Recent developments in housing law

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

POLITICS AND LEGISLATION

Homelessness

In England, during the quarter July to September 2011, 12,510 applicants for homelessness assistance were found to be owed the main housing duty under Housing Act (HA) 1996 s193, a figure six per cent higher than for the same quarter of 2010: *Statutory homelessness: July to September Quarter 2011, England* (Department for Communities and Local Government (DCLG), December 2011).[1]

In response to these figures the housing minister, Grant Shapps MP, encouraged households facing the prospect of homelessness to seek early advice about their situation: DCLG news release, 8 December 2011.[2]

The report of a survey of homelessness agencies and local authority housing options teams, conducted in November 2011 by the policy team at HomelessWatch to investigate the extent and nature of youth homelessness in England, has been published: *Young and homeless* (HomelessLink, December 2011).[3] The survey found extensive use of bed and breakfast accommodation for the young homeless and continuing difficulties in some areas with effective joint working between children's services departments and housing officials over homeless 16 and 17 year olds.

Housing litigation

The latest statistics on court proceedings brought by social landlords in Wales indicate a continuing fall in the number of possession orders granted to local authorities (down six per cent) and other social landlords (down 15 per cent) compared with the previous year: *Social landlords possessions and evictions in Wales, 2010–11* (Welsh Government, December 2011).[4] More than 800 tenants were evicted on execution of possession orders. More than 100 outright possession orders were made for anti-social behaviour. The number of anti-social behaviour orders (ASBOs) granted to social landlords in Wales fell from 33 to eight and the number of demotion orders fell from 41 to 23.

In England, an analysis of the local rates of landlord and mortgage lender possession claims has been published, indicating areas of the country in which residents are most likely to face eviction: *Eviction risk monitor* (Shelter England, December 2011).[5]

Mortgage help for homeowners

The UK government has invited evidence on the future provision of financial support with mortgage interest payments to benefit claimants who are homeowners: *Support for mortgage interest: informal call for evidence* (Department for Work and Pensions (DWP), December 2011).[6] The DWP has also published an impact assessment of any change to current arrangements.[7]

In the financial year 2011/12, £86 million has been available to support mortgage rescue in England, and the latest tranche of that sum (£16 million) was released at the end of 2011. All local authorities have been encouraged to work with mortgage rescue providers to ensure that the allocation is spent by the end of the financial year. In the first six months of 2011/12, the fund assisted 820 households to complete mortgage rescues: *2011/12 Mortgage rescue completions – April to September 2011* (Homes and Communities Agency).[8] A further £86 million is expected to be made available in 2012/13.

Housing and domestic violence

The Home Office is conducting a consultation on a new definition of 'domestic violence' to be adopted across UK government departments: Home Office news release, 14 December 2011.[9] Responses are invited by 30 March 2012 to the consultation paper, *Cross-government definition of domestic violence: a consultation* (Home Office, December 2011).[10]

Housing and anti-social behaviour

On 9 January 2012, the provisions of sections 34 to 36 and 39 of the Crime and Security Act (CSA) 2010 were brought into force by the Crime and Security Act 2010 (Commencement No 4) Order 2011 SI No 3016. CSA ss37–38 came into force on 31 January 2011 under Crime and Security Act 2010 (Commencement No 1) Order 2010 SI No 2989. Together they extend the jurisdiction of the county court to make gang injunctions. Such orders may now be sought in respect of defendants aged 14 to 17. In the light of this change, the statutory guidance on gang injunctions has been revised and reissued: *Statutory guidance: injunctions to prevent gang-related violence* (Home Office, December 2011).[11]

The latest research on the outcome of participation in family intervention projects and services by households with a history of anti-social behaviour has been published: *Monitoring and evaluation of family intervention services and projects between February 2007 and March 2011* (Department for Education, December 2011).[12]

HUMAN RIGHTS

Articles 6 and 8

■ Maempel v Malta

App No 24202/10, 22 November 2011

Mr and Ms Maempel owned and lived in a house in a remote area of grassland. Each year, during village feasts, firework displays were set up in the fields close to the house. They claimed that every time fireworks were let off, they were exposed to grave risk and peril to their life, physical health and personal security and that heavy debris caused considerable damage to the residence. Despite complaints to the ombudsman and the advice of experts, the Commissioner of Police continued to give permits for firework displays. The Constitutional Court dismissed a civil claim.

The European Court of Human Rights (ECtHR) dismissed their claim that there had been breaches of articles 6 and 8 of the European Convention on Human Rights ('the convention'). Although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve authorities adopting measures designed to secure respect for private life and home, even in the sphere of the relations of individuals between themselves. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Although article 8 contains no explicit procedural requirements, the decision-making process must be fair and must afford due respect to the interests safeguarded to the individual by article 8. It is therefore necessary to consider all the

procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available. Individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process. In cases involving environmental issues, the state must be allowed a wide margin of appreciation.

The ECtHR noted that Mr and Ms Maempel knew about the firework displays when they acquired the property. The damage caused was minor and remediable, with no real risk of lasting harm. The court did not find that the authorities had overstepped their margin of appreciation by failing to strike a fair balance between the rights of the individuals affected to respect for their private life and home, the conflicting interests of others, and of the community as a whole. Nor did it find that there had been fundamental procedural flaws which impinged on their article 8 rights.

Article 1 of Protocol 1 and article 8

■ Gladysheva v Russia

App No 7097/10,
6 December 2011

In September 2005, Ms Gladysheva bought her flat as a bona fide purchaser. She registered her title and lived in the flat with her son as their home. In July 2009, a court decided that the earlier privatisation of the flat had been fraudulent and that the true title belonged to the local council. The flat ought never to have been available for purchase. Her title was revoked and the council was declared to be the legal owner. As she had no legal right to remain, the court made a possession order. The applicant's appeals were dismissed. She complained to the ECtHR that there had been breaches of article 1 of Protocol 1 and article 8.

In relation to article 1 of Protocol 1, the court stated that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified. However, article 1 of Protocol 1 does not guarantee a right to full compensation in all circumstances, since legitimate 'public interest' objectives may call for reimbursement of less than the full market value. The court noted that Ms Gladysheva had been stripped of ownership without compensation, and that she had no prospect of receiving replacement housing from the state. The risk of any mistake made by the state authority must be borne by the state and errors must not be remedied at the expense of the individual concerned. Dispossessing the applicant of her flat placed an excessive individual burden on her and the public interest was not sufficient justification for doing so. There was accordingly a violation of article 1 of Protocol 1.

