Recent developments in housing law

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

POLITICS AND LEGISLATION

Housing allocation

The Secretary of State for Communities and Local Government (CLG) has issued new statutory guidance for local housing authorities in England on allocation of social housing under Housing Act (HA) 1996 Part 6: *Fair and flexible: statutory guidance on social housing allocations for local authorities in England* (CLG, December 2009).[1]

The guidance replaces the following parts of the statutory *Code of guidance on the allocation of accommodation* which was issued in November 2002:

- Chapters 1, 2 and 6;
- Chapter 5 paras 5.1–5.12, para 5.18 and paras 5.23–5.32;
- Annexes 2, 4, 5, 6, 7, 8, 9 and 12; and

replaces the following paragraphs of the statutory *Code of guidance on choice based lettings* which was issued in August 2008:

- Paragraphs 4.1–4.49;
- Paragraphs 4.68–4.71; and
- Paragraphs 4.79–4.80.

The new guidance came into immediate effect on 4 December 2009. It must be taken into account by housing authorities in discharging their allocation functions: HA 1996 s169. Its publication follows a consultation exercise which ended in October 2009: *Fair and flexible: draft statutory guidance on social housing allocations for local authorities in England - summary of responses to consultation* (CLG, December 2009).[2]

The guidance is accompanied by two assessments of its likely impact:

- *Impact assessment of statutory guidance on social housing allocations for local authorities in England* (CLG, December 2009);[3] and
- *Fair and flexible: statutory guidance on social housing allocations for local authorities in England: equality impact assessment* (CLG, December 2009).[4]

The new guidance particularly promotes choice-based letting (CBL) schemes which operate on the basis of bands rather than points and that cover regional or sub-regional groupings of social landlords. Plans to operate a national scheme for access to social housing will be assisted by research: *Mobility matters: exploring mobility aspirations and options for social housing residents* (Homes and Communities Agency, November 2009).[5]

Homelessness

The government is providing at least £170m to local housing authorities in England, through the homelessness grant, to work on homelessness prevention over the three years 2008/09 to 2010/11. The first statistical evaluation of this work has now been published: *Homelessness prevention and relief: England 2008/09 experimental statistics* (CLG, November 2009).[6] The figures indicate that in the first year 130,000 households in England were prevented from becoming homeless (or helped to find alternative accommodation) in addition to the work authorities had undertaken to meet legal obligations under HA 1996 Part 7. The extra help included providing rent deposits, mediation and sanctuary schemes.

HAT Update November 2009, from the Homelessness Action Team at the Tenant Services Authority (TSA), contains features on homelessness strategies, sale-and-rent-back schemes, private sector access schemes and housing help for offenders.[7]

In 2008, the government launched a new rough sleeping strategy: 'No one left out: communities ending rough sleeping'. The strategy set the objective of ending rough sleeping in England by 2012. 'No one left out' was backed by a 15-point action plan. A new report reflecting on the first year of the strategy has now been published: *No one left out: communities ending rough sleeping. An annual progress report: November 2008–November 2009* (CLG, November 2009).[8]

The correct approach to youth homelessness is now being teased out by housing authorities following the House of Lords' decision in *R (G) v Southwark LBC* [2009] UKHL 26; [2009] 1 WLR 1299. The organisation London Councils has carried out a survey of London boroughs on the impact of the judgment. On 13 October 2009, its Leaders' Committee agreed to ask the Local Government Association to take up the implications of the ruling with central government. The Children's Legal Service at Shelter England has produced a briefing on the legal issues in *R (G): Responding to youth homelessness following the G v LB Southwark judgment* (November 2009).[9]

Social housing fraud

On 30 November 2009, the minister for housing launched a new campaign to address 'housing fraud' in social housing in England which is designed to recover possession of up to 10,000 council and housing association homes. The primary objective is to uncover instances of unlawful subletting of social housing tenancies. Local authority and the larger social landlords have received data on 8,000 possible cases of sub-letting arising from a national information-matching exercise. The government is funding a scheme of rewards for the first 1,000 individuals who report sub-letting of social housing to local landlords.

Guidance has been published to assist social landlords in implementing the campaign: *Tackling unlawful subletting and occupancy: good practice guidance for social landlords* (CLG, November 2009).[10] Campaign funding of £4m has been made available to 147 housing authorities. A marketing pack of publicity materials intended to drive the campaign forward has been published.[11]

Possession proceedings

On 12 November 2009, possession proceedings statistics for England and Wales for the third quarter of 2009 were published: *Statistics on mortgage and landlord possession actions in the county courts – third quarter 2009* (Ministry of Justice (MoJ)).[12] The provisional figures reveal increases in claims and orders made in landlord possession proceedings and an increase in the number of mortgage possession claims leading to possession orders being granted. The Mortgage Pre-Action Protocols are having a 'negative impact on the quality of' the seasonally adjusted figures which would otherwise show a reverse trend; accompanying tables break down the figures by local authority area and court.[13]

The *Short guide from regional resource teams for local authorities on how to prevent homelessness due to mortgage and landlord repossession* has now been distributed to the housing benefit sections of all local housing

authorities as an appendix to Circular HB/CTB A21/2009 (Department for Work and Pensions, December 2009).[14]

Both mortgage borrowers and private tenants are facing particular difficulties in the current recession. The team of 110 staff at National Debtline in Birmingham is now receiving 1,600 calls a day. The number of callers who are behind with mortgage payments has increased by more than 15 per cent: CLG news release, 3 December 2009.[15]

In February 2009, the Money Advice Trust commissioned Shelter to carry out research into the impact of the current economic downturn on the private rented sector. Shelter's research reveals that the recession has exacerbated the financial difficulties of many private sector tenants: *Taking the strain: the private rented sector in the recession*.[16]

Protecting mortgage borrowers

The Council of Mortgage Lenders (CML) has reported that the number of UK homes which have been repossessed increased to 11,700 in the third quarter of 2009 (from 11,400 the previous quarter); however, the CML has reduced its estimated national annual totals for repossessions to 48,000 in 2009 and 53,000 in 2010 (CML press release, 12 November 2009).[17]

The Mortgage Rescue Scheme (MRS) in England is still making only a modest impact according to the latest quarterly figures.[18] They show that in the quarter to September 2009, 74 households accepted an offer from a registered social landlord (RSL) to buy and rent back their homes, taking the total since the MRS's launch in January 2009 to only 92.

It would seem that the equivalent MRS in Wales is proving proportionately more successful. That may be, in part, the result of the pilot scheme being operated by county courts in Carmarthenshire where the Legal Services Commission (LSC) has granted authority to assist with mortgage rescue under a fixed-fee payment, and where the courts are working with a specifically-designed local protocol and using a template court order designed by District Judge Terry Lewis: *Focus magazine,* Issue 62, October 2009, p17.[19]

On the reform of mortgage law, the government announced that before the end of 2009 a consultation paper would be issued on proposals to reverse the decision in *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), and require all lenders to take court proceedings before selling a mortgage defaulter's home: MoJ news release, 12 November 2009.[20]

In a speech delivered on 13 November 2009, the minister for housing announced that to help head off pressures that could risk a rise in mortgage repossessions in 2010, the government is:

- expanding its repossessions campaign into 2010 and into another 34 local hotspot areas;
- extending the English MRS by increasing the number of housing associations involved;
- tightening protections in court with the new checklist that all lenders must complete to show that repossession really is a last resort; and
- toughening up rules – and Financial Services Authority (FSA) regulation – for lenders dealing with borrowers in arrears.[21]

On 25 November 2009, the Treasury announced the launch of a consultation exercise on further strengthening protection for mortgage borrowers: *Mortgage regulation: a consultation* (HM Treasury, November 2009).[22] It proposes the following:

- to extend the scope of FSA regulation to include second-charge mortgages;
- to extend the scope of FSA regulation to include buy-to-let mortgages; and
- to protect borrowers when lenders sell on mortgage books to third parties.

