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

Social housing

On 1 April 2010, the new regulatory regime for social housing took effect with the Tenant Services Authority (TSA) becoming fully established as the new regulator of both council and housing association landlords. The heart of the new arrangements is contained in *The regulatory framework for social housing in England from April 2010* (TSA, March 2010), which sets out six new standards for social housing.[1] The document describes the outcomes social landlords should meet for each standard and the TSA's specific expectations in respect of each of them. The standards are backed by the statutory regulation and enforcement powers vested in the TSA by the Housing and Regeneration Act (H&RA) 2008. The six standards cover:

- **Tenant involvement and empowerment** containing requirements relating to:
  - customer service, choice and complaints;
  - involvement and empowerment; and
  - understanding and responding to diverse needs of tenants.
- **Home** containing requirements relating to:
  - quality of accommodation; and
  - repairs and maintenance.
- **Tenancy** containing requirements relating to:
  - allocations;
  - rent; and
  - security of tenure.
- **Neighbourhood and community** containing requirements relating to:
  - neighbourhood management;
  - local area co-operation; and
  - anti-social behaviour (ASB).
- **Value for money**; and
- **Governance and financial viability**

The new standards apply to both local housing authorities and other providers of social housing (with the exceptions that the governance and financial viability standard and that part of the tenancy standard which relates to 'rent' do not apply to council housing).

The key to the TSA's regulatory function is that all social housing providers must register with the authority. One consequence of the new registration regime is a change in terminology for non-council landlords from 'registered social landlord' to 'private registered provider of social housing', local councils being the non-private registered providers.

Among the range of statutory and non-statutory materials requiring amendment to reflect the change are the Civil Procedure Rules (CPR), practice directions and protocols. The consequential amendments to the *Pre-action protocol for rent arrears*, among others, are contained in *52nd update March 2010* practice direction amendments.[2]

In the lead up to the establishment of the new regime, a stream of secondary legislation was made which included:

- the Housing and Regeneration Act 2008 (Consequential Provisions) (No 2) Order 2010 SI No 671;[3]
- the Housing and Regeneration Act 2008 (Penalty and Compensation Notices) Regulations 2010 SI No 662;[4]
- the Housing Management Agreements (Break Clause) (England) Regulations 2010 SI No 663;[5]
- the Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010 SI No 660;[6]
- the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 SI No 844;[7]
- the Housing and Regeneration Act 2008 (Commencement No 7 and Transitional and Saving Provisions) Order 2010 SI No 862;[8] and
- the Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 SI No 866.[9] See also page 26 of this issue.

Assured tenancies

At present, a tenancy cannot be an assured tenancy (or an assured shorthold tenancy) if the rent exceeds £25,000 per annum: Housing Act (HA) 1988 Sch 1 para 2(1)(b). As a result, many relatively modest lettings (particularly of houses let to a number of students as joint tenants) are outside statutory protection. On 25 March 2010, the government laid the Assured Tenancies (Amendment) (England) Order 2010 SI No 908, increasing the rent threshold to £100,000 per annum with effect from 1 October 2010 in England.[10]

The explanatory memorandum published with the Order contains an impact assessment dealing with the likely consequential effects, for example, in relation to protection of tenants' deposits. The change will apply to tenancies extant at the commencement date as well as to new tenancies.

Housing associations and rent arrears

Rent arrears management practices in the housing association sector (TSA, March 2010) details how housing associations deal with tenants in arrears.[11] The findings indicate that:

- at the end of 2007–08, 5.3 per cent of all rent due was unpaid, which is down from 5.6 per cent in 2005;
- evictions have fallen from 9,114 in 2004–05 to 7,703 in 2008–09; and
- about 95 per cent of evictions of housing association tenants were for rent arrears.

The research also reviews the use of HA 1988 Sch 2 Ground 8 by housing associations.

Homelessness

The statistics for local housing authority statutory homelessness provision in England for the last quarter of 2009 have been published: *Statutory homelessness: October to December 2009 England* (Communities and Local Government (CLG), March 2010).[12] They indicate that despite the impact of the recession there have been further significant falls in the number of households accepted as owed the main housing duty (HA 1996 Pt 7 s193) and of the number in temporary accommodation.