In relation to article 8, the court held that although the possession order had not been enforced, the very making of such an order amounted to an infringement of the article 8(1) right. The order had been lawfully obtained in pursuit of a legitimate aim (the provision of housing to welfare claimants to whom the flat would be reallocated). The state had a narrower margin of appreciation when seeking to justify interference with article 8 rights in respect of housing matters. The domestic courts had made no examination of the proportionality of the eviction and had left article 8 rights wholly out of account when deciding on eviction. The ECtHR made an order that Ms Gladysheva's title be restored and the eviction be rescinded. It also awarded non-pecuniary damage of €9,000 and costs.

SECURE TENANCIES

Only or principal home

■ Islington LBC v Boyle and Collier

[2011] EWCA Civ 1450,
6 December 2011

In 1996, Islington granted Ms Boyle a secure tenancy of a two-bedroom flat. She lived there with her partner, Mr Collier, and their three children. Their son was severely autistic and suffered from epilepsy and Tourette syndrome. In 1999 he started attending a special school for autistic children in north London. In 2004, the relationship between Ms Boyle and Mr Collier broke down. Mr Collier moved out and bought a house in Suffolk. However, later that year, in view of their son's increasingly aggressive conduct and inappropriate behaviour towards his sisters, Ms Boyle and Mr Collier decided that she and her daughters would move out of the flat and live in the Suffolk house, and Mr Collier would move back into the flat and care for their son. The personal belongings of Ms Boyle and her daughters were moved to Suffolk. Large pieces of her furniture remained in the flat. Ms Boyle was registered with a local GP in Suffolk. Her daughters were entered into a local school. Ms Boyle initially intended the move to the Suffolk house to be a temporary one for six months, but it became prolonged. Meanwhile, Mr Collier, with her permission, dishonestly submitted applications for benefits on the basis that she remained living in the flat and had care of their son. In January 2007, Ms Boyle and Mr Collier wrote a letter to Islington in which they acknowledged that they had not gone about matters properly in relation to the tenancy and claims for benefits. They asked permission for Mr Collier to live in the flat so that their son could remain in London. Islington did not accept the proposed arrangement. In October 2007, a housing officer asked Ms Boyle whether the Suffolk house was her principal home. She replied that she was living in the country. The same month, Islington served a notice to quit on Ms Boyle. In September 2008, Ms Boyle moved back into the flat, and Mr Collier and their son went to live with the two daughters in the Suffolk house. Islington brought a possession claim. HHJ Matheson dismissed the claim.

The Court of Appeal allowed Islington's appeal. Etherton LJ summarised the principles to be applied in determining whether a tenant continues to occupy a dwelling as his/her home despite living elsewhere:

First, absence … may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree. Secondly, assuming the circumstances of absence are such as to give rise to that inference: (1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased; (2) in order to rebut the presumption the tenant must have an intention to return; (3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a 'practical possibility' or 'a real possibility' of the fulfilment of the intention to return within a reasonable time; (4) the tenant must also show that his or her inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it. Thirdly, two homes cases … must be viewed with particular care … Fourthly, whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. In the absence of an error of law, the trial judge's findings of primary fact cannot be overturned on appeal unless they were perverse, in the sense that they exceeded the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts (para 55).

However, in relation to secure tenants, it is

not enough to satisfy the tenant condition that the tenant occupies the dwelling as his/her home (HA 1985 s81): the dwelling must be occupied as the tenant's only or principal home. Where tenants are physically absent from dwellings, their intentions about living there again as the sole or principal home will be critical. It is not sufficient, however, for the tenant merely to give oral evidence of his/her subjective belief and intention. The credibility of such evidence as to belief and intention must be assessed by reference objectively to ascertained facts. The reason for the absence, the length and other circumstances of the absence and (where relevant) the anticipated future duration of the absence, as well as the statements and conduct of the tenant, are all relevant to that objective assessment.

Where a notice to quit has been served to terminate the contractual tenancy, the tenant condition must be satisfied on the expiry of the notice to quit. What happened before the expiry of the notice to quit and what happened after it may, nevertheless, throw light on whether the tenant condition was satisfied at the date of expiry of the notice to quit. In this case, the judge did not consider whether or not the flat was Ms Boyle's principal home and so the Court of Appeal remitted the possession claim to the county court.

POSSESSION CLAIMS

■ R (Campbell) v Clerkenwell and Shoreditch County Court

[2011] EWCA Civ 1525,
21 November 2011

Hackney council brought a claim for possession against Mr Campbell. He raised a defence that the council was in breach of an order made many years earlier requiring it to complete Mrs Campbell's purchase of the flat under the right to buy scheme. His defence was struck out by District Judge Manners. He was refused permission to appeal against that order by HHJ Cryan. He brought a claim for judicial review of the refusal of permission to appeal. Edwards-Stuart J refused his renewed application for permission to apply for judicial review. After referring to *Strickson v Preston County Court* [2007] EWCA Civ 1132, *Sivasubramaniam v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475 and *Gregory v Turner* [2003] EWCA Civ 183; [2003] 1 WLR 1149, he stated that to justify granting an application for permission to apply for judicial review of a decision refusing permission to appeal from a district judge, the defect in the circuit judge's decision had to be much more fundamental than an error of law in the particular case. He concluded by saying: 'The courts will have to be vigilant to see that only truly exceptional cases – where there has … been a frustration or corruption of the very judicial process – are allowed to proceed to judicial review in cases where further appeal rights are barred by [Access to Justice Act 1999] section 54(4)' (para 2).

The Court of Appeal dismissed an application for permission to appeal. It could not 'be said that the district judge was manifestly in error in deciding that it was no longer possible to transfer the flat' (para 4). Although 'there may well have been arguments to the contrary … the fact that the district judge may or may not have been wrong about those matters does not mean that this case falls within the exceptional category' (para 4). There was no realistic prospect of Mr Campbell being able to persuade the Court of Appeal that the case was 'truly exceptional' (para 5).

