Recent developments in housing law

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

POLITICS AND LEGISLATION

Social housing allocation

In December 2008, Communities and Local Government (CLG) approved funding for another tranche of local housing authorities and housing association partners to work up proposals for regional or sub-regional choice-based lettings schemes. The schemes in this fourth round of grant-funding in some cases cover large areas incorporating most of, or the whole of, a county: CLG press release, 12 December 2008.[1]

Regulating social housing

The new regulator for England, the Tenant Services Authority (TSA), has published *Putting things right: what to do if you have a complaint about a registered social landlord*.[2] It also has a booklet explaining how a complaint can be made against the TSA itself: *Making a complaint about our services*, TSA, November 2008.[3]

Homelessness

Statistics for England for the third quarter of 2008 show that the number of households accepted as homeless and owed the main housing duty (Housing Act (HA) 1996 s193(2)) has fallen by 60 per cent since 2003. Only 14,340 households were accepted as owed the main duty – a 13 per cent reduction compared to the same quarter last year. The statistics also show a reduction in the number of homeless households in temporary accommodation – down 29 per cent since 2004: *Statutory homelessness, 3rd quarter 2008, England*, CLG, 11 December 2008.[4]

The latest government thinking on issues around homelessness prevention and temporary accommodation was set out by the junior housing minister, Iain Wright MP, when responding to a Commons debate about temporary accommodation: *Hansard,* HC Debates col 260WH, 26 November 2008.

In December 2008 the YMCA published *Breaking it down: developing whole-family approaches to youth homelessness*.[5] Based on interviews with parents of homeless young people, it found that 72 per cent of those interviewed believed that extra help could prevent the breakdown of family units causing young people to leave home.

Anti-social behaviour and housing

Several developments require consideration by housing advisers:

Family intervention tenancies: On 1 January 2009 it became possible for these new non-secure, non-assured tenancies to be granted by local housing authorities and registered social landlords. These tenancies of social housing are available to people undertaking behaviour support programmes designed to address their anti-social behaviour. Such tenancies can be ended by service of a notice to quit (NtQ). Before a local authority landlord gives a NtQ to a family intervention tenant, it must first serve a minded-to notice and offer the opportunity of a review. The Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008 SI No 3111 spell out the procedure to be followed on such a review.

Premises closure orders: Several of these new orders have already been made since the relevant provisions of the Criminal Justice and Immigration Act 2008 came into force on 1 December 2008. Although only the police or a local housing authority may apply for an order, the provisions are tenure-neutral. For example, Tower Hamlets LBC applied for and obtained an order in respect of a property let by Old Ford Housing Association: Home Office press release, 8 December 2008.[6]

Anti-social behaviour orders (ASBOs): In December 2008 the Sentencing Guidelines Counci (SGC) issued new guidance to the criminal courts when sentencing offenders for breach of ASBOs: *Breach of an anti-social behaviour order*, SGC, December 2008.[7]

Housing statistics for England

The latest annual volume of national housing statistics was published in December 2008: *Housing statistics 2008*, CLG.[8] The report covers all aspects of housing in England (and in some cases, tables also deal with the whole of the UK).

Disability and housing

In December 2008 the government announced that it would be making £157 million available to local authorities in England for the financial year 2009/10 through the Disabled Facilities Grant Programme (designed to help disabled and older people stay in their homes) and gave details of the authority-by-authority allocations: CLG press release, 10 December 2008.[9]

The December 2008 edition of *Housing Spotlight* (Issue 29), published by the Chartered Institute of Housing, focused entirely on the relationship between housing and disability.[10]

Help for owner-occupiers

Throughout December 2008, starting with a written ministerial statement on 8 December 2008, the government announced a portfolio of new measures intended to improve arrangements for the buying and selling of houses and flats and to assist homeowners in financial difficulties: *Hansard*, HC Debates col 25WS, 8 December 2008. These included:

- a comprehensive study by the Office of Fair Trading (OFT) of home buying and selling, looking at competition between service providers and how consumer interests are served;
- the strengthening of home information pack (HIP) requirements. A property information questionnaire (PIQ) will be needed in a HIP for all properties marketed for sale from 6 April 2009. The PIQ is designed to provide information sellers can supply without professional help: *Property information questionnaire (PIQ) – general version*, CLG, December 2008.[11] The requirement for a PIQ follows consideration of the responses to a consultation exercise: *Improving consumer information in the home information pack – summary of consultation responses*, CLG, December 2008;[12]
- further modifications to the HIP regime, some of which were brought into effect on 1 January 2009 and others which will be introduced on 6 April 2009, in each case by the Home Information Pack (Amendment) (No 3) Regulations 2008 SI No 3107;
- more than 130 developers agreeing to offer the HomeBuy Direct scheme which will help up to 18,000 first time buyers purchase a home at sites across England aided by an equity loan, part funded by the government and the developer. The equity loan, which will be free of charge for five years, can be used as a deposit and can cover up to 30 per cent

of the purchase price: CLG press release, 15 December 2008;

