argued that the notice was invalid because as 20 January 2008 was a Sunday, it could not be the last day of a period of the tenancy within the meaning of HA 1988 s21(4). Counsel for NHHT argued that:

- the particular form of tenancy agreement entered into did not create an initial fixed term;
- alternatively (if the initial tenancy was for a fixed term) the new replacement statutory periodic tenancy under s21(5) must be on the same terms as the preceding fixed term, and so would be expected to continue as before from Monday to Sunday; and
- that 'month' meant 'lunar month' and so the six-month term came to an end 24 weeks from the start, ending on a Sunday, so that the periodic tenancy could start the following day, Monday.

District Judge Allen rejected these arguments. Law of Property Act 1925 s61 defines month as 'calendar month'. The term 'month' is used frequently within HA 1988, where it is clear that 'calendar month' is intended. In this case, the statutory periodic weekly tenancy started on Tuesday 13 December and ran from a Tuesday of every week to the following Monday. The last day of a period of a tenancy was a Monday, not a Sunday. NHHT could not rely on the part of the notice which stated that the 'notice expires on 20 January 2008' as that was not the last day of the period of a tenancy. Nor could NHHT rely on the 'saving' words ' … or after expiry of two months from service of this notice upon you'. The notice was served by first class post on 13 November 2007. DJ Allen found that the date of service was, therefore, 15 November 2007. The expiry of two months' notice from 15 November 2007 was 15 January 2008 and the specified date on this alternative was a Tuesday. (DJ Allen reached similar conclusions in a number of associated cases.)

TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

■ Omotajo v Omotajo

CC/2008/PTA/0514,
16 October 2008

Mr and Mrs Omotajo were married, but separated. Mr Omotajo owned a house, but Mrs Omotajo claimed to be beneficially entitled to a half share. Mr Omotajo began a possession claim. His son, who claimed to have lived there since the 1980s with the permission of his mother, was one of the defendants. Mr Omotajo applied for summary judgment against his son. A judge granted summary judgment, holding that Mr Omotajo was entitled to terminate the licence given to his son. The son appealed. He argued that:

- the permission to occupy given by his mother was derived from her right of occupation under Trusts of Land and Appointment of Trustees Act 1996 s12;
- accordingly, his father could only restrict his entitlement to occupy the property under s13(1); and
- that required the court's approval under s13(7).

Underhill J dismissed the appeal. Section 13(1) was not engaged. The s13(1) entitlement was only a beneficial entitlement under s12(1). The son was not a beneficiary and had no rights. The only beneficiaries were Mr and Mrs Omotajo.

PRESERVATION OF LEASES AND THE STATUTORY CHARGE

■ R (Hyslop) v Legal Services Commission

[2008] EWHC 2294 (Admin),
1 July 2008

Ms Hyslop was a long lessee who failed to pay service charges and ground rent. Her landlords began possession proceedings. Ms Hyslop was granted legal aid to defend those proceedings. In due course, her landlords abandoned the claim for possession because they had failed to comply with HA 1996 s81, but continued with the claim for arrears of service charges and ground rent. After those proceedings had been concluded, the Legal Services Commission (LSC) registered a charge against her flat for the £6,731 legal costs incurred by her solicitors, on the basis that the flat was property which had been preserved within the meaning of Access to Justice Act 1999 s10.

Burnett J dismissed Ms Hyslop's renewed application for judicial review of the LSC's decision to register the charge. Having regard to the decision in *Curling v Law Society* [1985] 1 All ER 705, CA, possession proceedings, if defended successfully, result in the preservation of the property concerned. He noted Ms Hyslop's contention that her flat was only ever at risk theoretically because the possession claim was hopeless, but rejected her submission that if a hopeless possession claim is resisted by public funding, the LSC could not obtain a charge.

HOMELESSNESS

Eligibility

■ Teixeira v Lambeth LBC

[2008] EWCA Civ 1088,
10 October 2008

The claimant and her daughter were Portuguese citizens living in the UK. The claimant was not employed but her daughter was in full-time education. On an application for homelessness assistance under HA 1996 Part VI, the council decided that the claimant was not 'eligible': s185. That decision was upheld on review. HHJ Welchman dismissed an appeal.