LONG LEASES

Service charges

■ Freeholders of 69 Marina, St Leonards-on-Sea – Robinson, Simpson and Palmer v Oram and Ghoorun

[2011] EWCA Civ 1258,
8 November 2011

The defendants were each long lessees in a building containing six flats. In 2005, the freeholders carried out works to rectify damage caused by water penetration. The freeholders claimed a proportion from the defendants as service charges. The claim was disputed on the basis that there had been a failure to comply with the consultation requirements of Landlord and Tenant Act (LTA) 1985 s20. A leasehold valuation tribunal (LVT) dispensed with those requirements and determined the sums payable. In a subsequent county court claim District Judge Nightingale found that the terms of the leases bound the lessees to pay 'all that they have specifically cost the lessors in terms of dealing with these proceedings, both before the LVT and before this court, in relation to solicitors' costs' (para 6). The lessees appealed. HHJ Hollis dismissed their appeal.

The Court of Appeal dismissed a second appeal. There was no doubt that the freeholders incurred costs in carrying out the repairs in accordance with their obligations under the leases. This, in turn, created a liability on the lessees to reimburse the freeholders for those costs. The freeholders' costs before the LVT fell within the terms of the leases.

■ Rey-Ordieres v Lewisham LBC

LON/OOAZ/LSC/2010/0129,
LVT,
7 February 2011

A number of lessees who had bought their homes under the right to buy legislation sought a determination under LTA s27A as to their liability to pay service charges in respect of a private finance initiative (PFI) contract for major works. In particular, they challenged management fees and the cost of scaffolding. The professional fees claimed amounted to 26 per cent of the cost of the works. These comprised fees of 3.48 per cent, preliminaries of 10.52 per cent and subcontractors' overheads and profit totalling 12 per cent. They argued that the charging of overheads and profit by the subcontractors was wrong because no profit should have been made. They also objected to a ten per cent management fee payable to the council under the lease being added to the 26 per cent. So far as the scaffolding was concerned, they argued that it should have been procured for each block separately.

The LVT rejected the lessees' contention that it was wrong for the subcontractors to make a profit. It also found that the fees of 3.48 per cent were reasonable. However, overheads and profit of 12 per cent were excessive. It substituted a figure of ten per cent as being reasonable. It also reduced the figure for preliminaries to 3.5 per cent to take into account the fact that most of this related to rented properties, not leasehold properties. The overall 'on cost' fee should be 16.98 per cent. Furthermore, it was not reasonable to add a ten per cent management fee on to the PFI contract charges. The method of procurement for the scaffold under the contract was reasonable and the cost of the scaffold was reasonable, but it was unreasonable to charge a flat rate charge for scaffolding for each property. They should have been charged in accordance with a schedule which resulted in individual charges for each building.

■ Stenau Properties Ltd v Leek

[2010] UKUT 478 (LC),
12 December 2011

Lessees made an application to the LVT under LTA s27A for a determination of their liability to pay the service charge expenditure claimed or estimated. The LVT found that the service charges were justified and reasonable, but noted that the landlord had not carried out the statutory consultation required by LTA s20. The LVT accordingly considered that it was bound to find that the maximum contribution the landlord could recover from the leaseholders was £250, unless and until the landlord succeeded in an application seeking dispensation. The landlord then made an application under section 20ZA for a determination that the consultation requirements could be dispensed with, but the LVT dismissed it. It concluded: 'No good reason has been put forward to explain the failure to consult. Given this the tribunal determines that the application ought to be refused' (para 8). The landlord appealed.

HHJ Mole QC dismissed the appeal. After referring to *Daejan Investments Ltd v Benson*

[2011] EWCA Civ 38 and *Camden LBC v Leaseholders of 37 Flats at 30–40 Grafton Way* LRX/185/2006, he stated that 'the issue of prejudice was plainly considered by the LVT' (para 18). He continued:

Where there has been a minor breach of procedure it will be important for a tribunal to find evidence that respondents were prejudiced or disadvantaged. Where the breach has been substantial it may be reasonable to assume prejudice … The effect of a properly conducted consultation process should be to give the tenants confidence in the decisions that are reached and leave them feeling as comfortable as they can be with the service charges that are likely to flow from those decisions. The opportunity to participate in a meaningful way in the decision-making process is of real value. Even if the end result would probably have been the same without their participation, it seems to me very arguable that tenants who are substantially deprived of their right to be included in the decision-making process are genuinely prejudiced (para 22).

The LVT was entitled to find that the breach was so substantial that prejudice must be taken to have flowed from it, even though there was no evidence of any work that would have been done differently if the consultation had been carried out properly.

HOMELESSNESS

■ Kata v Westminster City Council

[2011] EWCA Civ 1456, 4 November 2011

The claimant, a single man, applied to the council for homelessness assistance under HA 1996 Part 7. The council decided that he was homeless but, on review, concluded that although he was HIV positive he was not vulnerable (HA 1996 s189(1)(c)) and therefore not in priority need. He appealed to the county court on the grounds that the reviewing officer had failed: (1) to appreciate that his condition had actually developed into AIDS; and (2) to address his inability to access medication if he was street homeless.

HHJ Cowell noted the relevant guidance in the *Homelessness code of guidance (England)* (DCLG, July 2006) para 10.32 but dismissed the appeal as he could detect no error of law in the reviewing officer's decision.[13] The reviewing officer had applied the *Pereira* test correctly (*R v Camden LBC ex p Pereira* (1999) 31 HLR 317, CA) to the facts.

McFarlane LJ refused permission to bring a second appeal. The appeal raised no important point of principle or practice and had no prospect of success.

HOUSING AND CHILDREN

■ R (CJ) v Cardiff City Council

[2011] EWCA Civ 1590, 20 December 2011

The claimant, a young man, applied to the council for accommodation under Children Act (CA) 1989 s20. It undertook an assessment of his age and decided that he was over 18. He challenged that assessment in a claim for judicial review.

Ouseley J decided that the burden of proof in an age assessment case lay on the claimant. However, on the facts, he was able to assess age without recourse to the burden of proof and held that the claimant was not a 'child' entitled to accommodation. The claimant appealed.

