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

Legal aid in housing cases

On 1 April 2013, the Civil Legal Aid (Merits Criteria) Regulations 2013 SI No 104 come into force. They outline the criteria for decision-making by the new Legal Aid Agency in respect of legal aid funded advice or representation. The specific housing-related criteria are set out in regulations 61–63. Cases which do not satisfy these criteria will not be funded unless they also fall under other subject-specific categories (or are not covered by any subject category and therefore only subject to the new generally applicable criteria also stipulated in the regulations). The criteria for assistance by way of the Help at Court scheme is prescribed in regulation 33.

Housing and anti-social behaviour

The Home Affairs Select Committee has concluded its pre-legislative scrutiny of the draft Anti-social Behaviour Bill and has published its final report and the evidence received: *House of Commons Home Affairs Committee. The draft Anti-social Behaviour Bill: pre-legislative scrutiny. Twelfth Report of Session 2012–13.*[1] The committee welcomed the government's decision to review and rationalise the statutory framework for dealing with anti-social behaviour, but set out a series of 'companion measures' on which it suggested the government should bring forward proposals during the bill's passage (p25).

The UK government has published a new report to help local authorities and social landlords calculate the cost-savings flowing from taking effective measures against anti-social behaviour: *The Cost of Troubled Families* (Department for Communities and Local Government (DCLG), January 2013).[2]

Bed and breakfast and homeless people

In the face of growing concerns about the number of homeless families placed in bed and breakfast (B&B) temporary accommodation by local housing authorities in England, despite the restrictions in the Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326, Don Foster MP, under secretary of state at the DCLG, stated that: 'It is unacceptable and illegal to place families with children in bed-and-breakfast accommodation except in an emergency and then for no more than six weeks.' (*Hansard* HC Debates col 548, 17 December 2012).

On 18 January 2013, housing minister Mark Prisk was asked what steps he is taking to tackle those local housing authorities actually breaking the law. He reiterated that 'Legislation remains in place that prohibits the use of bed and breakfast for families unless in an emergency, and then for no more than six weeks.' (*Hansard* HC Written Answers col 957W, 18 January 2013). He confirmed that he had met with those local authorities in London exceeding the maximum limits and had called on them to address the situation.

Housing benefit for social housing tenants

On 1 April 2013, the housing benefit regime will be amended by the introduction of size criteria for social housing tenants (the 'bedroom tax'). Working-age tenants who are under-occupying by one or more bedrooms face significant reductions in housing benefit and some 660,000 households will be affected.

A series of recent parliamentary debates have explored, in turn:

- the impact in Wales (*Hansard* HC Debates col 65WH, 22 January 2013);
- the impact for disabled tenants (*Hansard* HC Debates col 96WH, 23 January 2013);
- the whole principle of the changes (*Hansard* HC Debates col 105WH, 23 January 2013).

The Chartered Institute of Housing (CIH) has published a new guidance note for social landlords on how best to use discretionary housing payments in order to meet the likely shortfall in rent payments: *How to … make the most of discretionary housing payments* (CIH, January 2013).[3]

Later this year, all social housing tenants will start to be paid housing benefit monthly (rather than weekly as at present) and benefit will be paid direct to the tenant rather than to the landlord. This change has been piloted since July 2012 by six demonstration projects. On 17 December 2012, a report about outcomes in the six areas participating in that project was published: *Direct Payment Demonstration Project: Payment figures* (Department for Work and Pensions (DWP), December 2012).[4] It identified that, over the first four months of the pilot, 6,220 tenants were paid their housing benefit directly and that rent payment collection rates were 92 per cent overall, with a range across the different areas from 88 per cent to 97 per cent. Three hundred and sixteen tenants had been switched back to payments to their landlords – because they had either reached triggers for switch back or been switched back through early intervention when arrears accrued.

The latest developments on the overall benefit cap and other housing benefit issues are covered in *Housing Benefit and Council Tax Benefit General Information Bulletin G12/2012* (DWP, 21 December 2012).[5]

HUMAN RIGHTS

Article 8

■ Dacorum BC v Sims

[2013] EWCA Civ 12, 24 January 2013

Dacorum Council let a house to Mr Sims and his wife as joint tenants. Initially, the tenancy was an introductory tenancy, but it became a secure tenancy. On the breakup of their marriage, Mrs Sims left the property with their two youngest children and moved into a women's refuge. She validly terminated the joint tenancy by notice to quit served on the council. There was accordingly no longer any tenancy in legal existence under which Mr Sims could claim the right to occupy the property as a secure tenant, jointly, solely, or in any other recognised legal capacity (*Hammersmith and Fulham LBC v Monk* [1992] AC 478, HL). Dacorum Council sought possession. Deputy District Judge Wood made a possession order. Mr Sims appealed.

