Recent developments in housing law

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

POLITICS AND LEGISLATION

Housing cases in the courts

From 6 April 2009, judicial review proceedings in housing cases will be capable of issue and determination at four court centres outside London (Birmingham, Cardiff, Leeds and Manchester). The detail is in the new Practice Direction 54D Judicial Review (Administrative Court (Venue).[1]

Other amendments to the Civil Procedure Rules (CPR) and the Practice Directions to be made on the same date contained in the 49th Update to the Civil Procedure Rules include several applicable to housing cases (see February *Legal Action* 51).[2] For example, minor changes are made to CPR 55 (possession claims), County Court Rules (CCR) Ord 26 r17 (possession warrants) and CPR 52 (appeals).

Commencing new housing legislation

Communities and Local Government (CLG) has published its annual schedule of commencement dates for various housing measures: *Common commencement dates: annual statement of forthcoming regulations* (CLG, January 2009).[3]

Among those which will come into effect on 6 April 2009 are:

- The provisions of the Housing and Regeneration Act (H&RA) 2008 (s299 and Sch 11) which prevent the creation of more tolerated trespassers and provide current tolerated trespassers with replacement tenancies (see also page 27 of this issue). A new statutory instrument – the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 – will deal with cases in which there has been a stock transfer since the tenant became a trespasser.
- H&RA 2008 s300, which removes the low-rent test as a means of determining eligibility for the right to enfranchise (ie, buy the freehold) in relation to shared-ownership houses. The test will remain for some purposes, eg, when the claim is for a lease extension (as opposed to acquiring the freehold). The test will continue to apply to existing shared-ownership house leases.
- H&RA 2008 ss301–302, which deal with shared-ownership leases in protected areas and set out prescribed conditions and exemptions from enfranchisement.
- Regulations amending the prescribed forms used when a tenant exercises the right to enfranchise in relation to a house.

Not commencing new housing legislation

Housing advisers are keenly awaiting the commencement of H&RA 2008 s314 and Sch 15, which will repeal Housing Act (HA) 1996 s185(4) – the only provision of housing law declared incompatible with the European Convention on Human Rights ('the convention') by a domestic court: *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184; [2006] 1 WLR 505. However, no commencement date appears in the CLG publication mentioned above.

The government has recently explained how it thinks that the replacement provisions will make good the deficiency in homelessness law which led to s185(4) being declared incompatible: *Responding to human rights judgments* Cmnd 7524 (TSO, 2009).[4]

There is similarly no news on a commencement date for the provision designed to extend security of tenure to residents on local authority Gypsy and Traveller caravan sites: H&RA 2008 s318.

More housing cases

The Legal Services Commission's extended deadline for applications from legal advice providers for new housing matter-starts will expire on 31 March 2009: LSC news release, 8 January 2009. Details of how to apply are given on the 'tenders' page of the LSC's website.[5]

Family intervention tenancies

The government has published non-statutory guidance for social landlords (local authorities and registered social landlords) on the use of these new forms of tenancy: *Guidance on the use of family intervention tenancies* (CLG, January 2009).[6] The guidance helpfully attaches the relevant regulations and orders as well as a checklist of issues for prospective landlords and tenants to consider.

Regulation and redress in housing

A research project reviewing regulation and redress arrangements in the housing market has reported to government that 'the highest degree of consumer dissatisfaction … is in private rented accommodation which is also the sector that has the least regulated services and very limited redress opportunities': *Government review of regulation and redress in the UK housing market: final report to the Department for Communities and Local Government (CLG) and the Department for Business, Enterprise and Regulatory Reform (BERR)* (CLG, January 2009).[7] The report concludes that there is scope for reform, extension and rationalisation in regulation and redress.

Representing tenants' interests

The government has accepted the recommendations of a project group, chaired by Professor Steve Hilditch, which has been working on the establishment of a national tenants' organisation to be known as National Tenant Voice: *Citizens of equal worth: the project group's proposals for the National Tenant Voice* (CLG, February 2009).[8] The next stage of the group's work will be the establishment of the National Tenant Council later this year.