The Office of the Chief Analyst at the NHS has published a comprehensive guide for those advising the single homeless: *Healthcare for single homeless people* (NHS, March 2010).[13]

Mortgage arrears and repossessions

Statistics published by the Financial Services Authority (FSA) show that over 54,000 homes were repossessed in 2009 by mortgage lenders: *MLAR statistics: March 2010 edition* (FSA, March 2010).[14] These figures are higher than those published by the Council of Mortgage Lenders (CML) because they include action by non-CML members and

repossessions under second charges.

The Social Security (Claims and Payments) Amendment Regulations 2010 SI No 796 provide that, where payments of mortgage interest are deducted from income support etc on or after 8 April 2010 and paid to a mortgage lender, any amount paid in excess of the borrower's actual mortgage interest liability will be applied first to pay off any arrears of mortgage interest, and then to repay the principal sum of that mortgage or any other liability to the lender in respect of that mortgage.[15]

Minister for Housing, John Healey MP, has announced that a further £2.5m is being committed to achieving greater publicity of the help available to homeowners in difficulties: CLG news release, 16 March 2010.[16] The new funding will be used to advertise the mortgage help website and National Debtline's free advice-line telephone number. The announcement details the 86 repossession 'hot spot areas' in which most help is being targeted.

Long leases

Long leaseholders who want to take over management of their homes need to establish right-to-manage companies and then serve appropriate notices on the landlords (Commonhold and Leasehold Reform Act 2002). The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 SI No 825, which came into force on 19 April 2010, replace the relevant documentation with new versions.[17]

HUMAN RIGHTS

Article 6 and delay

■ Anderson v UK

App No 19859/04,
9 February 2010

Edinburgh City Council served a statutory repairs notice on Mr Anderson, the owner of a building. After carrying out works in default, the council brought proceedings in the Sheriff Court against Mr Anderson to recover his share of the repair costs. He filed a counterclaim alleging that the council had trespassed by carrying out further repairs which had damaged his property. Mr Anderson also obtained a summons to bring proceedings against a commercial property company and the council in the Outer House of the Court of Session, alleging that the statutory notices were invalid on grounds of fraud and illegal conspiracy. The total length of the proceedings was six years, eight months. Mr Anderson complained to the European Court of Human Rights (ECtHR) that the length of the proceedings before the Court of Session challenging the statutory notices was incompatible with the 'reasonable time' requirement of article 6 of the European Convention on Human Rights ('the convention').

The ECtHR noted that this was not a complex case. There were no novel points of law. Mr Anderson's allegations had been rejected as unfounded and unspecified. Mr Anderson's 'civil rights and obligations' had not been decided within 'a reasonable time'. Accordingly, there was a breach of article 6. The ECtHR awarded €1,500 in respect of non-pecuniary damage.

Article 8 and possession claims

■ Salford City Council v Mullen

[2010] EWCA Civ 336,
30 March 2010

The Court of Appeal heard five appeals concerned with occupiers who were either introductory tenants or provided with accommodation as homeless persons and had raised issues relating to article 8 of the convention in possession claims. The Court of Appeal considered *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 and *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367.

The Court of Appeal gave a lengthy analysis of recent decisions, pending the hearing of the appeal in *Pinnock v Manchester City Council* [2009] EWCA Civ 852; [2010] 1 WLR 713 by the Supreme Court in July. It concluded:

> *We are thus bound to hold that gateway (b) can apply to any decision of the local authority relevant to seeking possession which could be the subject of judicial review. [However] ... in the introductory tenancy scheme as in the demoted tenancy scheme the proper construction of the legislation means that any gateway (b) attack on any decision would have to take place in the Administrative Court and the role of the county court would be limited to consideration as to whether such an attack was arguable* (paras 74 and 75).

The Court of Appeal dismissed the appeals; however, the court gave permission to appeal to the Supreme Court, in one case in each category, namely, *Hounslow LBC v Powell* and *Leeds City Council v Hall*.