All parties agreed that the appeal should be dismissed, but the real contest was whether the Court of Appeal should grant permission to appeal to the Supreme Court and stay the possession order, so that Mr Sims could challenge the compatibility of the current state of the law on the termination of periodic joint tenancies of residential property with the European Convention on Human Rights ('the convention') article 8 and article 1 of Protocol No 1. The Court of Appeal held that neither article 8 nor article 1 of Protocol No 1 was

engaged. The proposed appeal to the Supreme Court was unarguable. There is no incompatibility between the rules of English property and contract law relating to the termination of a joint tenancy by one joint tenant and the convention. No sensible purpose would be served by the expenditure of yet more public funds on a hearing before the Supreme Court. The Court of Appeal dismissed the appeal and refused permission to appeal.

■ Islington LBC v Doner

[2012] EWCA Civ 1745,
4 December 2012

A secure tenant died. The defendant had been living with him for more than a year as his carer. The council sought possession. The defendant claimed that the property was her home and that an eviction would interfere with the right to respect for that home protected by article 8 of the convention. A district judge made a possession order. HHJ Mitchell dismissed an appeal.

Jackson LJ gave permission for a second appeal to be pursued in the Court of Appeal.

POSSESSION CLAIMS

Housing Act secure tenancies

■ Camden LBC v Tonello

[2013] All ER (D) 72 (Jan),
16 January 2013

A council property was let to two joint secure tenants. In 2003, the defendant tenant moved out to live elsewhere. When the other joint tenant died in 2010, the council gave notice to quit. The defendant resisted a possession claim on the basis that she was still occupying the property as her principal home because she was only temporarily absent and intended to return (Housing Act (HA) 1985 s81). A judge rejected that defence and granted possession. The defendant lodged an appeal. She found a letter written in September 2010 by her solicitors asserting her intention to return. As the letter had not been produced at trial, she asked that the appeal be conducted as a complete rehearing rather than by way of review. The appeal judge agreed.

However, Henderson J allowed the council's challenge to that ruling. Nothing about the circumstances justified the appeal being by way of rehearing.

Rent Act protected tenancies

■ Miles v Law

[2012] EWCA Civ 1756,
14 November 2012

Mr and Mrs Miles were private landlords. Mr Law was their Rent Act protected tenant. They wanted the property back in order to provide a home for their adult son and daughter who were of modest means. Mr Law, who only had part-time work and was also of modest means, wanted to stay. A claim for possession was made under Rent Act 1977 Sch 15 Ground 9. District Judge Langley found that possession had been reasonably required and that, on balance, the 'greater hardship' would be suffered by the landlords if possession were to be refused. Mr Law made a renewed application for permission to appeal.

Arden LJ refused permission. The judge had to make a comparative judgment and had not arguably erred in the conclusions she had reached. She had been entitled to find that Mr Law would be able to obtain alternative accommodation.

Tenants of mortgage borrowers

■ Paratus AMC Ltd v Fosuhene

[2012] EWHC 3791 (Ch),
5 October 2012

The claimant was a mortgage lender. The mortgage loan was advanced in 2008. In 2009, the property was let to the defendant. From August 2009, she paid the rent direct into the mortgage loan account. In April 2011, the lender sought possession. The defendant claimed that the lender was bound by her tenancy as a result of estoppel or waiver. Master Teverson made a possession order.

Lesley Anderson QC, sitting as a deputy judge of the High Court, dismissed an appeal. Put at its highest, the defendant's case was that she had paid rent which had been accepted. There was, however, no evidence to sustain an arguable case that the lender had done more than receive payments made into the mortgage loan account. There was no intention to adopt the tenancy or enter into a legal relationship with the tenant.

LONG LEASES

Power to lease

■ Charles Terence Estates Limited v Cornwall Council

[2012] UKSC 267,
20 December 2012

The Supreme Court has refused permission for Cornwall Council to appeal from the Court of Appeal decision ([2012] EWCA Civ 1439, 13 November 2012; January 2013 *Legal Action* 38) that there was no justification for reading the words 'at a reasonable price' into the council's statutory power to acquire housing (HA 1985 s17). The application did not raise an arguable point of law of general public importance. There was no realistic prospect of successfully appealing the first ground of the Court of Appeal's decision.