The Court of Appeal held that the burden of proof had no role to play in such proceedings. Pitchford LJ said:

Where the issue is whether the claimant is a child for the purposes of the Children Act it seems to me that the application of a legal burden is not the correct approach. There is no hurdle which the claimant must overcome. The court will decide whether, on a balance of probability, the claimant was or was not at the material time a child. The court will not ask whether the local authority has established on a balance of probabilities that the claimant was an adult; nor will it ask whether the claimant has established on a balance of probabilities that he is a child (para 23).

■ R (SA) v Kent CC

[2011] EWCA Civ 1303, 10 November 2011

The council set up and funded an arrangement under which the claimant, a child who required accommodation, was accommodated with her maternal grandmother. The council claimed to be acting under CA 1989 s17 and paid a kinship allowance of only £63 per week.

The claimant sought a judicial review, contending that she was a 'looked after child', who had been placed with her grandmother under CA 1989 s23(2), and that a fostering allowance of £146 per week was payable. Black J allowed the claim and the council appealed.

The Court of Appeal dismissed the appeal. The judge had found on the facts that the placement with the grandmother was made under CA 1989 s23(2). She was entitled to make that finding and it followed that the appeal had to be dismissed. See also page 26 of this issue.

1 Available at: www.communities.gov.uk/documents/statistics/pdf/2046094.pdf.
2 Available at: www.communities.gov.uk/news/housing/2046822.
3 Available at: www.homeless.org.uk/sites/default/files/111202.Young_and_homeless.pdf.
4 Available at: http://wales.gov.uk/docs/statistics/2011/111207sdr2292011en.pdf.
5 Available at: http://england.shelter.org.uk/professional_resources/policy_and_practice/policy_library/policy_library_folder/eviction_risk_monitor.
6 Available at: www.dwp.gov.uk/docs/support-for-mortgage-interest-call-for-evidence.pdf.
7 Available at: www.dwp.gov.uk/docs/support-for-mortgage-interest-call-for-evidence-ia.pdf.
8 Available at: www.homesandcommunities.co.uk/sites/default/files/aboutus/mortgage-rescue-completions-nov11.csv.
9 Available at: www.homeoffice.gov.uk/publications/about-us/consultations/definition-domestic-violence/.
10 Available at: www.homeoffice.gov.uk/publications/about-us/consultations/definition-domestic-violence/dv-definition-consultation?view=Binary.
11 Available at: www.official-documents.gov.uk/document/other/9780108511288/9780108511288.pdf.
12 Available at: www.education.gov.uk/publications/eOrderingDownload/DFE-RR174.pdf.
13 Available at: www.communities.gov.uk/publications/housing/homelessnesscode.

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The Localism Act 2011: security of tenure in social housing

This is the third in a series of five articles reviewing the changes to be made to housing law by the Localism Act (LA) 2011.[1] Jan Luba QC and David Renton outline how the new statute will deal with security of tenure for new social housing tenancies. Further articles in this series will consider the creation of a new housing ombudsman and social housing regulator, and changes to the law on tenancy deposits and other miscellaneous aspects of housing law.

Introduction

Among a wide range of other changes to housing law, LA Part 7 makes a series of significant amendments to the law relating to security of tenure in the social housing rented sector. Social landlords throughout England are already preparing for their implementation in the coming months. Only the provisions relating to the new tenancy strategies (see below) and certain regulation-making powers are already in force.[2] The substantive provisions relating to new regimes for security of tenure and succession will be brought into force later this year.

LA Part 7 does not (thankfully) create any wholly new form of tenancy in social housing; however, it does introduce a new subspecies of local authority secure tenancy – 'flexible tenancies' – in England. Part 7 works by making significant amendments to the Housing Act (HA) 1985 in respect of secure tenancies and to the HA 1988 in respect of assured tenancies which are used by other social landlords. It not only facilitates much more widespread use of fixed-term tenancies in respect of all new letting of social housing, rather than the grant of periodic tenancies, but it changes the rules for succession to all future social housing tenancies and also amends the current statutory grounds on which possession can be obtained. Only limited changes are made to social housing law in Wales.

LA Part 7 gives effect to the UK coalition government's blueprint for the future of social housing. This has been most recently set out in its national housing strategy for England: *Laying the foundations: a housing strategy for England* (Department for Communities and Local Government (DCLG), November 2011).[3] The detailed programme of reform to tenure in social housing was first proposed in a consultation paper: *Local decisions: a fairer future for social housing* (DCLG, November 2010).[4] There was then the announcement of the intention to proceed in the light of responses to that consultation: *Local decisions: next steps towards a fairer future for social housing. Summary of responses to consultation* (DCLG, February 2011).[5] It has also been the subject of a published impact assessment: *Localism Bill: a fairer future for social housing. Impact assessment* (DCLG, January 2011).[6]

This article considers the changes relating to social housing tenure in three parts:

- strategic planning for social housing tenancies;
- local authority tenancies; and
- non-local authority (assured) tenancies.

Strategic planning for social housing tenancies

When fully in force, LA Part 7 will enable all social landlords, whether councils or housing associations, either to adopt the new forms of social housing tenancy that it enacts or to continue with present arrangements (or to combine the old and new arrangements) in their lettings policies. The main changes to forms of tenancy made by the LA will only affect new tenancies granted on or after the relevant commencement date.

To avoid a chaotic mess developing, with different social housing providers taking wholly different approaches to social housing tenure, even within a single local authority district, a 'steering' role is given to each local housing authority in England. Each council must draw up and then publish a 'tenancy strategy' for its area: LA s150(1). This will set out the matters that the authority considers should inform policy-making by all local social landlords on:

- what sorts of tenancies to make available;
- which sorts of tenancies will be offered in which cases;
- how long any fixed-term tenancies will run for; and
- in which cases further tenancies will be granted when a fixed term expires.

The tenancy strategy document will also serve as a local source-book summarising the policies of the local social housing providers and signposting readers to where full copies of the policies of non-council providers can be found: section 150(2).