■ Nettleton Road Housing Co-operative Limited v Joseph

[2010] EWCA Civ 228,
16 March 2010

The co-operative was a fully mutual housing association within the meaning of Housing Associations Act (HAA) 1985 s1(2). It was also registered as a co-operative housing association under the provisions of the Industrial Provident Societies Act 1965. Mr Joseph was one of its tenants. As a result of HAA s1(2) and HA 1988 Sch 1 para 12(h), his tenancy could not be an assured tenancy. His tenancy agreement included a prohibition on keeping any pet in the premises without the co-operative's written permission. In breach of that term, Mr Joseph kept a Staffordshire bull terrier. After a number of meetings, a notice to quit which complied with the provisions of the Protection from Eviction Act (PEA) 1977 was served and a possession claim was issued. District Judge Lee made a possession order.

Mr Joseph appealed. The principal ground of appeal was that the exclusion of any system of statutory protection by the provisions of the HA 1988 created a situation in which the tenants of fully mutual housing associations could be evicted from their houses on an arbitrary and capricious basis and in a way which was wholly incompatible with the provisions of either article 8 or article 14 of the convention.

The Court of Appeal dismissed the appeal. Even if Mr Joseph were to succeed in all his arguments on the law, his appeal would fail on the facts. The breach of covenant was a serious breach. To bring a dog like a Staffordshire bull terrier into the house without the consent and against the wishes of the other residents showed a complete disregard for the interests of the other tenants and was a breach of the fundamental principle of consent which underpins associations of this kind. The terms of the prohibition were clear. An argument that the period for compliance with the notice to quit was inadequate was 'hopeless'. It was not possible to say that the seven weeks given to Mr Joseph in which to 're-home' the dog was either inadequate or unreasonable.

■ R (Coombes) v Secretary of State for Communities and Local Government and Waltham Forest LBC

[2010] EWHC 666 (Admin),
8 March 2010

In 1954, the council granted John Coombes a tenancy of a flat. He lived in the flat until he died in 1999. His wife succeeded to the tenancy under HA 1985 s85, but she too died in 2005. In 2008, the council served a notice to quit on their son, who had lived in the flat since 1954 when he was six years old, and Mrs Coombes's personal representatives. In 2009, they brought a claim for possession in Bow County Court. Mr Coombes junior counterclaimed raising human rights issues, namely, that his personal circumstances and his long occupancy of the property, coupled with his attachment to it, offered a basis for being permitted to remain. HHJ Mitchell

transferred the claim and counterclaim to the High Court. The issue before the court was the compatibility of PEA s3 and related legislation with article 8 of the convention.

Cranston J considered *Kay* (above) and *Doherty* (above), and recent ECtHR authorities. He stated that *Doherty* did not enable the county court to substitute its view for that of the council. That court should still be asking itself whether the decision to recover possession was flawed on public law principles. He held that it was not open to him to grant a declaration of incompatibility. Section 3 of the PEA did nothing more than prohibit a property owner from repossessing property without first seeking a possession order in court. The requirement to seek a possession order, rather than to recover possession without any supervision by the court, could not be incompatible with article 8. Coupled with other legislation, PEA s3 did not fall within the exceptional category of cases which the House of Lords in *Kay* and *Doherty* identified as passing through gateway (a). He also noted that the provisions which denied Mr Coombes's right to succeed to the tenancy had been held to strike the requisite balance and to be fully compatible with article 8 (*R (Gangera) v Hounslow LBC* [2003] EWHC 794 Admin; [2003] HLR 68 and *Wandsworth LBC v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 617). Nor was it open to him to find that the manner in which county courts grant possession orders was incompatible with article 8 of the convention. However, Cranston J granted permission to appeal to the Court of Appeal.

■ Slough BC v Aden

[2009] EWCA Civ 1541, 9 December 2009

Slough granted Mr Aden a non-secure tenancy of a room in a hostel under the homelessness provisions of HA 1996 Pt 7. It was a periodic tenancy, which was terminated by a notice to quit served because of alleged rent arrears. Slough decided that Mr Aden did not have a priority need and was therefore ineligible for an allocation of housing accommodation under Part 7. A review was carried out under s202, but the decision was affirmed. An appeal to the county court was dismissed. District Judge Parker then made an order for possession. HHJ McIntyre dismissed an appeal and refused to transfer the possession claim to the High Court so that Mr Aden could seek a declaration of incompatibility. Mr Aden sought permission to being a second appeal. He argued that the absence of security of tenure for applicants for homelessness assistance under Part 7 was incompatible with article 8 of the convention.