Service charges

■ Phillips and Goddard v Francis

[2012] EWHC 3650 (Ch),
21 December 2012

Mr and Mrs Francis were the lessors of a holiday site in Cornwall. More than 150 chalets were let on 999-year leases. Mr and Mrs Francis decided to carry out major works of repair and improvement 'to bring the site up to a first class standard'. They demanded increased sums in respect of service charges. The lessees issued proceedings challenging the recoverability of the service charges. In particular, they argued that the works were qualifying works within the meaning of Landlord and Tenant Act 1985 s20, and that, in the absence of consultation or dispensation, their liability was capped at £250 each. HHJ Cotter rejected that argument. He held that the correct approach was to identify individual 'sets' of work (eg, roof repairs, external repairs, etc) and that consultation was only required in respect of those sets which would result in a leaseholder being required to pay more than £250. The lessees appealed.

Sir Andrew Morritt, the Chancellor of the High Court, allowed the lessees' appeal. There was:

> *... nothing in the present legislation which requires the identification of one or more sets of qualifying works. If the works are qualifying works it will be for the landlord to assess whether they will be on such a scale as to necessitate complying with the consultation requirements or face the consequence that he may not recoup the cost from the tenants' contributions* (para 35).

The judge had applied the wrong tests. The works were qualifying works within the statutory definition.

> *Accordingly, all of them should be brought into the account for computing the contribution and then applying the limit. It may be that they should be spread over more than one year thereby introducing another limit. With that exception, the provisions relating to this service charge do not require any identification of 'sets of qualifying works' or the avoidance of 'excessive fragmentation'* (para 37).

■ Sadd v Brown

[2012] UKUT 438 (LC),
5 January 2013

A leaseholder applied to the Leasehold Valuation Tribunal (LVT) in a dispute about service charges. It was contended that the landlord had sought to recover an excessive proportion of the insurance premiums from the leaseholder and that the claim for the premiums included charges other than for

insurance. The LVT decided that there was no requirement in the lease to pay insurance premiums at all. The landlord appealed.

HHJ Robinson, sitting in the Upper Tribunal, held that the point about whether there was any requirement to pay a premium had not been taken in the LVT and should not have been the subject of a decision there. However, the point about liability was canvassed fully on appeal and, on a true construction of the lease, no insurance premium was payable.

■ **Johnson v County Bideford Ltd**
[2012] UKUT 457 (LC),
17 December 2012
A landlord served lessees with a demand for service charges. The demand failed to give the name and address of the landlord (instead, naming the managing agent). The landlord subsequently issued further demands giving the correct details.

The Upper Tribunal held that invalidity in a notice arising from non-compliance with Landlord and Tenant Act 1987 s47 could be made good retrospectively by late compliance with the section's requirements. The late compliance in this case validated the earlier defective demands.

■ **Hackney LBC v Akhondi**
[2012] UKUT 439 (LC),
10 December 2012
A long leaseholder complained to a LVT that service charges imposed by her council landlord were unreasonably high. She particularly mentioned charges for an entry-phone and replacement front door. The LVT held that the charges were excessive in relation to the doors, the roof, administration charges and preliminaries.

The Upper Tribunal allowed the council's appeal. The LVT decision had been arbitrary, unsupported by evidence and infused with procedural error.

CRIMINAL OFFENCES

■ **Health and Safety Executive v Hashim**
Chester Magistrates' Court,
17 January 2013
The defendant was a private landlord. She was unable to produce any annual gas safety inspection certificates for the period October 2009 to October 2011. The case was referred to the Health and Safety Executive (HSE) and the defendant was charged with breaching the Gas Safety (Installation and Use) Regulations ('the Gas Safety Regs') 1998 SI No 2451 and with failing to comply with a HSE Improvement Notice requiring production of a certificate.

She pleaded guilty. She was fined £400 and ordered to pay £1,000 towards prosecution costs.

■ **Haringey LBC v Parlak**
Highgate Magistrates' Court,
28 November 2012
The defendant was a private landlord. On inspecting his overcrowded and unlicensed house in multiple occupation (HMO), a council officer found 78 items of disrepair, including fire safety failures, security issues, damp and mould, filthy conditions, broken windows and lights not working. The conditions were so poor that they severely compromised the safety and comfort of tenants.

