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

Homelessness

The latest statistics on statutory homelessness in England cover January to March 2013: *Statutory homelessness: January to March 2013 and 2012/13, England* (Department for Communities and Local Government (DCLG), June 2013).[1] They indicate that:

- 13,230 applicants were accepted as owed the main homelessness duty (Housing Act (HA) 1996 s193) in those three months;
- in the financial year 2012/13, there were 53,540 acceptances (an increase of six per cent from 50,290 in 2011/12);
- 55,300 households were in temporary accommodation on 31 March 2013 (ten per cent higher than at the same date in 2012);
- there were 14 per cent increases in the numbers of both families in bed and breakfast (B&B) accommodation and applicants placed in temporary accommodation out of district on 31 March 2013 compared with the same date in 2012;
- 760 families were placed in B&B for longer than the statutory maximum of six weeks.

Nearly 80 per cent of the 760 families in B&B for more than six weeks were placed there by just 15 local authorities. They have been invited to bid for part of a new £1.8m fund to develop innovative and sustainable solutions to the problems that are driving the use of B&B.[2] The 15 local authorities are Barking & Dagenham, Birmingham, Brent, Crawley, Croydon, Hammersmith & Fulham, Harrow, Hillingdon, Hounslow, Milton Keynes, Redbridge, Reigate & Banstead, Tower Hamlets, Wandsworth and Westminster.

Eligibility for housing

The eligibility rules for both allocations and homelessness have been amended to take account of Croatia joining the EU on 1 July 2013: the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2013 SI No 1467.[3] On 14 June 2013, the DCLG wrote to local housing authorities explaining how the eligibility provisions would apply to Croatian nationals.[4]

The European Court of Human Rights (ECtHR) has published a substantial (but free) new handbook on European law on asylum and immigration: *Handbook on European law relating to asylum, borders and immigration*.[5]

Discretionary housing payments

Universal credit claimants who have rent (or equivalent) liabilities will now be able to apply for discretionary housing payments (DHPs) in the same way as tenants claiming housing benefit (HB): the Welfare Reform Act 2012 (Consequential Amendments) Regulations 2013 SI No 1139.[6]

Given the recent increase in applications for DHPs, councils may find they can boost available funds by meeting the cost of DHPs for their own tenants from their Housing Revenue Accounts rather than from general council funds. On 9 May 2013, the DCLG wrote to local housing authorities in England inviting applications for specific directions to that effect under Local Government and Housing Act 1989. Swindon Council was among the first to apply and received such a direction on 29 May 2013.[7]

Housing law reform

The Welsh government has published a white paper on its proposed reforms of the law on rented housing: *Renting homes. A better way for Wales*.[8] Consultation on the proposals closes on 16 August 2013.

The new housing tribunal

The Property Chamber of the First-tier Tribunal was established with effect from 1 July 2013. The Chamber brings together the former rent assessment committees, residential property tribunals, leasehold valuation tribunals, agricultural land tribunals and the Land Registry adjudicator: the Amendments to Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 Order 2013 SI No 1034.[9] The President of the Chamber is former housing barrister Siobhan McGrath, the immediate past Senior President of the Residential Property Tribunal Service.

Appeals from the Property Chamber will lie to the Upper Tribunal (Lands Chamber). The President of that Chamber is Lindblom J and the new Deputy President is Judge Martin Rodger QC.