Meanwhile, the Tenant Services Authority (TSA) has launched a nationwide consultation exercise to ask social housing tenants what they think the new national standards for social housing should contain. The TSA has statutory power to fix national standards required to be observed by social landlords in the letting and management of the homes they provide: H&RA 2008 s193. The standards will be enforceable by fines and compensation. The consultation exercise is called the 'National Conversation' and involves a programme of meetings around the country (driven by 33 specially-trained 'trailblazer' organisations) and other opportunities for participation: TSA news release 02/09, 14 January 2009.[9]

Council housing

On 21 January 2009, the government announced new arrangements under which local authorities will be free to build council

housing again and keep the full rents received (or the proceeds of sale under the right to buy): CLG news release, 21 January 2009.[10] The detail is set out in a consultation document: *Changes to the revenue and capital rules for new council housing: consultation on excluding new council housing from Housing Revenue Account Subsidy and pooling* (CLG, 2009) to which responses are sought by 17 April 2009.[11]

On the following day the government published the latest statistics on the current stock of local authority housing: *Local authority housing statistics, England 2007/08* (CLG, January 2009).[12] The figures cover waiting lists, choice-based letting schemes, decent homes delivery and the total stock holdings.

April 2009 rent increases

Before it was wound up, the Housing Corporation issued guidance to registered social landlords about rent increases for the financial year 2009/10: Housing Corporation Circular 04/08: *Rents, rent differentials and service charges for housing associations* (see January 2009 *Legal Action* 21).[13]

In January 2009 the new TSA reminded housing associations that they are not required to impose on tenants the full 5.5 per cent maximum guideline rent increase mentioned in that guidance.[14]

Disability and housing

A new report published by the National Aids Trust (NAT) notes that decisions on the priority given to individuals with HIV for social housing are often based on out-of-date criteria such as whether or not someone has an AIDS diagnosis or the presence of certain 'symptoms': *Housing and HIV* (NAT, January 2009).[15] This approach fails to address HIV as a recognised disability and a long-term condition which involves continuing vulnerability and very often fluctuating health.

The House of Commons Select Committee on Work and Pensions has been taking oral and written evidence on how the issues arising from the decision of the House of Lords in *Lewisham LBC v Malcolm* [2008] UKHL 43; [2008] 3 WLR 194 should be addressed in the forthcoming Equality Bill. The evidence of, among others, the Housing Law Practitioners' Association and the Discrimination Law Association has been published on the internet.[16]

Home ownership

Faced with the prospect of repossession for mortgage default, some owners have been attracted to the possibility of remaining in their homes as tenants. A new scheme for England, the Mortgage Rescue Scheme, was launched nationwide in January 2009 and enables those homeowners who would be in priority need if actually made homeless to become tenants of registered social landlords: CLG news release, 16 January 2009.[17] CLG has set up a 'Questions & Answers' webpage for those seeking more details about the new scheme.[18]

Under the Mortgage Rescue Scheme in Wales, grants can be used by housing associations to buy a share of the mortgage or buy properties outright, and then rent them back to the former owner: Welsh Assembly Government news release, 15 January 2009.[19]

For other homeowners, private sector companies have been offering 'sale-and-rent-back' arrangements under which the firms buy properties at a significant discount, and then rent them back to the former owners under tenancy agreements. The Office of Fair Trading (OFT) has issued formal notices to 16 such firms asking them to substantiate claims they make in their advertising. The firms have been given 14 days to reply. Based on their replies, the OFT will make a decision whether or not to take further action (including prosecution): OFT news release 8/09, 30 January 2009.[20]

From 6 April 2009 owners selling their homes must have completed a property information questionnaire (PIQ) giving basic information about their properties which is likely to be of help to prospective buyers. The PIQ must be prepared before marketing a property for sale: see February 2009 *Legal Action* 32. The Home Information Pack (Amendment) Regulations 2009 SI No 34 correct an omission from earlier regulations introducing this new aspect of home information pack requirements.[21]

Local housing authorities have discretionary powers to waive some of the council tax which would otherwise be payable by owners for empty properties. A recently published government-commissioned research report considers the impact of the exercise of that power on the number of empty homes in the country: *Application of discretionary council tax powers for empty homes* (CLG, January 2009).[22]