Etherton LJ refused permission to appeal. The compatibility of Part 7, in the context of security of tenure, with article 8 was considered by the Court of Appeal in *Sheffield City Council v Smart* [2002] EWCA Civ 4; [2002] HLR 34 and *Desnousse v Newham LBC* [2006] EWCA Civ 547; [2006] HLR 38, and was held to be compliant. He did not consider that the Court of Appeal would be at liberty to depart from those previous decisions.

■ R (Husband) v Solihull MBC

[2009] EWHC 3673 (Admin), 1 December 2009

Mr and Mrs Husband were joint tenants. They had marriage problems. In June 2008, Birmingham County Court issued a non-molestation order against Mr Husband and an exclusion order lasting until 19 February 2009. On 9 February 2009, Mrs Husband indicated to Solihull that she wished to terminate the tenancy. Solihull told her of the effect this would have on Mr Husband's position. She served a notice to quit which expired on 16 March 2009. On 10 February 2009, she handed back the keys. On 17 March 2009, Solihull wrote to Mr Husband notifying him that the tenancy had ended. On 26 March 2009, a housing officer visited the house. She found that it was empty, except for a bedstead, and the locks were changed. A possession claim was issued. Mr Husband sought permission to move for judicial review of the decision to treat the premises as abandoned and to refuse to readmit him. The decision to recover possession was also challenged. He argued that the unqualified right of a landlord to possession where a co-tenant has determined a tenancy, which had been established in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, HL, was, in the light of *McCann v UK* App No 19009/04; [2008] ECHR 385, incompatible with the convention.

Beatson J dismissed a renewed application for permission to seek judicial review. The submissions based on *Monk* had been determined in other cases, including *Doherty* (above) and the decision of HHJ Bidder QC in *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin). He continued: 'In my judgment, it is not, in the state of English law now, arguable that the unqualified right to possession by a landlord is incompatible with article 8; or indeed, in the light of *Sheffield [City Council] v Smart* [2002] HLR 34, with article 1 Protocol 1 of the convention' (para 8).

PUBLIC SECTOR

Stock transfer

■ R (Hayes) v Secretary of State for Communities and Local Government

[2009] EWHC 3520 (Admin), 6 November 2009

In a claim for judicial review, the claimant, who was not legally represented, challenged the secretary of state's decision to grant consent for the transfer of the Clapham Park estate from Lambeth LBC to Clapham Park Homes Limited. Charles J rejected claims that the proposed transfer breached the claimant's rights under articles 1, 3, 8, 14 and article 1 of Protocol No 1. He also found a *Wednesbury*-unreasonable challenge alleging irrationality to be hopeless. The argument that the secretary of state had failed to take into account relevant factors in reaching her decision was 'also doomed to failure'.

ASSURED SHORTHOLD TENANCIES

Section 21 notices

■ Elias v Spencer

[2010] EWCA Civ 246, 29 January 2010

A landlord served a HA 1988 s21 notice on an assured shorthold tenant. The notice required possession: 'After: 22ND NOVEMBER 2008 or, if this notice would otherwise be ineffective, after the date being the earliest date not earlier than two months after the date of service of this notice when shall expire a period of the assured shorthold tenancy.' The date of November 22 was wrong because it was not a day on which the periodic tenancy expired. The landlord relied on the alternative formula provided in the notice. Recorder Owen QC accepted that submission and made a possession order. The tenant sought permission to appeal. Stanley Burnton LJ refused permission to appeal. He said that the present case was indistinguishable from *Lower Street Properties Ltd v Jones* [1996] 28 HLR 877.

Sir Scott Baker refused a renewed application for permission to appeal. Although *Lower Street Properties Ltd* had slightly different facts, the principle that the formula was perfectly good was clear. 'The formula was applied in this case and it obviously in the terms of the notice trumped any problem with regard to the invalidity by one day of the date' (para 6). An appeal would not have a real prospect of success.