HUMAN RIGHTS

Article 8 and article 1 of Protocol 1

■ Optima Community Association v Ker

[2013] EWCA Civ 579, 24 May 2013

In February 2009, Optima granted Ms Ker an assured shorthold tenancy of a flat under a 'FlexiBuy' scheme, whereby she paid a market rent of £700 but had an option to purchase the property at a later date. If she exercised that option, Optima would give her a deposit to help fund the purchase. The value of the deposit was calculated as the difference between the market rent actually paid and the notional social rent that could have been charged for the property (the difference amounting to around £2,500 per year). If Ms Ker was evicted, she would lose both the option and the right to the deposit. After about a year, Ms Ker stopped paying her rent in full. Optima served a HA 1988 s21 notice. Ms Ker defended the subsequent possession claim contending that it was disproportionate to make an order for possession and that the tenancy agreement was a sham in so far as it provided that the monthly payment of £700 was rent. She counterclaimed for a money judgment in respect of the deposit. HHJ Hall made a possession order, with a money judgment for the arrears. He dismissed her counterclaim. She appealed. In the Court of Appeal, Ms Ker accepted that she could not afford to live in the property and did not seek to reverse the possession order. However, she challenged the money judgment for the arrears and the right of Optima to terminate her tenancy.

The Court of Appeal dismissed the appeal. There was no allegation in the pleadings nor any evidence from Ms Ker of a common intention by her and Optima to deceive any third party about the terms and effect of the tenancy agreement. The judge was therefore correct to reject the claim that the tenancy was a sham. Furthermore, she had no answer to the claim for possession on article 8 or article 1 of Protocol 1 grounds. The property was not provided to her as social housing but as part of a scheme designed to enable applicants to acquire ownership of property without having to enter into an immediate purchase with the financial commitment which that would involve. Ms Ker fully understood the nature of the scheme and the commercial realities it

involved. Optima did its best to assess her ability to afford the outgoings but Ms Ker's assessment of her own financial prospects was over-optimistic and she failed to disclose that she would need and intended to apply for support in the form of HB. The FlexiBuy scheme was not intended for tenants dependent on HB and Ms Ker's application would not have been accepted had she disclosed this fact.

It was not disproportionate for Optima to seek, or for the court to grant, an order for possession. Ms Ker had no proprietary right to the deposit. It was not her property but was, at best, a contractual right to future property which would arise if certain circumstances came to pass (ie, only if she was in a position to purchase the flat under the option agreement). Looked at simply in terms of the construction of the documents signed, Ms Ker's case was hopeless. The tenancy agreement was an ordinary form of assured shorthold tenancy. It reserved the entire £700 as rent and was granted on Optima's standard terms and conditions. It contained no reference to part of the rent being appropriated towards a future deposit under a shared ownership purchase.

ANTI-SOCIAL BEHAVIOUR

■ Willoughby v Solihull MBC

[2013] EWCA Civ 699,
8 May 2013

Ms Willoughby was a secure tenant. She suffered from mental health problems and was a recovering heroin addict and alcoholic. She was receiving support from drug and alcohol support services. Her neighbours complained that she and her boyfriend caused nuisance and annoyance by arguing, swearing, shouting and banging loudly inside the flat. Solihull obtained an interim injunction which prohibited Ms Willoughby from allowing her boyfriend into her flat or from causing a nuisance or annoyance to her neighbours. In September 2012, the council issued a committal application for breach of the interim injunction. Ms Willoughby admitted seven out of eight alleged breaches and was sentenced to two months' imprisonment, suspended on terms that there was no further breach of the injunction.

Solihull later obtained a final injunction in broadly the same terms as the interim injunction. Committal proceedings were issued in respect of further alleged breaches, a number of which were admitted. HHJ Pearce-Higgins QC found that the terms of the suspended sentence had been breached. He activated that sentence. He also sentenced Ms Willoughby to an additional ten months for the newly admitted breaches, to be served consecutively to the activated suspended sentence, making a total of 12 months. Ms Willoughby appealed.

The Court of Appeal allowed the appeal. It substituted a sentence of three months' imprisonment, plus the previously suspended sentence. Custody is the most serious sanction that can be imposed by a civil court. Such sentences should only ever be made for the minimum appropriate period.