The long leases of retirement flats bought by the elderly sometimes provide that, on any later sale of the lease, the tenant will pay a 'transfer fee' to the original builder/developer. The OFT has taken the view that such a term may be 'unfair' and thus breach the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083. The major builder McCarthy & Stone plc has agreed with the OFT that it will not enforce such terms in its existing leases and will amend the terms of the future leases it offers to new purchasers. OFT news release 1/09, 14 January 2009.[23]

The housing stock in England

The latest statistics on all aspects of housing in England show continued expansion of the private rented sector and a reduction in the percentage of the housing stock in owner-occupation. The details, and figures on a range of other housing-related issues, are given in the newly-published *Survey of English Housing preliminary report: 2007/08* (CLG, January 2009).[24]

Separate statistical information on the physical condition of England's housing is given in *English House Condition Survey 2007: headline report* (CLG, January 2009).[25] The content of both sets of data is summarised in *Housing Surveys Bulletin No 4* (CLG, January 2009).[26]

The government's target is that every social housing tenant should have a 'decent' home by 2010. In recent years there have been discrepancies in the statistics used to record and monitor moves towards that target. The government has now published *Decent homes in the social sector: statistics reconciliation project 2008* (CLG, January 2009), seeking to reconcile the statistics in order to demonstrate precisely what progress has been made.[27]

HUMAN RIGHTS

Article 8 and possession claims

■Ćosić v Croatia

App No 28261/06,
15 January 2009

Ms Ćosić was a teacher. In 1984, the school in which she taught provided her with a flat which it had temporarily leased from the Yugoslav People's Army. The lease expired in 1990. In 1991, the state took over all army property. Ms Ćosić continued to live in the flat, paying a monthly rent to the state. In 1999, the state brought a civil action against the school and Ms Ćosić seeking her eviction. The court ordered her to vacate the flat in 15 days because the lease had expired. It found that there was 'no legal basis for [Ms Ćosić] to have acquired any rights on the flat'. An appeal was dismissed. She complained to the European Court of Human Rights (ECtHR), alleging that there was a breach of article 8.

The ECtHR found that there was a breach of article 8. The obligation to vacate the flat was an interference with her right to respect for her home. The national courts' decisions were in accordance with domestic law and the interference in question pursued the legitimate aim of protecting the rights of the state as the owner of the flat. The central question was whether or not the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'. This

raised a question of procedure as well as one of substance. Following *Connors v UK* App No 66746/01, 27 May 2004; (2005) 40 EHRR 9 and *McCann v UK* App No 19009/04, 13 May 2008; (2008) 47 EHRR 40, the court continued:

The first-instance court expressly stated that … its decision had to be based exclusively on the applicable laws. 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 the measure to be applied against the applicant. However, the guarantees of the Convention require that the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate … to the legitimate aim pursued, regard being had to the particular circumstances of the case. … [T]he court reiterates that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude 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 … [In] the present case the applicant was not afforded such a possibility. It follows that, because of such absence of adequate procedural safeguards, there has been a violation of article 8 (paras 21–23).

■ Wandsworth LBC v Dixon

[2009] EWHC 27 (Admin), 15 January 2009

In 1983, Wandsworth granted Mr Dixon and his sister a joint tenancy. In 2005, his sister served a notice to quit, determining the joint tenancy. After executing two separate search warrants, police found small quantities of cocaine and herbal cannabis in the flat, resulting respectively in a fine and a caution. In May 2006, Wandsworth wrote that in view of his conviction for an arrestable offence, the council would no longer consider his request for a discretionary tenancy and required vacant possession. In August 2006, District Judge Tilbury made an order for possession on the basis that the defendant was an unauthorised occupant. In March 2007, Wandsworth notified Mr Dixon that he was ineligible for an allocation of housing accommodation. His claim for judicial review of that decision and a renewed application for permission to appeal were dismissed ([2008] EWCA Civ 595; July 2008 *Legal Action* 22). The defendant subsequently applied to set aside the possession order and/or to stay or suspend the execution of the warrant for possession.