Disability Discrimination Act 1995

■ Drum Housing Association Ltd v Thomas-Ashley

[2010] EWCA Civ 265, 17 March 2010

Ms Thomas-Ashley suffered from bipolar mood disorder that was characterised by cyclical and episodic disturbances in mood which, at their extreme, fulfilled criteria for manic as well as depressive episodes. She was an assured shorthold tenant of a flat. In breach of the terms of the tenancy, she kept a Jack Russell/Border Collie cross in the flat. After receiving complaints that the dog barked, Ms Thomas-Ashley's landlord, Drum Housing Association, served a HA 1988 s21 notice and took possession proceedings. HHJ Murphy made a possession order. He found that Ms Thomas-Ashley: 'paid no particular attention to the … terms' of the tenancy agreement. She had asked permission to have a dog, which was refused, and went on to take a risk by having it without permission. The dog did bark and was not the type of dog for which the head lessors would give consent. If the dog stayed, it was inevitable that the head lessor would bring forfeiture proceedings, against which there was no defence. Ms Thomas-Ashley appealed. She argued that the use of the s21 procedure was an attempt to enforce provisions in the tenancy agreement which were unlawfully discriminatory under the Disability Discrimination Act 1995 and that the court should not sanction the landlord's enforcement of such provisions.

The Court of Appeal dismissed the appeal. After referring to *Lewisham LBC v Malcolm* [2008] 3 WLR 194; [2008] UKHL 43, Sir Scott Baker said that this was not a case where the interpretation of the legislation could be stretched to assist Ms Thomas-Ashley.

[She] fails on the facts found by the judge both to show that the 'no animals' term discriminated against her on the grounds of her disability and that if it did there was nothing the respondents could reasonably have done about it. The 'no animals' provision was in the appellant's tenancy agreement and the head lease for a purpose (para 34).

The insurmountable problem faced by Ms Thomas-Ashley was that changing the terms of her lease would have provoked forfeiture of the housing association's lease from the head lessor.

PROCEEDS OF CRIME ACT 2002

■ Olden v Serious Organised Crime Agency

[2010] EWCA Civ 143, 26 February 2010

Mr Olden was convicted on counts of deception relating to mortgage fraud. However, his conviction was set aside on appeal. The Serious Organised Crime Agency (SOCA) then took civil recovery proceedings under the Proceeds of Crime Act (POCA) 2002. At first instance ([2009] EWHC 610 (QB)) the court made a civil recovery order and a possession order in respect of his property in favour of SOCA. Mr Olden appealed.

The Court of Appeal allowed his appeal against the possession order. POCA contained no express power to make a possession order, and the court should not imply such a power. The purpose of a recovery order was to vest the property to be recovered in the trustee. Once the property was vested in the trustee, s/he could decide to apply under CPR Part 55 for an order for possession.

HOUSING ALLOCATION

■ R (Joseph) v Newham LBC

[2009] EWHC 2983 (Admin), 20 November 2009

Mr Joseph was the tenant of a Newham council flat. He applied for a transfer. He was accorded 'reasonable preference' status under the council's choice-based lettings scheme on account of overcrowding: HA 1996 Part 6 s167(2)(c). Newham's scheme provided for reduced preference to be given to those applicants with property-related debts: HA 1996 s167(2A)(b) and *Allocation of accommodation code of guidance for local housing authorities 2006* para 5.23(b). The scheme stated:

Applicants who have any property-related debts (such as rent arrears, council tax arrears or a housing benefit overpayment) to the council, either relating to their existing home or a former home, are normally given less priority than other applicants when being considered for offers of accommodation, or when being considered for a nomination to a registered social landlord for housing, until such time as they clear all debts owed.

The council notified Mr Joseph that this provision would be applied to him because of a debt of £895 in respect of overpaid housing benefit. He sought judicial review on the basis that:

- the debt had been owing for so long that recovery of it was statute-barred; and
- the allocation scheme should not be used to compel payment of otherwise irrecoverable debt.

HHJ Thornton QC (sitting as a deputy judge of the Administrative Court) quashed the council's decision. He held that:

- in context, the provision allowing property-related debts to lead to a loss of priority in Newham's scheme was a reference to recoverable housing benefit, that was to overpaid housing benefit whose recovery has not been barred by Limitation Act 1980 s9; and
- by applying the property-related debt provision to debts that were no longer recoverable in law to the detriment of Mr Joseph, Newham was acting irrationally and contrary to his legitimate expectation of how his applications under that scheme would be dealt with and treated.