The first tenancy strategies must be published by 15 January 2013 (LA s150(4) and the Commencement No 2 Order article 4(1)(m)). However, before adopting its tenancy strategy, a council must consult with every social housing provider in its district: section 151(1). Councils in London must consult with the Mayor: section 151(2)(b). Regulations will enable DCLG to impose other consultation requirements: section 151(2)(a). The intention is that the tenancy strategy will be framed having regard to the council's homelessness strategy, its allocation scheme and, for councils in London, the London housing strategy: section 151(3). These cross-referencing requirements will also work the other way, so that the tenancy strategy must be taken into account in later formulating any new homelessness strategy or revised housing allocation scheme: sections 153 and 147(12).

Once the tenancy strategy has been adopted, it must be published and copies provided on request: sections 150(1) and 150(7). Local authorities may modify their tenancy strategy and when they do so, they must publish the modifications of the strategy: section 150(6).

The strategy is given legal 'teeth' by the requirement that every local housing authority '… must have regard …' to its tenancy strategy in exercising any of its housing management functions: section 150(3) (section 150(3) was not brought into force on 15 January 2012 with the rest of section 150. A commencement date is awaited). In other words, the content of the strategy will be a relevant consideration each time a council makes a decision in the exercise of its housing management functions. Failure to have regard to its content may render any or all subsequent housing management decisions and actions unlawful. Advisers assisting clients with housing work will obviously need copies of the tenancy strategies for the areas in which their clients either live or are seeking social housing, as soon as they are adopted.

Although it will be for each council to take its own path in framing the local tenancy strategy, the content will *not* be legally binding on other local social housing providers in the council's area. They will draw up their own policies having regard to the content of the local authority's strategy and their conduct will

be governed by the new regulatory framework which will address fully tenure issues from April 2012 and will be enforced by the new social housing regulator (see below).

Local authority tenancies

The new form of secure tenancy

Before commencement of the LA, the default position was that new local authority tenancies were usually periodic (weekly, fortnightly or monthly) tenancies. They were normally secure tenancies or, for an initial period, introductory tenancies: HA 1985 Part 4 and HA 1996 Part 5 respectively. The *Local decisions* consultation paper (see above) described the current arrangements for periodic secure tenancies as 'a broken, centrally-controlled system' with 'inflexible, centrally-determined, rules' producing a 'one-size-fits-all model' (paras 1.3, 1.9 and 1.12).

LA Part 7 introduces a new form of secure tenancy available for councils in England to grant, if they wish, to their new tenants: the 'flexible tenancy' (HA 1985 ss107A–107E inserted by LA s154). The primary difference between a flexible secure tenancy and a periodic secure tenancy is that the former is a tenancy of a fixed duration, and therefore less secure because a possession order will be available on a mandatory basis after expiry of the fixed term.

A central feature of the envisaged new landscape is that local housing authorities are empowered but not required to use flexible tenancies. Their use (and duration) will accordingly vary from locality to locality. From a standpoint of rational administration or housing justice it might seem surprising that even neighbouring local authorities could operate quite different policies for social housing tenure. Yet this is very much part of the rationale for the inclusion of flexible tenancies within a 'Localism' Act which is concerned with the devolution of power from central government to elected councillors.

Quite how pervasive flexible tenancies will be remains to be seen. A small number of local housing authorities have indicated, in advance, that they do not intend to use flexible tenancies at all; while others are likely to use them for all new 'general needs' tenancies. There will probably be many local housing authorities adopting an approach which fits somewhere in between.

The normal length of the fixed term of a flexible tenancy will also vary from one local authority to another. The statute provides that flexible tenancies must be granted for a minimum term of two years: HA 1985 s107A(2)(a). In May 2011, Andrew Stunell MP, the Parliamentary Under-Secretary of State for Communities and Local Government, told the House of Commons:

> *We propose that five years should be the minimum term in normal circumstances. We would expect it to be appropriate to offer less than five years only in very exceptional cases* (*Hansard* HC Debates col 403, 18 May 2011).

In July 2011, the housing minister, Grant Shapps MP, announced in a letter to social housing providers that flexible tenancies ought ordinarily to be granted for a minimum of five years but declined to agree that the statutory minimum should be raised.[7] Instead, the statutory Directions that the secretary of state has given to the new social housing regulator for England include a requirement that the regulator must set the Tenure Standard with a view to achieving, so far as possible, that 'registered providers grant general needs tenants a periodic secure or assured (excluding assured shorthold) tenancy or a tenancy for a minimum fixed term of five years, or *exceptionally* a tenancy for a minimum term of no less than two years, in addition to any probationary tenancy period' (emphasis added): *Implementing social housing reform: Directions to the social housing regulator – consultation. Summary of responses*, Annex A (DCLG, November 2011).[8]

New HA 1985 s107A sets out the circumstances under which a flexible secure tenancy can be created. In most cases, new flexible tenancies will be made by the local authority simply:

- serving a prior written notice on the tenant stating that the tenancy will be a flexible tenancy; and
- granting a fixed-term tenancy of not less than two years' duration: section 107A(2).

There are also provisions for flexible tenancies to be created where the tenant has previously occupied a council property under a family intervention, demoted or introductory tenancy: section 107A(3) and (6)(a)–(b).

Review of decisions relating to offers of flexible tenancies

Some prospective council tenants will not be satisfied with the offer of a flexible tenancy rather than a periodic secure tenancy and others may wish to dispute the length of the fixed period for which a flexible tenancy is offered. The latter can request a review within 21 days of the original decision (ie, the date of the decision to offer the tenancy as a flexible tenancy from the outset or to convert an introductory tenancy into a fixed-term rather than a periodic tenancy): HA 1985 s107B(4). However, the right of statutory review is strictly limited to a challenge to the authority's decision as to the duration of the new tenancy: HA 1985 s107B(4). A tenant may thus be able to seek a review of a decision that the duration of the flexible tenancy is to be for two rather than five years but the tenant will not be able to seek a statutory review of a decision to grant a flexible tenancy rather than a secure periodic tenancy.

Moreover, the only basis on which the decision about length of term can be reviewed is that the duration offered does not accord with the authority's tenancy strategy: section 107B(3). Where a review upholds the originally proposed term, the reviewing officer will have to provide reasons: section 107B(9). Where a review is successful, presumably there will be a consequential decision to offer a flexible tenancy for a longer term. The procedure to be followed on review will be set out in regulations: section 107B(6).