■ from 5 January 2009, changes to the welfare benefits system which have enabled help with mortgage interest payments to be made available earlier than previously. The changes reduce the waiting period for assistance with mortgage interest from 39 weeks to 13 weeks and increase the capital limit to £200,000: Department for Work and Pensions (DWP) press release, 19 December 2008; and

■ in response to complaints of misleading information being given to council tenants to encourage them to exercise the right to buy, the OFT has secured undertakings from three former directors of companies engaged in the marketing of credit agreements to such tenants: OFT press release, 19 December 2008.[13]

Despite these measures, the Council of Mortgage Lenders issued a statement predicting that by the end of 2009 there would be 75,000 mortgage repossessions and 500,000 households with more than three months' arrears: *CML market commentary*, 18 December 2008.[14]

Rent officers

On 5 January 2009 the rules for rent officer assessments in housing benefit and local housing allowance cases were changed to reverse the effect of the House of Lords decision in *R (Heffernan) v Rent Service* [2008] UKHL 58; [2008] 1 WLR 1702. Instead of considering rents in a 'locality', officers will now be looking at 'broad rental market areas': Rent Officers (Housing Benefit Functions) Amendment (No 2) Order 2008 SI No 3156.[15]

From 1 April 2009 ministerial responsibility for the rent officer service will switch from the DWP to Her Majesty's Revenue and Customs: Transfer of Functions (Administration of Rent Officer Service in England) Order 2008 SI No 3134.[16]

Housing and the elderly

In December 2008, CLG published *Delivering lifetime homes, lifetime neighbourhoods: a national strategy for housing in an ageing society*.[17] The document sets out the government's action plans for implementing a national strategy to address the housing needs of an ageing population.

HUMAN RIGHTS

Article 8

■ Hillingdon LBC v Collins

[2008] EWHC 3016 (Admin), 5 December 2008

The defendants occupied caravans on a site provided by Hillingdon. They did not have security of tenure. After allegations of serious anti-social behaviour, Hillingdon served notices to quit and began possession claims. The defendants filed defences relying on article 8 of the European Convention on Human Rights ('the convention'). Following *Birmingham City Council v Doherty* [2008] UKHL 57; [2008] 3 WLR 636, they contended that they were entitled to have Hillingdon's decision to bring proceedings scrutinised by the court. The claim was transferred to the High Court. They sought directions relating to the calling of evidence and disclosure.

After reviewing a number of authorities, HHJ Gilbart QC, sitting as a deputy high court judge, noted that:

■ the effect of *Doherty* is 'to widen the scope of the enquiry that may be made into decision making by an authority'. Observations in *Smith v Buckland* [2007] EWCA Civ 1318; [2008] 1 WLR 661 that 'the circumstances where [an article 8] defence can be made out as wholly exceptional have been overtaken by subsequent authority' (para 54);

■ 'the test is no longer whether the claim on public law grounds is "seriously arguable". It is now, as per *Doherty* at paragraph 55, whether the decision was reasonable, in the sense of whether no reasonable person would think that recovering possession was justifiable' (para 55);

■ while a judge 'must eschew simply substituting his own judgment for that of the local authority, [the court] must grapple with whether it had material before it, and whether the decision was reasonable' (para 56);

■ 'There is no better tribunal, nor one more experienced in dealing with disputes of this kind in housing cases, than an experienced circuit judge sitting in the county court' (para 57).

He concluded that at some stage the case would involve disputes of fact with witnesses being required. He remitted the case to Uxbridge County Court to be heard by a circuit judge. He gave directions for service of witness statements and disclosure.

■ Bedfordshire CC v Taylor

[2008] EWCA Civ 1316, 16 October 2008

Bedfordshire took possession proceedings against trespassers. They raised their rights under article 8 as a defence. HHJ Everall QC made a possession order. On an oral application for permission to appeal, the defendants argued that '*Doherty* adds a material gloss to *Kay*; … that contrary to the majority decision in *Kay*, it now enables the personal circumstances of the defendants to be taken into account in assessing the proportionality of a decision by a public authority to recover possession of property.'