HOMELESSNESS

Applications

■ O'Callaghan v Southwark LBC

Lambeth County Court, 6 November 2009[18]

The claimant, aged 17, applied to the council when she was homeless. It did not refer her to Children's Services but dealt with her under HA 1996 Pt 7. Initially, the council provided the claimant with accommodation in bed and breakfast and later at foyer-style supported accommodation, but she was not notified of any decision on the application under Part 7. When the claimant was evicted from that accommodation, the council decided that she had become homeless intentionally. The decision was upheld on review.

On the claimant's appeal, the council contended that the foyer accommodation had been secured as part of its homelessness prevention arrangements and that by accepting the placement there the claimant had brought her homelessness application to an end.

HHJ Welchman allowed the appeal. He varied the decision to one that the claimant had not become homeless intentionally. As there had been no decision on the application for homelessness assistance, the loss of the interim accommodation (HA 1996 s188) could not give rise to a finding that the claimant had become homeless intentionally. The prevention of homelessness was commendable, but only against the background of the statutory Part 7 framework and not as an alternative to it. Provision of accommodation as

'homelessness prevention' could not be used as a way of seeking to avoid the council's statutory responsibilities.

■ R (Raw) v Lambeth LBC

[2010] EWHC 507 (Admin), 12 March 2010[19]

The claimant, a single man aged 61, applied to the council for homelessness assistance: HA 1996 Pt 7. At first interview, a housing options officer suggested that he take up the council's Lettings Direct scheme under which a private sector tenancy would be arranged for him (with a rent guarantee and a deposit paid). The claimant was not told that this would affect his homelessness application. When notified that he had been referred to the scheme, the claimant was worried and his solicitors wrote to the council seeking confirmation that his homelessness application was being dealt with. He was then given documentation for the scheme which indicated that his homelessness application would not be progressed. The claimant sought judicial review of what his representatives said was 'outrageous "gate keeping"'.

Before the claim could be tried the council agreed to proceed with the homelessness application and in due course accepted that it owed him the main duty (HA 1996 s193(2)).

Stadlen J declined an invitation to continue the claim despite it having become academic. However, the judgment (at paras 70–82) contains helpful general observations about local housing authority arrangements which may appear to be designed to avoid enquiries into homelessness applications and/or to avoid the provision of accommodation during enquiries.

■ R (Halewood) v West Lancashire DC

Administrative Court (sitting in Manchester), 31 July 2009[20]

Ms Halewood made an application to the council for homelessness assistance under HA 1996 Pt 7. The council decided that she lacked the necessary capacity to make an application: *R v Tower Hamlets LBC ex p Begum* [1993] 1 AC 509, HL. A consultant psychiatrist advised that she possessed the capacity to understand and respond to an offer of accommodation. However, he also considered that her mental condition would be likely to impair her ability to comply with the requirements of any future tenancy, although 'it would be not the major effect, and would only be significant on some, but not all, occasions of breach of tenancy'.

Ms Halewood sought judicial review on the grounds that:

■ it was not open to the council to refuse her application simply because her lack of capacity as a result of mental impairment was likely to have some role to play, however minor, in future tenancy breaches; and

■ the true ratio of *Begum* was that only those persons so lacking in capacity as to be unable to understand and comprehend an offer of accommodation ought to be excluded from Part 7.

HHJ Pelling QC (sitting as a deputy judge of the Administrative Court) granted a renewed application for permission to seek judicial review. The contention that the council had misapplied the *Begum* test was arguable. After the grant of permission, the council agreed to accept the application as competent and also later accepted a duty to the claimant under HA 1996 s193(2).

Intentional homelessness

■ Gibbons v Bury MBC

[2010] EWCA Civ 327, 26 March 2010

Mr Gibbons was an assured shorthold tenant in rent arrears. His landlords gave him two months' notice seeking possession: HA 1988 s21. Mr Gibbons completed an application form for council housing (HA 1996 Pt 6) in which he stated that he could not afford his rent, had to move out of his home 15 days later (when the notice expired) and would then become homeless.