Responses are sought by 15 February 2010.

The House of Commons Library has updated its helpful briefing on *Mortgage arrears and repossessions*.[23]

Housing and human rights

In a speech delivered on 27 November 2009, Lord Neuberger, the new Master of the Rolls, reviewed the latest case-law on the following issues:

- Whether or not housing associations were 'public' authorities for the purposes of the Human Rights Act (HRA) 1998 and amenability to judicial review.
- Whether or not occupiers of social housing could defend possession proceedings on human rights grounds (see below).[24]

The Equality and Human Rights Commission (EHRC) has published its action programme on human rights for the next three years: *Our human rights strategy and programme of action: 2009–2012* (EHRC, November 2009).[25]

Housing and anti-social behaviour

In November 2009, the Secretary of State for Communities and Local Government launched a new package of measures to tackle housing-related anti-social behaviour, including:

- ensuring tenants are supported to challenge landlords, councils and the police where they are failing or not acting quickly enough;
- a new housing anti-social behaviour action squad to work with landlords to spread and embed good practice (see below);
- new guidance for social landlords to provide them with a detailed understanding of how to use their powers effectively (see below); and
- a revised Respect Standard, on tackling anti-social behaviour, which will become binding on social landlords for the first time: CLG news release, 20 November 2009.[26]

Giving further details of the new housing anti-social behaviour action squad, the TSA announced that it was establishing an action squad of experts to work with social landlords to tackle anti-social behaviour: TSA news release, 20 November 2009.[27] On new guidance for social landlords, the Chartered Institute of Housing (CIH) announced that it had been commissioned by the government to draft new guidance to help landlords tackle anti-social behaviour in a new £10m drive targeting 130 local authority areas in England: CIH news release, 20 November 2009.[28]

The Crime and Security Bill, a new government bill, has been introduced in the House of Commons.[29] It is designed to address anti-social behaviour, domestic violence and gang violence. The bill's provisions include:

- parenting assessments where under 16 year olds are being considered for anti-social behaviour orders (ASBOs), and parenting orders where they have breached their ASBOs;
- extending injunctions for violent gang members to those who are under 18; and
- giving police the power to apply for orders to remove alleged perpetrators of domestic violence from their homes or premises for a fixed period of time. The police will be able to apply to magistrates' courts for eviction orders in respect of alleged domestic violence, ousting the alleged perpetrators for 28 days with no right of appeal.

The government has launched a new round of £15m funding for the establishment, by local authorities and social landlords, of Family Intervention Projects (FIPs) designed for social housing tenants facing eviction or other enforcement measures as a result of anti-social behaviour.[30]

A new research report has examined the outcomes from FIPs: *Anti-social behaviour Family Intervention Projects: monitoring and evaluation* (Department for Children, Schools and Families research brief, November 2009).[31] Another report examines the differences between the uses of tools to tackle anti-social behaviour across different local authority areas: *Exploration of local variations in the use of anti-social behaviour tools and powers* (Home Office, December 2009).[32]

Legal aid in housing cases

The terms on which legal aid will be provided through solicitors and other advisers in

housing and other civil law casework from October 2010 have now been released. The LSC has published the 2010 Standard Civil Contract under which it will purchase such legal services from October 2010.[33] The detail relating to housing cases is in Part 10 of the civil specification to the contract (paras 10.15–10.30). The rules for funding the housing possession court duty schemes are at paras 10.31–10.70.[34] The bidding round opens in February 2010.

The LSC has made it clear that, from October 2010, only Community Legal Advice Centres (CLACs) will have contracts for the provision of legal services in social welfare law (including housing) in Derby, Gateshead, Hull, Leicester, Portsmouth, East Riding, Barking and Dagenham, West Sussex, Wakefield and Manchester (although contracts in the last five areas in the list above are still subject to final agreement with local councils): *Statement on the future of joint commissioning* (LSC, November 2009).[35]

Housing advisers in Gloucestershire, Sunderland, Cardiff, Bridgend and Vale of Glamorgan, where previously the LSC published its intention to establish CLACs, have been warned that contracts let to other suppliers in those areas may be for a shorter period than three years from October 2010.

New standards in social housing

The government has decided to exercise its statutory powers to bring all social housing tenants (local authority and RSL tenants) under the jurisdiction of one regulator, the TSA, from April 2010: CLG news release, 10 November 2009.[36] This decision follows the conclusion of, and response to, a consultation: *The Housing and Regeneration Act 2008 (Registration of local authorities) Order 2009: summary of responses to consultation* (CLG, November 2009).[37]

In exercise of powers given by Housing and Regeneration Act 2008 s197, the government has issued statutory directions to the TSA requiring it to issue national standards regulating social housing rent levels (for RSLs) and both the quality of housing let and the degree of tenant empowerment available: *Directions to the Tenant Services Authority: summary of responses and government response* (CLG, 10 November 2009).[38] On 12 November 2009, the TSA responded by publishing consultation drafts of all the new national standards (including those covered by the Directions): *A new regulatory framework for social housing in England: a statutory consultation*.[39] The new standards replace over 50 live Housing Corporation Circulars and Good Practice Notes.

The TSA also published a draft of its proposed 'guidance' on social housing management: *Guidance on the use of powers under the Housing and Regeneration Act 2008. A statutory consultation*.[40] A third TSA document deals with consents to disposals by landlords of social housing stock: *TSA consent to disposals. A statutory consultation*.[41] Responses to the consultation documents should be submitted by 5 February 2010. The final standards will be published in March 2010, and they will come into force on 1 April 2010.

Rents in social housing

On 16 November 2009, the TSA wrote to all housing association chief executives about rent increase limits from April 2010.[42] Since any retail-prices-index-based formula produces a prospective reduction of 0.9 per cent, associations were given until the end of December 2009 to make special representations to the TSA for relief from the imposition of the guideline. The detail is in *Rents, rent differentials and service charges for housing associations 2010–11*, which replaces Housing Corporation Circular 04/08.[43]

Representation of tenants in social housing

On 12 November 2009, the Local Democracy, Economic Development and Construction Act 2009 received the royal assent. Part 1, Chapter 4 of the Act gives the secretary of state power to establish and fund a national representative organisation for tenants (likely to be known as National Tenants' Voice); the provisions in chapter 4 took immediate effect on receiving the royal assent.