The defendant pleaded guilty to breaches of HMO management regulations and failure to obtain a HMO licence. He was fined £23,000 (in the light of similar previous convictions) with costs of £2,890.

■ **Sandwell MBC v Gill**
Sandwell Magistrates' Court,
19 November 2012
The defendant was a private landlord. On inspecting his property, a council officer found penetrating dampness, broken paving, dilapidated kitchen base units and an insecure front entrance door. An improvement notice was served under HA 2004 Part 1. When it was not complied with, the council prosecuted.

The defendant was convicted in his absence and fined £1,600 with costs of £896.37.

■ **Sandwell MBC v Singh**
Sandwell Magistrates' Court,
19 November 2012
The defendant was a private landlord. On inspecting his property, a council officer found dampness, water-saturated kitchen base units and worktops, loose gas pipework, insecure windows and an insecure entrance door. An improvement notice was served under HA 2004 Part 1. When it was not complied with, the council prosecuted.

The defendant was convicted in his absence and fined £1,600 with costs of £894.

■ **Health and Safety Executive v Khan**
Bradford Magistrates' Court,
2 January 2013
The defendant was a private landlord. His tenant was without heating and hot water for months as a result of a faulty boiler. On inspection of the premises by environmental health officers, he was unable to produce an annual gas safety inspection certificate. The case was referred to the HSE, which found that no inspection certificate had been prepared since 2007. The defendant was charged with breaching the Gas Safety Regs and failing to comply with a HSE Improvement Notice.

He was found guilty of both offences. The court imposed a community order with a requirement that he perform 200 hours unpaid work. He was ordered to pay £1,500 towards prosecution costs.

HOUSING ALLOCATION

Local Government Ombudsman

Complaint

■ **Kettering BC**
11 011 766,
16 January 2013[6]
The complainant was a homeowner. He wished to move nearer to a school which was able to meet the needs of his disabled child. He applied for accommodation under the council's choice-based allocation scheme, was allocated priority Band B, and was able to bid under the scheme.

In response to a successful bid, the council nominated him for a housing association property which suited his needs and he agreed to take it. However, the association operated an additional letting criterion – it would not let to an applicant who was a property owner. No such criteria appeared in the council's allocation scheme. The association refused to rent the property to the complainant. The council accepted the association's position. When the complainant sought a review, the council said that it could not hold a review because the decision had been made under the association's policy.

When the matter was raised with the Local Government Ombudsman, both the council and the association agreed that they had acted wrongly.

The ombudsman found maladministration because the council had:

■ lacked a clear understanding of its arrangements for nominations and consequent housing association lettings; and
■ simply accepted the association's withdrawal of the tenancy.

The refusal of a review had compounded those errors. Recommendations made included £3,800 compensation, a direct let and a review of both staff training and the content of nomination agreements made with local housing associations.

■ **R (George) v Hammersmith and Fulham LBC**
[2012] EWCA 1768,
28 November 2012
The claimant's mother was a secure tenant. In 2009 she moved to a care home. In 2010 the council served a notice to quit to end her tenancy. The notice having expired, the claimant applied for the discretionary grant of a tenancy to him. The council refused that application because: (1) there were considerable rent arrears; (2) the property would be under-occupied; and (3) the claimant had a history of previous violent and aggressive behaviour on the estate. Later, he applied again and the council responded that it had already considered the application.

Deputy High Court Judge Stuart Catchpole QC dismissed his claim for judicial review of the latter decision (see June 2012 *Legal Action* 36).

Ward LJ has granted permission to appeal, holding that it was arguable that the council had failed to comply with its own allocation scheme by failing to notify the claimant that its decision carried a right to a review.

HOMELESSNESS

Interim accommodation

■ Serious case review in respect of 'Robert'

North Yorkshire Safeguarding Adults Board, November 2012[7]

The deceased 'Robert' had been a long-term rough sleeper. On 21 December 2011, he asked Harrogate Council for homelessness assistance. He was advised to present himself at the council's offices but was told by telephone that if his tent was in the Leeds area rather than Harrogate he would be referred to Leeds for assessment. As a result, he believed that he needed to be able to provide evidence of a local connection to Harrogate before proceeding.

However, on 29 December 2012, in the light of his deteriorating condition, a project worker contacted the council's out-of-hours service. Both Robert and the project worker spoke to the duty officer (who was unable to reach the council's temporary accommodation manager). The focus of the discussion was whether there was a local connection and whether the council had emergency accommodation for a person who, like Robert, was using crutches. The council declined to accommodate on the ground, among others, that there was no established local connection.