HHJ Bidder QC, sitting as a deputy judge of the High Court, refused the application. After reviewing all the recent authorities on article 8 of the convention, he stated that it could 'hardly be doubted that parliament must be assumed to have left unqualified the right of an owner to recover possession where one of two joint tenants has served notice to quit'. There would be obvious practical problems if the question of proportionality were to result in the common law rule being displaced. It would be undesirable if one tenant were to be prevented from terminating his/her interest in a tenancy and, thus, be forced to continue to pay rent. Alternatively, the difficulty would arise as to one tenant paying the full rent or the landlord being faced with only one tenant paying half the rent.

In this case, the situation was, in principle, no different from the position of the appellants in *Lambeth LBC v Kay*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465, and was distinguishable from the position in *McCann v UK* App No 19009/04, 13 May 2008; (2008) 47 EHRR 40. Mr Dixon had no right to remain in the property, not simply because of the common law but because parliament had chosen not to bring his case within the statutory scheme of protection. On the other hand, *Birmingham City Council v Doherty* [2008] UKHL 57; [2008] 3 WLR 636 was the type of exceptional case envisaged in *Kay* because of the discriminatory effect of the statutory scheme which applied at the time the possession order was sought.

HHJ Bidder QC was 'satisfied, for the reasons expounded by Lord Bridge in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 which appear to have been accepted by all in *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, *Kay* and *Doherty* as being compatible with article 8, that the domestic law strikes a proper and unassailable balance between the rights of joint tenants and their landlords and that it is not arguable that the rule in *Monk* is incompatible with article 8'. Furthermore, *Kay* was binding authority that the decision made by Wandsworth to seek summary possession against Mr Dixon in reliance on its clear right to possession under domestic law may only be challenged on the basis that its decision was one that no reasonable person could consider justifiable, ie, the test enunciated in *Wandsworth LBC v Winder* [1985] AC 461, HL.

In this long-running case, Wandsworth had afforded Mr Dixon the opportunity to make extensive representations about the factual matters that the council should take into account when making its decision about whether he was ineligible for housing accommodation because he was guilty of unacceptable behaviour within HA 1996 s160A. It was 'simply unarguable that the claimants [had] not properly considered whether to continue with the possession claim … [It was] clear that, in reaching that decision, they [had] performed the very balancing exercise that is required by article 8(2).'

Article 6 and discretionary housing payments

■ R (Brown) v South Oxfordshire DC

[2008] EWHC 3378 (Admin), 13 August 2008

Mr Brown was the lessee of a houseboat and received housing benefit. He applied to the council for a discretionary housing payment because there was a difference between his housing benefit and the rent assessed by the rent service. His application was refused. On appeal, an appeals panel, comprising five councillors, again refused to make a discretionary housing payment. Mr Brown sought permission to challenge that decision. He argued that there was a breach of article 6. He claimed that the award of discretionary housing payment was a civil right and that the panel, composed of councillors making decisions in relation to the council budget and perhaps affected by political considerations, could not be independent or impartial.

Ouseley J dismissed the application. He distinguished *Tsfayo v UK* App No 60860/00, 14 November 2006; [2007] HLR 19. That decision was concerned with the independence of the housing benefit review board of a local authority, which was making decisions of fact that bore on the entitlement of a claimant to a housing benefit which was administered by the council. The claim here was to a discretionary payment that the council was not obliged to grant. He held that the circumstances were much more akin to those in *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430. The contention that article 6 applied was 'unarguable'. He also rejected the contention that there was actual or apparent bias on the part of at least one member of the panel.

LONG LEASES

Service charges

■ Leicester City Council v Master

LRX/175/2007, 29 October 2008

Mr Master was a secure tenant who exercised the right to buy. The long lease granted to him included a covenant 'to pay on demand … at such times and in such manner as the lessor shall direct a fair proportion … of the reasonable costs or estimated costs

(including overheads) of any services incurred'. Leicester, through the service charge provisions, sought to set up a reserve fund for future expenditure on repairs. Mr Master disputed this and applied to the Leasehold Valuation Tribunal (LVT) under Landlord and Tenant Act 1985 s27A for a determination about the amount of service charge properly payable. The LVT determined that the covenant to pay service charges did not permit Leicester to set up a reserve fund. Leicester appealed.

