claimant did not have a right to reside. The *Baumbast* decision ought, according to the commissioner, to be distinguished from the present case. In *Baumbast*, the claimant had remained a worker; his family were self-sufficient except regarding medical insurance for emergency treatment in the UK; he had had his main home in the UK for over five years; and his family were not nationals of any EU state and had never lived in the claimant's own member state, Germany. In those circumstances, it would not have been reasonable to suggest that the only member state in which there was a right to reside was Germany. However, that did not apply in the present case.

Moreover, since the decision in *Baumbast*, Council Directive 2004/38/EC had been adopted. When considering whether or not EC law provides a right of residence, regard must be had to that directive's provisions (the commissioner's previous decisions in *CIS/2358/2006*, 25 October 2007 and *CIS/408/2006*, 31 October 2007 applied). The directive addresses the issues raised in *Baumbast*, and yet neither of those assist the present claimant: the exclusion was deliberate. Where directives do not confer a right of residence, it must be accepted that the Council of the European Communities 'envisages that a citizen of the Union who needs to rely on social assistance will return to the state of which he or she is a national'. The terms of the court's rulings, said the commissioner, 'must be regarded as having been qualified by the new directive'. Regarding the daughter, there was no reason in principle why she should have a right to reside. Nothing in the legislation gave a right to remain in education after the parents have ceased to exercise a right of freedom of movement guaranteed by the EC Treaty (for example, they have ceased to be workers). Council Directive 2004/38/EC made no such provision, and there was no reason otherwise to imply one here.

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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. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing and Regeneration Act 2008

The Act received royal assent on 22 July 2008. The printed statute now runs to 256 pages as a result of over 700 amendments being added during the parliamentary passage of the bill. Comprehensive explanatory notes prepared by Communities and Local Government (CLG) civil servants have also been published.[1]

For housing advisers, the key features of the Act are:

Possession orders The amendments to the possession order provisions of Housing Acts (HA) 1985, 1988 and 1996 made by s299 and Sch 11 Part 1 will prevent the creation of further tolerated trespassers. The provisions of Sch 11 Part 2 deal with current tolerated trespassers. As originally cast, the provisions for the abolition of tolerated trespasser status did not cover those who had become trespassers before a stock transfer, but the Act now contains a regulation-making power to enable the secretary of state to extend the provisions to that group.

Social housing regulation Part 2 of the Act establishes a new regulator for social housing (the Tenant Services Authority (TSA)) with new powers. The TSA's initial jurisdiction will cover housing association tenants, but, as a result of late government amendments, the authority will also be able to regulate local authority housing without the need for further primary legislation. On 22 July 2008, Peter Marsh, the TSA's chief executive designate announced that the authority was firmly on track for a December 2008 launch: Housing Corporation news release 01/08.

Family intervention tenancies These new non-secure, non-assured social housing tenancies are created by ss297 and 298 for occupiers of accommodation provided with 'behaviour support services', which are designed to help people who have been evicted (or have faced eviction) as a result of anti-social behaviour. An evaluation of the effectiveness of these Family Intervention Projects (FIPs) reported that 60 per cent of families surveyed were subject to one or more housing enforcement actions when they started working with a FIP but that this had reduced to 18 per cent for families leaving the schemes.[2]

Service charges Yet more statutory regulation in relation to service charges and the provision of information about such charges is made by s303 and Sch 12.

Right to buy Numerous amendments to the right-to-buy scheme for secure tenants are made by ss304–310. In Wales, a consultation exercise on taking statutory powers to suspend the right to buy closed on 1 September 2008: *Proposed assembly measure to suspend the right to buy and right to acquire in areas of housing pressure: a consultation paper*.[3]

Housing and persons from abroad The statutory arrangements for both homelessness assistance and housing allocation are modified by s314 and Sch 15. Those provisions introduce a new category of 'restricted person' and add a layer of additional complexity for housing authorities dealing with households that include persons from abroad.

Stock transfer New provisions in relation to stock transfer ballots are made by s294. Initiatives taken by tenants to prompt stock transfers are dealt with by s296.

Leaseholders acquiring freeholds Changes to the leasehold enfranchisement provisions of the Leasehold Reform Act 1967 are made by ss300–302.

Demolition notices HA 1985 Schs 5 and 5A are modified heavily by s305 and Sch 13 in cases where the right to buy is being exercised in respect of a home that is scheduled for demolition.

Accommodation for Gypsies and Travellers The provision in the Mobile Homes Act 1983 that deprives occupiers of council sites from the security of tenure enjoyed by other caravan site occupiers is repealed by s318. The Housing Corporation has published a new toolkit for housing associations encouraging

them either to establish or to manage sites providing for the accommodation needs of Gypsies and Travellers.[4]

None of the provisions above came into effect with royal assent. Most of the Act can only be brought into force by commencement order (s325(1)), but some of the provisions relating to stock transfer ballots, the right to buy and other miscellaneous amendments will come into force automatically on 22 September 2008 (s325(2)).