The project itself accommodated Robert overnight on a camp-bed but the following day the council's out-of-hours service again declined to assist after an approach by Robert's GP and repeated requests from the project worker. B&B accommodation was refused 'as it did not state in the procedures [manual]' that its use was an option for the council (para 2.21). A further request made by the project manager to the council on the following day was rejected. The project considered Robert so vulnerable that, on 2 January 2012, it booked him into a room in a hotel. He failed to maintain contact with the project and on 6 January 2012 was found dead in that room.

HA 1996 s188 provides for the immediate accommodation of an applicant who may be homeless and may have a priority need. It applies 'irrespective of any possibility of the referral of the applicant's case to another local housing authority': HA 1996 s188(2). In dealing with what may be the first case of a death linked to the non-provision of section 188 accommodation, the Safeguarding Adults Board found that there were 'lessons to be learned', including 'greater understanding and information sharing across agencies on both homelessness legislation and community care' (para 4.1).

Suitable accommodation

■ Slattery, Sheridan and Slattery v Basildon BC

Southend County Court, 21 December 2012[8]

The appellants and their families were members of the Irish Traveller community and former residents of the Dale Farm Gypsy and Traveller site. On their applications to Basildon for homelessness assistance, they were accepted to have become unintentionally homeless and to be in priority need. The council acknowledged that it owed the main housing duty (HA 1996 s193) but in each case offered only 'bricks and mortar' accommodation. On review, the council upheld decisions on the suitability of those offers of accommodation. Appeals to the county court (HA 1996 s204) were brought on the basis that nothing less than a place to park their caravans would be 'suitable'. The appellants adduced medical evidence as to the mental and/or physical consequences if they were obliged to live in 'bricks and mortar' housing.

The council argued that the Court of Appeal's decision in *Sheridan v Basildon BC* [2012] EWCA Civ 335, 21 March 2012 was determinative. However, the appellants persuaded the court that whether the offers of accommodation fell below the *Wednesbury* minimum line on suitability in relation to the needs of each particular appellant and their family, and/or whether the council's decisions were contrary to article 8 of the convention, remained open to question.

Of the three appeals heard, one was allowed but the other two were dismissed. In one unsuccessful case, it was held that undisputed expert evidence that the appellant's anxiety was such that she would 'probably be unable to enter the property at all' was insufficient to render the offer of 'bricks and mortar' unsuitable. However, another appellant did succeed in having the decision to offer her such a property quashed on the basis the council ought to have made further medical enquiries if it wished to offer 'bricks and mortar'.

HOUSING AND CHILDREN

■ R (KA) v Essex CC

[2013] EWHC 43 (Admin), 18 January 2013

The claimant was a Nigerian national who had illegally entered the UK in 2002. She then had three children, all born in the UK. Her attempts to obtain permission to remain in the UK all failed. She had been staying with her husband's sister, but in March 2012 she was told to leave. She applied to the council for accommodation for her children (and herself) under Children Act 1989.

The council decided that a refusal to assist her would not breach her human rights because she could safely return to Nigeria with the children. The claimant applied for a judicial review.

Robin Purchas QC (sitting as a deputy High Court judge) quashed the decision. Article 8 of the convention protected both substantive and procedural rights. The council had failed to consider the procedural right (to an appeal about a decision on her immigration status) which would be lost or impaired if the claimant had to leave the country. The decision as to whether a refusal to assist with accommodation in the UK would infringe her human rights would need to be retaken having regard to that factor.

HOUSING AND COMMUNITY CARE

■ R (Naureen) v Salford CC

[2012] EWCA Civ 1795, 15 January 2013

The claimants were failed asylum-seekers. They applied to Salford Council for accommodation under National Assistance Act 1948 s21. When that was refused, they applied for a judicial review. A judge ordered a combined hearing of both permission to apply and of the substantive claim and meanwhile granted an order that Salford accommodate the claimants.

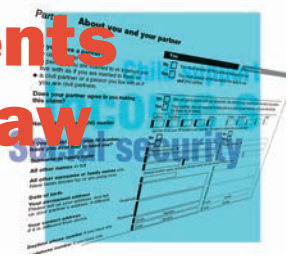
Later, the Home Office granted the claimants exceptional leave to remain and the claim became academic. The claimants asked for their costs on the basis that they would have won the judicial review. A judge made no order as to costs.