HHJ Huskinson allowed the appeal. Where a lessor seeks to recover money from a lessee, there must be, on ordinary principles, clear terms in the contractual provisions which entitle the lessor to do so. In this case, in view of the terms of the covenant, Leicester was entitled to demand a fair proportion of the reasonable estimated costs of repairs to be incurred in the future in observing and performing the repairing obligations under the lease. This was not limited to the cost of services which had been performed, nor to the cost of services which had been identified as already being required, although not yet performed. There was nothing in the covenant to indicate that estimated costs had to be incurred within any specific accounting year, or within any particular time frame. The words 'at such times and in such manner as the lessor shall direct' were sufficiently wide to entitle Leicester to demand that the fair proportion of the reasonable estimated costs of future repairs be paid not in a single payment but in instalments. Leicester was entitled to build up a reserve fund through the service charge against the estimated cost of future repairs that were not yet needed, but which would be needed in due course. However, demands could only be justified if there was a properly prepared, reasonable estimate of the costs of repairs to be incurred.

TRESPASSERS

Adverse possession

■ St Pancras & Humanist Housing Association Ltd v Leonard

[2008] EWCA Civ 1442, 17 December 2008

Around 1973, Camden LBC sought to acquire two houses. Before it could do so, squatters moved in. In 1975, Mr Leonard, who was described as 'a seasoned squatter', broke into one of the garages, patched it up and put a padlock on the entrance gates. He claimed that 12 years' adverse possession started from that date. Later, Camden granted long leases of the houses, the gardens and the garage to a housing co-operative comprising squatters and local residents. In 1999, the co-operative transferred its interest to St Pancras & Humanist Housing Association. In 2007, St Pancras began a possession claim in respect of the garage. HHJ Marshall QC found that Mr Leonard had established 12 years of adverse possession. However, she also found that because, at co-operative meetings, Mr Leonard created the impression that he accepted that the garage was communal property, he was estopped from denying St Pancras's right to possession of the property.

Mr Leonard appealed and St Pancras cross-appealed. Both appeals were dismissed. There was cogent evidence to support the judge's conclusions.

HOUSING ALLOCATION

■ R (Alam) v Tower Hamlets LBC

[2009] EWHC 44 (Admin), 23 January 2009[28]

Mr Alam applied to Tower Hamlets for homelessness assistance (under HA 1996 Part 7). It provided interim accommodation (HA 1996 s188) but in due course decided that although he was eligible, homeless and not intentionally homeless, he did not have a priority need. His application for a review of that decision failed and an appeal was dismissed. The council's only duty under Part 7 was to provide him with advice and assistance.

Mr Alam also applied for an allocation of social housing (under HA 1996 Part 6). Tower Hamlets' choice-based letting scheme placed applicants in 'community groups'. The terms of Group 2 provided that it included '[t]hose assessed by the council as homeless under the Housing Act Part 7 and other homeless households who have an assessed priority need'. The council placed Mr Alam's application in the lower Group 3.

Mr Alam sought judicial review contending, first, that he was entitled to be accorded a reasonable preference in the allocation scheme because he was 'homeless' (see HA 1996 s167(2)(a)), and, second, that he met the terms of the first limb of the words of Group 2.

Timothy Brennan QC, sitting as a deputy judge of the High Court, quashed the decision. Rejecting a number of submissions made by the council, he held that:

- Mr Alam had not ceased to be 'homeless' because he was being provided with interim accommodation under HA 1996 s188. He was still 'homeless';
- the class of the 'homeless' in HA 1996 s167(2)(a) was not confined to those who had applied to a local authority for assistance under HA 1996 Part 7;
- the fact that Mr Alam had made such an application and the council had found that it did not owe a housing duty under HA 1996 Part 7 did not take him outside the term 'homeless'; and
- on a true construction of the scheme, Mr Alam met the terms of the first limb of the words of Group 2 and should have been included in that group.

HOMELESSNESS

Considering applications

■ Basildon DC v McCarthy

[2009] EWCA Civ 13, 22 January 2009

The claimants were numerous Gypsies who were the owners of plots of adjacent green belt land on which they had stationed their homes. Planning permission for such development was refused (for both permanent and temporary use), appeals were dismissed and enforcement notices were issued. The council decided to evict all the occupiers onto the roadside by use of its 'direct action' powers under planning legislation. The claimants sought judicial review of that decision on the basis that, inter alia, the council had failed to consider the responsibilities it might owe under the provisions of HA 1996 Part 7 (Homelessness).