Although the Court of Appeal did 'not hold out any encouragement to the appellants to expect success on the substantive hearing', it granted permission to appeal. Rimer LJ said that 'a permission application … is not the occasion on which to wrestle with the effects, if any, of [*Doherty*'s] 56 pages of speeches …'.

PUBLIC SECTOR TENANCIES

Possession claims: reasonableness

■ CDS Housing v Bellis

[2008] EWCA Civ 1315, 28 October 2008

Mr Bellis was a secure tenant. He was mentally unwell and suffered from delusions. He thought that there was electro-magnetic radiation emanating from the central heating or some other part of the electrical system of the flat. In trying to find out the source of the radiation he twice damaged the electrical and gas installations in the flat. This rendered his own flat and neighbouring properties unsafe. There was a risk of an explosion. HHJ Trigger found that the property was in a 'highly dangerous condition'. Mr Bellis left the property to stay with friends but did not take his belongings. CDS obtained an injunction that he remove them so that it could carry out repairs, but Mr Bellis did not comply with the order. CDS sought possession. At trial, a psychiatrist gave evidence that Mr Bellis continued 'to hold delusional ideas about the safety of his property'. He concluded 'I suspect that if Mr Bellis were to return to his property and if he were to be left alone … it would be only a matter of time before there were further damage caused to the property'. HHJ Trigger made an outright order. Mr Bellis appealed.

The Court of Appeal dismissed the appeal. It was common ground that HHJ Trigger should only have made an immediate order if there was no lesser alternative which would realistically make sense. Jacob LJ stated that this boiled down to a simple question, 'could the court be satisfied that there was no longer any real risk that the appellant would not do to the property that which he had done before?' He could see no fault in the judge's conclusion. 'The consequences of getting this one wrong could be catastrophic.' The judge had considered reasonableness and whether there should be suspension or postponement. 'The judge was absolutely right in his judgment.'

■ South Lanarkshire Council v Nugent

Sheriffdom of South Strathclyde Dumfries and Galloway, SD1706/07, 19 August 2008[18]

The parties entered into a contractual Scottish secure tenancy agreement in

February 2000. Subsequently, Mr Nugent pleaded guilty to supplying ecstasy and possessing amphetamines, at the property and elsewhere. It was accepted by the prosecution that he had only been concerned in the supply of drugs to his friends. He was ordered to serve 220 hours of community service. Although no complaints were received from neighbours, the council's policy 'in every case without exception' was to take positive action to evict tenants whenever misuse of drugs was established to have taken place. It sought possession against Mr Nugent under Housing (Scotland) Act 2001 Sch 2 paras 1 and 2 (which is very similar to the second limb of HA 1985 Sch 2 Ground 2). During the hearing of the possession claim, a detective constable gave evidence that ecstasy, amphetamine and cannabis resin found in the house had a value of between £1,860 and £1,891. He also referred to mixed banknotes totalling £845, a knife, a chopping board, cling film and scales found there. He said that on the day that these items were found, Mr Nugent was seen in a public house a mile from his house passing ecstasy to an unknown person. After stating that Mr Nugent had been 'warehousing large quantities of illegal [drugs] on the tenancy property to supply to others', the Sheriff found it reasonable to grant an order for recovery of possession. Mr Nugent appealed.

After considering a number of Scottish authorities dealing with the question of reasonableness, where tenants have been involved with drugs, the Sheriff Principal applied the four tests set out in *Glasgow City Council v Lockhart* 1997 Hous LR 99, namely: (i) the public interest; (ii) the fact that there was no doubt that Mr Nugent knew the consequences of his actions; (iii) the gravity of the offence (described as 'a very serious matter indeed' involving what was described as a 'substantial' quantity of drugs); and (iv) the consequences of removal ('no doubt material as far as [Mr Nugent was] concerned, but that is something which he might have applied his mind to before embarking on a course of criminal conduct'). The Sheriff Principal dismissed the appeal. The Sheriff was entitled to reach the decision which he did. The Sheriff Principal rejected the submission that the Sheriff's consideration of the defender's drug misuse was restricted to the terms of his plea of guilty. The possession claim was a civil action and the standard of proof was on the balance of probabilities. The Sheriff was entitled to take into account all the evidence which he heard from the housing officer, the detective constable and the anti-social investigation officer employed by the council.