The Court of Appeal dismissed an appeal. The judge had exercised his discretion on costs in keeping with the authorities on compromise of judicial review claims and had made no error in the exercise of his discretion. It was simply not 'clear' that the claim would have succeeded.

1 Available at: www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/836/836vw.pdf.
2 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/68744/The_Cost_of_Troubled_Families_v1.pdf.
3 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/How%20to%20make%20the%20most%20of%20discretionary%20housing%20payments.pdf.
4 Available at: www.dwp.gov.uk/docs/direct-payment-demo-figures.pdf.
5 Available at: www.dwp.gov.uk/docs/g12-2012.pdf.
6 Available at: www.lgo.org.uk/GetAsset.aspx?id=fAAxADcAMAA2AHwAfABUAHIAdQBlAHwAfAAwAHwA0.
7 Available at: www.northyorks.gov.uk/CHttpHandler.ashx?id=21369&p=0.
8 Alex Offer, barrister, Leeds and London.


Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers. He is also a recorder. The authors are grateful to the colleague at note 8 for the note of judgment.

Recent developments in social security law – Part 2



Simon Osborne and **Sally Robertson** continue their six-monthly series. This article reviews case-law in both non-means-tested benefits (including employment and support allowance) and means-tested benefits (including the right to reside). In addition, relevant decisions of the Administrative Appeals Chamber (AAC) of the Upper Tribunal appear in summary form. Part 1 was published in February 2013 *Legal Action* 27.

NON-MEANS-TESTED BENEFITS

Disability living allowance

A decision of the Upper Tribunal, dealing with entitlement to the high rate of the mobility component on the basis of virtual inability to walk, contains a helpful review of case-law authority on the virtual inability to walk test. Another decision provides a reminder, in cases where a tribunal wishes to reduce or remove an existing award, of the necessity of identifying a ground for supersession, as well as considering entitlement.

■ MMF v Secretary of State for Work and Pensions

[2012] UKUT 312 (AAC), 7 September 2012
(CDLA/3162/2011)*

The claimant had chronic diarrhoea, which included stomach cramps, the severe discomfort of trying to hold in a bowel movement while walking and being covered in faeces when that effort failed. She was awarded the high rate of the care component but only the lower rate of the mobility component. The First-tier Tribunal rejected her argument that she was 'virtually unable to walk' and so entitled to the high rate, on the basis that she did not have a physical disability which rendered her virtually unable to walk.

Judge Lane allowed the claimant's further appeal and remitted the case to a fresh tribunal for rehearing. The tribunal had erred in its approach to the legal test for the higher rate of the mobility component, in particular by not taking into account her physical condition as a whole, as required by regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 SI No 2890. Specifically, the tribunal erred in law in finding that diarrhoea and ulcerative colitis (which gave rise to the diarrhoea) did not indicate a physical problem with the act of walking; rather, the condition could comprise a condition, 'capable of interfering with the act of walking'. It was therefore the case that diarrhoea might make a person virtually incapable of walking (paras 19–20).

In so holding, the judge approved previous case-law, namely, *CDLA/1361/1999* and *CDLA/0217/2009*, which had held that conditions involving bowel incontinence and soiling could give rise to the higher rate. Reviewing authority on the test of virtual inability to walk, the judge noted from the decisions in *Lees v Secretary of State for Social Services* [1985] 1 AC 930, HL and *R(DLA) 6/99* that the requirement was that the claimant's condition has an impact on his ability to walk, or in the act of walking itself, 'in other words, to put one foot in front of the other' (para 11). It was also the case that in *CDLA/1639/2006* that principle had been followed so that the effects of the condition in question must affect the physical act of walking itself. So, although pain from the migraine could not be relevant regarding the higher rate, the claimant's loss of balance might, ie as it affected the manner of walking, and it did not matter that the problem arose before or after the claimant began to walk (paras 17–18). In the present case, it was clear that the physical pain of the claimant preventing herself from soiling herself might stop her from walking, as might the added pain and soreness associated with faeces running down her legs (para 19).

■ DH v Secretary of State for Work and Pensions

[2012] UKUT 330 (AAC), 5 September 2012
(CDLA/107/2012)

The claimant suffered from arthritis, peripheral artery disease and depression. She was in receipt of the higher rate of the mobility component and the lowest rate of the care component. Following a heart bypass operation, she applied for a supersession, saying that her mobility needs were the same