On a second appeal, the question was whether or not the child's right under article 12 of Regulation (EEC) 1612/68, read with the decision in *Baumbast v Secretary of State for the Home Department* [2002] ECR I–07091; Case C–413/99, gave the claimant a right to reside in the UK under EU law. The Court of Appeal stayed the appeal and referred that question to the European Court of Justice in Luxembourg.

Comment: The Court of Appeal had earlier referred a similar question in *Harrow LBC v Ibrahim* [2008] EWCA Civ 386, but in that case the claimant/parent had not been an EU national.

■ Parker v Brent LBC

Central London Civil Justice Centre,
1 August 2008[26]

The claimant was a Polish national who had had mainly unregistered rather than registered work in the UK. She sought homelessness assistance from Brent but the council decided that she was not eligible: HA 1996 s185. On appeal, she asserted a right to remain in the UK based on her child's right to education under article 12 of Regulation (EEC) 1612/68 as interpreted in *Baumbast* (see above) and sought a stay of the appeal to await the outcome of the reference in *Ibrahim* (see above). Brent sought to distinguish *Ibrahim* by asserting that:

- the claimant's failure to register for work as an accession state national was an abuse of process;
- she had never been in employment sufficiently long to be a worker; and
- her children had been placed in school before she obtained any work.

HHJ Knight QC ordered a stay. He found that neither the homelessness application nor the appeal were an abuse of process and that he could not dismiss the appeal on any of the grounds advanced before the conclusion of the appeal in the *Ibrahim* case.

Priority need

■ Simms v Islington LBC

[2008] EWCA Civ 1083,
16 October 2008

The claimant was a single homeless man aged 37. He had been sleeping rough for over six months. The claimant was asthmatic, morbidly obese, smoked excessively (with resultant coughing, breathlessness and chest infections) and had been addicted to cannabis and crack cocaine. In support of his application for homelessness assistance, the claimant furnished a letter from a drug misuse charity. His GP completed a medical questionnaire. The council's adviser concluded (without seeing the claimant) that he was not medically vulnerable and the council decided that he did not have a priority need.

In support of a review of that decision, the claimant put forward a further report from his GP listing his conditions and advising that 'he has a poor quality of life and health which will only worsen if he is rendered street homeless'. The reviewing officer (RO) upheld the original decision. HHJ Simpson dismissed an appeal. A further appeal was pressed primarily on the grounds that:

■ the RO had failed to take proper account of whether, having regard to the risk of relapse, the claimant as a recovering drug addict was vulnerable for 'some other special reason' (see *Crossley v Westminster City Council* [2006] EWCA Civ 140; [2006] HLR 26); and/or

■ the RO had not properly taken into account the medical evidence, particularly as the council's adviser had not seen the claimant and had not been asked to advise on the further report from the GP.

The Court of Appeal dismissed the second appeal. The RO's decision had summarised correctly the concerns raised in the GP's further report, including the risk of relapse. It was impossible to say it had been overlooked. The RO had applied the correct test of 'vulnerability' and had been entitled to find that, with the help and support available to the claimant, there was not such risk of detriment in the prospect of street homelessness as to render him vulnerable. As to the medical evidence, there was no duty on an authority to refer every medical report to its adviser. The nature of the GP's further report did not make the failure to call for advice unreasonable.

■ Kelly v Westminster City Council

Central London County Court,
14 August 2008[27]

The claimant was a 49-year-old single man who had asthma, back pain, depression, and a history of crack cocaine addiction; he had also served numerous sentences of imprisonment. Since 2005, he had been either street homeless, staying in crack houses, or in prison. While in prison, the claimant was able to remain drug-free, but had a history of relapsing on release. During his last sentence, he had been released on 'tag' to an address, but was subsequently recalled to prison when the address turned out not to be available. In June 2007, he made a homeless application supported by a letter from a senior prison officer stating that he would remain drug-free in prison, would relapse on release due, in part, to his lack of housing, and that, in the prison officer's opinion, he was institutionalised. Westminster decided that he was not vulnerable based, in part, on two findings of fact: that he was not institutionalised and that his address history showed that he had managed to secure housing over the previous five years.