Housing benefit: discretionary payments

■ R (Gargett) v Lambeth LBC

[2008] EWCA Civ 1450, 18 December 2008

Ms Gargett was a housing association tenant who was entitled to full housing benefit. Her weekly rent was increased, but neither she nor her landlord notified Lambeth. As a result, Lambeth did not increase the amount of housing benefit, and rent arrears accrued. The housing association began a possession claim, which was stayed on terms. Ms Gargett asked Lambeth for a discretionary housing payment on the basis that, in addition to her entitlement to housing benefit, she required further financial assistance to meet 'housing costs' in the form of rent arrears. Lambeth refused, stating that, in view of Discretionary Financial Assistance Regulations (DFA Regs) 2001 SI No 1167 para 2(3)(b), it had no discretion to make a discretionary housing payment, because Ms Gargett was now in receipt of full housing benefit and there was not a continuing shortfall. Ms Gargett's application for judicial review was refused.

The Court of Appeal allowed her appeal. The DFA Regs did not expressly place a limit on Lambeth's discretion. It was not possible to construe paras 2 and 4 to impose the limit which Lambeth sought. Lambeth had misconstrued the DFA Regs by giving the fact that she was already in receipt of full housing benefit as the reason why it had no discretion to grant the application for a discretionary housing payment. Lambeth's decision was quashed.

Suspended possession orders

■ Knowsley Housing Trust v White
■ Islington LBC v Honeygan-Green
■ Porter v Shepherds Bush Housing Association

[2008] UKHL 70, 10 December 2008

In these three appeals, heard together, the House of Lords considered important questions relating to suspended possession orders.

Mrs White was initially a secure tenant of Knowsley MBC but, as a result of a large-scale stock transfer, she became an assured tenant of Knowsley Housing Trust (HT). She fell into rent arrears. A 'suspended possession order' was made on 8 June 2004 in Form N28 which provided: 'The defendant give the claimant possession [of the property] on or before 6 July 2004 … This order is not to be enforced so long as the defendant pays the claimant the rent arrears and the amount for use and occupation and costs, totalling £2,262.52 by the payments set out below in addition to the current rent.' Largely owing to housing benefit difficulties, Mrs White breached the terms of the order. Later, she sought to exercise her preserved right to buy, but Knowsley HT informed her that she was not entitled to exercise that right because her tenancy had come to an end on the breach of the 'suspended possession order'. It asserted that she occupied the property as a tolerated trespasser. She sought a declaration that she was still an assured tenant and entitled to exercise the right to buy. HHJ Mackay dismissed her claim. The Court of Appeal dismissed her appeal: [2007] EWCA Civ 404; [2007] 1 WLR 2897.

The House of Lords allowed Mrs White's further appeal. Mrs White was entitled to a declaration that she was, and had been, an assured tenant, notwithstanding that there was an effective suspended order for possession against her and that she had been in breach of the terms of suspension.

Ms Honeygan-Green was a secure tenant. In May 2000, she made an application to buy the property under the right to buy scheme. That application was admitted by Islington, her landlord. In July 2002, Islington began a possession claim based on arrears of rent. In the meantime, completion of the right to buy application was delayed because another tenant had encroached on Ms Honeygan-Green's garden and a wall had collapsed. She served notices of delay under HA 1985 s153A. In October 2002, Islington obtained a suspended possession order in Form N28. It provided that the order was not to be enforced so long as Ms Honeygan-Green paid current rent and £50 per week. She failed to comply with the order. Islington wrote to Ms Honeygan-Green stating that she had become a tolerated trespasser. Ms Honeygan-Green then applied to set aside the possession order. By July 2003, she had paid all arrears and the possession order was discharged. In 2005, further arrears accrued. Islington again began a possession claim and Ms Honeygan-Green counterclaimed for a mandatory injunction ordering the council to convey the property to her. HHJ Marr-Johnson granted that order on the discharge of all arrears. Nelson J allowed Islington's appeal: [2007] EWHC 1270 (QB); [2007] 4 All ER 818. The Court of Appeal allowed Ms Honeygan-Green's further appeal: [2008] EWCA Civ 363; [2008] 1 WLR 1350.

The House of Lords dismissed Islington's appeal. Ms Honeygan-Green's right to buy was revived retrospectively and with immediate effect when the order for possession was discharged.