SECURE TENANCIES

Succession

■ Reading BC v Holt

[2013] EWCA Civ 641,
7 June 2013

From 1949 to 1977, Mr Holt was the sole tenant of a three-bedroom council house. On his death, the council granted a tenancy to his wife. That tenancy became a secure tenancy as a result of the HA 1980. Mrs Holt died in 2010. Their daughter Wendy Holt, who was born in 1953 and had lived all her life in the property, succeeded to the tenancy (HA 1985 ss87 and 89). The council served a notice seeking possession relying on HA 1985 Sch 2 Ground 16 on the basis that the accommodation was more extensive than was reasonably required. The council made five offers of alternative accommodation. Ms Holt did not accept any of them. A possession claim was issued. There was no live offer of a particular property at the time of trial. Ms Holt conceded that her house was more extensive than she reasonably required but argued that:

■ it was not reasonable to make an order for possession; and

■ given that there was no offer of any particular property at the date of trial, the court could not be satisfied that suitable accommodation would be available for Ms Holt when the order took effect.

Recorder Moulder made a possession order, conditional on the council making Ms Holt an offer of accommodation which satisfied specific requirements set out in the order. Ms Holt appealed.

The Court of Appeal dismissed the appeal. In relation to reasonableness, the recorder had directed herself correctly as to the relevant principles, properly considered the evidence before her and identified the material considerations and weighed them with great care in arriving at her conclusion. She made no error of principle and did not arrive at a conclusion which was plainly wrong. The points made on the appeal were all matters which the recorder had considered in 'her long and careful judgment' (para 39). She specifically took into account the length of Ms Holt's residence, the evidence from her doctor that she became agitated when she was away from the property and that it contained a lifetime of belongings and, no doubt, memories. She also expressly mentioned Ms Holt's anxiety and depression at the thought of having to move and found that there was a real risk that she might not settle elsewhere. Kitchin LJ said that:

… in assessing the reasonableness of making a possession order it is not appropriate or helpful to seek to draw comparisons with the conclusions reached on the facts in other cases. Such a course is likely to lead to a needless citation of authority and a corresponding and unnecessary increase in the length and costs of the hearing because the competing considerations, taken as a whole, are bound to vary from case to case. The issue of reasonableness must be decided in each case in the light of its own facts (para 45).

With regard to suitable alternative accommodation, there is no requirement either that an offer of accommodation is made before the date of the trial or that the accommodation is available at the date of that hearing. 'The court must instead be satisfied that suitable accommodation will be available when the order takes effect' (para 52). Furthermore, there is nothing in the legislation which says that the court must be satisfied that these requirements are fulfilled by reference to a particular property. That may be the case, but it need not necessarily be so. If, in the particular circumstances of the case, 'the court is satisfied that accommodation having particular characteristics would be reasonably suitable to meet the needs of the tenant and his [or her] family and that such accommodation will become available then … the court has jurisdiction to make a possession order which will not take effect until such accommodation has in fact become available' (para 54).

However, it will not be appropriate to make a conditional order whenever a local housing authority seeks possession. Courts should consider with great care whether such an order is necessary and appropriate in the particular circumstances of the case before it or whether justice would better be served by adjourning the final determination of the application until a particular property has been identified.

'Relevant circumstances may include, for example, whether it would be unreasonable to impose on the tenant the burden of bringing the matter back to court, perhaps as a result of the tenant's vulnerability or personal circumstances; whether the tenant is legally represented; how frequently accommodation having the necessary characteristics becomes available in the relevant area; and how variable such property tends to be' (para 58).

If the court does make a conditional order, it is desirable that the order should include specific liberty to apply. Such an order should

normally include a time limit within which the local authority must make the suitable accommodation available and a provision that, if it fails to do so, the order will lapse.

UNLAWFUL EVICTION

■ Lambeth LBC v Loveridge

[2013] EWCA Civ 494, 10 May 2013

Mr Loveridge was a secure tenant of a one-bedroom flat. The tenancy agreement included a term that he would notify Lambeth if he was absent from the property for more than eight weeks. In July 2009, he left for a lengthy visit to Ghana. He did not return until December 2009. He did not inform Lambeth of his absence. In September 2009, Lambeth became concerned that he might have died in the property and forced entry. The council cleared out his possessions and re-let the flat. Mr Loveridge brought a claim for unlawful eviction and wrongful disposal of his possessions.