On appeal, HHJ Mitchell held that, on the evidence, each of those findings was so unreasonable that no reasonable RO could have made them. Although the prison officer was not qualified to judge whether or not the claimant was vulnerable, she was capable of making the judgment that he was institutionalised: if a person functions in prison and not outside, s/he is institutionalised. It was also difficult to see how a man who had at best only been able to find accommodation with friends (where he had no security or right of occupation) could be regarded as having managed to secure housing. The conclusion that he had managed to secure housing ignored the fact that he had been recalled to prison because he had not managed to get housing. The appeal was allowed and the decision quashed.

Local connection

■ Melka v Tower Hamlets LBC

Bow County Court,
7 July 2008[28]

The claimant was a refugee. While still an asylum-seeker, she had been accommodated by the National Asylum Support Service (NASS) in Sunderland. The NASS accommodation was withdrawn. She applied to Kensington and Chelsea (K&C) for homelessness assistance under HA 1996 Part VII. The council placed her in interim accommodation in the borough of Tower Hamlets (TH): HA 1996 s188. On completing enquiries 18 months later, K&C concluded that, although the claimant was owed the main housing duty (HA 1996 s193), she had no connection with its borough but that she did have a connection with Sunderland. K&C referred the duty to Sunderland. The claimant did not return to Sunderland but instead applied to TH for accommodation. TH decided that she had no connection with its area and again sought to refer her to Sunderland. That decision was upheld on review.

On appeal, the claimant asserted that the RO's decision had failed to address whether or not a period of normal residence in the TH area (while in interim accommodation) had given her a connection with that area. The RO sought to adduce a witness statement indicating that that issue had been addressed but that it had been decided that the interim accommodation arranged by K&C did not amount to normal residence in its area: HA 1996 s199(1)(a).

Recorder Haines allowed the appeal and quashed the decision. The witness statement sought to rewrite a decision that had simply failed to address whether or not the claimant had a connection with TH through her residence there. There was no rule that residence in interim accommodation could never be residence of 'choice': HA 1996 s199(1)(a). Each case was fact-sensitive. Furthermore, the claimant had chosen to remain in TH's area after K&C's duties to her had ended.

ACCOMMODATION FOR CHILDREN

■ R (M) v Barnet LBC

[2008] EWHC 2354 (Admin),
6 August 2008

The claimant was a girl aged 17. In November 2006, she left her parents' home (having fled and returned on previous occasions) and took shelter in a refuge. She alleged that she could not return home and that she had been assaulted or abused there. Barnet provided her with accommodation, maintaining that it was doing so in exercise of its powers under Children Act (CA) 1989 s17. On a claim for judicial review, it was alleged that:

■ Barnet's policies in relation to help for homeless teenagers amounted to a side-stepping of its obligations under CA s20; and

■ that the decision to accommodate under s17 in the claimant's case was plainly unlawful as she was owed a s20 duty.

HHJ Michael Kay QC dismissed the claim. The materials relied on by the claimant did not make out the contention that the council had adopted policies designed to sidestep its duties. On the material before the council concerning the claimant's case, it had been entitled to conclude that the reason she would not return home was not because her parents were unwilling or inappropriate carers but simply that she did not want to live with her parents; that did not bring the claimant within CA s20.

Comment: For a useful summary of recent cases on the distinction between CA s17 and

CA s20 accommodation see Azeem Suterwalla and Caoilfhionn Gallagher, 'Looked after children', NLJ 10 October 2008, p1405.

ACCOMMODATION FOR PERSONS FROM ABROAD

■ KA and others (Public funds: housing) Iraq

[2007] UKAIT 00081, 14 August 2007

The appellants were Iraqi nationals (a mother and eight children) who applied unsuccessfully for entry clearance to settle in the UK with their sponsor (the husband and father). Their application had been rejected for failure to meet the requirements of the Immigration Rules paragraphs 281 and 297 requiring them to show that they would have adequate accommodation without recourse to public funds. 'Public funds' are defined as including '(a) housing under Part VI or VII of the [HA] 1996 and under Part II of the [HA] 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988'. The appellants relied on a letter from Edinburgh City Council showing that if they were admitted to settle, it would grant a secure tenancy under Housing (Scotland) Act 2001, a statute not included in the definition. An immigration judge allowed an appeal and the secretary of state appealed to the Asylum and Immigration Tribunal (AIT).