Collins J quashed the decision on the ground that, inter alia, the council had failed to consider that on any homelessness application it might find that:

- it owed the main housing duty (s193(2)); and
- that duty could only be lawfully performed by provision of a site rather than by bricks-and-mortar (see *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925; [2005] HLR 1). Had it taken that matter into account it might not, at least in those cases, have decided to evict.

The Court of Appeal allowed an appeal. On the facts, the council had been mindful of its responsibilities under Part 7 in reaching its decision to clear the whole site. Before actually implementing the eviction, it would need to receive and consider any homelessness applications made and make arrangements for performing any duties arising. Armed with the information gleaned from such an applications, it could then determine whether to proceed with eviction in any particular case. (See also page 43 of this issue.)

Accommodation pending review

■ **R (Hassan) v Croydon LBC**

CO/97302008,
13 January 2009[29]

The claimant left her matrimonial home with her children and applied to Croydon for homelessness assistance. It decided that she had become homeless intentionally. She applied for a review, contending that she had become homeless as a result of domestic violence. When the temporary accommodation provided under the council's duty under HA 1996 s190 expired, she applied for accommodation to be continued pending the outcome of the review: HA 1996 s188(3). The council declined to exercise that power in her favour and she brought a claim for judicial review of that decision. An interim injunction and permission to apply for judicial review were granted.

HHJ Mackie QC, sitting as a deputy judge of the High Court, dismissed the claim. In addition to fact-specific grounds, the claimant had contended that the council, a unitary authority, had been wrong to decline to exercise the s188(3) power without considering the obligations it might have to the children of the family under Children Act (CA) 1989 ss17–20 read with article 8 of the convention. The judge held that to impose such requirements would be to add unnecessary complexity to the decision required by s188(3). Although the two departments – housing and social services – of a unitary authority were required to co-operate (see HA 1996 ss213–213A) they were undertaking separate statutory functions.

Priority need

■ **Holmes-Moorhouse v Richmond upon Thames RLBC**

[2009] UKHL 7,
4 February 2009

A family court ordered the claimant to leave the home that he occupied with his partner and their four children. By consent, the order provided that the three youngest children would reside with each parent for alternate weeks and half of all holidays (a 'shared' residence order). On his application for homelessness assistance, Richmond decided that the claimant was homeless but did not have a priority need. It rejected his claim that the children might 'reasonably be expected to reside' with him: HA 1996 s189(1)(b). That decision was upheld on review. HHJ Oppenheimer dismissed an appeal against that decision.

The Court of Appeal allowed an appeal on the basis that the reviewing officer had misdirected himself by referring to 'staying' rather than 'residing with' in his decision letter. The council's appeal to the House of Lords was allowed. It held that:

- the functions of (a) the family court in making orders concerning residence of children, and (b) the local authority concerning homelessness and priority need, were entirely different;
- while the order of a family court (and the reasons for its making) would be of relevance and assistance to an authority in deciding whether a child might 'reasonably be expected' to reside with an applicant, it was not determinative;
- in considering whether a child might reasonably be expected to live with an applicant, a local authority was entitled to take account of the fact that the child may already have a home with the other parent and that the consequence of awarding priority might be the provision of accommodation to the applicant which would be under-occupied for much of the time;
- as a result, 'it will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII with another so that he can reside with the other parent as well' (para 21);
- such 'exceptional circumstances' might arise where there is a disabled child and care of both parents is imperative;
- although the reviewing officer in the instant case had wrongly construed the court order, that was an immaterial error.

The speeches of Baroness Hale (on the role of the family court in making residence orders) and of Lord Neuberger (on the correct approach to be taken on HA 1996 s204 appeals to the reasons given for review decisions) were described by Lord Hoffman as 'required reading' for family and county court judges.

Discharge of duty

■ **Miles v Redbridge LBC**

[2008] EWCA Civ 1561,
30 October 2008

Redbridge accepted that it owed Mr and Mrs Miles the main housing duty: HA 1996 s193(2). It offered them a tenancy of a two-bedroom house. That offer was rejected on the basis that the premises were insecure to the side and rear and Mrs Miles suffered from anxiety for her personal safety. Redbridge decided that the refusal of the offer had brought its duty to an end. Mr Miles sought a review. The reviewing officer upheld the council's decision. She relied on a drive-by assessment from a council environmental health officer that the property did not give rise to any unacceptable security risk. HHJ Platt dismissed an appeal.