When the notice expired, he left the property and later applied for homelessness assistance (HA 1996 Pt 7). The council decided that he had become homeless intentionally on the ground that he had left at a time when he had £7,000 in capital which he could have paid towards his rent. On review of that decision, it became plain that there had not been £7,000 capital available to clear the arrears. Following a meeting with Mr Gibbons and his representatives, the reviewing officer gave notice that she was minded to, nevertheless, uphold the decision on the basis that the tenancy had been given up voluntarily and Mr Gibbons had expended his savings frivolously instead of using them to pay rent. The representatives sought a further meeting but none was held.

HHJ Tetlow allowed an appeal and quashed the review decision. The council's appeal from that decision was dismissed.

The Court of Appeal held that:

■ the reviewing officer had failed to take account of a relevant consideration, namely that the Part 6 housing application disclosed information triggering an obligation on the council to provide advice and assistance such as might have helped the claimant avoid homelessness. Jackson LJ said:

When the council received that application form, the council clearly had reason to believe that Mr Gibbons and his daughter were threatened with homelessness. That, in my view, is sufficient to trigger the obligations of the council under Part 7 of the 1996 Act (para 31);

■ the reviewing officer had also failed to decide the question of whether or not Mr Gibbons had been ignorant of his entitlement to housing benefit and (if he had been ignorant of that matter) no finding had been made on whether or not he had acted in 'good faith': HA 1996 s191(2); and

■ there had been a deficiency in the original decision (the mistake in relation to the £7,000) and once the reviewing officer had notified an intention to uphold the decision on a different factual basis, she should have held an oral hearing as his representatives had sought: Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2).

■ Eryurekler v Hackney LBC

Clerkenwell and Shoreditch County Court, 9 February 2010[21]

The claimant had been a private sector tenant with a £25 per week shortfall between her housing benefit and her rent. She was dependent on income support and child tax credits. She gave up the tenancy and later applied to the council for homelessness assistance: HA 1996 Pt 7. The council decided that she had become homeless intentionally: HA 1996 s191. The decision was upheld on review. Neither decision made any reference to the *Homelessness code of guidance for local authorities* para 17.40: 'In considering an applicant's residual income after meeting the costs of the accommodation, the secretary of state recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseeker's allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit.'

On an appeal (under HA 1996 s204), it was argued that paragraph 17.40 applied and that 'income support' should be read as including child tax credits. The council argued that 'income support' should be given its natural meaning and be restricted to the amount actually paid to the claimant for herself.

HHJ Mitchell accepted that the interpretation urged by the council would lead to 'unprincipled results' which cannot have been the intention of the secretary of state. This was because it would put the claimant in a worse position than a long-term lone parent who had continued to receive income support incorporating a childcare element, and in a less favourable position compared with an adult receiving income support who had no dependent children. The reviewing officer

should have considered paragraph 17.40. The fact that the decision made no reference to the paragraph suggested that the reviewing officer had not considered it. If he had done so and chosen not to follow the secretary of state's recommendation, he would have been obliged to give reasons for so doing. In the event, the appeal was dismissed. The error made no difference because a very high level of unnecessary expenditure demonstrated that the rent had actually been affordable.

Discharge of duty

■ Connors v Birmingham City Council

Birmingham County Court, 15 January 2010[22]

The council owed Ms Connors the main housing duty under HA 1996 s193(2). It made her an offer of permanent accommodation which she declined. The council then notified her of a decision that its duty had been discharged (HA 1996 s193(7)), but no reasons were given in that notice as to why the offered accommodation was considered 'suitable'. Ms Connors sought a review. The reviewing officer acknowledged that the discharge letter had failed to give reasons, but issued a minded-to letter inviting further representations within seven days and indicating that the discharge decision was likely to be upheld for reasons the reviewing officer herself gave. No representations were received in time and the reviewing officer upheld the original decision.

HHJ Cook quashed the review decision. Had the council provided reasons in the first discharge letter, Ms Connors would have had 21 days to consider and respond to it in her review request: HA 1996 s202. Failure to give those reasons had deprived her of that opportunity. It had been unfair to give her fewer than seven days (taking into account postal delivery) to make representations once the reviewing officer had furnished some reasons in the minded-to letter.