The AIT allowed the appeal. The letter produced by the appellants showed only the form of tenancy that might be granted (in England the equivalent would have been a secure tenancy under Part IV of the HA 1985). The definition of 'public funds' addressed the statutory routes whereby such housing might be secured (homelessness or allocation of social housing). It concluded that 'in general, housing provided by local authorities and others whose powers derive from the legislation in question, whether or not for those who would otherwise be homeless, is "public funds" for the purposes of the Immigration Rules'.

Comment: By parity of reasoning, accommodation secured in the private or housing association sectors for an applicant assisted by a local authority as a homeless person or an applicant for social housing would be 'public funds' even if the tenancy were an 'assured' tenancy governed by the HA 1988 Part I.

■ R (Tekeste) v Islington LBC

[2008] EWHC 2405 (Admin), 18 June 2008

The claimant was a failed asylum-seeker. The secretary of state was providing her with 'hard cases' support and accommodation in London under Immigration and Asylum Act (IAA) 1999 s4. She was the principal carer for her disabled mother who was being accommodated by Islington under National Assistance Act (NAA) 1948 s21. When faced with the prospect of dispersal to a regional centre by the secretary of state, the claimant invited Islington to accommodate her with or near to her mother. When it declined, she sought judicial review asserting a direct right to such accommodation or an indirect right (based on her mother's needs for care).

Ouseley J dismissed the claim. The claimant had no direct right to NAA s21 assistance as she was fit and able bodied. Even if she had had the requisite needs, her immigration status barred her from NAA s21 assistance: NAA s21(1A). For those reasons she could not be given assistance under LGA 2000 s2: LGA s3. The indirect claim also failed. Although NAA s21(2) contains a power to provide s21 accommodation for family members in addition to a disabled person, Islington had declined to exercise that power. It had done so based on a needs assessment which did not indicate that the mother needed the claimant to be accommodated with her. That assessment had not been challenged. Although the secretary of state disclaimed any power to meet the claimant's costs of travelling to care for her mother, the council accepted that LGA s2 might cover those costs. The question of payment for such costs had not yet arisen.

■ R (Ahmed) v Asylum Support Adjudicator

[2008] EWHC 2282 (Admin), 2 October 2008

The claimant was an Iraqi Kurd who sought asylum in May 2002. He was provided with accommodation and support by NASS. In April 2004, when his application for asylum had been refused and his appeal rights exhausted, NASS assistance was withdrawn. At first, his friends accommodated him but when the friends asked him to leave in March 2007, he became homeless and destitute. He applied for accommodation under IAA 1999 s4 ('hard cases' support). The application was refused by the secretary of state. He accepted that the claimant was destitute but decided that he did not meet the conditions for support set out in Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 SI No 930 reg 3(2). The Asylum Support Adjudicator (ASA) dismissed an appeal from that decision.

Silber J dismissed a claim for judicial review. The claimant could not show that the ASA had erred in law in finding that the requirements for statutory support under reg 3(2) were not made out or that the provisions of that regulation had been misconstrued or misinterpreted.

1 Available at: www.opsi.gov.uk/si/si2008/draft/pdf/ukdsi_9780110846613_en.pdf.
2 *Short notice inspections of local authority housing services and ALMOs: the Audit Commission's proposals for a pilot programme* is available at: www.audit-commission.gov.uk/Products/NATIONAL-REPORT/63B02AA6-8BDF-46E4-8656-EA149BBA762F/20081020SNI_LA_ALMO_consultation.pdf.
3 Available at: www.housingcorp.gov.uk/server/show/ConWebDoc.15427.
4 Available at: www.communities.gov.uk/news/corporate/996383.
5 See: www.publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/uc1123-i/uc112302.htm and www.housingcorp.gov.uk/CFG/upload/pdf/pm_letter_to_rsls_and_las.pdf.
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23 Available at: www.hipassociation.co.uk/ node/423.
24 Available at: www.communities.gov.uk/documents/housing/pdf/makingadifference.pdf.
25 Nik Nicol, barrister, London.
26 Maya Naidoo, barrister, London.
27 Liz Davies, barrister, London.
28 Maya Naidoo, barrister, London, and Diarmaid Ward, TV Edwards, solicitors, London.

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