Those dissatisfied with the outcome of the review will have no right of appeal to any court or tribunal. Any legal challenge to a review decision would have to be by way of judicial review. Likewise, those who wish to challenge the decision to offer them a new tenancy (or a replacement for an introductory tenancy) as a fixed-term rather than periodic tenancy would need to seek judicial review of that decision. Applications to the High Court for judicial review would need to be made very urgently to prevent the offered property being withdrawn and let to someone else. Recently the Court of Appeal has recognised that judicial review applications may need to be made very quickly where a social housing tenancy may be about to be offered to someone else: *Birmingham City Council v Qasim* [2009] EWCA Civ 1080 at para 39.

Flexible tenancies: rights and obligations

The flexible tenancy is a secure tenancy. Although it will normally be granted for a fixed term of more than three years it need not be made by deed: LA s156. Nor need the fixed-term tenancy be registered against the title to the property: LA s157.

Flexible secure tenants will enjoy the usual portfolio of statutory rights and obligations applicable to secure tenants (right to buy, right to succession, etc) but the provisions relating to improvements by secure tenants (and compensation for improvements) contained in HA 1985 ss97 and 99A are disapplied: LA s155. The arrangements for mutual exchange with another social housing tenant are modified if one of the swap partners is a flexible tenant. In such circumstances, instead of exchange by assignment, LA ss158 and 159 and Sch 14 provide for arrangements for mutual exchange to operate through a process of surrender and re-grant. A flexible tenant can even be 'demoted': HA 1996 s143MA inserted by LA s155(7).

Normally, in the absence of a break-clause, a tenant would be locked in to a fixed-term

tenancy for the full term. However, new HA 1985 s107C enables a tenant to seek to terminate a flexible tenancy at any time by giving at least four weeks' written notice specifying a termination date. The landlord can agree to waive the requirement for notice or the minimum period of notice and agree an earlier date: section 107C(4). Importantly, the tenancy will end on the specified (or agreed) date only if the tenant is not in arrears of rent or otherwise in breach of a term of the tenancy: section 107C(5). Obviously this raises the prospect that in many cases it will be unclear whether or not a flexible tenancy has been determined by a tenant's notice.

Monitoring flexible tenancies during their terms

The statutory scheme envisages that although flexible tenancies are granted for fixed terms from the outset, it will not necessarily follow that the tenants will need to leave their homes when the fixed terms expire. Some tenants may be allowed simply to continue in occupation of the same properties as statutory periodic secure tenants after their terms expire. Or further fixed terms could be offered of the same properties. Some tenants may be offered an alternative tenancy elsewhere by the same council or a different social landlord. The expectation is that local authorities will keep future options under review as the fixed term progresses.

Where a local authority will in due course seek possession of a property let on a fixed-term tenancy it must give at least six months' notice that a flexible tenancy will not be renewed: section 107D. Although the statute is not entirely clear, the 'not less than six months' notice' must presumably be given not less than six months before the fixed term expires (indeed Andrew Stunell told the House of Commons at the committee stage: 'Local authority landlords are required to serve a notice on the tenant six months *before the end of the flexible tenancy* when they are minded not to reissue it at the end of the fixed term' (emphasis added): *Hansard* HC Public Bill Committee Debates col 828, 8 March 2011). The written notice given must inform the tenant of the reasons why a further tenancy will not be granted and notify them of their right to seek a review within the specified time (21 days): HA 1985 s107D(3).

Such a review request need not be made in writing but must be made within 21 days of the service of the authority's six months' notice: HA 1985 s107E(1). There is no limit to the matters which can be raised on review but, in addition to any other matters, the reviewing officer must consider whether the decision was in accordance with the authority's tenancy strategy: section 107E(3). The review will be conducted in accordance with regulations to be made by the secretary of state: section 107E(4). Where the decision on a review is to uphold the decision not to grant a further tenancy, the authority must provide written reasons: section 107E(7). Where the review is successful, the reviewing officer will presumably exercise delegated powers to grant a further tenancy term.

Where a tenant is dissatisfied with the outcome of the review there is no right of appeal so any legal challenge will be in judicial review proceedings. Applications to the High Court would need to be made urgently to prevent the giving of notice seeking possession or the commencement of possession proceedings. Alternatively, the tenant could await the issue of possession proceedings and then take the point that the review decision was wrong in law (see below): section 107D(6).

Gaining possession of the property let on a flexible tenancy

During the fixed term, a council which wished to recover possession could do so in the normal way by serving notice of seeking possession and establishing one of the statutory grounds in HA 1985 Sch 2.

Once the fixed term has expired, new HA 1985 s107D is intended to ensure swift recovery of possession on a mandatory basis. If each of three conditions is satisfied in possession proceedings the court 'must make' a possession order without needing to be satisfied of any fault on the tenant's part: section 107D(1). Condition 1 is that the flexible tenancy has come to an end and no further secure tenancy (save for a statutory periodic tenancy) is in existence: section 107D(2). Condition 2 is that the authority has given six months' written notice that it does not intend to renew the flexible tenancy (see above): section 107D(3). Condition 3 is that, on or before the end date of the term of the flexible tenancy, the landlord has given the tenant two months' notice in writing that it requires possession of the property: section 107D(4).

The statute is silent as to what will happen where some but not all of the conditions are satisfied: for example, if the term of the flexible tenancy has expired (condition 1), a notice requiring possession has been given (condition 3) but the tenant has not been given six months' notice of the decision not to renew the flexible tenancy (condition 2). Tenants' representatives will presumably argue that unless all three conditions are satisfied the possession claim must be dismissed. The tenant would then remain in possession under a statutory secure periodic tenancy, which can only be ended under the normal procedures for determining a secure tenancy on statutory grounds.

Where all three conditions are met, to the satisfaction of the court, a possession order can only be refused in one of three circumstances:

- the tenant requested a review of the six months' notice (see above) and either the review was not carried out or it resulted in a decision that was wrong in law: HA 1985 s107D(6)(b);
- the tenant raises and makes out a public law defence to the claim; or
- the tenant successfully raises a human rights defence (see *Manchester City Council v Pinnock* [2010] UKSC 45).

Succession to secure tenancies

The position before commencement of the relevant provisions of the LA is that a spouse or civil partner can succeed by statute to a secure tenancy and, if there is no spouse or partner, any 'family member' who has lived with the late tenant for 12 months can succeed: HA 1985 ss87–89. These provisions will continue to apply to current secure tenants even after the LA comes into force. The provisions will also remain unaltered for new secure tenants in Wales.