An application for permission to appeal to the Court of Appeal was put on the basis that:

- Mr and Mrs Miles had not been granted access for their advisers to assess the security risk; and
- the reviewing officer had not dealt with the medical dimension.

Tuckey LJ dismissed the application. He held that:

- there had been no clear, written request for access by any adviser (and, in any event, there was no reason why an adviser could not have made a drive-by assessment of security); and
- the reviewing officer's decision had referred to the asserted medical dimension but medical reports Mr Miles had promised to provide concerning his wife's state of anxiety had not emerged.

HOUSING FOR CHILDREN

■ **R (A) v Coventry City Council**

[2009] EWHC 34 (Admin),
22 January 2009

The claimant was a teenager estranged from his parents and a child in need (CA 1989 s17). He was provided with accommodation by the mother of a friend. He claimed that the council owed him an accommodation duty under CA 1989 s20 and that accordingly it should pay an allowance to the mother to meet his living expenses if he remained with her. The council declined to meet his living costs on the basis that the friend's mother had voluntarily taken him in. He therefore had 'accommodation' with her and no s20 duty had arisen. Alternatively, there had simply been a private fostering arrangement.

Anthony Edwards-Stuart QC, sitting as a deputy judge of the High Court, quashed that decision. He held that:

- this was, on the facts, a case where a local authority had allowed a proposed foster parent to believe that she would receive financial support for looking after a child, as opposed to having to do so at her own expense and that, accordingly, the council was be taken to have exercised its powers and duties as a public authority under s20; alternatively
- the council's decision that it had not owed a duty to secure accommodation for the claimant under s20 was flawed. A child was owed that duty if s/he lacked 'suitable' accommodation. Accommodation which is uncertain as to duration because it is not founded on any secure financial footing is not accommodation that can be said to be suitable for a 15 year old, who is a child in need, however caring the prospective family may appear to be. Accordingly, a child in that situation lacks suitable accommodation. The council had simply failed to consider that

issue once the claimant had been taken in by his friend's mother.

HOUSING AND COMMUNITY CARE

■ R (Scott) v Hackney LBC

CI/08/1226,
20 January 2009

The claimant, a disabled adult, brought a claim for judicial review relating to the council's decision-making about his community care needs and the failure to provide a care plan: National Assistance Act (NAA) 1948 s21. Permission to apply for judicial review was granted but, before trial, the council produced a care plan and the judicial review claim was withdrawn. The judge decided to make no order for costs. The claimant appealed.

The Court of Appeal dismissed the appeal. The judgment reviews the principles under which the courts should deal with the costs of judicial review claims which are determined by settlement or withdrawal.

■ R (Walcott) v Lambeth LBC

[2008] EWHC 2745 (Admin),
6 October 2008

The claimant applied to Lambeth for homelessness assistance (HA 1996 Part 7). It concluded that although he was homeless, eligible and in priority need he had become homeless intentionally. He then applied for accommodation under NAA s21. The council made an assessment that if he were accommodated he would be supplied with a care package: National Health Services and Community Care Act (NHSCCA) 1990 s47. However, it declined to provide accommodation because it was not satisfied that he was in need of 'care and attention not otherwise available'. In particular, help was available to him through the NHS and welfare benefits. The claimant sought judicial review and obtained an interim injunction requiring accommodation to be provided.

Ouseley J dismissed a renewed application for permission to apply for judicial review. He held that the decision on 'care and attention' had sufficiently addressed the threshold identified in *R (M) v Slough BC* [2008] UKHL 52; [2008] 1 WLR 1808 and had been lawfully reached. The fact that a person is identified as needing a low-level care package does not automatically bring him/her within s21 if his/her needs can be met by other service providers. Although there may be circumstances in which the absence of provision under HA 1996 Part 7 may trigger responsibilities under s21 for a person needing a package of care which could only be provided if s/he were accommodated, that was not this case. The injunction was extended a further 28 days to give the claimant some reasonable 'packing-up time'.

■ R (N) v Coventry City Council

[2008] EWHC 2786 (Admin),
17 October 2008

The claimant, a South African, applied unsuccessfully for asylum. His appeals were dismissed. He remained in the UK, living with and supported by a cousin. The claimant was HIV positive and had been diagnosed with tuberculosis, TB meningitis and syphilis.

Following in-patient hospital treatment, he continued to attend outpatient clinics and take antiretroviral medication and painkillers. When the cousin asked him to leave and could no longer support him, the claimant applied to Coventry for accommodation under NAA s21. It decided that because his medication was effective and would continue and because he was able to complete most daily living tasks he was not in need of 'care and attention'. If that was wrong, such care and attention could be secured by his return to South Africa and, in any event, he was disqualified from NAA 1948 s21 assistance by s21(1A). He applied for judicial review of that decision.

Neil Garnham QC, sitting as a deputy judge of the High Court, dismissed the claim. He held that the decision on 'care and attention' had sufficiently complied with the approach in *R (M) v Slough BC* [2008] UKHL 52 and had been lawfully reached. If that was wrong, he would have held that the case was one of 'destitution plus' in the sense that if the claimant had still been an asylum-seeker his needs would not have solely arisen from destitution but rather from his medical condition: NAA s21(1A). In any event, the claimant was a former asylum-seeker and, given that he was free to return to South Africa, it could not be said that refusal of assistance to him would infringe his convention rights: Nationality Asylum and Immigration Act 2002 Sch 3 para 3.

1 Available at annex C of: www.justice.gov.uk/civil/procrules_fin/pdf/preview/cpr_update_49_PD_amendments.pdf.
2 Available at: www.justice.gov.uk/civil/procrules_fin/index.htm.
3 Available at: www.communities.gov.uk/documents/corporate/pdf/1135077.pdf.
4 Available at: www.justice.gov.uk/docs/responding-human-rights-judgments.pdf.
5 Available at: www.legalservices.gov.uk/aboutus/tenders.asp.
6 Available at: www.communities.gov.uk/documents/housing/pdf/familyintervention tenancies.pdf.
7 Available at: www.berr.gov.uk/files/file49743.pdf.
8 Available at: www.communities.gov.uk/documents/housing/pdf/projectgroupreport.pdf.
9 There is a dedicated website at: www.nationalconversation.co.uk.
10 Available at: www.communities.gov.uk/news/corporate/1125206.
11 Available at: www.communities.gov.uk/documents/housing/pdf/capitalruleschanges.pdf.
12 Available at: www.communities.gov.uk/documents/statistics/pdf/1126284.pdf.
13 Available at: www.housingcorp.gov.uk/upload/pdf/Circular_04-08_Rents_printer-friendly.pdf.
14 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.16647/changeNav/13640.
15 Available at: www.nat.org.uk/Media%20library/Files/Policy/Poverty%20and%20Social%20Disadvantage/NAT%20Report%20-%20Housing%20and%20HIV-6.pdf.
16 Available at: www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/equbill/contents.htm.
17 Available at: www.communities.gov.uk/news/housing/1120655.
18 Available at: www.communities.gov.uk/housing/buyingselling/mortgagerescuemeasures/mortgagerescuefaq/.
19 Available at: new.wales.gov.uk/news/topic/housing/2009/2870288/?lang=en.
20 Available at: www.oft.gov.uk/news/press/2009/08-09.
21 Available at: www.opsi.gov.uk/si/si2009/pdf/uksi_20090034_en.pdf.
22 Available at: www.communities.gov.uk/documents/localgovernment/pdf/1127769.pdf.
23 Available at: www.oft.gov.uk/news/press/2009/01-09.
24 Available at: www.communities.gov.uk/documents statistics/pdf/1133551.pdf.
25 Available at: www.communities.gov.uk/documents/statistics/pdf/1133548.pdf.
26 Available at: www.communities.gov.uk/documents/statistics/pdf/1133593.pdf.
27 Available at: www.communities.gov.uk/documents/housing/pdf/decenthomes reconciliation.pdf.
28 Robert Latham, barrister, London.
29 Emily Orme, barrister, London.

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