The parties agreed that the possessions were valued at £9,000 and that common law damages for the unlawful eviction were £7,400. Mr Loveridge argued that, rather than common law damages, he was entitled to statutory damages under HA 1988 s28, in the sum of £90,500. Lambeth contended that his statutory damages were nil and that he was only entitled to the agreed common law damages. The valuation evidence for Lambeth proceeded on the basis that the notional open market sale would result in the occupier becoming an assured tenant and that would have no impact on the price that a private purchaser would pay. Mr Loveridge's valuer assumed that the purchaser should be deemed to take the building subject to an ongoing secure tenancy. The trial judge found for Mr Loveridge. Lambeth appealed.

The Court of Appeal allowed the appeal. A secure tenancy becomes an assured tenancy on the sale of the local authority landlord's interest. The valuation exercise in section 28 should have reflected this. The court substituted the agreed damages of £16,400 in place of the £90,500 awarded by the trial judge.

FULLY MUTUAL HOUSING ASSOCIATIONS

■ Sterling v Cyron Housing Co-operative Ltd

[2013] EWHC (QB), 10 May 2013

Ms Sterling was a member of Cyron Housing Co-operative Ltd ('the Co-op'). Her tenancy agreement limited the circumstances in which a notice to quit could be served. Those circumstances included, inter alia, ceasing to be a member of the Co-op. In 2010, the Co-op expelled her. It served a notice to quit and possession proceedings were issued. Ms Sterling defended the claim, arguing that her expulsion was not in accordance with the Co-op's rules. In court, the Co-op successfully relied on the Court of Appeal decision in *Mexfield Housing Co-operative Ltd v Berrisford* [2010] EWCA Civ 811; [2010] HLR 44. As a result, the judge did not consider whether the Co-op had properly followed its own rules. The judge suspended the warrant pending the decision of the Supreme Court in *Mexfield* ([2011] UKSC 52; [2012] 1 AC 955). Following that decision, permission to appeal was granted.

Slade J allowed the appeal. Whether or not the Co-op had properly terminated Ms Sterling's membership was crucial to determining whether the notice to quit was valid. That issue required determination at a full hearing. The case was remitted to the county court.

LONG LEASES

■ Cussens v Realreed Ltd

[2013] EWHC 1229 (QB), 15 May 2013

Andrew Smith J held that county courts have jurisdiction under the County Courts Act 1984 s15 to make declarations for the purposes of Commonhold and Leasehold Reform Act 2002 s168 that tenants are in breach of covenant.

■ R (Spaul) v Upper Tribunal (AAC)

CO/2136/2012, 22 May 2013

Mr Spaul was a long lessee of a flat. His landlord sought a determination in the Leasehold Valuation Tribunal (LVT) in relation to his liability to pay service charges. The LVT found that, contrary to his assertions, he had received various statutory notices. He sought permission to appeal. The Upper Tribunal refused permission to appeal. He then applied for judicial review.

Leggatt J dismissed the claim. The application for permission to appeal failed to give any compelling reasons or evidence as to why the LVT was said to have erred. The Upper Tribunal had been entitled to conclude that there were no proper grounds for granting permission to appeal. (See *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663.)

HOMELESSNESS

Priority need

■ El Goure v Kensington and Chelsea RLBC

UKSC 2013/0003, 16 April 2013

The Supreme Court refused the applicant permission to appeal from the decision of the Court of Appeal ([2012] EWCA Civ 670) concerned with his claim to priority need based on his dependent children: HA 1996 s189(1)(b). A panel of justices decided that the application did not raise an arguable point of law of general public importance that ought to be considered by the Supreme Court, bearing in mind that the case had already been the subject of judicial decision and reviewed on appeal and for the clear reasons given by the Court of Appeal.