Late in the House of Lords' deliberations on the bill, other issues of interest to advisers were canvassed:

■ A Housing Law Practitioners Association-drafted amendment designed to give effect in the statute to the judgment in *McCann v UK* App No 19009/04, 13 May 2008 was debated. The government opposed the amendment as unnecessary. The minister, Baroness Andrews, said that the Human Rights Act 1998 already required the domestic courts to have regard to a Strasbourg decision, and that meant that on a claim to possession made by a local authority 'they must already consider whether possession action is the proportionate response'.[5]

■ Despite the judgment in *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin), 24 June 2008, the government's position remains that the provision of social housing for rent by housing associations is not a public function. It rejected an amendment designed to put the issue beyond doubt.[6]

Possession proceedings

The latest figures on the number of possession claims issued, and possession orders made, in county courts in England and Wales were released for the second quarter of 2008 on 15 August 2008.[7] They show that during the second quarter of 2008, 28,658 mortgage possession orders were made – 24 per cent higher than in the second quarter of 2007; and 28,042 landlord possession orders were made – eight per cent higher than in the second quarter of 2007 (see 'Mortgage default' below).

In August 2008, the Legal Services Commission (LSC) invited bids to provide court-based advice and assistance on housing possession days at a further 20 county courts.[8] The LSC already funds housing possession county court duty schemes at 94 other county courts: LSC press release, 7 August 2008.

Mortgage default

In the first six months of 2008, 18,900 homes were repossessed by members of the Council of Mortgage Lenders (CML) compared with 12,800 in the first six months of 2007.[9] The CML forecasts that 170,000 borrowers will be in arrears of more than three months by the end of this year: CML press release, 8 August 2008.

The National Landlords Association has issued a draft code of practice for those landlords entering into 'sale and rent back' arrangements with defaulting homeowners. Consultation on the draft code was carried out during August 2008.[10]

The Financial Services Authority (FSA) has asked mortgage lenders to ensure that they treat customers fairly in current market conditions. The FSA's latest review found weaknesses in the way some lenders were handling arrears and repossessions: FSA press release, 5 August 2008.[11]

National housing policy

In the gap between the publication of the last housing green paper in 2007 and the next one (which is now due in December 2008) the government has published an update to its housing policy, *Facing the housing challenge: action today, innovation for tomorrow* (CLG, July 2008).[12] Among the government's commitments are:

■ A new scheme to help first-time buyers into affordable home ownership by renting first and buying later. Under the scheme, eligible households earning £60,000 a year or less will be able to rent a new home at a discounted rate for a period of two to three years. They will have the option to buy a part share in the home. The affordable rent, which will be 80 per cent of the market rent or less, will enable the household to save for a deposit to buy the share in the home. The new pilot scheme, called Rent to Homebuy, is detailed in Housing Corporation news release 53/08, 16 July 2008.[13]

■ New plans to work with local authorities and housing associations to examine proposals for mortgage rescue schemes and the wider role they could play in supporting home owners.

■ A new leaflet *Worried about your mortgage? Get advice now* to be published by the National Housing Advisory Service and distributed this summer by local authorities, citizens advice bureaux, Shelter, and money advisers.

Housing and anti-social behaviour

Between October 2006 and October 2007, 12 county courts in England and Wales adopted a pilot scheme of appointing an anti-social behaviour co-ordinator. The evaluation report, *County court anti-social behaviour co-ordinators – a pilot scheme*, found a significant lack of awareness among local organisations that the pilot had even been underway in their areas.[14]

Mandatory certificates

From 1 October 2008, every new tenant in the social and private rented sectors in England and Wales must be provided with a copy of the energy performance certificate for the premises by the landlord: Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 SI No 991. On 13 August 2008, CLG published *Energy performance certificates (EPCs) and renting homes: a tenant's guide*.[15] The government has also published extensive guidance about the requirements in *Energy performance certificates for dwellings in the social and private rented sectors: a guide for landlords* (CLG, June 2008) and *Energy performance certificates for dwellings in the social and private rented sectors: a guide to generating energy performance certificates for similar dwellings owned by the same landlord* (CLG, July 2008).[16] The requirements will be enforced by local authorities. They can impose £200 fixed penalties for non-compliance.

Housing disrepair claims

The government has announced that, following a consultation exercise, it has decided to make no change to the threshold for determining whether or not housing disrepair cases should be allocated to the small claims track or to the fast track.[17]

Housing and disability discrimination

In a debate on the ratification of the UN Convention on Disability Rights, the minister, Lord McKenzie, indicated that the government did not believe that the decision in *Lewisham LBC v Malcolm* [2008] UKHL 43 would adversely affect the UK's ability to ratify the disability rights convention later this year.[18] He said that the government is giving 'careful consideration' to the House of Lords' judgment in *Malcolm*. See page 38 of this issue.

Eligibility for housing allocation and homelessness assistance

On 8 July 2008, the government laid the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2008 SI No 1768. The Order is designed to ensure that European Economic Area nationals, who are not exercising treaty rights, have no right to reside and are persons subject to immigration control, are not entitled to access to housing authority accommodation in England, Scotland and Northern Ireland or to homelessness assistance in Scotland and Northern Ireland. The changes came into effect on 7 August 2008. An explanatory

memorandum has been published summarising the changes. The amendments have been notified to the Welsh Assembly to consider exercising its own powers to make further delegated legislation.

The new report of the House of Commons Communities and Local Government Committee, *Community cohesion and migration*, notes recent work by the Equality and Human Rights Commission and the Local Government Association identifying the minimal impact made by new migrants on social housing allocation and records that tensions between groups caused by issues of access to housing are 'undoubtedly exacerbated' by the shortage of social and affordable housing (para 36).[19] For a review of the current and confusing law on housing eligibility, see Sue Lukes, 'Ifs, buts and maybes', *Adviser* 128, July/August 2008, p21 and Steve Povey, 'More ifs, buts and maybes', *Adviser* 128, July/August 2008, p28.

Tenant empowerment

Moves to establish a new organisation, National Tenant Voice (NTV), to empower tenants at national level and provide them with relevant expertise are well underway. Responses to the consultation paper issued by the project group – *The NTV project group's emerging proposals for the National Tenant Voice* – are sought by 12 September 2008.[20]

The white paper on community involvement, *Communities in control: real people, real power*, indicates progress towards implementing the 'councillor call for action' provisions of the Police and Justice Act 2006 for victims of anti-social behaviour (para 4.15) and a range of measures to stimulate participation by tenants in the management of their homes (paras 4.57–4.63).[21]

The associated paper, *Local petitions and calls for action consultation: government response*, sets out responses to a consultation exercise on the 'councillor call for action' concept and the government's conclusions.[22]

Young homeless people

Youth homelessness in the UK: a decade of progress?, published by the Joseph Rowntree Foundation, provides a review of literature on the subject, an analysis of statistics and the findings from six case study areas.[23]

Homeless ex-prisoners

A new report, *High hopes: supporting ex-prisoners in their lives after prison*, contains a review of arrangements for access to housing by ex-prisoners (Chapter 3).[24] The researchers concluded that there is a 'clear need for the housing needs assessment being used while they are in prison to ensure that all ex-prisoners have some accommodation arranged for the period following their release'.

Housing complaints

The Local Government Ombudsmen's annual report 2007/2008 shows that they received 3,741 complaints concerning housing matters.[25] A further 1,004 complaints concerned (housing) benefits and another 704 were about anti-social behaviour.

In Scotland, housing complaints concerning both councils and registered social landlords are dealt with by the Scottish Public Services Ombudsman (SPSO). The Chartered Institute of Housing in Scotland has produced *Seeing beyond the negative: a report on handling housing complaints* investigating why so many complainants go straight to the SPSO without, first, using or exhausting their own landlords' complaints procedures.[26]

Fire safety in housing

The Chartered Institute of Environmental Health and the Association of Chief Fire Officers have jointly prepared a new guidance paper *Housing - fire safety: guidance on fire safety provisions for certain types of existing housing*.[27]

Home information packs

The government is consulting on a proposal that, from January 2009, home information packs (HIPs) should additionally require a property information questionnaire. Consultation on the proposals set out in *Improving consumer information in the home information pack* ends on 30 September 2008.[28]

Meanwhile, a working group has been established to take forward work on HIPs for leasehold properties in the light of the conclusions in the report *Local property searches and leasehold information: report to the Rt Hon Caroline Flint MP, minister for housing and planning* (CLG, June 2008).[29]

HUMAN RIGHTS

■ Birmingham City Council v Doherty

[2008] UKHL 57,
30 July 2008,
(2008) Times 14 August

The defendant was a Gypsy. From 1987, he and his family occupied a plot on a Gypsy and Travellers' site as their home under a licence agreement with Birmingham City Council. In March 2004, the council served notice to quit, which expired in May 2004. The council began possession proceedings. It asserted that:

- the family's occupation was not protected under any relevant legislation;
- possession was required to carry out essential improvements; and
- the site when cleared would be managed as temporary accommodation for Travellers coming to the city.

Furthermore, it was said that the family's presence on the site 'deterred' other Travellers from going there, that it was 'severely under utilised' and that this caused unauthorised encampments elsewhere in the city.

The defendant accepted that he had no enforceable right to remain under English property law, but relied on the protection of article 8 of the European Convention on Human Rights ('the convention'). He claimed that the grant of summary possession would not be reasonable or proportionate.

In December 2004, HHJ McKenna gave summary judgment for the council and made an order for possession. The defendant appealed. The Court of Appeal dismissed the appeal ([2006] EWCA Civ 1739; [2007] HLR 32). Mr Doherty appealed to the House of Lords.

The House of Lords allowed the appeal. It rejected what Lord Scott described as an 'attempt to undermine' the decisions of the majority of the House of Lords in *Harrow LBC v Qazi* [2004] 1 AC 983; [2003] UKHL 43 and *Kay v Lambeth LBC* and *Leeds City Council v Price* [2006] 2 AC 465; [2006] UKHL 10. Notwithstanding *McCann v UK* App No 19009/04, 13 May 2008, the House of Lords reaffirmed those decisions. Lord Scott, quoting Lord Hope's paragraph 110 in *Kay* said that:

> *... if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8; ... [and] (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable* (for example, para 66).

Lords Hope, Scott and Walker were all critical of the European Court of Human Rights' (ECtHR's) decision in *McCann*. Lord Scott described 'comments' made by the ECtHR about the English and Welsh law as 'quite astonishing'. He stated:

... I consider the McCann judgment to be based on a mistaken understanding of the procedure in this country whereby proceedings brought by a local authority owner of residential property for the purpose of recovery of possession of the property from a defendant who has, or had had, his home on the property can be defended by reliance on article 8 ... the domestic courts are not bound by those decisions and where, as here, they appear to be based on an imperfect understanding of domestic law or procedure, they need not, and in my opinion should not, be followed (paras 82 and 88)

Lord Hope said that county court judges should continue to follow the guidance which was given in *Kay* at para 110. However, perhaps the most significant shift that can be detected in the Lords' speeches in *Doherty* is a narrowing, or, indeed, merging of the traditional *Wednesbury* test and direct human rights challenges. For example, Lord Hope said:

... it would be unduly formalistic to confine the review strictly to traditional Wednesbury *grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent's decision was reasonable, having regard to the aim which it was pursuing ... would be appropriate* (para 55).

Lord Mance said:

The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with human rights convention rights should not however be exaggerated and can be seen to have narrowed, with "the 'Wednesbury' *test ... moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests"... there remains room in another case to reconsider how far conventional or domestic judicial review and convention review can be further assimilated, and in particular whether proportionality has a role in conventional judicial review* (para 135).

All members of the House of Lords confirmed that judicial review-type scrutiny of the fairness and legality of a council's decision to bring proceedings may be presented by way of a defence to the possession proceedings.

Applying *Connors v UK* (2005) 40 EHRR 9; App No 66746/01 to this case, Lord Hope said that special consideration for the needs of Gypsies and their different lifestyle required that Mr Doherty 'must be able to insist, by way of a defence to the claim, that it be shown there is a proper justification for the decision to seek a possession order' and that the 'decision to evict him and his family from the site was justified by a pressing social need and was proportionate' (para 33). Lord Hope considered that this was 'an exceptional case', and that it was 'the law itself that is at fault' because the statute excluded the Gypsy community from its procedural safeguards. The modification that was made to *Qazi* to accommodate the decision in *Connors* applied to this case (para 42).

The case was remitted to the judge in the High Court so that he could review the reasons that the council gave for serving a notice to quit, resolve any disputed facts and decide whether or not the decision to terminate Mr Doherty's licence was reasonable. If that requirement is met he must make a possession order. If it is not, the judge 'must decline to make the order unless or until a justification that meets that test has been made out' (para 57). See page 50 of this issue.

ASSURED TENANTS

Possession claims and reasonableness

■ North Devon Homes Ltd v Batchelor

[2008] EWCA Civ 840,
22 July 2008

Ms Batchelor, a 61-year-old woman, was an assured tenant of sheltered accommodation. In September 2005, police officers executed a search warrant at her flat. They found 7.5 grammes of cocaine and some cannabis. She was prosecuted for possession of a class A drug with intent to supply, possession of cannabis and money laundering. She pleaded guilty to the class A offences on the limited basis that she had been asked to hold the drugs for her son and had intended to return them to him. She pleaded guilty to possession of cannabis. She was convicted of money laundering. Her landlord sought possession under HA 1988 Sch 2 Grounds 12 (breach of the terms of her tenancy), 14(a) (nuisance and annoyance) and 14(b) (conviction of an arrestable offence in the property).

In cross-examination, Ms Batchelor said that she might continue to use cannabis. The trial judge found the grounds for possession proved but ruled that it was not reasonable to make a possession order as the offence of possession of a class A drug was at the lower end of the scale and it was not reasonable to make the order in respect of the offence of possession of cannabis. The claimant appealed. It contended that the judge had taken into account irrelevant matters (for example, the extent to which rehousing would be available if a possession order was granted) and had failed to take into account a relevant matter (Ms Batchelor's evidence that she might continue to smoke cannabis).

The Court of Appeal dismissed the appeal. There was no error in the judge's decision and his conclusion was one that was open to him. The judge was not engaging in the illegitimate exercise of speculating about whether or not Ms Batchelor would be rendered homeless. He merely held that, on the facts, her conviction for possession of cannabis was not sufficiently serious to warrant the making of a possession order. The judge was entitled to hold that Ms Batchelor's breaches of the tenancy agreement were not such as to make it unreasonable for him to decline to make a possession order.

Shared ownership leases and Ground 8

■ Richardson v Midland Heart Ltd

High Court (Chancery Division),
12 November 2007,
7TM0007

In 1995, Ms Richardson acquired a 99-year, shared-ownership lease from Focus Two Housing Association Ltd. Following various amalgamations, it became Midland Heart Ltd. She paid a premium of £29,500, 50 per cent of the then market value of the house and was obliged to pay a rent of £1,456 per annum.

In May 2003, her husband was sentenced to eight years' imprisonment. Later, some of his criminal associates threatened Ms Richardson and her family. She left the house and went to live in a refuge. After 52 weeks, housing benefit for the house ceased to be paid and rent arrears accrued. She attempted to sell the house, which was now worth £151,000. However, Midland Heart sought possession under HA 1988 Sch 2 Ground 8 relying on 16 months' rent arrears. District Judge Chapman refused a request for an adjournment and made a possession order. Later, Ms Richardson began proceedings. She claimed that, as a result of the shared-ownership lease and the premium that she had paid, she had acquired a 50 per cent interest in the property. She asserted that the property was subject to a trust.

Jonathan Gaunt QC, sitting as a deputy judge, dismissed the claim. The relationship between Midland Heart and Ms Richardson was that of landlord and tenant, not that of trustee and beneficiary. She had an option to lay claim to the freehold but only if she paid the other half of the value of the property and

exercised her staircasing rights. She did not exercise that option.

The judge also rejected the contention that Ms Richardson had two tenancies, namely an assured tenancy, protected by the HA 1988 and a long leasehold interest vulnerable to forfeiture. The lease created a 99-year term of years certain. The tenancy thus arising was one to which HA 1988 s1 applied. It was a tenancy of a dwelling house let as a separate dwelling to an individual who occupied it as her only or principal home and it did not fall within any of the exclusions. It was, therefore, an assured tenancy. Ms Richardson had no interest left in the property since the lease had been determined by order of the court. Therefore, she was not entitled to the relief that she sought.

POSSESSION CLAIMS

Possession orders

■ Admiral Taverns (Cygnet) Limited v Daniel and Daly

[2008] EWHC 1688 (QB), 21 July 2008[30]

The claimant was the head lessee of a public house. It entered into a caretaking agreement with Mr Daniel. Ms Daly was his partner. In February 2008, the claimant gave notice terminating the agreement with effect from 4 April 2008. A possession claim was issued in Lambeth County Court. Ms Daly notified the court that she would be late for the hearing. Notwithstanding this, HHJ Gibson heard the case in the absence of the defendants and made a forthwith possession order. When she attended, Ms Daly handed the judge a defence and a lease purportedly granted by the claimant. The judge declined to vary his order. A warrant was issued the same day; it was due to be executed on 18 June. Ms Daly lodged an appellant's notice and requested a stay. Teare J granted a stay. The claimant applied to discharge the stay. It argued that HA 1980 s89 restricted the power to grant a stay to 14 days or to six weeks if exceptional hardship would be caused.

Initially, Teare J set aside his order granting a stay, but then granted the defendants' application to set aside that order, thus restoring the stay. Parliament could not have intended appellants 'to be denied the fruits of a (potentially) successful appeal'. He noted that:

... the long title to [HA] 1980 describes the Act as one 'to restrict the discretion of the court in making orders for possession of land'. This does not suggest that it was parliament's intention to restrict the discretion of an appellate court ... when ordering a stay of execution of the order for possession pending ... appeal.

Suspension of warrants

■ Incorporated Trustee of Dulwich Estate v Bello

High Court (Chancery Division), 7 July 2008

In May 1983, the Dulwich Estate granted Ms Bello a lease for a term of 50 years. In breach of its terms, she converted the property into a series of bed-sits. Dulwich began possession proceedings. In September 2005, the possession proceedings were compromised by a consent order which provided for an order for possession on or before 27 January 2006 but with relief from forfeiture, provided that Ms Bello carried out all necessary works to convert the property back into two self-contained flats. In March 2006, she applied to vary the consent order, so as to grant her an extension of time for compliance and suspension of a possession warrant. On 12 July 2007, at the hearing of those applications, a consent order was agreed whereby Dulwich admitted that all work necessary to comply with the original consent order had been completed by the agreed date. It was ordered by consent that Ms Bello would pay Dulwich arrears of rent and costs by 26 July 2007 and that time was of the essence. A schedule to the consent order stated that the total due was £108,500 but no payment was made. On 31 July 2007, Dulwich obtained a warrant for possession. Ms Bello applied to suspend the warrant. That application was dismissed, as was her appeal. In September 2007, she applied to set aside the consent order of 12 July 2007. A judge dismissed her application. He decided that although he had jurisdiction to extend time to comply with that order, he would not do so. Ms Bello appealed.

Paul Girolami QC, sitting as a deputy judge, dismissed the appeal. The jurisdiction to extend time did not enable the court to interfere with time provisions that were expressed to be of the essence and which lay in contract and contract alone. In this case, the schedule to the consent order, although attached to the court's order, had not formed part of it and lay in contract. There was no jurisdiction to vary what the parties had agreed in the schedule. Furthermore, even if Ms Bello had applied for an extension of time or other relief from the September 2005 order, the consequences of her not paying on time were part of the agreement reached. The effect of allowing relief would be to require Dulwich to forego rights that it had acquired under the consent order after negotiations in which it had given up the opportunity to obtain immediate enforcement of the possession order. The judge had been right to refuse the tenant the relief sought.

TENDERING FOR CONTRACTS

■ Letting International Ltd v Newham LBC

[2008] EWHC 1583 (QB), 7 July 2008

The claimant, a property management company, submitted to Newham a tender for framework contracts for the management and maintenance of private sector leased properties. Its tender was not successful. The company challenged the council's decision. It argued that the criteria published by the council in the invitation to tender did not reveal the whole of the position in relation to the assessment of tenders and that the marking of the tenders was unfair.

Silber J found that Newham had acted unfairly, without the requisite transparency and contrary to the Public Contracts Regulations 2006 SI No 5, first, by failing sufficiently to disclose contract award criteria and weightings in advance, and, second, by failing to apply those criteria which were disclosed.

NOTICES

■ Green v Westleigh Properties Ltd

[2008] EWHC 1474 (QB), 27 June 2008

The defendant's solicitors posted a notice to the claimant's solicitors, purporting to rely on Landlord and Tenant Act 1987 Part 1 (right to first refusal). The claimant claimed that the notice was invalid because it:

- was incorrectly dated;
- referred to the 'Housing Act 1987' rather than to the Landlord and Tenant Act 1987;
- quoted s12A rather than s12B;
- was addressed to the claimant's solicitor on the face of the notice but to the claimant on the envelope, and therefore had not been served validly; and
- did not specify the particulars of the conveyance.

Teare J held that the notice was valid. Although the notice was poorly drafted, it was sufficiently clear and unambiguous that a reasonable recipient would have been in no doubt that the defendants were giving notice to have the freehold conveyed to them.

Comment: This judgment reflects the approach adopted by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. It is relevant to housing law practitioners since the courts are likely to adopt the same approach in housing cases.

TOLERATED TRESPASSERS

■ **Honeygan-Green v Islington LBC**
■ **Porter v Shepherds Bush Housing Association**
(2008) 30 July, HL
The House of Lords has granted leave to appeal in both these cases against orders of the Court of Appeal ([2008] EWCA Civ 363 and [2008] EWCA Civ 196 respectively). Because the cases concern the effects of possession orders made against tenants of social housing, the House of Lords has directed that they be heard at the same time as the appeals in *White v Knowsley Housing Trust* ([2007] EWCA Civ 404) and *Ansell v London & Quadrant Housing Trust* ([2007] EWCA Civ 326). The six-day hearing will begin on 8 October 2008.

HOUSING ALLOCATION

■ **R (Faarah) v Southwark LBC**
[2008] EWCA Civ 807, 11 July 2008
In September 2005, the council's arrangements for letting homes changed from a points-based allocation scheme to a banded choice-based lettings scheme. It had to decide how to deal with applicants who had been assessed for points under the old scheme and were to be banded under the new one.

The claimant had medical priority under the old scheme (20 points) but was not given the equivalent medical priority (Band 3) in the banding scheme, although the wording of the medical priority categories was virtually the same. The council was, in fact, operating unpublished administrative criteria for medical assessments that could not be squared with the criteria for the new scheme and a decision in the claimant's case was made pursuant to that.

In judicial review proceedings, HHJ Mackie QC held that the old and new schemes for assessment of medical need were indistinguishable in substance. He quashed the decision that the claimant should not be accorded Band 3 medical priority, and granted a declaration that the transitional provisions for those with 20 medical points were unlawful. He also declared the new scheme unlawful because it did not specify accurately the basis on which priority dates within bands could be computed.

The Court of Appeal dismissed an appeal against the first declaration. Not only was there no material difference between the two relevant categories, but the claimant's case (and others) had been dealt with by applying an unpublished administrative practice not part of the published allocation scheme.

The second declaration was set aside. The new scheme did not make any provision for priority dates within bands to be earlier than the date of commencement of the new scheme. It was for Southwark to consider whether or not to allow priority to run from a date earlier than the commencement of the new scheme. Once that decision was made, the arrangements for according any such priority dates had to be published as part of the scheme.

HOMELESSNESS

Handling applications
Local Government Ombudsman
Investigation
■ **Lambeth Council**
07/B/01138 and 07/B/05232, 30 June 2008
In April 2007, the council decided to move six of its staff, who had been engaged on assessment of homelessness applications under HA 1996 Part 7, to new duties in a Prevention and Options Service. The remaining members of the assessment staff were unable to cope with the 250 live cases and there was a lack of leadership and guidance. Many applications were simply not assessed. It took the council eight months to realise that a backlog had developed. By May 2008, the council was estimating that it might still take another 18 weeks to clear the backlog.

The two complainants made straightforward homelessness applications that would usually have been decided in a matter of days. Each was kept waiting for nine months before the council notified them that the main housing duty was accepted (HA 1996 s193). The Ombudsman found maladministration causing injustice. He noted an offer of £500 compensation to each complainant, and made recommendations for service improvements.

Performing duties
■ **Birmingham City Council v Aweys**
(2008) 9 July, HL
The House of Lords has granted the council permission to appeal against the decision of the Court of Appeal ([2008] EWCA Civ 48). The case concerns duties owed to those described by the council as being 'homeless at home'.
■ **Omar v Birmingham City Council**
(2008) 9 July, HL
The House of Lords has refused the applicant permission to appeal against the orders of the Court of Appeal ([2007] EWCA Civ 610). The case concerns the discharge of the main housing duty owed to the homeless by the refusal of an offer of accommodation.

Priority need
■ **Sesay v Islington LBC**
Clerkenwell and Shoreditch County Court 2 July 2008[31]
The claimant, an asylum-seeker from Liberia, was granted exceptional leave to remain in the UK but became homeless on withdrawal of his National Asylum Support Service (NASS) accommodation. When the claimant made an application as a homeless person, Islington decided that although he was suffering from depression and had difficulty sleeping (and received medication for both problems) as a consequence of post-traumatic stress disorder, he was not vulnerable and had no other priority need for accommodation. On review, the reviewing officer considered medical reports from those treating the claimant and a report commissioned from Dr Keen of NowMedical. The reviewing officer upheld the council's decision on the basis that the claimant's reaction to the trauma he had faced was no different from the reaction anyone else who experienced the same trauma would have suffered.

On appeal, HHJ Martin O'Dwyer quashed the decision on three grounds:
■ the reviewing officer had applied the wrong test in considering whether or not the claimant's condition was not 'unreasonable' by comparison to those of others who might have experienced trauma;
■ the reviewing officer had asked herself whether or not the claimant's medical problems would endure even if accommodation was available. The correct question was whether or not his medical condition made him more vulnerable than others when street homeless; and
■ the reviewing officer had failed to direct herself in accordance with the guidance given in *Shala v Birmingham City Council* [2007] EWCA Civ 624 about the importance of taking into account the difference in quality between the reports of those actually treating an applicant and a report on those reports commissioned from Dr Keen.

Intentional homelessness
■ **R (Dumbuya) v Lewisham LBC**
[2008] EWHC 1852 (Admin), 16 July 2008
The claimant was owed the main housing duty under HA 1996 s193 and was provided with accommodation by the council from 2004. In September 2006 she was evicted from that accommodation following a possession order which the council obtained for rent arrears. On the claimant's request for further accommodation, the council took the view that she had become homeless intentionally and declined to provide further accommodation.

In judicial review proceedings, on the papers Sullivan J granted the claimant an interim order that the council accommodate her. On considering the acknowledgement of service, Mitting J gave permission to apply for judicial review in October 2006. The judicial review proceedings lay dormant while the claimant appealed to the county court against the council's decision. A compromise of that appeal was reached and the council agreed to undertake a further review, the outcome of which was favourable to the claimant.

The judicial review proceedings were then restored to determine costs. Applying *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258, Walker J held that the council should pay the costs. In its summary grounds, the council had rejected the contention that even if the claimant was intentionally homeless, it had then owed a further limited duty to accommodate her under HA 1996 s190. The prospect of the council losing the judicial review, on the merits, had it gone to trial on that point was 'towards the obvious end of the spectrum'.

Homelessness appeals

■ Barrett v Southwark LBC

High Court (Queen's Bench Division), 4 July 2008

Ms Barrett had to leave her home after defaulting on her mortgage payments. She was profoundly deaf. Southwark decided, on review, that Ms Barrett had become homeless intentionally. The review decision letter was dated 7 February 2008. It was received by her lay advisers on 14 February 2008 and by her on 15 February 2008. Ms Barrett appealed to the county court but her appeal was filed outside the 21-day time limit (HA 1996 s204(1)) on 3 April 2008.

She applied for permission to bring the appeal out of time (s204(2)) on the following basis:

■ that she had been advised to appeal;
■ had been told she needed a solicitor; but
■ had been unable to find one (who was prepared to take her case notwithstanding her disability) in time, despite diligent efforts.

Ms Barrett's evidence was that at around the time the 21-day time limit had been running, she had faced eviction from her temporary accommodation and made a suicide attempt. Permission for a late appeal can only be granted if there 'was a good reason' for the failure to bring the appeal in time: HA 1996 s204(2A). HHJ Gibson dismissed the application for an extension of time and Ms Barrett appealed.

Sir Thomas Morrison (sitting as a deputy High Court judge) allowed the appeal. He held that:

■ Time to appeal ran not from the date of the review decision letter (as the judge had held) but from the earliest date on which, on the facts, the review decision letter could have come to the claimant's attention (15 February). The time limit had therefore expired on 6 March 2008 and the appeal was 27 days out of time.
■ The concept of good reason was analogous to 'good cause' used in social security provisions and explained by the social security commissioner in *R(S) 2/63 (T)*.
■ On the facts, the judge's conclusion had been wrong and produced an unjust result.
■ Time should be extended because Ms Barrett could 'not have done more than she did' to secure good legal advice which she could understand and follow.

In recording Ms Barrett's evidence of her unsuccessful attempts as a disabled woman to secure legal advice from a substantial list of local legal aid solicitors, Sir Thomas said: 'It appears that legal aid housing advisors get paid only a limited fixed fee for their work in this field and dealing with a deaf client adds to the time to be spent on the case.'

HOUSING AND CHILDREN

■ R (G) v Southwark LBC

[2008] EWCA Civ 877, 29 July 2008

The claimant left his parental home at the age of 17 and could not return. After several weeks of sofa-surfing, he applied to Southwark's children's services department for accommodation. A social worker conducted an assessment that identified a primary need for housing. However, having found G to be a capable and resourceful teenager, the social worker's assessment concluded that G only needed 'help' with securing accommodation from the homeless persons unit of the housing department because as a homeless teenager he would have a priority need: Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051 article 3.

Although the housing department was prepared to accommodate G under the homelessness provisions of HA 1996 Part 7, he sought judicial review. G claimed that the children's services department had to accommodate him under Children Act (CA) 1989 s20. Success in that claim would entitle him to support as a care leaver after the age of 18. Simon J refused permission to apply for judicial review and G appealed.

The Court of Appeal granted permission to apply for judicial review but dismissed the claim. The majority of the court (Longmore and Pill LJJ) decided that the council had been entitled on the specific facts to find that G only needed 'help' with finding accommodation from another council department and not the actual provision of the same by children's services. The decision in *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14; [2008] 1 WLR 535 was distinguishable because, in that case, the young person had not had a children's services assessment. Rix LJ, dissenting, held that Southwark's decision amounted to either a side-stepping of the statutory provisions or a misunderstanding that obligations under the Housing Acts took precedence over the Children Acts. He would have declared the decision unlawful.

■ R (Liverpool City Council) v Hillingdon LBC and Khan (interested party)

[2008] EWHC 1702 (Admin), 18 July 2008

AK, a young male asylum-seeker, applied to Liverpool for accommodation. The council decided that he was an adult and referred him to NASS. He was then accommodated in Hillingdon's area at an immigration detention centre. An immigration judge dealt with AK on the basis that he was a child. As a result, the Home Office released AK and referred him to Hillingdon's children's services department. Hillingdon decided that Liverpool had a continuing responsibility for AK and assisted him in returning there. Liverpool provided him with accommodation but sought judicial review of Hillingdon's decision.

James Goudie QC, sitting as a deputy judge, granted permission but dismissed the claim. AK was not 'ordinarily resident' in the UK let alone in either local authority area. Pending a further age assessment, Liverpool was responsible for providing AK with accommodation and other assistance under the CA 1989. Hillingdon had ceased to be responsible for AK when he had returned willingly to Liverpool's area.

HOUSING AND COMMUNITY CARE

■ R (M) v Slough BC

[2008] UKHL 52, 30 July 2008

The claimant, M, overstayed his leave to remain in the UK. He was HIV positive and needed accommodation with a refrigerator in which to store his medication. That need would be met by NASS (probably in a dispersal area) unless he had a need for 'care and attention', in which case it would be provided by the local council under National Assistance Act 1948 s21(1)(a) if such help was not 'otherwise available'. In judicial review proceedings, M succeeded in

establishing that the local authority had to accommodate him, and the Court of Appeal dismissed an appeal.

The House of Lords allowed Slough's appeal. It held that a person who only needed provision of normal housing (with a fridge) was not necessarily in need of 'care and attention'. In order to be so, a person had to need 'looking after'; M did not need looking after. M's medical needs did not mean that he required 'care and attention'. If M did need help as a result of medical needs, that particular assistance was 'otherwise available' from the NHS.

1 Available at: www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080017_en.pdf and at: www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080017_en.pdf respectively.
2 *Family intervention projects: an evaluation of their design, set-up and early outcomes*, Research report DCSF-RW047, is available at: www.dcsf.gov.uk/research/data/uploadfiles/ACF44F.pdf.
3 Available at: http://new.wales.gov.uk/consultation/desh/2008/suspendrighttobuy/consultatione.pdf?lang=en.
4 *Gypsies and Travellers financial toolkit for RSLs. Report to the Housing Corporation*, available at: www.housingcorp.gov.uk/upload/pdf/Gypsy_and_Traveller_Toolkit_20080801101515.pdf.
5 *Hansard* HL Debates cols 808–810, 9 July 2008 is available at: www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80709-0011.htm.
6 *Hansard* HL Debates cols 756–758, 9 July 2008 is available at: www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80709-0003.htm.
7 Available at: www.justice.gov.uk/publications/stats-pub-schedule.htm,
8 See: www.legalservices.gov.uk/aboutus/press_releases_8544.asp.
9 See: www.cml.org.uk/cml/media/press/1808.
10 *National Landlords Association sale and rent back code of practice. Consultation document* available at: www.nlarentback.org.uk/codeofpractice/RentbackCOPconsultation.pdf. The consultation closed on 31 August 2008.
11 See: www.fsa.gov.uk/pages/Library/Communication/PR/2008/087.shtml.
12 Available at: www.communities.gov.uk/documents/housing/pdf/facinghousingchallenge.
13 See: www.housingcorp.gov.uk/server/show/ConWebDoc.14588.
14 Available at: www.justice.gov.uk/docs/antisocial-behaviour-pilot.pdf.
15 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/925424.pdf.
16 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/866773.pdf and www.communities.gov.uk/documents/planningandbuilding/pdf/epcsforlandlord.pdf respectively.
17 *Case track limits and the claims process for personal injury claims: response to consultation*, CP(R) 08/07, July 2008, available at: www.justice.gov.uk/docs/case-track-limits-response.pdf.
18 *Hansard* HL Debates cols 748-750, 9 July 2008.
19 Available at: www.publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/369/369i.pdf.
20 Available at: www.cih.org/policy/NTV-Consultation-July08.pdf.
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28 Available at: www.communities.gov.uk/documents/housing/pdf/hipconsumerconsultation.
29 Available at: www.communities.gov.uk/documents/housing/pdf/localpropertysearches.pdf.
30 Peter Petts, barrister, London.
31 Edward Fitzpatrick, barrister, London.

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