HOUSING AND CHILDREN

■ R (O) v East Riding of Yorkshire CC

[2010] EWHC 489 (Admin), 11 March 2010

The claimant, a teenage boy, was accommodated and 'looked after' by the council under Children Act (CA) 1989 s20. Following an assessment of the claimant's special educational needs (under the Education Act (EA) 1996), the council found him a place at a residential school where he would be both educated and accommodated for 52 weeks a year. The claimant moved there. The issue was whether or not this placement brought his status as a 'looked after' child to an end.

A claim for judicial review was dismissed. Cranston J held that on a true construction of the two statutory schemes, the claimant had ceased to be a 'looked after' child because he was no longer provided with accommodation in exercise of the council's social services functions: CA s22(1)(b). Although it may represent a lacuna in the statutory scheme, the council's duties under CA s20 had come to an end on the commencement of the full-time placement arranged under the EA.

■ R (O) v Barking and Dagenham LBC

[2010] EWHC 634 (Admin), 3 March 2010

The claimant was accommodated by the council as an asylum-seeker aged under 18: CA s20. All his applications and appeals for asylum failed. After the claimant reached adulthood, the council decided to withdraw the accommodation because he would then be housed by the UK Border Agency's National Asylum Support Service scheme.

Calvert-Smith J dismissed a claim for judicial review of that decision. Nothing in the council's obligations under CA s23C(4)(c), owed to a 'former relevant child', required the council to provide accommodation itself when other accommodation was available to that 'child'.

HOUSING AND COMMUNITY CARE

■ R (M) v Hammersmith and Fulham LBC and others

[2010] EWHC 562 (Admin), 3 March 2010

The claimant sought accommodation from the council on being discharged back into the community after a period of detention under Mental Health Act 1983 s3. A judicial review claim became necessary because the local authorities for the areas in which the claimant had lived previously could not agree which was responsible for the costs of accommodating him now. The claim was linked with another case raising the same problem between Hammersmith and another local authority.

In the course of deciding the claims (by application of principles of 'residence'), Mitting J rejected the assertion of one council that there was a legitimate expectation that other councils would comply with an agreement entitled *Services for mentally ill and mentally handicapped people: responsibility for costs of accommodation and day care services*, which was made in 1988 between the Association of Metropolitan Authorities and the Association of County Councils about how such disputes between local authorities would be resolved.

1 Available at: www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf.
2 Available at: www.justice.gov.uk/civil/procrules_fin/index.htm.
3 Available at: www.opsi.gov.uk/si/si2010/uksi_20100671_en_1.
4 Available at: www.opsi.gov.uk/si/si2010/uksi_20100662_en_1.
5 Available at: www.opsi.gov.uk/si/si2010/uksi_20100663_en_1.
6 Available at: www.opsi.gov.uk/si/si2010/uksi_20100660_en_1.
7 Available at: www.opsi.gov.uk/si/si2010/uksi_20100844_en_1.
8 Available at: www.opsi.gov.uk/si/si2010/uksi_20100862_en_1.
9 Available at: www.opsi.gov.uk/si/si2010/uksi_20100866_en_1.
10 Available at: www.opsi.gov.uk/si/si2010/uksi_20100908_en_1.
11 Available at: www.tenantservicesauthority.org/upload/pdf/Rent_arrears_management_practices.pdf.
12 Available at: www.communities.gov.uk/documents/statistics/pdf/97814094.pdf.
13 Available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_114250.
14 Available at: www.fsa.gov.uk/pages/Library/Other_publications/statistics/index.shtml.
15 Available at: www.opsi.gov.uk/si/si2010/uksi_20100796_en_1.
16 See: www.communities.gov.uk/news/housing/1506373.
17 Available at: www.opsi.gov.uk/si/si2010/uksi_20100825_en_1.
18 Zia Nabi, barrister, London and Stuart Hearne, Cambridge House Law Centre®, London.
19 David Watkinson, barrister, London and David Thomas, solicitor, London.
20 Ben McCormack, barrister, Manchester and Nina Patel, solicitor, Jackson and Canter, Liverpool.
21 Martin Hodgson, barrister, London.
22 Nicholas Nicol, barrister, London and Samitra Balu, Tyndallwoods solicitors, Birmingham.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 18–22 for transcripts or notes of judgments.