■ Johnson v Solihull MBC

[2013] EWCA Civ 752, 6 June 2013

The applicant was a homeless single man aged 37. He was a drug addict with depression and a long history of persistent criminal offences (some resulting in custody). He had slept rough or sofa-surfed for many years. The council decided that he did not have priority need because he was not vulnerable: HA 1996 s189(1)(c). The decision was upheld on review and HHJ Oliver Jones QC dismissed an appeal to the county court. The applicant contended that the reviewing officer had failed to compare the risk of injury to the applicant if street homeless with the risk to an ordinary homeless person and had wrongly used other homeless drug addicts as relevant comparators.

The Court of Appeal dismissed a second appeal. There was no error of law in the reviewing officer's decision. The statutory test of vulnerability had been correctly applied. There was no ordinary homeless person of particular characteristics with whom applicants had to be compared.

■ Hotak v Southwark LBC

[2013] EWCA Civ 515, 15 May 2013

The council decided that the applicant, a single man, did not have a priority need (HA 1996 s189(1)(c)) because any vulnerability he might otherwise have could be dealt with by the provision of personal support and assistance from his brother (with whom he had lived and who was also homeless but ineligible for assistance). That decision was upheld on review and HHJ Blunsdon dismissed an appeal to the county court.

The Court of Appeal dismissed a second appeal. The reviewing officer was not required to make an assessment of vulnerability in isolation from the applicant's known personal circumstances which could relevantly include the support he was likely to receive from others.

■ Mohammed v Islington LBC

[2013] EWCA Civ 739, 21 May 2013

The council decided on a review that although the applicant was prone to fainting several

times a day, she did not have a priority need because she was not 'vulnerable' (HA 1996 s189(1)(c)), ie, less able to fend for herself than other homeless people such that she was likely to suffer injury. HHJ John Mitchell quashed that decision because the reviewing officer had failed to address:

- whether being street homeless would affect the factors that mitigated the frequency or severity of her fainting attacks; and
- the effect the fainting would have on her in the short and long term if she was street homeless.

The Court of Appeal dismissed a second appeal by the council. On the facts, the judge had been right.

Local connection

■ Salmani v Southwark LBC

Lambeth County Court,
29 April 2013[10]

The applicant was an Ahwazi Arab from Iran. She applied for asylum in the UK and was provided with accommodation in Swindon by the UK Border Agency until she was granted leave to remain. She then went to stay with her cousins in Southwark. They were her only relations in the UK. Southwark was also home to the only Ahwazi Arab community in the UK. When she became homeless, the council accepted that she met the conditions for the main housing duty (HA 1996 s193) but decided to refer her application to Swindon, which accepted it (HA 1996 s198). The decision to refer was upheld on review. The reviewing officer decided that there was no local connection with Southwark based on family associations or special circumstances (HA 1996 s199). The reasons given included matters of policy, which would normally have been relevant only to the exercise of a discretion to refer a person who had no local connection.

HHJ Blundsen allowed an appeal and quashed the decision. Whether the applicant had a local connection with Southwark was a strictly factual question. The reviewing officer had misdirected herself by taking into account other material that ought properly to have become relevant only if the applicant had no connection with Southwark.

Suitable accommodation

Local Government Ombudsman Complaint

■ Birmingham City Council

12 001 546,
28 May 2013

A mother and her four children had to leave their home due to incidents of harassment and intimidation. On an application for homelessness assistance, the council placed them in unsuitable B&B accommodation without making any sustained effort to find an alternative. As a result, the family had to live together in the same room for 17 weeks. That exceeded the absolute maximum of six weeks in B&B set out in the Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326. The initial decision on the homelessness application was the subject of a review and a county court appeal. The council then delayed reaching a decision on its second review of the application for a period in excess of the eight-week prescribed maximum: Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 9. The council also failed to take into account personal and financial circumstances when deciding whether the amount it charged for removal and storage of the family's possessions was reasonable: HA 1996 s211(4)(a).

The Ombudsman recommended an apology, payment of £1,980 (for the stress and anxiety caused by living in unsuitable accommodation and the delay in dealing with the second review decision), and payment of a further £2,000 in recognition of the injustice caused to the children by living in B&B accommodation for a prolonged period. It was also recommended that the council should reassess its charges for the removal and storage of possessions.

Accommodation pending review

■ R (IA) v Westminster City Council

[2013] EWHC 1273 (Admin),
20 May 2013

The applicant faced eviction from his private rented sector accommodation because of restrictions on his HB causing him to accrue arrears of rent. He was a single man and a refugee from Iran where he had suffered imprisonment and torture. He went to the council's offices to apply for homelessness assistance. He took with him a letter from his GP describing his depression, panic attacks, insomnia and leg and back pain. The letter described him as requiring help and 'support with his daily needs' (para 7). At the end of a short interview on that day, the council's officer printed off a letter, composed during the interview, notifying him of a decision that he did not have a priority need. The applicant applied for a review and asked for accommodation pending review. That accommodation was refused. He sought judicial review.

HHJ Thornton QC granted permission to apply for judicial review both of the initial adverse decision on priority need and of the refusal of accommodation pending review. He also granted an injunction pending trial of the claim. The applicant had made out an arguable case that both decisions had been made unlawfully and that case was sufficiently strong to justify an injunction pending trial.

Given the importance and topicality of this decision, the judge certified that his judgment may be cited and referred to in other cases or situations: Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, CA, para 6.1.

HOUSING AND CHILDREN

Local Government Ombudsman

Complaint

■ Kent CC

12 001 464,
24 May 2013

A 16-year-old boy approached the council for welfare and housing help when he became homeless after his parents abandoned him. The council offered a foster placement, which the boy declined. It failed to offer other housing alternatives. After staying with friends, the applicant became homeless again at the age of 18. The council would not provide him with accommodation because he was not in priority need: HA 1996 s189(1)(c).

The Ombudsman found maladministration causing injustice. The applicant should have been assessed as a 'child in need' on first approach and he should have been provided with accommodation under Children Act 1989 s20. The Ombudsman recommended that the council should:

- treat him as a 'leaving care child' and provide the services he was entitled to in that capacity;
- set aside £3,000 for the injustice caused to him by the loss of welfare benefits; and
- review the implementation of its joint protocol for homeless young people.

HOUSING AND COMMUNITY CARE

■ R (SL) v Westminster City Council

[2013] UKSC 27,
9 May 2013,
June 2013 Legal Action 17 and 40

The claimant was a failed asylum-seeker suffering from depression and post-traumatic stress disorder. He was assessed as needing regular sessions with mental health professionals and counselling groups, and weekly meetings with a social worker. The council decided that he did not need 'care and attention' and therefore it owed no duty to accommodate him under National Assistance Act (NAA) 1948 s21. His claim for judicial review of that decision was initially dismissed but later allowed by the Court of Appeal ([2011] EWCA Civ 954).

The Supreme Court allowed a further appeal. The council's conclusion had not been

irrational and there were no other grounds for interfering with it.

■ **R (Afework) v Camden LBC**
[2013] EWHC 1637 (Admin), 13 June 2013

From 1990 to 2000 the council provided accommodation and support for the claimant who had mental health difficulties. In 2000, he was the subject of a vicious racist attack and suffered very severe injuries including brain damage. The council provided him with specialist accommodation and support under NAA s21, which carried a right to levy charges. The claimant's case was that the duty to accommodate was in fact owed under Mental Health Act 1983 s117 for which no charge could be levied.

Mostyn J refused permission to apply for judicial review. No duty under MHA 1983 had arisen prior to 2000 and since then the need for care and accommodation had been rightly addressed under the NAA because that need had been caused by the injuries sustained in the attack and not by mental health problems.

1 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/205221/Statutory_Homelessness_Q1_2013_and_2012-13.pdf.
2 See: www.gov.uk/government/uploads/system/uploads/attachment_data/file/205300/bidding_prospectus.pdf.
3 See: www.legislation.gov.uk/uksi/2013/1467/pdfs/uksi_20131467_en.pdf.
4 See: www.gov.uk/government/uploads/system/uploads/attachment_data/file/207397/130607_final_letter_to_LHAs.pdf.
5 Available at: www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf.
6 See: www.legislation.gov.uk/uksi/2013/1139/pdfs/uksi_20131139_en.pdf.
7 See: www.totalswindon.com/community/housing-minister-approves-council-plan-to-help-struggling-tenants/.
8 Available at: http://wales.gov.uk/docs/desh/consultation/130520rentinghomesbillen.pdf.
9 See: www.legislation.gov.uk/uksi/2013/1034/pdfs/uksi_20131034_en.pdf.
10 Nik Nicol, barrister, 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 colleague at note 10 for the transcript of the judgment.

Recent developments in immigration detention and the law

Janet Farrell and **Jed Pennington** begin a six-monthly series on significant developments in law and policy affecting immigration detainees. This article covers recent significant cases concerning unlawful detention, private law claims and abuse of process, and regarding policy regarding the use of force.

CASE-LAW

Detention pending deportation and prospects of removal

■ **R (Muqtaar) v Secretary of State for the Home Department**
[2012] EWCA Civ 1270, 12 October 2012

The claimant challenged his detention under Immigration Act (IA) 1971 Sch 3 over a 41-month period from 8 February 2008 to 13 July 2011. He had arrived in the UK in 1999, claimed asylum and been granted exceptional leave to remain. He was a repeat offender, with his most serious convictions being two counts of robbery, for which he received a two-year prison sentence. Immediately preceding immigration detention, he was sentenced to 4½ months' imprisonment for a public order offence and failing to surrender to custody. The issue at the heart of the case was whether there was a realistic prospect of deporting the claimant to Somalia, within a reasonable period of time for the purposes of the third limb of the *Hardial Singh* principles (*R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB), 13 December 1983) identified by Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, 28 June 2002; [2003] INLR 196).

In June 2009, the European Court of Human Rights (ECtHR) issued a Rule 39 indication preventing the claimant's removal pending the outcome of test cases concerning the safety of removals to Somalia. In 2011, the ECtHR handed down judgment in *Sufi and Elmi v UK* App Nos 8319/07 and 11449/07, 28 June 2011; (2012) 54 EHRR 9. The court identified a wider category of individuals who were likely to be at risk of treatment contrary to article 3 of the European Convention on Human Rights ('the human rights convention') than the domestic courts: the violence in Mogadishu was of such a level of intensity that anyone in the city, except those exceptionally well connected to powerful actors, would be at risk. On 22 July 2011, the day before an appeal hearing, the Home Secretary withdrew her deportation decision. The judge below had found that the risks of the claimant absconding and reoffending were substantial. The judge held that there had been no breach of the second and third *Hardial Singh* principles at any point in the claimant's detention.

The Court of Appeal, dismissing the claimant's appeal, agreed. The court held as follows:

■ There had been no breach of the second and third *Hardial Singh* principles. There was no requirement for the Home Secretary to identify the timescale in which removal would take place; what was required was a case-specific assessment of whether there was a 'sufficient' prospect of removal, bearing in mind the other factors in play, to justify detention (para 37). There could be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal could reasonably be expected to occur, and without any certainty that removal would occur at all (para 38).

■ When the Rule 39 indication was received in June 2009, there was a realistic prospect that the ECtHR proceedings would be resolved within a reasonable period; it was not apparent that they would drag on for years, nor was it apparent that the outcome would prevent the claimant's removal (para 36). While 41 months was 'near the outer limit' of what could be justified, the judge had carefully considered all the relevant factors; it could not be said that he was wrong to conclude that the outer limit had not been exceeded (para 42). The period of just over two weeks that the claimant was detained following *Sufi and Elmi* before he was granted bail did not cause detention to exceed a reasonable period overall: it would have taken time to consider the claimant's case in the light of that judgment, and there was some force in the Home Secretary's