Overcrowding and under-occupation in social housing

The Homelessness Action Team at the TSA has published a new self-assessment guide for social landlords to help them address the issues of under-occupation and overcrowding in their stock: *Overcrowding and under-occupation: self-assessment for social landlords* (TSA, October 2009).[44]

Housing in Wales

On 30 November 2009, the proposed National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010, which would give the National Assembly for Wales powers to legislate on housing, was laid in the assembly.[45] If made, the Order will cover:

- regulation of social landlords;
- disposals by social landlords;
- social housing tenancies;
- homelessness; housing allocations;
- housing-related support;
- the provision of Gypsy and Traveller sites; and
- empty homes.

Housing statistics

CLG has published the compendium *Housing and planning statistics 2009* (December 2009), which covers tenure, prices, rents, overcrowding, the right to buy and much more.[46]

On 26 November 2009, the latest figures provided by local authorities in England on their Housing Strategy Statistical Appendix (HSSA) and Business Plan Statistical Appendix (BPSA) for 2008/09 were released.[47] The statistics show that:

- local authorities in England owned 1.8m dwellings on 1 April 2009, following a general decline from 3.2m on 1 April 1999;
- there were 1.76m households on local authority waiting lists on 1 April 2009, stabilising from 1.77m on 1 April 2008. This follows a general increase from 1.04m on 1 April 1999;
- 61 per cent of local authorities in England participated in CBLs on 1 April 2009, an increase from 47 per cent on 1 April 2008;
- local authority landlords in England made 151,700 lettings during 2008/09, following a general decline from 378,900 in 1998/99;
- the number of non-decent local authority dwellings across England was 396,900 on 1 April 2009, a fall from 491,700 on 1 April 2008; and
- local authority landlords in England were granted approximately 1,100 anti-social behaviour injunctions in 2008/09.

Accommodation and support for asylum-seekers

The Home Office has published *Reforming asylum support: effective support for those with protection needs* (November 2009).[48] The consultation paper outlines the way in which the Home Office proposes to recast the former National Asylum Support Service scheme for accommodation and support for asylum-seekers. The consultation period closes on 4 February 2010.

HUMAN RIGHTS

Article 8

■ Paulić v Croatia

App No 3572/06, 22 October 2009

In July 1991, the Croatian government adopted a Decree on the Prohibition of All Real Estate Transactions in Croatia. It banned all transactions in respect of immovable property situated in Croatia and belonging to the former Yugoslavia's federal institutions.

At that time, Mr Paulić was employed as a civilian by the Yugoslav People's Army (YPA). In August 1991, the Požega Garrison Command granted him, his wife and son, the right to occupy and purchase a flat in Požega which was owned by the YPA. In September 1991 they moved into the flat. In October 1991, all possessions of the former YPA came into the ownership of the Republic of Croatia. In October 1997, the state brought a civil action against Mr Paulić, seeking his eviction. It claimed that it was the owner of the flat, and that, as a result of the decree of July 1991, Mr Paulić had never obtained a specially-protected tenancy, and so the state had the right to repossess the flat. The Požega Municipal Court made a possession order. The court found that Mr Pauli´c did not have a specially protected tenancy or any other valid legal entitlement to the flat. His appeals were dismissed. He complained to the European Court of Human Rights (ECtHR) that the national courts' judgments ordering his eviction violated his right to respect for his home, contrary to article 8 of the European Convention on Human Rights ('the convention').

The ECtHR held that there was a breach of article 8. It found that:

■ the flat was Mr Paulić's home. The ECtHR stated:

… the concept of 'home' within the meaning of article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established. 'Home' is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a 'home' which attracts the protection of article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place (para 33);

■ following *Stanková v Slovakia* App No 7205/02, *McCann v UK* App No 19009/04 and *Ćosić v Croatia* App No 28261/06, the requirement that he leave the flat amounted to an interference with his right to respect for his home;

■ the national courts' decisions ordering his eviction were in keeping with domestic law and pursued the legitimate aim of the economic well-being of the country; however,

■ the civil court ordered his eviction without having established the proportionality of the measure. It did not afford Mr Paulić adequate procedural safeguards. The ECtHR stated:

… findings were restricted to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of … his eviction from a state-owned flat … the court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under article 8 of the convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat (paras 42 and 43).

Article 1 of Protocol No 1

■ Sierpiński v Poland

App No 38016/07,
3 November 2009

Mr Sierpiński's family owned a plot of land in Warsaw. He was the heir of the owners of that property. By a decree made in 1945, the ownership of all private land was transferred to the City of Warsaw. His predecessors requested the right of temporary ownership, but in December 1966 the board of the Warsaw National Council refused the request because the land had been designated for public use as an agricultural co-operative. In 1967, the Warsaw-Mokotów District National Council granted the right of perpetual use of the plot of land to a third party (TK). In 1993, the Minister of Planning and Construction declared the 1966 decision null and void. In 2000, the Local Government Board of Appeal declared that the 1967 decision had been issued in breach of the law, but refused to declare the decision null and void in view of its irreversible legal consequences: a civil contract had been concluded with the perpetual user of the land who, in 1990, had transferred the rights to the land to his son. On appeal, Mr Sierpiński's claim for compensation was dismissed. He complained to the ECtHR under article 1 of Protocol No 1 that as a result of the shortcomings in the decisions of the domestic courts and the lack of legal certainty, he had been deprived of compensation for damage caused by an unlawful administrative decision.

The ECtHR found a breach of article 1 of Protocol No 1. It noted that:

■ the concept of 'possessions' in the first part of article 1 of Protocol No 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision; and

■ where the proprietary interest is in the nature of a claim, it may be regarded as an 'asset' only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.

In this case, the 2000 ruling of the Local Government Board of Appeal established that the 1967 decision had been issued in breach of the law and this entitled Mr Sierpiński to seek compensation for damage. That entitlement was provided for expressly in domestic law. He therefore had a 'legitimate expectation' that his claim would be dealt with in keeping with the applicable laws and, consequently, upheld. Accordingly, he had a pecuniary interest that was recognised under Polish law and which was subject to the protection of article 1 of Protocol No 1. The court stated:

… states are under an obligation to provide a judicial mechanism for settling effectively property disputes and to ensure compliance of those mechanisms with the procedural and material safeguards enshrined in the convention. This principle applies with all the more force when it is the state itself which is in dispute with an individual (para 69).

The court concluded that Mr Sierpiński had fallen victim to administrative reforms, inconsistency in case-law and a lack of legal certainty and coherence. As a result, he was unable to obtain due compensation to which he was entitled. The state had failed to comply with its positive obligation to provide measures safeguarding his right to the effective enjoyment of his possessions as guaranteed by article 1 of Protocol No 1, thus upsetting the 'fair balance' between the demands of the public interest and the need to protect the applicant's right.

Article 6 and article 1 of Protocol No 1

■ Komnatskyy v Ukraine

App No 40753/07,
15 October 2009

Mr Komnatskyy was born in 1925. He was recognised as falling within Category I disabled status (the gravest one) on account of his service during the Second World War. He was also an operative who dealt with the consequences of the Chernobyl disaster. From 1997, he was on a special priority list of persons to be allocated an apartment by the state. In August 2006, the Korolyovskyy District Court ordered Zhytomyr Town Council to provide him with an apartment in keeping with the requirements of the Chernobyl Victims' Status and Social Security Act. This decision became final and enforcement

proceedings were commenced in September 2006. Although the Town Council was fined several times, the August 2006 decision was not enforced. On several occasions, the state authorities gave explanations based on a lack of funds in the budget to purchase or construct new apartments and the shortage of available apartments. In October 2009, the enforcement proceedings were still pending. Mr Komnatskyy continued to live in a rented house in poor living conditions, without a water supply, which was described as 'old' and 'ramshackle'. He complained to the ECtHR, under article 6 and article 1 of Protocol No 1, that the August 2006 decision had not been enforced.

The ECtHR found a breach of article 6 and article 1 of Protocol No 1. It noted that the decision had remained unenforced for more than three years. Having regard to his vulnerable status, his present living conditions and, first and foremost, his age, enforcement of the decision required particular diligence. The ECtHR reiterated that it is not open to a state authority to cite lack of funds as an excuse for not honouring a judgment debt.

PUBLIC SECTOR

Possession claims: public law defences

■ R (Weaver) v London & Quadrant Housing Trust

[2009] 5 November, UKSC

The Supreme Court has issued new reasons for its refusal of permission to appeal against the decision of the Court of Appeal ([2009] EWCA Civ 587; July 2009 *Legal Action* 32). The new reasons state that the point of law is clearly one for the Supreme Court, but is not suitable for determination on the facts of this case. Should a suitable case be identified, the Supreme Court's view is that consideration should be given to a leapfrog appeal (Administration of Justice Act 1969 s13).

■ Central Bedfordshire Council v Taylor

[2009] 5 November, UKSC

The Supreme Court has refused the occupiers' application for permission to appeal against a decision that their eviction would not infringe their human rights ([2009] EWCA Civ 613; August 2009 *Legal Action* 32).

Rent increases

■ Circle 33 Housing Trust Limited v Segovia

Lands Tribunal,
[2009] UKUT 203 (LC),
15 October 2009[49]

Ms Segovia was a secure tenant. Her tenancy agreement stated that service charges were £1.80 per week and heating and hot water was £1.42 per week. The service charges for the year 2006/2007 were reduced to £1.02 per week, with heating and hot water charges increasing to £17.39 per week in order to recover a deficit incurred for the year 2004/2005 (covering a period before Ms Segovia's tenancy began). In August 2007, Ms Segovia applied to the Leasehold Valuation Tribunal (LVT) for a determination about the reasonableness of the service charge and heating and hot water charges for 2006/2007 and for 2007/2008. In March 2008, the LVT decided that the terms of the tenancy did not permit Circle 33 to increase the charges for heating and hot water beyond the amount stated in the tenancy agreement, namely £1.42 per week. The LVT also held that Circle 33 was not entitled to recover from Ms Segovia a deficit of heating and hot water charges incurred before her tenancy began as there was no privity of contract between her and the previous tenant. Circle 33 appealed to the Lands Tribunal.

HHJ Robinson held that Circle 33 was entitled to increase heating and hot water charges as a result of clause 1(5) of the agreement, and so partially allowed the appeal. However, she upheld the LVT's decision that Circle 33 was not entitled to recover from Ms Segovia a deficit for services provided to a previous tenant, on the ground that there was no express provision in Ms Segovia's agreement stating that the balancing accounting system operated by Circle 33 permitted recovery of a shortfall incurred before her tenancy began.

Introductory tenancies

■ Plymouth City Council v Hill

Exeter County Court,
6 November 2009[50]

In April 2007, Mr and Mrs Hill were granted an introductory tenancy by Plymouth City Council. Later, the couple fell into arrears of rent and the council served a notice complying with HA 1996 s128. On 15 April 2008, the court ordered Mr and Mrs Hill to give up possession of the property on or before 13 May 2008. Plymouth applied for a warrant for eviction and a bailiff's appointment was given for 25 June 2008. Mr and Mrs Hill sought further time to pay the rent arrears and applied to suspend the warrant. A district judge ordered the warrant to lie on the file or in the court office. There were two further requests for bailiffs' appointments, two more applications to suspend and two further orders that the warrant lie on file. At another hearing on 17 October 2008, a district judge ordered that the warrant lie on file for 21 days pursuant to his powers under County Courts Act 1984 s123. Plymouth appealed against that decision. The council argued that the power to order a warrant to lie on file, as exercised purportedly by the district judge, did not exist and/or even if the power did subsist the district judge could not suspend execution of the warrant past the six-week period prescribed by HA 1980 s89.

HHJ Griggs held that:

- the court could hear and decide the appeal despite the outcome being academic (*R (McKenzie) v Waltham Forest LBC* [2009] EWHC 1097 (Admin)) and the authorities referred to in paragraph 24 in that ruling;
- the court did have jurisdiction to hear the appeal even though the district judge was purporting to exercise an administrative power because he was, in fact, exercising a judicial power;
- in this particular case, the power of the court to order a warrant to lie on the file did not exist; and
- the correct power was the one to suspend and this was limited by HA 1980 s89 to a period of up to six weeks. Beyond that date, there was no power to delay, whether by suspension or the administrative device of ordering the warrant to lie on the file.

ANTI-SOCIAL BEHAVIOUR

■ Croydon LBC v Barber

[2009] EWCA Civ 903,
22 July 2009

The Court of Appeal granted permission to appeal against a possession order in a case where it was said that the council, by treating the claim as a simple matter of anti-social behaviour, failed to take account, for the purposes both of its policy and the Disability Discrimination Act 1995, of the fact which it ought from the matters in its files to have recognised, that Mr Barber was suffering from mental health problems.

■ Richmond Housing Partnership v Green

CC/2009/PTA/0304,
23 October 2009[51]

It appears that the defendant was an assured tenant. His landlord sought possession on HA 1988 Sch 2 Grounds 12 and 14. The evidence of a neighbour was that the defendant smoked noxious substances which prevented her from opening her windows. There was intimidation and harassment. In the middle of the night, Mr Green shouted and banged. There was evidence that he shut off the neighbour's gas supply. He let off fireworks and, throughout 2006, 2007 and early 2008, he played loud music and

shouted threats. On one occasion, he claimed that he had a gun and was a murderer. He followed the neighbour to Kew, a five-minute train journey. He was also fined for an offence contrary to Public Order Act (POA) 1986 s5. Mr Green was debarred from defending for failing to file a defence and lied to the court about the reason why he was unrepresented. After reading witness statements, a recorder made an outright order for possession, saying simply:

Yes, I am entirely satisfied it is entirely right to have a claim for possession and I will order it. So, order for possession forthwith.

Mr Green appealed. He contended that the recorder was wrong in failing to have regard to HA 1988 ss7, 9 and 9A, when deciding to make an outright order and that it was not reasonable to make an outright order in the circumstances of the case.

Saunders J allowed the appeal. It was clear that the recorder did consider the grounds for possession and must have come to a view of reasonableness, although he made no reference to reasonableness as a criterion. Furthermore, he must have considered the question of an immediate or postponed possession order. However, the recorder did not reflect this in his judgment. The difficulty was that the court could not be certain which factors were and were not weighed by the recorder.

Saunders J noted that the defendant had not committed any breaches of the tenancy agreement since July 2008. However, the seriousness of the conviction when combined with other matters was such as to make it reasonable to order possession. The neighbour's life had been rendered intolerable. The recorder was right to say that it was reasonable for possession to be granted. However, after considering *Sandwell MBC v Hensley* [2008] HLR 22, CA and *Lambeth LBC v Howard* (2001) 33 HLR 58, CA, Saunders J concluded that it was right to make an order for possession, but that it should be suspended. He said:

The only reason is because of the length of time since the last incident. I am confident that if there had been further misconduct prior to the appeal I would have heard of it. Given the past it will not take much ... Even the slightest hint of anti-social behaviour will activate the possession order ... The defendant has escaped an order for immediate possession by the skin of his teeth.

He made a possession order suspended for two years.

ANTI-SOCIAL BEHAVIOUR ORDERS

■ Heron v Plymouth City Council

CO/8478/2009,
12 November 2009

Plymouth City Council obtained an ASBO against Mr Heron preventing him from entering car parks. Plymouth applied to vary the ASBO so as to remove that prohibition and replace it with requirements that he:

- did not enter Plymouth city centre;
- did not cause harm, alarm or distress to any person; and
- was always able to produce a receipt for any wrapped goods found on his person.

Mr Heron appealed successfully by way of case stated. Although the prohibition on entering the city centre was necessary and proportionate, the other two terms were not. A prohibition against causing harm, alarm or distress to any person was too imprecise. It was no more than a repetition of offences contained in the POA. The requirement that he have a receipt for any wrapped goods on his person was unintelligible and offended against the need to keep the terms of ASBOs as simple and clear as possible.

RIGHT TO BUY

■ Scrowther v Watermill Properties

Newcastle upon Tyne County Court,
[2009] EW Misc 6,
23 October 2009

The claimant was a secure council tenant. She then exercised the right to buy her house at a discount. Three years later, unemployed and heavily in debt, the claimant entered into a form of equity-release scheme under which she:

- sold the house to the defendants;
- retained sufficient to clear her debts;
- released 25 per cent of the purchase price to the defendants; and
- continued in occupation as an assured shorthold tenant of the defendants at an above market rent.

The claimant quickly fell into arrears with her rent. The defendants obtained and executed a possession order. She then claimed return of the retained 25 per cent of the purchase price (which amounted to over £30,000). The defendants asserted that the retained sum was not repayable because there had been a breach of the tenancy agreement.

HHJ Behrens ordered return to the claimant of the retained sum. The agreement had not complied with Law of Property (Miscellaneous Provisions) Act 1989 s2 and its terms were not fair: they breached the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083.

PRIVATE SECTOR TENANCIES

Assured shorthold tenancies

Confiscation orders

■ B (acting in her capacity as enforcement receiver of N) v N and A and S

[2009] EWHC 2884 (Admin),
13 November 2009[52]

N was convicted of conspiracy to launder the proceeds of crime. A confiscation order for £778,550 was made against her in the Crown Court. The order identified two properties as being 'realisable assets', including one shared house in which Mr A was one of several tenants occupying under an assured shorthold tenancy. When N failed to comply with the confiscation order, the Crown Prosecution Service applied for an enforcement receiver to be appointed in keeping with Criminal Justice Act (CJA) 1988 s80. In November 2008, the receiver was appointed and given extensive powers to realise N's property. The same order also required all persons having possession of such property to deliver possession to the receiver forthwith. In September 2009, the receiver sought a writ of possession in the High Court. Mr A applied to stay the writ and to vary the November 2008 order so as to protect his right to continue to occupy the premises until his tenancy had been lawfully determined. The receiver argued that the public interest meant that the CJA 'trumped' the private law housing rights of Mr A as derived from the HA 1988. Mr A relied on CJA s82(4), which states '[t]he powers [under s80] shall be exercised with a view to allowing any person other than the defendant ... to retain or recover the value of any property held by him'.

James Goudie QC, sitting as a deputy High Court judge, rejected the receiver's submission that the CJA regime took precedence over the HA 1988.

Much clearer language would be required to expropriate a property right and to do so without compensation. The general scheme of the confiscation legislation is to realise the criminal's assets, but not to infringe the property rights, procedural and/or substantive, of other parties who may themselves be entirely innocent (para 28).

The CJA 'does not trump' the HA 1988. The judge also rejected the receiver's alternative argument that s82(4) bestowed a discretion on the court whether or not to

uphold the tenant's rights (and that in the circumstances the discretion ought to be exercised against Mr A). The judge found that there was no discretion under the CJA and no right to limit or qualify Mr A's rights in any way. The receiver was not entitled to a possession order in respect of the property until Mr A's property rights had been determined in the normal way.

Tenants' deposits

■ O'Brien v Hill

Barnet County Court, 22 September 2009[53]

Mr O'Brien granted Mr Hill an assured shorthold tenancy for a fixed term of 12 months starting on 9 June 2008. On 12 June 2008, the landlord served a notice under HA 1988 s21. On 2 July 2008, the landlord received the payment of the deposit from a third party, Barnet council, which had previously agreed to pay the tenant's deposit. The landlord registered the deposit with The Deposit Protection Service on 7 July 2008. Later, he issued a possession claim under the accelerated procedure relying on the s21 notice served on 12 June 2008.

District Judge Silverman ordered that the claim be struck out on the basis that the s21 notice was invalid because it was given at a time when there had not been compliance with HA 2004 s213, but gave the claimant permission to restore the claim if he thought that the order should not have been made. The claimant then applied to restore the claim on the basis that s213 did not apply because, at the time that the s21 notice was served (ie, 12 June 2008), the landlord had not yet received the deposit from Barnet and therefore he was unable to protect the deposit with an authorised scheme. The landlord argued that the s21 notice must therefore be valid and requested that a possession order be made. District Judge Silverman accepted this argument and made a possession order.

Harassment and unlawful eviction

Damages

■ Odera v Iqbal

Luton County Court, 3 September 2009[54]

The claimant was the assured shorthold tenant of a room in a three-bedroom house with shared, common amenities. From August 2007, she lived there with her 11-year-old daughter. The defendant was the landlord. There was no written agreement. Ms Odera claimed that throughout her tenancy the defendant harassed her by entering the premises unannounced and without warning. In January 2008, he gave her a defective notice seeking possession. She began looking for alternative accommodation. On 17 February 2008, she packed her belongings and told the defendant that she was on her way to collect the keys for her new accommodation. However, the new landlord would not give her the key to the promised accommodation as her deposit was short by £60. She returned to the premises about 8 pm. Later, the defendant and another man removed her belongings and placed them outside the front of the property. He dragged both the claimant and her daughter out of the bedroom, down the stairs and outside. They remained there for approximately an hour and a half. Although the police were called, they accepted the defendant's word that the claimant had no right to remain in the premises, but requested that he store her belongings until she could collect them the next day. She spent the night in emergency accommodation, and then stayed with her sister in Watford for three days. When the claimant returned to the premises to collect her belongings, she discovered that they had been discarded in the back garden and were soaked and rain damaged.

HHJ Kay QC accepted the claimant's evidence. He found that she had been subject to harassment from the defendant after the expiry of the invalid notice to quit on 6 February until her eviction on 17 February. The judge accepted that the claimant and her daughter were assaulted. He found that although the claimant had hoped, was ready to and intended to vacate the premises, she had not formally surrendered the tenancy; she had not handed over the keys and did not do any unequivocal act amounting to a surrender.

The judge accepted that her belongings were damaged in the way alleged. He ordered an enquiry concerning damages for the value of the belongings, to be the subject of a later hearing. In the interim, he awarded general damages of:

- £500 for breach of covenant for quiet enjoyment and trespass for the two weeks before eviction;
- £1,000 for the assault and method of eviction;
- £1,500 aggravated damages, particularly given that the claimant's daughter witnessed, and was subject to, an assault; and
- £1,000 exemplary damages because the defendant sought to increase his income by obtaining new tenants who could pay the full rent for the entirety of the premises.

Subsequently, the parties agreed a figure of £750 by way of special damages.

■ Cashmere v Walsh, Downing and Veale

Central London County Court, 27 October 2009[55]

Mr Cashmere was granted an assured tenancy of a flat in the Docklands in 1990. In 2000, Ms Downing bought the flat as the bare trustee for Mr Walsh. Ms Veale was Ms Downing's mother and a business associate of Mr Walsh. Between 2000 and 2003, the flat suffered from minor disrepair (a light pendant, windows and a storage heater in the living room did not work). In 2003, the second storage heater in the living room also became inoperative. In 2004, the bathroom was refurbished by Ms Downing, but thereafter the handle on the cistern kept breaking and the original vinyl flooring in the bathroom was not replaced. In June 2007, Mr Cashmere began to spend more time at his girlfriend's home because of the defects to the flat. He was, nevertheless, still in occupation. Ms Downing and Ms Veale promised that they would carry out repairs. On 2 December 2007, they asked Mr Cashmere to move out for the duration of works. Mr Cashmere moved out and allowed the landlord to clear the flat of his belongings, which were piled in the corridor. The works were completed within a week; they included a new front door and a new lock. When Mr Cashmere asked for a copy of the keys so that he could move back in, he was told he could not have them as there were rent arrears. He made several attempts to call the defendants and went to their home but was sent away by Ms Veale. He contacted solicitors who wrote pre-action letters to each of the defendants demanding that he be allowed to return and that his belongings be restored to him. Mr Walsh indicated that he was now the owner of the flat and that he had a new tenant in the flat. The annual rent was £10,920.

In a claim for damages, HHJ Cowell found the defendants had duped Mr Cashmere into handing over the flat to them on the pretext of repairs being required and that although works had been done, there had never been any intention to return the keys to Mr Cashmere. He awarded damages against:

- Mr Walsh (as the owner of the premises) in the sum of £73,215;
- Ms Downing (as the co-owner until just before the eviction and as Mr Walsh's agent at all material times) in the sum of £33,715; and
- Ms Veale (as an agent of Mr Walsh with a controlling influence over the others) in the sum of £24,515.

The awards were calculated as follows:

- £9,200 for disrepair. Damages of £1,200 for the first three years (ie, £400 per annum (four per cent of the rent)) and damages of £8,000 for the remaining five years (about 15 per cent of the rent).
- £47,000 against Mr Walsh under HA 1988 ss27 and 28. He had become the legal owner by the time of the unlawful eviction. Although

Mr Cashmere had previously caused noise nuisance to his neighbours and had 'historic' arrears of about £7,000, it was plain from the evidence that neither of these factors was the reason for the eviction. Although the defendants had chased housing benefit (or assisted in doing the same) the evidence showed that it was not until the day on which they refused to hand over the keys to the flat that they first required Mr Cashmere to make any payments himself. The true reason for the eviction was the desire to sell the flat which was achieved following the unlawful eviction. It followed that no reduction was appropriate under s27(7)(a) either by reason of the noise nuisance or by reason of the arrears.

- £8,000 against Ms Downing and Ms Veale for their part in the deception and the refusal to hand over keys, which amounted to a trespass. Mr Cashmere had taken over 18 months to find suitable alternative accommodation.
- £500 for the failure to return a deposit.
- £6,515 against Mr Walsh and Ms Downing for the loss of Mr Cashmere's belongings which were never recovered.
- Aggravated damages of £10,000 against all three defendants. Mr Cashmere had been duped into handing over access to the flat. He had even assisted in his own eviction by helping to store belongings in the communal corridor, a fact which the judge described as the consequence of an appalling piece of treachery. When told he could not have the keys, his belongings were left outside and were eventually dumped by the defendants. Mr Cashmere had no opportunity to recover them as he was never told where they were. In subsequent correspondence with Mr Cashmere's solicitors, the defendants, who were plainly acting together, had lied about the whereabouts of his belongings, had denied the eviction and had denied control over the flat at the relevant time. They had also lied about a new tenant being put into the flat after the eviction, a lie that caused Mr Cashmere's advisers not to pursue an injunction for reinstatement to the flat.

TRESPASSERS

Possession claims and injunctions

■ Secretary of State for Environment, Food and Rural Affairs v Meier

[2009] UKSC 11,
1 December 2009,
(2009) Times 3 December[56]

New age Travellers occupied land in Hethfelton Wood which was owned by the claimant but managed by the Forestry Commission. Some of them had children who attended local schools. The claimant sought possession against a number of named defendants and persons unknown of the wood which they were occupying and other sites. The defendants accepted that they were trespassers. Some had camped previously at Moreton Plantation, less than five miles from Hethfelton. The only defence advanced related to the HRA. Recorder Michael Norman made forthwith possession orders, but refused to extend the possession orders to other sites or grant an injunction in relation to other land. The claimant appealed the latter part of his order. The Court of Appeal allowed the appeal and made a possession order in respect of land which was not occupied ([2008] EWCA Civ 903; [2009] 1 WLR 828; October 2008 *Legal Action* 35). The occupiers appealed to the Supreme Court.

The Supreme Court allowed the occupiers' appeal to the extent of setting aside the wider possession order. Lord Rodger said:

Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission … the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate (paras 6 and 9).

Lord Neuberger said:

… courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited … it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case …

The notion that an order for possession may be … made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty) (paras 59, 64 and 65).

The court overruled *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906, CA; [2004] EWCA Civ 200. However, an injunction could be granted to prevent trespass. Lord Neuberger said:

Nonetheless, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

However … the court should not normally make orders which it does not intend, or will be unable, to enforce … [but] even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants (paras 79, 80 and 83).

Adverse possession

■ Northern Ireland Housing Executive v Gallagher

[2009] NICA 50,
26 October 2009

Mr Gallagher's father, a coal merchant, initially rented land from the Londonderry Corporation from about 1955 to 1966, using it for the grazing of horses. In or about 1966, the Corporation ceased to collect rent. Later, the Northern Ireland Housing Executive (NIHE) became the paper owner of the land, but Mr Gallagher's father continued to use it in a manner which he said showed that he had adverse possession of it. Over the years, Mr Gallagher repaired rough fencing around the disputed land. He also claimed that he fertilised the land, put lime on it and applied a weedkiller. On one occasion he grew potatoes on part of it, but 'this was an unsuccessful venture as local residents removed the potatoes'. The NIHE sought possession. Mr Gallagher defended and counterclaimed that he had established 12 years' adverse possession.

Deeny J concluded that Mr Gallagher: '… fell very far short of establishing the necessary 12 years' adverse possession. He concluded that he could not safely rely on [his] evidence (whom he clearly regarded as an unsatisfactory witness) unless there was some corroboration for it'. He made a possession order. Mr Gallagher appealed.

After considering *Powell v McFarlane* (1977) 38 P&CR 452, CA; *Buckingham CC v Moran* [1990] Ch 623, CA; and *J A Pye (Oxford) Limited v Graham* [2002] 1 AC 419, HL; [2002] UKHL 30, the Northern Ireland Court of Appeal dismissed the appeal. The evidence fell short of establishing possession by Mr Gallagher or an animus possidendi. His actions were at best equivocal and not necessarily referable to an intention to possess or an intention to dispossess the paper owner.

HOUSING ALLOCATION

■ R (Ariemuguvbe) v Islington LBC

[2009] EWCA Civ 1218, 21 October 2009

Islington had a CBL scheme that assessed housing needs by the use of points. Its scheme provided that 'the needs of all individuals in the applicant's household will be taken into account when points are awarded'. The claimant lived with her husband, five children (aged 31, 29, 27, 24 and 22) and three young grandchildren. The council declined to take the five adult children into account when assessing the claimant's points as they were all independent adults and were each subject to leave to remain in the UK which was conditional on not having recourse to public funds. The claimant complained that the scheme did not define 'household' and, on an ordinary meaning of the word, the whole family lived as one household. Cranston J dismissed a claim for judicial review (see [2009] EWHC 470 (Admin); June 2009 *Legal Action* 28). The claimant appealed.

The Court of Appeal dismissed the appeal. The allocation scheme was not an enactment and had to be read in a practical, common sense and non-legalistic way. The scheme had to be given an interpretation that 'allows a sensible degree of flexibility when it comes to dealing with individual cases' (para 31). The council had been entitled to take account of the fact that none of the five adult children would have qualified for social housing in their own right. It had applied the scheme correctly, interpreted in a common sense fashion, to the particular circumstances of the claimant.

Public Services Ombudsman for Wales

Complaint

■ Pembrokeshire CC

2008/02230, 9 November 2009

The complainants applied for a transfer to alternative council accommodation. They claimed that a senior housing official had built up false expectations of their likelihood of obtaining a transfer. The Ombudsman found that the complainants had not been advised appropriately and criticised some aspects of the council's response to their complaints. The council agreed to implement recommendations aimed at minimising the chance of recurrence of the errors made.

HOMELESSNESS

Human rights

■ R (EW) v Secretary of State for the Home Department

[2009] EWHC 2957 (Admin), 18 November 2009

In deciding a claim for judicial review of an immigration decision, the Administrative Court considered the extent to which article 3 of the convention requires the state to provide accommodation to the homeless. After reviewing *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, Hickinbottom J said:

… the important point to note is that there is no general right to accommodation or a minimum standard of living that can be drawn from the [convention] or the Directives, or from elsewhere in the European or our domestic human rights, social or other legislation. The setting of such a minimum standard - no matter how low - is a matter for social legislation, not the courts.

… their Lordships were at pains to stress that article 3 does not prescribe a minimum standard of social support for those in need: it does not require the state to provide a home or a minimum level of financial assistance to all within its care…

… The opinions in Limbuela *were clear in reinforcing the proposition that article 3 did not require a member state to provide accommodation for all within its jurisdiction, nor provide a minimum standard of living … and it required more than a state's passivity for breach* (paras 23, 86 and 90).

Interim accommodation

■ R (Kelly and Mehari) v Birmingham City Council

[2009] EWHC 3240 (Admin), 10 November 2009

The claimants applied to the council for assistance with accommodation under HA 1996 Part 7. Mr Kelly, a young man with mental health and medical problems, attended the council's offices with medical evidence and a letter from his mother confirming that she had 'kicked him out'. Mr Mehari had been sharing a house with other single men and occupied a room created by conversion of a toilet. When Mr Mehari's wife and child joined him, the landlord took away his keys. In both cases, the council declined to provide temporary accommodation. The claimants sought judicial review and were granted interim relief rendering the claims academic.

The claims were pursued on the basis that they demonstrated that the council was systemically failing to comply with its duty to provide interim accommodation to applicants under HA 1996 s188. Instead, the council's documents and procedures showed it to be considering whether or not applicants seeking assistance were entitled to 'emergency accommodation' before providing any interim shelter. The council admitted that there had been mistakes in the particular cases; however, it said that these were not the result of its policy but of individual officers' errors.

Hickinbottom J gave permission to apply for judicial review. He rejected the proposition that the problems had been caused by officers failing to comply with instructions. The judge held that the general practice and procedure of the council was unlawful in respect of interim accommodation. He said:

None of the officers purported to apply the [s]188 criteria. None of the council's documents explained that they should do so, nor did their external documents explain or suggest to applicants that those criteria would be applied. The [s]188 duty to afford interim accommodation pending the conclusion of enquiries under [s]184 is part of a comprehensive and coherent statutory scheme: but the council treated what they called the application for 'emergency accommodation' as a discrete and separate exercise, divorced from the substantive housing application … I am satisfied that, far from the errors in these cases being of individuals who went outside the council's practice and procedures, the relevant officers were following the practice and procedure they were encouraged to follow by the council themselves.

… In my judgment, the failure of the council to apply the [s]188 criteria in the two cases was symptomatic of a general failure of their practice and procedure. The approach of the council to their obligations under [s]188 at the very least lacks legal coherence and a proper consideration of the relevant [s]188 criteria. So far as the council are concerned that failure had and, insofar as that practice continues, continues to have, the effect of avoiding their obligations under [s]188 of the 1996 Act (paras 39–40).

Accommodation pending review

■ **R (Anwar) v Manchester City Council**

[2009] EWHC 2876 (Admin), 24 April 2009

The claimant applied to the council for homelessness assistance for himself, his wife and their baby. The council decided that he had become homeless intentionally and that 14 days would be sufficient for him to seek alternative housing: HA 1996 s190(2). The claimant applied for a review of that decision (s202) and asked for accommodation pending the outcome (s188(3)) or for the extension of the 14-day period allowed under s190(2). The council declined. The claimant sought judicial review. The evidence before the court was that within the following week the claimant would be able to clear previous arrears, secure housing benefit and with the help of a bond scheme acquire a private sector tenancy. HHJ Pelling QC decided that the judicial review claim was at least arguable and, in the circumstances, the grant of an interim injunction was warranted, to expire at the end of the following week.

Review procedure

■ **Harman v Greenwich LBC**

Lambeth County Court, 24 November 2009[57]

On a review of an adverse decision notified under HA 1996 s184, a reviewing officer decided that the requirements of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) applied. The claimant's solicitors were sent a letter, dated 12 June 2009 and received on 17 June 2009, which read: 'I would therefore require a response or any submissions from you … The submissions should reach me by 19 June'. The solicitors were unable to contact the claimant in time to make written representations and the reviewing officer notified a further adverse decision.

HHJ Welchman allowed an appeal on two grounds:

■ Giving the claimant only a week to make representations was unreasonably short, and the two days' actual notice was manifestly too short.

■ The letter had failed to draw attention to the right to make oral representations and how they should be made.

HOUSING AND CHILDREN

■ **R (A) v Croydon LBC;**
■ **R (M) v Lambeth LBC**

[2009] UKSC 8, 26 November 2009

The claimants were young people who had applied to the two councils for accommodation under Children Act (CA) 1989 s20. A question arose about how decisions about the age of the applicants should be resolved, if their ages were in doubt. The Supreme Court decided that because CA 1989 s105(1) defined a child as 'a person under the age of eighteen', it raised a question of fact for the councils to resolve. If their assessments were challenged, a judicial review court would have to decide on the evidence whether or not the applicant was a child. There was no room for any discretion or policy issues to affect the decision. It was purely for the council and (on review) the court to decide the question on the facts.

Comment: Recent cases in which the judicial review courts have taken a different and more restrictive approach may need to be reconsidered, for example, the November 2009 decision in *R (AW) v Croydon LBC* [2009] EWHC 3090 (Admin). See also page 26 of this issue.

■ **R (C and C) v Nottingham City Council**

[2009] EWHC 2766 (Admin), 12 October 2009

The claimants were a very young couple. At age 16, the male claimant had applied for homelessness assistance when his relationship with his family broke down. The council had placed him in a homeless persons' hostel. He began a relationship with the female claimant, also 16, who lived with her father. The father asked her to leave. When she applied for homelessness assistance, she was placed in the same hostel and the couple shared a room. The female claimant became pregnant and both claimants were evicted following their arrest for drugs offences. Although charges were later dropped, the council decided that they had become homeless intentionally.

The claimants sought judicial review and a declaration that they had been children in need owed the accommodation duties in CA 1989 s20. In addition, they complained that the council (a unitary authority) had no protocol between housing and social services departments for jointly assessing the needs of young homeless people.

HHJ Inglis refused permission to claim judicial review. The accommodation had been provided by the housing department and not social services, so it could not be said that the claimants had been accommodated under s20, even if they should have been. Although the failure to have a protocol was in breach of *Homelessness code of guidance for local authorities* para 12.6 (CLG, 2006), the council was working on a protocol and expected to adopt one in the near future.

1 Available at: www.communities.gov.uk/documents/housing/pdf/1403131.pdf.
2 Available at: www.communities.gov.uk/documents/housing/pdf/1403178.pdf.
3 Available at: www.communities.gov.uk/documents/housing/pdf/1403246.pdf.
4 Available at: www.communities.gov.uk/documents/housing/pdf/1403197.pdf.
5 Available at: www.homesandcommunities.co.uk/public/documents/Mobility_Matters_Report.pdf.
6 Available at: www.communities.gov.uk/documents/statistics/pdf/1393543.pdf.
7 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.19793.
8 Available at: www.communities.gov.uk/documents/housing/pdf/1395288.pdf.
9 Available at: http://england.shelter.org.uk/__data/assets/pdf_file/0005/231269/G-v-Southwark–ChildrenLegalService_briefing-Nov09.pdf.
10 Available at: www.communities.gov.uk/documents/housing/pdf/1396431.pdf.
11 Available at: www.communities.gov.uk/publications/housing/housingfraudtoolkit.
12 Available at: www.justice.gov.uk/about/docs/stats-mortgage-land-q3-09.pdf.
13 Available at: www.justice.gov.uk/publications/docs/stats-la-and-court-breakdowns-qu3-09.xls.
14 Available at: www.dwp.gov.uk/docs/a21-2009.pdf.
15 Available at: www.communities.gov.uk/news/housing/1402302.
16 Available at: http://england.shelter.org.uk/__data/assets/pdf_file/0009/229725/Taking_the_strain_PRS_during_recession.pdf.
17 Available at: www.cml.org.uk/cml/media/press/2456.
18 See: www.communities.gov.uk/publications/corporate/statistics/mortgagerescuestatistics q32009.
19 Available at: www.legalservices.gov.uk/docs/about_us_main/focus_62.pdf.
20 Available at: www.justice.gov.uk/news/newsrelease121109a.htm.
21 Available at: www.communities.gov.uk/speeches/housing/cmlconference2009.
22 Available at: www.hm-treasury.gov.uk/d/consult_mortgage_regulation.pdf.
23 Available at: www.parliament.uk/commons/lib/research/briefings/snsp-04769.pdf.
24 'The current legal challenges facing social landlords: a judge's perspective' is available at: www.judiciary.gov.uk/docs/speeches/mr-shla-lecture-2009.pdf.
25 Available at: www.equalityhumanrights.com/uploaded_files/publications/our_human_rights_strategy.pdf.
26 Available at: www.communities.gov.uk/news/housing/1388365.
27 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.19807/changeNav/14567.
28 Available at: www.cih.org/news/view.php?id=1139.
29 Available at: http://services.parliament.uk/

bills/2009-10/crimeandsecurity.html.
30 Visit: www.dcsf.gov.uk/everychildmatters/strategy/parents/ID91askclient/thinkfamily/tf/.
31 Available at: www.dcsf.gov.uk/research/data/uploadfiles/DCSF-RBX-09-16.pdf.
32 Available at: www.homeoffice.gov.uk/rds/pdfs09/horr21c.pdf.
33 Visit: www.legalservices.gov.uk/civil/8758.asp#About.
34 Available at: www.legalservices.gov.uk/docs/civil_contracting/Section_10_-_Miscellaneous_Nov_09.pdf.
35 Available at: www.legalservices.gov.uk/docs/cls_main/Statement_on_future_of_Joint_Commissioning_FINAL.pdf.
36 Available at: www.communities.gov.uk/news/housing/1379025.
37 Available at: www.communities.gov.uk/documents/housing/pdf/1376860.pdf.
38 Available at: www.communities.gov.uk/documents/housing/pdf/1379446.pdf.
39 Available at: www.tenantservicesauthority.org/upload/pdf/Statutory_consultation_web.pdf.
40 Available at: www.tenantservicesauthority.org/upload/pdf/Guidance_on_use_of_powers.pdf.
41 Available at: www.tenantservicesauthority.org/upload/pdf/TSA_consent_to_disposals.pdf.
42 See: www.tenantservicesauthority.org/upload/pdf/Rents_letter_2010_11.pdf.
43 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.19783.
44 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.19788.
45 Available at: www.assemblywales.org/lco-ld7808-e.pdf.
46 Available at: www.communities.gov.uk/documents/statistics/pdf/1400509.pdf.
47 Available at: www.communities.gov.uk/documents/statistics/pdf/1186234.pdf.
48 Available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/221878/simplifying-imm-law-new-framew1/asylum-support-consultation?view=Binary.
49 Sandra Yao, solicitor, Hopkin Murray Beskine, London and Patricia Tueje, barrister, London.
50 Russell James, barrister, Devon Chambers, Plymouth.
51 Chay Alexis, Blavo & Co solicitors, London and Samuel Waritay, barrister, London.
52 Mary Ward Legal Centre, London and Jamie Burton, barrister, London.
53 Tilly Rubens, solicitor, Alan Edwards & Co, London.
54 Mandeep Gill, ARKrights solicitors, Watford and Samuel Waritay, barrister, London.
55 Mark Martynski, Glazer Delmar solicitors, London and Dominic Preston, barrister, London.
56 Chris Johnson, solicitor, The Community Law Partnership, Birmingham.
57 Michael Paget, barrister, London and Jeff Sharp, HE Thomas solicitors, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 49–57 for transcripts or notes of judgments. Readers can visit their websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm.