Recent developments in housing law

Jan Luba QC and Nic Madge 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

Tenants in mortgaged property

On 1 October 2010, the provisions of the Mortgage Repossessions (Protection of Tenants etc) Act (MR(PT)A) 2010 came into force: the Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order 2010 SI No 1705. They offer tenants of mortgage borrowers the opportunity for a respite from eviction where possession is being sought by the mortgage lender. The provisions cover 'unauthorised' tenants, ie, those to whom the borrowers have let without the consent of the lenders. Under MR(PT)A s1(2) tenants can invite the court, when making possession orders, to postpone the date on which possession must be given for up to two months. Tenants should have notice of possession hearings as a result of the notification requirements in Civil Procedure Rules (CPR) 55.10. A new CPR 55.10(4A) refers to tenants' rights to apply for the suspension of possession orders: see Civil Procedure (Amendment No 2) Rules (CP(ANo2) Rules) 2010 SI No 1953 r7.

Under MR(PT)A s1(4), tenants can invite the court to postpone execution of such a possession order for up to two months. To ensure that tenants know of the opportunity to secure the stay of a possession warrant, section 2 requires lenders to give notice that execution is being sought. The form of notice is prescribed by the Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations (DH(EPOM) Regs) 2010 SI No 1809 and is set out in the new edition of *Defending Possession Proceedings* (LAG, 7th edition, August 2010) at p759. When applying for warrants, lenders are now required to certify that notice has been given in keeping with the DH(EPOM) Reg: CPR Sch 2 CCR Order 26 r17(2A) (see CP(ANo2) Rules r13).

The criteria for the exercise of both discretions – in respect of the order and/or the warrant – are set out in MR(PT)A s1(5). *The Explanatory memorandum* published with the DH(EPOM) Regs is accompanied by an impact assessment of the new measures and indicates that Communities and Local Government (CLG) proposes to issue non-statutory guidance on the Act and the DH(EPOM) Regs this autumn.

Housing and the Equality Act 2010

Key provisions of the Equality Act (EqA) 2010 relating to letting and management of residential premises came into effect on 1 October 2010: the Equality Act 2010 (Commencement No 4, Savings Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 SI No 2317). They include provisions governing discrimination in relation to premises (Part 4 ss32–38) and those relating to disability in respect of reasonable adjustments and improvements to rented dwellings (Part 13 ss189–90 and Sch 21). For a general introduction to the EqA see p20 of this issue.

The Equality Act 2010 (Disability) Regulations 2010 SI No 2128, also in force from 1 October 2010, include further provisions:

- deeming certain aspects of work on premises to be 'auxiliary aids or services' for the purposes of EA Sch 4 paras 2–4 (reg 8);
- addressing whether work to physical features of a dwelling falls within a 'reasonable' adjustment for the purposes of Schs 2 and 15 (reg 9); and
- defining when a landlord's consent to works relating to a disability has been withheld and whether it has been withheld reasonably, unreasonably or subject to conditions (regs 10–14).

Legal aid and housing

On 14 September 2010, the Legal Services Commission (LSC) announced that in the light of legal challenges arising from the latest tender round for the new 2010–2013 civil contracts, all current contracts (including those for housing law) have been extended to 14 November 2010. New contracts which were due to start in October 2010 will now start on 15 November 2010.[1]

On 8 September 2010, the LSC agreed to make an offer of an allocation of work to the Community Law Partnership (CLP) to deliver social welfare law services in the Birmingham procurement area. As a result, the CLP withdrew its judicial review claim against the LSC.[2] See also page 4 of this issue.

Mortgage possession claims

The latest official figures for mortgage repossessions in England show that 17,774 mortgage possession claims were issued in the second quarter of 2010 (April to June) and 13,389 possession orders were made in the same period: *Statistics on mortgage and landlord possession actions in the county courts in England and Wales – second quarter 2010* (Ministry of Justice (MoJ), August 2010).[3]

The new research paper *Giving up home ownership: A qualitative study of voluntary possession and selling because of financial difficulties* (CLG, August 2010) shows that even greater numbers than those covered by the official figures have abandoned home ownership.[4] *Mortgage Rescue Scheme monitoring statistics – June quarter 2010* (CLG, August 2010) gives the latest data on the operation of the Mortgage Rescue Scheme in England.[5]

Landlord possession claims

The latest figures show that 33,171 landlord possession claims were issued in the second quarter of 2010 (April to June) and 23,300 landlord possession claims led to orders being made in the same period: *Statistics on mortgage and landlord possession actions in the county courts in England and Wales – second quarter 2010* (MoJ, August 2010).[6] The statistical report shows that the local authority areas with the highest number of landlord claims leading to an order made per 1,000 households in the second quarter of 2010 were:

- Lambeth (3.31), south London;
- Newham (3.11), east London;
- Brent (2.96), north-west London.

Gypsies and Travellers

The government has announced that it will implement in England the provisions of the Housing and Regeneration Act (H&RA) 2008 s318. This will give residents on local authority Gypsy and Traveller sites equivalent security of tenure to that enjoyed by other mobile home site residents under the Mobile Homes Act 1983: CLG news release, 29 August 2010.[7] The expected implementation

date is February 2011 .

The government has also announced that it intends to revoke Planning Circulars 01/06 and 04/07. They are to be replaced with light-touch guidance outlining councils' statutory obligations to those on unauthorised encampments: *Hansard*, HC Written Answers col 634W, 26 July 2010.[8]

Homelessness

The government has published new experimental statistics on the effectiveness (or otherwise) of homelessness prevention work: *Homelessness prevention and relief: England 2009/10. Experimental statistics* (CLG, August 2010).[9] These figures supplement the data in *Statutory homelessness: June quarter 2010 England* (CLG, September 2010) reporting the latest quarterly statistics on homelessness applications in England.[10]

Housing and anti-social behaviour

In readiness for the commencement of Policing and Crime Act 2009 Part 4 (injunctions: gang-related violence), new provisions are to be included in CPR Part 65 Section VIII to enable injunction applications to be made in the county court: the CP(ANo2) Rules r9. The rules provide not only for the making of applications for such injunctions on a without notice basis, but also for appeals against the refusal of such orders to be made to the appeal courts without an appellant's notice being served: CPR Part 52 r52.4(4) (see CP(ANo2) Rules r6).

Housing and domestic violence

The research report *The effectiveness of schemes to enable households at risk of domestic violence to remain in their homes* (CLG, August 2010) reviews the effectiveness of measures such as sanctuary schemes designed to prevent victims of domestic violence from having to leave their homes.[11] To improve the development and take up of such schemes, CLG has published *Sanctuary schemes for households at risk of domestic violence. Practice guide for agencies developing and delivering sanctuary schemes* (CLG, August 2010).[12]

Shared ownership

Promoting Shared Ownership – a group of 21 housing associations – has published *Shared ownership. Facts & figures* (September 2010) promoting the claimed success of shared ownership schemes.[13] Two new research papers suggest that low-cost, shared ownership can bring problems:

- Kim McKee, 'Promoting homeownership at the margins', *People, Place & Policy Online* (2010) 4/2 p38.14
- David Cowan, 'Shared ownership: some problems of law and policy', [2010] *Journal of Housing Law* 56.

Housing and the Ombudsmen

The Law Commission has issued a consultation paper on reforming the statutory provisions governing public services ombudsmen including the Housing Ombudsman, the Local Government Ombudsman and the Public Services Ombudsman for Wales: *Public services ombudsmen. A consultation paper* (Law Commission Consultation Paper No 196, September 2010).[15] Responses are invited by 3 December 2010.

Houses in multiple occupation

The coalition government has decided, following consultation, to relax planning restraints on conversion of individual houses for use as houses in multiple occupation (HMOs): CLG news release, 7 September 2010.[16] The Town and Country Planning (General Permitted Development) (Amendment) (No 2) (England) Order 2010 SI No 2134, which allows the changes, came into force on 1 October 2010.[17] CLG has written to all local planning authorities outlining the new approach.[18]

Private sector rents in Northern Ireland

From 1 October 2010, certain private sector registered rents in Northern Ireland have increased by 1.9 per cent as a result of the Registered Rents (Increase) Order (Northern Ireland) 2010 SRNI No 285.[19]

SECURE TENANTS

Replacement tenancies

■ Chase v Islington LBC

Clerkenwell and Shoreditch County Court, 30 July 2010[20]

Ms Chase was a tolerated trespasser. She brought a claim against Islington, her landlord, for damages for disrepair and an order for specific performance. Within that claim, she issued an application under H&RA Sch 11 para 21(3) for an order that her current tenancy and her former, original tenancy were to be treated as the same tenancy which continued uninterrupted throughout a period between about February 2001, when her original tenancy was terminated, and 20 May 2009 when she obtained a new tenancy under the provisions of Sch 11 para 16.

When considering her application, HHJ John Mitchell set out the following principles:

- the burden of showing that the discretion to treat the former and replacement tenancy as the same tenancy should be exercised rests on the tenant;
- the aim of the court is to produce a result which is fair to both parties;
- the discretion should be exercised having regard to all the circumstances of the case, including any benefit or prejudice to the parties in granting or refusing the application;
- regard should be had to the extent to which the parties believed or treated the original tenancy as having continued during the period of tolerated trespass, including the extent to which either party acted to his/her detriment;
- it would be unjust to refuse relief to a tenant who had technically been in breach of a term of a suspended order for possession by missing an instalment payment by a day but who thereafter for a number of years complied with the terms of the tenancy and discharged all the arrears;
- it would be unjust to grant relief where the landlord allowed a vulnerable occupant to occupy the premises as a matter of grace for a limited period while s/he was attempting to find alternative accommodation but failing to make any payments on account of the occupation;
- the importance of granting or refusing relief to the parties should be considered;
- regard should be had to the amount and merits of the claim;
- if the costs of defending a claim would be out of proportion to the amount claimed, or if the merits were slight, it may be unfair to allow the claim to proceed;
- there is a need to avoid protracted 'satellite' litigation; and
- the court can impose conditions on the grant of relief, for example, by limiting the amount of damages which can be recovered.

He noted that in this case the use and occupation charges were identical to what Ms Chase would have been liable to pay if she were a tenant. They included an amount to fund repairs. Although the arrears remained high throughout, they had fallen by almost £1,000. Taking these matters into account, he was satisfied that he should exercise his discretion in favour of permitting Ms Chase to treat her new tenancy as part of her original tenancy for the purpose of a claim for disrepair. However, fairness required that her claim should be limited to the amount of arrears outstanding on 20 May 2009.

■ Crawley BC v Threader

Horsham County Court, 14 June 2010[21]

Ms Threader's mother became a secure tenant of the council in 1993. Ms Threader lived with her mother and her own two children from the beginning of the tenancy. The mother fell into rent arrears, and a suspended possession order was made

against her in 2003. The terms were breached shortly afterwards and the mother became a tolerated trespasser. Ms Threader's licence was also determined and she too became a trespasser. The council did not enforce the order. In 2007, while still a tolerated trespasser, the mother moved out into permanent residential care because she suffered from vascular dementia. Ms Threader remained in occupation with her two children (now adults). The council sought possession. Ms Threader defended the claim on the basis that her mother had a replacement tenancy as a result of H&RA Sch 11 para 16(1) because she occupied the property as her only or principal home at all relevant times.

Deputy District Judge White found that, although there was a clear wish on the part of the mother and the family for her to return to the property, there was no real or practical possibility of her doing so within a reasonable time. Accordingly, Ms Threader had failed to discharge her burden of proving that her mother had the relevant intention to return to the property. The judge applied the guidelines set out in *Brickfield Properties Ltd v Hughes* (1988) 20 HLR 108, CA, and distinguished *Hammersmith and Fulham LBC v Clarke* (2001) 33 HLR 77, CA, on the facts.

Death and succession

■ Hackney LBC v Hylton

Clerkenwell County Court, 10 June 2010[22]

On 16 September 2008, Winston Hylton, a secure tenant of a one-bedroom flat, died. His son, Mark Hylton, asserted a right to succeed to his father's tenancy. He produced witnesses and documents connecting him with the flat for a year before his father's death. He had been registered on Hackney's housing register since November 2002 seeking his own accommodation because the flat was overcrowded and he was sleeping on a sofa-bed in the living room. However, in 2008, Mark Hylton began a relationship with a new girlfriend. He spent time at her property and the judge found that, between June 2008 and September 2008, it was registered as his permanent address with the Department for Work and Pensions and that he had applied for loans using the address in July 2008. In addition, in November 2007 his father had declared, for housing benefit purposes, that he was living in the flat alone.

District Judge Sterlini held that Mark Hylton satisfied the succession criteria under Housing Act (HA) 1985 s87. In *Freeman v Islington LBC* [2009] EWCA Civ 536; [2010] HLR 6, the Court of Appeal cautioned that full-time occupation by relatives, for caring purposes, does not necessarily show that they were 'residing with' the tenant. There must be evidence of 'homemaking'. Likewise, here, when considering occupation away from the flat, the same test should apply. Although there were 'indicia' connecting the defendant with his girlfriend's property, he had a relationship that had not gone beyond dating and he was not 'homemaking' with her.

■ Harlow DC v Snellgrove

Harlow County Court, 8 June 2010[23]

Mr Snellgrove was a single man aged 38. He succeeded to his mother's secure tenancy of a two-bedroom property. Harlow offered a series of one-bedroom properties as suitable alternative accommodation. Mr Snellgrove conceded that his home was more extensive than he reasonably required and that the offers of alternative accommodation were suitable. Harlow sought possession under HA 1985 Sch 2 Ground 16. Mr Snellgrove submitted that it was not reasonable to make an order for possession, relying on *Bracknell Forest BC v Green* [2009] EWCA Civ 238; [2009] HLR 38, CA. Harlow pointed out that the property was at the rear of an empty house which it intended to sell to a private developer. If the property could be included in the sale, the sale price would increase by £200,400. Harlow intended to use those additional proceeds of sale to improve, redevelop and enhance its existing sheltered accommodation.

District Judge Pearl viewed Mr Snellgrove's property and the alternative accommodation. She noted that he had lived in the property since he was one month old. There were no rent arrears or complaints about his behaviour. He was a vulnerable man who had been unable to work since 2002. He suffered from anxiety and depression. He had known his neighbours for most of his life and their proximity made him feel safe. The effect of having to move would be profound. Balancing the parties' respective interests, she held that Mr Snellgrove's personal circumstances outweighed the benefit to the council of possession and that it was not reasonable to make an order for possession.

Setting aside warrants

■ Hackney LBC v Brownless-Odina

Mayor's and City of London County Court, 28 May 2010[24]

The defendant was the secure tenant of a three-bedroom property. As a result of his poor rent payment history, Hackney obtained possession orders. He made a number of successful applications to stay warrants. An outright possession order was made on 17 February 2009. Hackney sent a letter, received on 20 April 2009, informing him that a warrant was due to be executed on 22 April 2009. The letter suggested that eviction could only be avoided if all the arrears were paid. On 21 April 2009, the defendant was told in a telephone call with Hackney's income and recovery team manager that the eviction could be stopped if the arrears were cleared in full and that he could apply for a stay. Crucially, he was not told that the application needed to be made that day. After the warrant was executed, the defendant applied to have it set aside. It was accepted that the pre-eviction letter was misleading and oppressive (*Lambeth LBC v Hughes* (2001) 33 HLR 33, CA). Hackney asserted that because of the defendant's own knowledge of court procedure and the telephone conversation, he had not actually been misled. District Judge Karp found that there was oppression and set aside the executed warrant. Hackney appealed.

HHJ Birtles dismissed the appeal. It was 'crystal clear' that the district judge had found that the combination of a misleading letter and the conversation with the housing officer meant that the defendant was misled in that he was not told and did not understand that he had to apply to the court on that very day. It was a finding of fact which was not challengeable unless it was inherently unreasonable. It was a finding of fact which was open to the judge.

Stock transfer

■ Daventry DC v Daventry & District Housing Ltd

[2010] EWHC 1935 (Ch), 30 July 2010

The council transferred its housing stock and housing staff to the defendant in a large-scale stock transfer transaction. The terms provided that the council would pay the deficit in the pension fund of the staff who were transferred. It later asserted that the provision had been a mistake and that:

- there had been a common intention that the defendant would pay the deficit; and
- the defendant had owed a duty of care in the transaction.

Vos J rejected the council's case. This had been a carefully negotiated and detailed contract. The common intention had changed four days before it was concluded. No duty of care was owed by a purchaser in a stock transfer negotiation.

ASSURED TENANCIES

Possession claims

■ Leeds & Yorkshire Housing Association v Vertigan

[2010] EWCA Civ 963,
22 July 2010

Mr Vertigan was an assured tenant. His landlord brought a claim for possession, apparently relying on anti-social behaviour relating to his dogs. HHJ Belcher found some of the allegations proved and decided that it was reasonable to make a possession order. She refused to suspend it. Mr Vertigan appealed.

Although HHJ Belcher had given 'a very detailed and comprehensive judgment' (para 3) and her 'judgment and reasoning [seemed] to be impeccable' (para 6), Peter Smith J gave permission to appeal. Mr Vertigan was 'truly remorseful' and had 'realised the enormity of his stupidity' (para 7). He was prepared to give undertakings which he had not offered to the trial judge. It was 'possible that, had [undertakings] been available to Judge Belcher, she might have been willing to give him one last chance … in these [straitened] times one should [not] remove every possible opportunity to see whether or not a person can for the last time conduct themselves in such a way that they do not interfere with everybody else's enjoyment of the community areas which are shared with him and give him an opportunity to maintain his house' (para 11).

Debt relief orders

■ A2 Dominion North Ltd v Godfrey

[2010] EWCA Civ 941,
29 July 2010

Mr Godfrey was an assured tenant. In 2006, he had a heart attack and was unable to work. In January 2009, A2, his landlord, issued a possession claim based on rent arrears of £2,091. In April 2009, the Official Receiver made a 'debt relief order' within the meaning of Insolvency Act 1986 Part 7A. The order included the rent arrears. Its effect was to impose a moratorium in respect of each qualifying debt, including the rent arrears, so that during the moratorium, which ordinarily lasts for a period of one year, the creditor 'has no remedy in respect of the debt' (para 2). Mr Godfrey argued that the claim amounted to 'legal proceedings against [him] for the debt' (s251G(2)(b)) and that in keeping with s251(3) the court should stay the claim (para 2).

District Judge Gatter did not do this and made a money judgment order, a costs order and a possession order suspended on terms that Mr Godfrey pay current rent and £5 a week off the arrears. He appealed. HHJ Harris QC dismissed the appeal on the ground that a possession order based on arrears of rent was not 'a remedy in respect of the debt' within the meaning of s251G(2).

Rimer LJ granted permission for a second appeal. He did not find the questions raised straightforward. They were 'important questions of principle turning on the new regime of debt relief orders, upon which there is no direct authority in this court and in respect of which … there is considerable professional interest' (para 5).

Unfair contract terms

■ Chesterton Global Ltd v Finney

Lambeth County Court,
30 April 2010

Chesterton sued the defendant landlord under the terms of a property management services contract for the payment of commission which it claimed to be due on the renewal of a tenancy. District Judge Wakem found that the renewal commission provisions were unfair for the purposes of Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083 reg 5, and so were not binding. There was a significant imbalance in the rights and obligations of Chesterton and Mr Finney which operated to his detriment. The contractual term relating to renewed tenancies was not written in clear language. Furthermore, Chesterton had very little to do on renewal and yet each year would receive a higher payment because of the rent increase provisions. The claim was dismissed.

Houses in multiple occupation

■ R (Goremsandu) v Harrow LBC

[2010] EWHC 1873 (Admin),
26 July 2010

The claimant owned a furnished property which was let as a whole to joint assured shorthold tenants. The tenants did not want the use of the claimant's furniture. It was moved to the conservatory of the property, which became so full that the room itself could not be used. The council decided that the property was an HMO for council tax purposes because it was occupied by both the tenants (as to the most part) and the claimant (as to the conservatory).

The decision was upheld by the Valuation Tribunal, but HHJ Thornton QC, sitting as a deputy High Court judge, allowed an appeal. The whole property had throughout been subject of the letting to the tenants. They had at all times had a legal right to use of the furniture and the conservatory itself. The property was not an HMO.

Anti-social behaviour

■ Barnet LBC v Kani

[2010] EWCA Civ 818,
23 July 2010

The defendant was a used car dealer. On receiving complaints about the defendant trading from his home and using local streets to park his sale vehicles, the council seized 17 cars and sought an injunction under Local Government Act 1972 s222 to require the defendant to stop. An order was granted restraining him from the sort of parking that had been troublesome to the other residents and from trading in vehicles from any residential property in Barnet. The defendant counterclaimed for return of the cars, the costs of repairs to those damaged while in the council's possession and for loss of profits.

The Court of Appeal allowed (unopposed) an appeal in respect of one part of the judge's ruling on damages, but dismissed the main appeal on whether the council had offered to return the cars and against the rejection of the claim for lost profits. On the evidence, the defendant had failed to prove his loss of profit or that the council had unlawfully retained the majority of the cars.

Adverse possession

■ Ramroop v Ishmael

[2010] UKPC 14,
21 July 2010

The claimant sought to establish that she had acquired ownership of her home by adverse possession against the true owner. Although that claim failed on its facts, the judgment of the Privy Council is interesting for its endorsement of the proposition that – in appropriate cases – title could be obtained by adverse possession of some part, rather than the whole, of a building or parcel of land.

Information about sex offenders

■ Craigdale Housing Association v Scottish Information Commissioner

[2010] CSIH 43,
19 May 2010

A housing association asked its local police force for the number of registered sex offenders living in particular geographical areas. The intention was to establish whether areas in which the housing association was operating were bearing a greater burden in housing such offenders. The chief constable declined the request, relying on exemptions in the Freedom of Information (Scotland) Act 2002. The decision was upheld on appeal by the commissioner. The association appealed to the Court of Session. The Court of Session allowed the appeal and remitted the matter to the commissioner for reconsideration.

HOUSING ALLOCATION

■ R (Kabashi) v Redbridge LBC

[2009] EWHC 2984 (Admin), 20 November 2009

Ms Kabashi was homeless. The council accepted that it owed her the main housing duty in HA 1996 Part 7 s193 and provided her with temporary accommodation. It placed her on its choice-based lettings allocation scheme with an effective registration date of 11 September 2003 and with an assessed need for a three-bedroom property. In 2007, Ms Kabashi's household circumstances changed. She informed the council and it reassessed her as needing a two-bedroom property. It amended her registration date to 1 August 2007 under a provision in its scheme that:

For new applicants ... their registration date is when we receive their application. However, should an applicant's assessed housing need change necessitating the provision of a particular type of accommodation or property with more or less bedrooms than originally needed, the effective date will be when the new need arose (para 8).

The scheme contained no discretion enabling council officers to depart from that rule. The effect was that any bid from Ms Kabashi for a two-bedroom property would attract less priority than a bid from a person who had been registered for two bedrooms from, for example, 2006. She sought judicial review claiming that the provision in the scheme was irrational because it penalised an applicant where the change of circumstances had diminished the extent of accommodation needed.

HHJ Thornton QC dismissed the claim. Having had regard to *R (Ahmad) v Newham LBC* [2009] UKHL 14 and *R v Lambeth ex p Yemlahi* [2002] EWHC 1187 (Admin), he held that the scheme was not rendered unlawful by the omission of any residual discretion. The council had advanced its reasons for adopting the rule in the scheme that it had applied. It was not the role of the court to evaluate those reasons provided the scheme complied with the statutory requirement to give a reasonable preference to the categories of applicant identified in HA 1996 Part 6 (as it did). Even if it could be demonstrated that the rule had adversely affected the claimant's prospects of bidding successfully, the court would not embark on the process of identifying 'what if any unfairness results from the present policy of altering effective [registration] dates when an applicant up-sizes or down-sizes' (para 18).

HOMELESSNESS

Priority need

■ Thorbourne v Oxford City Council

[2010] EWCA Civ 957, 22 June 2010

Mr Thorbourne applied to the council for homelessness assistance under HA 1996 Part 7 following his eviction from his shared ownership home. The council decided that he did not have a priority need for accommodation and that he had become homeless intentionally. HHJ Compston dismissed an appeal from that decision and Mr Thorbourne sought permission to bring a second appeal. He contended that the priority need categories in HA 1996 s189 discriminate against single men by giving preferential treatment to women who are pregnant: s189(1)(a).

Wilson LJ refused the application. The preferential treatment given to pregnant women was justified by their particular vulnerability while pregnant and by society's need to protect unborn children.

■ Bah v UK

App No 56328/07, 1 December 2009

Ms Bah applied to Southwark council for homelessness assistance for herself and her dependent son. She had been granted indefinite leave to remain in the UK but her son was subject to immigration control. The council decided in 2007 that she did not have a priority need because her son fell to be excluded from her application for the purposes of determining any priority need: HA 1996 s185(4) as enacted. The decision was upheld on review. Ms Bah complained to the European Court of Human Rights that she had been the victim of unlawful discrimination contrary to article 14 read with article 8 of the European Convention on Human Rights ('the convention') because the council's decision had turned on the national origin of her child. The court noted the decision of the Court of Appeal in *Morris* (see below) and posed this question for the parties:

Has the applicant been discriminated against in violation of article 14, read in conjunction with article 8 of the convention? Specifically, the government are asked to comment on what steps have been taken or are envisaged to address the declaration of incompatibility made by the Court of Appeal in Westminster [City Council] v Morris *[2005] EWCA [Civ] 1184*.

HOUSING AND CHILDREN

■ R (Birara) v Hounslow LBC

[2010] EWHC 2113 (Admin), 16 July 2010

The claimant entered the UK aged 17 and applied for asylum. The council provided her with accommodation and support under Children Act (CA) 1989 s20. It continued that assistance after she turned 18, under care-leaver provisions. When the claimant turned 21 (by which time she had had a child, was in further education and her latest Home Office application was awaiting determination) the council decided to withdraw its support for her.

Dobbs J allowed a claim for judicial review of that decision. The council's pathway plan for the claimant was flawed; it had failed to have regard to its relevant policies and had misunderstood the claimant's immigration status.

■ R (MC) v Liverpool City Council

[2010] EWHC 2211 (Admin), 16 July 2010

The claimant, an Iranian national, sought assistance from the council with accommodation under CA 1989 s20 on the basis that he was a child, having been born in March 1994. The council decided that he was two years older than he claimed. He sought judicial review of that decision. Langstaff J decided that the claimant was most likely born in September 1992 and substituted an assessment to that effect.

■ R (PM) v Hertfordshire CC

[2010] EWHC 2056 (Admin), 4 August 2010

The claimant applied to the council as an unaccompanied asylum-seeker and was provided with accommodation and support under CA 1989 s20. Subsequently, a First-tier Tribunal (Immigration and Asylum Chamber) (FTT) dealing with his asylum claim decided that he was over 18. The council decided to withdraw its section 20 provision. The claimant sought judicial review of that decision.

Allowing the claim, Hickinbottom J gave this guidance:

I do not consider that a local authority charged with obligations to children under sections 17 and 20 of the 1989 Act is bound by a simple finding of fact by the FTT as to the age of an applicant for support, that finding not being a judgment in rem or otherwise binding in law on the local authority, or on other strangers to the asylum and immigration appeal. After such a finding has been made, in an appropriate case, it is for the authority to reassess the age of the section 20 applicant. In doing so, they must take into account any new evidence (including evidence before the tribunal that was not

previously been before them), and give due respect to the basis and reasoning of tribunal's finding, whilst taking account of the fact that they may have different evidence available to them (para 88).

1 See: www.legalservices.gov.uk/civil/cls_news_12007.asp?page=1.
2 See: www.legalservices.gov.uk/civil/cls_news_11988.asp?page=1.
3 Available at: www.justice.gov.uk/publications/docs/mortgage-landlord-possession-stats-q2-10.pdf.
4 Available at: www.communities.gov.uk/documents/housing/pdf/1684824.pdf.
5 Available at: www.communities.gov.uk/publications/corporate/statistics/mortgagerescuestatisticsq22010.
6 See note 3.
7 Available at: www.communities.gov.uk/news/housing/1700766.
8 See: www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100726/text/100726w0002.htm#10072632000565.
9 Available at: www.communities.gov.uk/documents/statistics/pdf/1698295.pdf.
10 Available at: www.communities.gov.uk/documents/statistics/pdf/1710082.pdf.
11 Available at: www.communities.gov.uk/documents/housing/pdf/1697772.pdf.
12 Available at: www.communities.gov.uk/documents/housing/pdf/1697793.pdf.
13 Available at: www.moat.co.uk/HomeBuy/Documents/Facts%20and%20figures.pdf.
14 Available at: http://extra.shu.ac.uk/ppp-online/issue_2_290710/documents/homeownership_margins_lowcost_regen_areas.pdf.
15 Available at: www.lawcom.gov.uk/docs/cp196.pdf.
16 See: www.communities.gov.uk/news/corporate/ 1708222.
17 Available at: www.legislation.gov.uk/uksi/2010/2134/pdfs/uksi_20102134_en.pdf.
18 See: www.communities.gov.uk/documents/planningandbuilding/pdf/1708912.pdf.
19 See: www.legislation.gov.uk/nisr/2010/285/pdfs/nisr_20100285_en.pdf.
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22 Bill Parry-Davies, Dowse & Co, solicitors and Michael Paget, barrister, London.
23 Adeola Osuntola, Harlow Welfare Rights and Advice, solicitor and Liz Davies, barrister, London.
24 Hadley Long, Traymans, solicitors and Michael Paget, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 20–24 for transcripts or notes of judgments.

Recent developments in education law – Part 1

Angela Jackman and Eleanor Wright continue this twice-yearly series considering changes and developments in the law relating to education. This article looks at the changes introduced by the coalition government and the Children, Schools and Families Act (CSFA) 2010, a report from the Office for Standards in Education (Ofsted) and at case-law developments relating to special educational needs. Part 2 of the article will be published in November 2010 *Legal Action*.

POLICY AND LEGISLATION

Department for Education

Following the election of the new coalition government in May 2010, the Department for Children, Schools and Families was replaced with the Department for Education (DfE).

A number of education proposals have been tabled by the coalition government which could impact significantly on this area of law. Some of the government's flagship proposals, including academies and free schools, will be reviewed in 'Recent developments in education law – Part 2', November 2010 *Legal Action*. Practitioners are waiting to see how these proposals develop.

Children, Schools and Families Act 2010

Section 2 of the CSFA (right of appeal against determination by local authority not to amend statement) inserts a new section, ie, s328A, after Education Act (EA) 1996 s328 to introduce a new right for parents to appeal to the Health, Education and Social Care Chamber of the First-tier Tribunal – which holds the jurisdiction of Special Educational Needs and Disability (SEND) – where, following an annual review, the local authority determines that no changes are to be made to a child's statement of special educational needs (SSEN).

The local authority must inform parents, in writing, of their right of appeal within a period of seven days, beginning with the day on which the determination was made. The appeal may be in relation:

- to the description of the local authority's assessment of the child's special educational needs in the unamended statement;
- to the special educational provision in the unamended statement and the name of a school specified in it; or
- to the fact that no school is named in the unamended statement.

So, EA s328 is amended to create a new right of appeal when a local authority determines not to amend a statement following an annual review. The provision came into effect on 1 September 2010.

Comment: It is anticipated that this provision will result in a significant increase in appeals to the SEND tribunal. Previously, parents were frequently left without an effective remedy in situations where they believed that their child's SSEN required amendment, but the local authority refused to make the said changes despite recommendations for the same at the annual review. This is, therefore, a welcome provision.

Special Education Needs and Disability green paper: call for views

The government intends to publish a green paper this autumn with the objective of improving the special educational needs system. The paper will cover areas such as early identification and assessment. Its guiding principles are expected to be, among other things, to develop fairer and more transparent funding arrangements. Priorities will include how to provide family support and streamline assessment to make the process easier for parents and achieve greater school choice.

The government is seeking views to enable it to develop proposals for consultation which are practical to implement, and that will build on current effective practice and maximise available funds. The call for views consultation is open until 15 October 2010 and the relevant papers are available on the DfE's consultations website.[1]