Mr Porter was the secure tenant of a flat. He fell into arrears of rent and a suspended possession order was made against him in 1997, when the arrears were £2,338. He did not comply with the terms and his tenancy

came to an end. He was allowed to remain in occupation as a tolerated trespasser. In April 2004, when the arrears stood at about £1,400, he issued a claim for damages for disrepair. Shepherds Bush Housing Association, his landlord, defended that claim on the basis that he was a tolerated trespasser. Before the hearing of that claim, he cleared the arrears. He then made an application to revive his former secure tenancy under HA 1985 s85(2) or, alternatively, to rescind the 1997 order for possession under s85(4). Following *Swindon BC v Aston* [2002] EWCA Civ 1850; [2003] HLR 42 and *Marshall v Bradford MDC* [2001] EWCA Civ 594; [2002] HLR 22, District Judge Nicholson dismissed the application. HHJ Simpson dismissed an appeal. The Court of Appeal dismissed a second appeal: [2008] EWCA Civ 196; [2008] HLR 35.

The House of Lords allowed Mr Porter's further appeal. Mr Porter's application for discharge of the suspended possession order was remitted to the county court.

The three appeals gave rise to the following principal issues:
(a) *When a suspended order for possession has been made against an assured tenant under the HA 1988, when does the tenancy come to an end?* On a fair and practical reading, the HA 1988 leads to the conclusion that an assured tenancy subject to a possession order does not end until possession is delivered up – ie, the position of an assured tenant is the same as that of a regulated tenant under the Rent Act 1977 (para 76). Lord Neuberger described the status of a tolerated trespasser as 'conceptually peculiar, even oxymoronic' (para 79) but said that the House of Lords should not reconsider the view expressed in *Burrows v Brent LBC* [1996] 1 WLR 1448 that *Thompson v Elmbridge BC* [1987] 1 WLR 1425 was rightly decided so far as secure tenancies are concerned (para 92). (At present, therefore, secure tenancies come to an end on breach of the terms of a suspended possession order, but the position will change when Housing and Regeneration Act 2008 s299 and Sch 11 are brought into force.)
(b) (i) *Can the court, when making a suspended possession order under the HA 1985, proleptically direct that the order be discharged once the terms have been complied with?* Yes. Section 85 permits a proleptic (ie, anticipatory) discharge provision, not least because the court can always revisit the provision, effectively at the suit of the landlord, if the terms of the suspension are not complied with. Section 85 should be construed, as far as permissible, to confer as much flexibility as possible on the court, and in such a way as to minimise future uncertainty and the need for further applications (para 96).
(ii) *If so, can the court proleptically direct that the order be discharged even if the terms of the suspension have not been strictly complied with?* Yes. The terms on which a possession order for non-payment of rent is suspended should, almost as a matter of course, include precise dates on which any payment should be made. However, it does not follow that proleptic discharge should only be available if payment is made strictly on those dates (para 105). Nevertheless, the terms of a suspended order are to be literally applied and precisely complied with. If a tenant fails to comply strictly with any of the terms of suspension, the landlord can apply for a warrant (para 110). The decisions in *Marshall* and *Swindon* were wrong on this issue (para 112).
(c) *In the case of a suspended order under the HA 1985, without a proleptic discharge provision, can a tenant who has not complied with the terms of suspension, but has paid off the arrears and costs, seek a discharge or variation of the order?* Yes. There is nothing in s85(2), or elsewhere in the Act, which expressly or impliedly prevents a tenant, who has paid off all the arrears and costs, making an application to the court to exercise its powers under s85(2) (para 113).
(d) *If a tenant who has served notice exercising the right to buy is then made subject to a suspended possession order, does the right to buy pursuant to the notice revive if and when the order is discharged?* Yes. The right to buy, pursuant to a notice already served under s122, is not permanently lost once the tenant is obliged to deliver up possession (para 119). The language of HA 1985 s121(2)(d) does not permanently remove the right to buy. It merely suspends it (para 118). Lord Neuberger said that the well-established rule that discharge of a suspended possession order revives the secure tenancy retrospectively logically carries with it the consequence that the tenant must be retrospectively treated as having had a secure tenancy throughout the period when s/he was contemporaneously 'obliged to give up possession … in pursuance of an order of the court' (para 121).

ANTI-SOCIAL BEHAVIOUR

Anti-social behaviour orders

■ Fairweather v Commissioner of Police for the Metropolis

[2008] EWHC 3073 (Admin), 2 December 2008

Ms Fairweather was convicted of 68 offences over a period of 13 years. She also breached a number of ASBOs. The police applied for a further ASBO under Crime and Disorder Act 1998 s1(1)(b), after complaints that, when drunk, she had attended both (i) a residential home for the elderly where she was abusive; and (ii) a police station where she had assaulted police officers and members of the public. In the magistrates' court, a district judge made a further ASBO, despite a report from an educational psychologist which referred to her limited intelligence and learning difficulties. She appealed.

The Divisional Court dismissed the appeal. An individual who suffers from a personality disorder may be liable to disobey an order, but that is not sufficient reason for holding that an order, which is otherwise necessary to protect the public from anti-social behaviour, is not necessary for that purpose, or that the court should not exercise its discretion to make an order. The district judge was entitled to hold that the evidence fell short of showing that Ms Fairweather did not understand simple instructions, as the report did not properly focus on the issue of whether she was capable of complying with an order.

Local Government Act 1972 s222

■ Bristol City Council v Ahmed

Bristol County Court, 5 December 2008[19]

In October 2007 Bristol City Council was granted an injunction for one year under Local Government Act 1972 s222 preventing the defendant from begging contrary to the Vagrancy Act 1824 anywhere in the City of Bristol or from remaining on Bristol's highways for the purposes of begging. The injunction was later amended to exclude the defendant from Bristol city centre. The defendant breached the injunction in October and November 2007. In February 2008, he received a 21-day prison sentence, suspended for the remaining term of the injunction. Further breaches were proved in new committal proceedings in July 2008 and the 21-day prison sentence was activated with no further penalty.

At a further hearing, Recorder Derbyshire accepted that the injunction had been sought not just to prevent a breach of the criminal law but also to address a public nuisance and could be distinguished from *Stoke on Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. He rejected the council's submission that the criminal law had inadequate sanctions to deal with begging. He also held that the council could have sought an ASBO to regulate the defendant's behaviour and, although it related to future criminal behaviour, *R v Boness* [2005] EWCA Crim 2395; [2006] 1 Cr App R (S) 120 would not prevent the making of such an order.

However, following *Birmingham City*

Council v Shafi [2008] EWCA Civ 1186; December 2008 *Legal Action* 24, he held that there were no exceptional circumstances to justify the injunction or the continuation of it. The injunction was discharged.

LONG LEASES

Service charges

■ **Morshead Mansions Ltd v Di Marco**
[2008] EWCA Civ 1371, 10 December 2008
Morshead was a private limited company which was the freehold owner of a block of 104 flats let on long leases. It had been established to undertake the management and administration of the block. Each lessee held one share in the company. The Articles of Association of the company permitted it to establish and maintain capital reserves, management funds and any form of sinking fund and to require the shareholders to contribute towards such reserves or funds in such manner as the members might approve by resolution in a general meeting. At the AGM in 2006, a motion was passed approving the establishment of a 'recovery fund', to raise £400,000 from the shareholders to redecorate the exterior and finance the provision of normal services such as the building insurance and cleaning. Each shareholder was to pay two instalments of £2,000. Although the interim service charge for 2007 would be £400,000, and each lessee would receive a service charge demand, payment of the instalments for the recovery fund would entitle the payer to an equivalent credit against his/her respective service charge account. Mr Di Marco was a lessee of one of the flats and a shareholder. He did not pay either instalment to the recovery fund. Morshead sued him as a shareholder for £4,000 plus interest. He defended, claiming that the recovery fund was a service charge as defined by Landlord and Tenant Act 1985 s18. In the county court, Recorder Mitchell QC accepted that the recovery charge was a service charge and dismissed the claim. Morshead appealed.

The Court of Appeal allowed the appeal, finding that there was a distinction between the liability of a tenant to a landlord under a lease containing service charge provisions, and the liability of a member of a company to the company under separate contracts made under its Articles of Association. The two kinds of legal relationship can co-exist between the same parties, but they are different relationships, incurred in different capacities and they give rise to different enforceable obligations. In this case, the claim related only to the right to recover moneys owed by the defendant as a member of the company.

HOUSING AND CHILDREN

■ **R (A) v Croydon LBC**
■ **R (M) v Lambeth LBC**
[2008] EWCA Civ 1445, 18 December 2008
The claimants were young asylum-seekers. If they were adults, the National Asylum Support Service would have been responsible for accommodating them. If they were 'children in need', the local authorities would have to accommodate them under Children Act (CA) 1989 s20. In each case, the councils decided that the claimants were over 18. Their claims for judicial review of those decisions were dismissed (August 2008 *Legal Action* 44).

The Court of Appeal dismissed their appeals. Questions of the age of prospective 'children in need' were not questions of precedent fact falling for determination by the High Court if a dispute arose but questions reserved by parliament to the authority by means of the CA 1989. Judicial review was available in the normal way. Provision for initial decision-making by the authority subject to scrutiny by way of judicial review sufficiently discharged the state's obligations under article 6 of the convention.