However, from the date that LA s160 is brought into force, any new secure tenancy in England will carry very different statutory succession rights under a new HA 1985 s86A. This is intended to achieve a minimum statutory right for succession by a tenant's partner but statutory succession rights of 'family members' will no longer be available automatically. The new provisions enlarge the definition of spouse or civil partner to include those who occupy the home and were living with the late tenant 'as wife or husband' or 'as if they were civil partners': HA 1985 s86A(1) and (5). Unless the tenancy agreement stipulates otherwise, that will be the limit of the statutory succession rights.

However, it will be possible for landlords of secure tenants to include in tenancy agreements provisions that go beyond 'partners' and provide for succession by others. If there are such provisions, and they are satisfied, the secure tenancy will vest automatically in that successor: HA 1985 s86A(2) and s89(1A). As now, it will not be possible to succeed a tenant who was him/herself a successor unless the tenancy agreement makes provision for second or subsequent successions: HA 1985 s86A(3) and (4).

These changes mean that every local authority landlord in England must consider what it wants to do about making provision in tenancy agreements for succession rights for new secure tenants, preferably before the LA provisions are brought into force.

Grounds for possession: secure tenancies

Reflecting the fact that more secure tenancies are likely to be granted on fixed-term tenancies, the LA amends the HA 1985 to deal with the effect of death of a secure tenant during the running of the fixed term. If there is no statutory successor (under the new arrangements described above) the tenancy will devolve under the estate of the deceased. HA 1985 s90 is enlarged by amendment made by LA s162(1) to enable a social landlord in England to recover possession where that has occurred.

Where there has been a succession to a secure tenancy (periodic or fixed term) and the property is under-occupied by a successor other than the late tenant's partner, possession can be sought by the landlord on a discretionary ground. The present Ground 16 is retained for use in Wales in amended form: LA s162(3). For England, there is a wholly new Ground 15A inserted into HA 1985 Sch 2 to deal with under-occupation by successors to either periodic or fixed-term secure tenancies: LA s162(2). Both Ground 15A and amended Ground 16 make provision for a court to give a landlord permission to rely on a notice seeking possession served between six months and 12 months after the date it becomes aware of the tenant's death, even if that date is significantly later than the actual date of death. This change reverses the effect of the decision in *Newport City Council v Charles* [2008] EWCA Civ 1541; [2009] HLR 18.

Lettings by other social landlords

Forms of tenancy

Most social landlords that are not local housing authorities are currently letting their properties to new tenants on periodic assured tenancies (in some cases after a period as a starter tenant on an assured shorthold tenancy). However, that has never been a statutory requirement. The HA 1988 would usually have effect to make all such lettings assured shorthold tenancies by default: HA 1988 s19A. Until now, most social landlords have given their incoming tenants written notice (often in the tenancy agreement itself) that the tenancy will be a full assured tenancy: HA 1988 Sch 1. Up until April 2011, it was the expectation of the social housing regulator that this approach, offering the maximum available form of statutory security of tenure, would be the norm. However, in that month, the regulator (presently the Tenant Services Authority (TSA)) amended its regulatory framework on tenure to facilitate new fixed-term lettings by social landlords on affordable rents: *Revision to the Tenancy Standard: affordable rent* (TSA, April 2011).[9]

To coincide with the proposed commencement of flexible tenure arrangements introduced for council lettings by the LA, the scope for fixed-term lettings by non-local authority social landlords becoming the norm will be further enlarged by an even looser regulatory framework to take effect in April 2012. The content of that framework in relation to security of tenure is framed by the secretary of state's Directions (see above) and the proposed final wording of a new framework has recently been subject to consultation: *A revised regulatory framework for social housing in England from April 2012. A statutory consultation* (TSA, November 2011).[10] The intention is to enable all social landlords to offer fixed-term or periodic tenancies (whether at social or affordable rents) according to whatever policy they choose to adopt for their lettings, provided that the minimum fixed term should usually be at least five years or, exceptionally, at least two years. Allowance will continue to be made for shorter starter or probationary tenancies.

The more common use of fixed-term assured tenancies by social landlords, other than local authorities, is reflected in a series of consequential amendments to housing law to be found spread throughout LA Part 7. When brought into force, these will include:

- lifting the requirement for such fixed-term tenancies to be granted by deed: LA s156;
- waiving the requirement for registration of most fixed-term leases granted by social landlords: LA s157;
- modification of mandatory HA 1988 Sch 2 Ground 7 (devolution of an assured tenancy on death) to include, in England, fixed-term tenancies: LA s162(4) and (5);
- new arrangements for assured shorthold tenancies to follow demoted or family intervention tenancies: LA s163;
- new provisions about the tenant's 'right to acquire': LA s165; and
- extension of the repairing obligations in Landlord and Tenant Act 1985 s11 to fixed-term lettings by social landlords of more than seven years (except shared-ownership leases): LA s166.

Where a social landlord grants a fixed-term assured shorthold tenancy for a term not less than two years, and seeks possession on the termination of that term using the notice procedure in HA 1988 s21(1), new additional provisions will apply. The social landlord will be unable to recover possession unless, six months before the expiry of the term, it notified the tenant in writing that no further tenancy would be granted and that notice explained how the tenant could get help or advice: HA 1988 s21(1A) and (1B) inserted by LA s164.

Succession to assured tenancies

Under current statutory provisions, an assured tenancy can pass by statutory succession to a spouse or civil partner of the deceased (which is defined to include those living with the deceased as though they were married or in a civil partnership): HA 1988 s17. Many social landlords, particularly those which had taken on sitting tenants of local authorities, sought to grant enhanced succession rights to other family members. This has never been entirely satisfactory. Rules about privity of contract made the terms difficult to enforce by would be 'successors' and such 'succession' could only be achieved by the tracing and termination of the late tenant's tenancy and the grant of a fresh tenancy to the prospective successor.

These difficulties will be largely resolved by very extensive amendments made to HA 1988 s17 by LA s161, the broad thrust of which is to enable tenancies to vest by statutory succession where the succession terms in the tenancy agreement itself are made out.

Conclusion

The current system of mainly long enduring periodic tenancies for social housing has protected the stability of communities in which there is a mixture of residents, including the old, the poor and the vulnerable, as well as working families of average or modest means. Built into the new fixed-term tenancy regime, given statutory underpinning by the LA, is an implicit assumption that significant numbers of new social housing tenants will need to be provided with such housing only for limited terms. When their needs have been met, they can be required to leave and make way for other new entrants to the sector.

In the absence of lasting security of tenure, a high proportion of such tenants will have their tenancies determined at the end of their term and will be required to accommodate themselves elsewhere in the social or private rented sectors or in owner occupation.

Those who qualify for social housing but who are granted only a fixed-term tenancy will face a degree of uncertainty over how long they will be able to stay in their homes and the unwelcome prospect of a detailed review of their personal circumstances before the end of the fixed term. There is a real risk of the entire social housing sector becoming dominated by the transitory passing of large numbers of occupiers into and out of the sector. Housing advisers will be in more demand than ever to advise social housing tenants on how to retain the homes they have found themselves fortunate enough to rent.

1 See also Jan Luba QC and Llz Davies, 'Housing and the Localism Act 2011: homelessness', December 2011 *Legal Action* 21 and Tim Baldwin and Jan Luba QC, 'The Localism Act 2011:

allocation of social housing accommodation', January 2012 *Legal Action* 23.

2 Localism Act 2011 (Commencement No 2 and Transitional and Saving Provision) Order 2012 ('the Commencement No 2 Order') SI No 57 article 4 brought LA ss150 (partially), 151, 152 and 153 (partially) into force on 15 January 2012 and on the same date commenced those parts of LA ss154 and 158 which confer regulation-making powers.

3 Available at: www.communities.gov.uk/documents/housing/pdf/2033676.pdf.

4 Available at: www.communities.gov.uk/documents/housing/pdf/1775577.pdf.

5 Available at: www.communities.gov.uk/documents/housing/pdf/1853054.pdf.

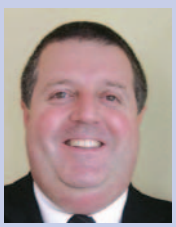
6 Available at: www.parliament.uk/documents/impact-assessments/IA11-010AA.pdf.

7 Available at: www.communities.gov.uk/documents/housing/pdf/1956470.pdf.

8 Available at: www.communities.gov.uk/documents/housing/pdf/2017529.pdf.

9 Available at: www.tenantservicesauthority.org/upload/pdf/Decision_Statement_5_-_Final2.pdf.

10 Available at: www.tenantservicesauthority.org/upload/pdf/statutory_consultation_20111121122417.pdf.



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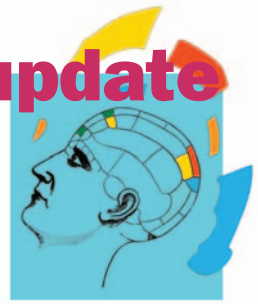
Mental health law update



Robert Robinson reports on recent developments in mental health law. This article covers the latest important case-law. Readers are invited to submit summaries of significant unreported cases.

CASE-LAW

Conditional discharge and deprivation of liberty

■ **Secretary of State for Justice v (1) RB (2) Lancashire Care NHS Foundation Trust**

[2011] EWCA Civ 1608, 20 December 2011

The decision of the Upper Tribunal, against which the secretary of state appealed, was covered in 'Mental health law update – Part 2', February 2011 *Legal Action* 38. RB was a restricted patient, detained under Mental Health Act (MHA) 1983 ss37/41. The Upper Tribunal found that his conditional discharge to a care home, ordered by the First-tier Tribunal under MHA 1983 s73(2), would have the effect of depriving him of his liberty in the care home. However, notwithstanding the continuing deprivation of liberty, the Upper Tribunal held that this was a lawful exercise of the First-tier Tribunal's power because its effect was to discharge RB from detention in a hospital for the purpose of receiving medical treatment for mental disorder.

The secretary of state argued that even though the proposed conditional discharge was in RB's best interests, it was unlawful because its effect would be to deprive him of his liberty in circumstances outside the powers conferred by the MHA 1983. As such, the consequent deprivation of liberty would be in breach of the requirement of article 5 of the European Convention on Human Rights ('the convention') that any detention of a person of 'unsound mind' must be based on criteria which are prescribed by law, 'that is to say, be set out in legislation, so that the patient knows what they are and can bring effective proceedings to challenge his detention' (para 14 (iv)).

This argument was accepted by the Court of Appeal. The court held, first, that MHA 1983 s73(2), which is the operative provision for a conditional discharge ordered by the First-tier Tribunal, does not confer a power to deprive a person of liberty. If it were to be capable of having that effect it would need to contain express words, but it is in fact silent on the issue of deprivation of liberty. Second, section 73(2) is not capable of satisfying the 'prescribed by law' requirement of article 5(1). The Court of Appeal pointed out that, if relied on for the purpose of authorising a deprivation of liberty:

> *The effect of this provision would be, for instance, that a patient who did not need to be detained in hospital for the purposes of any treatment, could be conditionally discharged on terms that involved a deprivation of liberty simply on the basis that the tribunal was not satisfied that it was not appropriate that he should not be liable to be recalled to hospital for further treatment. [MHA 1983 s73(2)(b)] simply does not address the reasons why in any particular case there is a need for him also to be deprived of his liberty* (para 54).

The absence of any criteria for deciding whether conditional discharge should be on terms that amount to a deprivation of liberty would offend against the fundamental convention protection from arbitrary detention if MHA 1983 s73(2) were to be relied on for this purpose.

The Court of Appeal accepted that, as a consequence of its judgment, whenever the First-tier Tribunal orders conditional discharge it will have to satisfy itself that implementation of the conditions will not involve an inevitable deprivation of liberty. However, in disagreement with the Upper Tribunal, the court concluded that this is a task which the First-tier Tribunal is well able to perform, and that in practice it is unlikely to be a difficult issue in every case.

Comment: As the Court of Appeal recognised, the outcome is, paradoxically, that in protecting RB from being arbitrarily detained in a care home, he was prevented from leaving secure hospital conditions where his quality of life was worse than it would have been in the care home. However, as the court pointed out,