HOMELESSNESS

Eligibility

■ **Barry v Southwark LBC**
[2008] EWCA Civ 1440, 19 December 2008
The claimant was a Dutch national and an EU citizen. Although unemployed and incapacitated by an accident, he claimed to be eligible for homelessness assistance because he was a 'worker' for the purposes of Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 reg 6(2)(a) under the extended definition of that phrase given by Immigration (European Economic Area) Regulations 2006 SI No 1003 reg 6(2)(b)(ii) which embraces former workers who have not been continuously unemployed for more than six months before an incapacitating injury. Within the six months before his accident, the claimant had been employed for a fortnight as a steward at a tennis tournament while also receiving jobseeker's allowance. Southwark decided that that engagement did not count as 'work' and that because he had had no other work for that six months he was not eligible. The decision was upheld on review and an appeal was dismissed by HHJ Welchman.

The Court of Appeal allowed a second appeal. It decided that a wide and flexible interpretation of 'worker' was required by EU law and by the jurisprudence of the Court of Justice at Luxembourg. In settled EU law, 'work' need not be of indefinite duration, can be part-time or casual and need not be remunerated at the minimum wage. The true question was whether the services provided to the employer were real and actual and not merely marginal or subsidiary. Applying that approach, the applicant was in 'work' during the two weeks. Deductions were made from his pay on a PAYE basis, the work done was of economic value and it was not ancillary to any other relationship between the claimant and the employer. The reviewing officer could not properly come to any other conclusion than that he had been in work for those two weeks. By a respondent's notice, Southwark sought to uphold its decision by reliance on the fact of receipt of jobseeker's allowance for the relevant two weeks. The Court of Appeal held that even wrongful receipt of benefits could not deprive actual work of having the effect of rendering the claimant eligible as a 'worker' for the purposes of HA 1996 s185.

Priority need

■ **Mangion v Lewisham LBC**
B5/08/0018(A), B5/08/0018, 11 December 2008
Ms Mangion had moderate depression, back problems and a condition of alcohol dependency. A medical adviser, when assessing her for disability benefits purposes, had described her as having 'severe disability'. On her application for homelessness assistance, Lewisham decided, on a review, that she was not 'vulnerable': HA 1996 s189(1)(c). HHJ Knight QC dismissed an appeal against that decision.

Following the grant of permission to appeal on a renewed application (see January 2009 *Legal Action* 27), the Court of Appeal dismissed Ms Mangion's further appeal. The council's reviewing officer was addressing a different issue from those officials responsible for assessing incapacity for welfare benefits purposes. The reviewing officer had correctly addressed and applied the test in s189(1)(c).

Intentional homelessness

■ **Gaskin v Norwich City Council**
[2008] EWCA Civ 1490, 10 July 2008
In December 2003 the claimant was evicted from her privately rented home for non-payment of rent. On her homelessness application, Norwich initially decided that she did not have priority need. That decision was subsequently withdrawn and, in October 2004,

a new decision was made that although homeless, eligible and in priority need, she had become homeless intentionally: HA 1996 s191. In January 2005 that decision was confirmed on review. HHJ Barham dismissed an appeal against it and in October 2007 Chadwick LJ refused permission for a second appeal (see January 2008 *Legal Action* 38). Meanwhile, the claimant had made a second homelessness application. Norwich again decided that she had become homeless intentionally and that decision was upheld on review in August 2006. HHJ Darroch dismissed an appeal against that second review decision in September 2007. The claimant sought permission to bring a second appeal.

Stanley Burnton LJ refused a renewed application for permission. The grounds relied on to show that the appeal raised an important point of principle or practice (Civil Procedure Rule 52.13) were: that not all the relevant documents in the case had been before the second reviewing officer. Stanley Burnton LJ held that that was a matter confined entirely to the facts and raised no point of principle; and that the second reviewing officer had referred to and relied on the reasons of the first reviewing officer. Stanley Burnton LJ held that that was explicable because exactly the same factual issues had been raised before, and determined by, the first reviewing officer and the second reviewing officer agreed with the reasons given and came to the same conclusions himself.

■ Hassan v Brent LBC

[2008] EWCA Civ 1385, 20 October 2008

The claimant lost her last settled home at a time when she was still a child. Brent decided that she had become homeless intentionally: HA 1996 s191. That decision was upheld on review and HHJ Powles QC dismissed an appeal.

The claimant sought permission to bring a second appeal on the grounds that the judge had erred in law in finding that the reviewing officer had taken into account the fact that the claimant had been a child when she became homeless and in relating her age to the questions of: (i) whether she had acted deliberately; and (ii) whether it would have been reasonable for her to have continued in occupation.

Etherton LJ refused permission. The reviewing officer's decision had specifically referred to the claimant's age and her difficulties with undertaking her homework. In those circumstances there was no real prospect of success.

Reviews

■ Banks v Kingston-upon-Thames RLBC

[2008] EWCA Civ 1443, 17 December 2008

Mr Banks applied for homelessness assistance. Kingston decided that he was not homeless. He sought a review but, before it was concluded, he was given notice to quit by his private landlord. The reviewing officer decided that the original decision could not stand because Mr Banks was now homeless but that no duty was owed because he did not have a priority need.

HHJ Crawford Lindsay QC dismissed an appeal against that decision.

The Court of Appeal allowed a second appeal. Although on a literal construction of the words of Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) there had been no 'deficiency or irregularity' in the original decision when made, a broad reading of the regulation required a reviewing officer to give an applicant an opportunity to address him/her (orally or in writing) before making an adverse decision on wholly different grounds. That embraced a situation where an original decision had become 'deficient' simply because it did not deal with a matter raised by a changed factual situation since it was promulgated. Such a strained interpretation of the regulation would not have been necessary had the claimant taken the expedient course of making a fresh application when his factual circumstances changed rather than pursuing his review of a decision overtaken by events.

Main housing duty

■ Muse v Brent LBC

[2008] EWCA Civ 1447, 19 December 2008

Brent owed Ms Muse the main housing duty under HA 1996 s193(2) and provided her under that duty with temporary accommodation on an assured shorthold tenancy with a housing association. As her family grew, the accommodation became overcrowded and she applied for a transfer to alternative accommodation. Brent decided that her present accommodation had become unsuitable and told her that it had instructed the housing association to recover possession. It offered other suitable accommodation but Ms Muse declined to move. The council decided that its duty had been discharged. HHJ Powles QC allowed an appeal but the Court of Appeal allowed a second appeal.

The Court of Appeal acknowledged two possible variants of the application of the statutory scheme to the facts. It could be said that the s193(2) duty had been completely performed by the offer and acceptance of the temporary housing association premises but that a fresh s193(2) duty had arisen later when that accommodation became unsuitable. Alternatively, it could be said that a continuing s193(2) duty had at all times been owed. However, the effect of the offer and refusal of the new suitable accommodation had been the same on either view: namely to work a discharge of the duty by operation of HA 1996 s193(5): refusal of an offer of suitable accommodation. There had been no unfairness to Ms Muse in not warning her that an application to transfer to alternative temporary accommodation might, in some circumstances, lead to the duty being discharged. But the council had been wrong to make the misleading statement that it would 'instruct' the housing association to recover possession. Whether the association wished to seek possession was a matter for its consideration and not the proper subject of instruction from a local housing authority.

1 Available at: www.communities.gov.uk/news/housing/1097330.
2 Available at: www.tenantservicesauthority.org/upload/pdf/Putting_things_right.pdf.
3 Available at: www.tenantservicesauthority.org/upload/pdf/Making_a_complaint_about_our_services.pdf.
4 Available at: www.communities.gov.uk/documents/statistics/pdf/1095044.pdf.
5 Available at: www.ymca.org.uk/SITE/UPLOAD/DOCUMENT/Breaking_it_Down.pdf.
6 Available at: nds.coi.gov.uk/content/Detail.asp?ReleaseID=386765&NewsAreaID=2&print=true. See also: www.insidehousing.co.uk/story.aspx?storycode=6502434.
7 Available at: www.sentencing-guidelines.gov.uk.
8 Available at: www.communities.gov.uk/documents/statistics/pdf/1095351.pdf.
9 Available at: www.communities.gov.uk/news/housing/1094670.
10 Available at: www.cih.org/spotlight.
11 Available at: www.communities.gov.uk/publications/housing/propertyinformationquestionnaire.
12 Available at: www.communities.gov.uk/corporate/publications/consultations.
13 Available at: www.oft.gov.uk/news/press/2008/148-08.
14 Available at: www.cml.org.uk/cml/publications/marketcommentary/archive.
15 Available at: www.opsi.gov.uk.
16 Available at: www.opsi.gov.uk.
17 Available at: www.communities.gov.uk/documents/housing/pdf/deliveringlifetimehomes.pdf.
18 Available at: www.scotcourts.gov.uk/opinions/SD1706.html.
19 Frances Barratt, solicitor, Bristol; Michael Paget, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at www.nicmadge.co.uk and www. gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm.