

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

Allocating social housing

The Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012 SI No 1869 came into force on 24 August 2012. They were made by the secretary of state in exercise of his powers in Housing Act (HA) 1996 s160ZA(8)(b). The regulations prevent any local housing authority in England from imposing local connection requirements on an applicant for social housing who:

- is serving in the regular Armed Forces or who has served in the regular Armed Forces within five years of the date of his/her application; or
- has recently ceased or will cease to be entitled to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner where –
 - (i) the spouse or civil partner has served in the regular forces; and
 - (ii) his/her death was attributable (wholly or partly) to that Service; or

■ is serving or has served in the reserve Armed Forces and who is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to that Service (reg 3(3)).

A separate memorandum has been published explaining how the new regulations are intended to operate.¹

The Chartered Institute of Housing (CIH) has published a briefing on the content of the new statutory guidance issued to local authorities in England about social housing allocation:

Allocation of accommodation: guidance for housing authorities in England. Briefing paper (CIH, July 2012).²

Homelessness in England

A parliamentary debate on homelessness in England was held in Westminster Hall on 12 June 2012. The minister for housing responded to criticism that homelessness was increasing as a result of housing benefit (HB) restrictions and that the unlawful use of bed and breakfast accommodation – as temporary housing for

homeless families – was commonplace: *Hansard* HC Debates cols 23WH–45WH, 12 June 2012.³

Housing complaints and the Ombudsmen

Currently the House of Commons Select Committee on Communities and Local Government is reviewing the work of the Housing Ombudsman. The call for submissions of evidence ended on 6 September 2012.⁴

Earlier this year, the same committee reviewed the work of the Local Government Ombudsman (LGO). The committee reported that the LGO service had taken too long to determine some complaints made to it: *House of Commons Communities and Local Government Committee. The work of the Local Government Ombudsman. Third report of session 2012–13* (July 2012, HCP 431).⁵

Eligibility for homelessness assistance and housing allocations

The Immigration (European Economic Area) (Amendment) Regulations 2012 SI No 1547 came into effect on 16 July 2012. They alter the legal position relating to eligibility for housing assistance for some EU nationals and their families and were made in order:

- to give effect to judgments of the Court of Justice of the European Union (ECJ) concerning the circumstances in which individuals can be admitted to, and reside in, the UK; and
- to address issues concerning the transposition of Directive 2004/38/EC and the practical application of the regulations which they amend (Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003).

They give effect to the decisions of the ECJ in the linked cases of *Harrow LBC v Ibrahim and Secretary of State for the Home Department* [2010] C-310/08; [2010] HLR 32 and *Teixeira v Lambeth LBC and Secretary of State for the Home Department* [2010] C-480/08. A separate memorandum has been

published explaining how the new regulations are intended to operate.⁶

Right to buy

The UK government has launched a new drive to promote take up of the right to buy (RTB) council housing in the light of the increased discounts that have been available since 1 April 2012. There is a new website at: www.communities.gov.uk/righttobuy and a new dedicated call centre for enquiries on: 0300 123 0913.

Statistics indicate that since 1 April, there has been a dramatic increase in RTB claims. Between April and June 2012, Wandsworth LBC received 141 applications, compared with 13 during the same period in 2011, and Birmingham City Council received 463 in the same three months, compared with 219 during the same period in 2011: Department for Communities and Local Government (DCLG) news release, 23 July 2012.⁷

Tenant management of social housing

The Housing (Right to Manage) (England) Regulations 2012 SI No 1821 came into force on 6 August 2012. They were made under HA 1985 ss27 and 27AB and govern the process by which tenant management organisations (TMOs) can take over the management of council housing. These regulations revoke the Housing (Right to Manage) (England) Regulations 2008 SI No 2361 in so far as they apply to local authorities in England.

A separate memorandum has been published explaining how the new regulations are intended to operate.⁸ The regulations reflect the UK government's response to a consultation exercise on tenant management issues: *Giving tenants control: right to transfer and right to manage regulations. Summary of consultation responses* (DCLG, July 2012).⁹

Housing and anti-social behaviour

An analysis of results on benchmarking of the activity of social landlords in tackling anti-social behaviour has been published: *ASB benchmarking. Analysis of results 2011/12* (HouseMark, July 2012).¹⁰ The report indicates that eviction is pursued in only 'a very small proportion of cases' and that other successful means of tackling such behaviour include the use of injunctions (p19).

Housing and human rights

The Commission on a Bill of Rights for the UK launched its second consultation exercise in July 2012.¹¹ The consultation paper invites views on whether socio-economic rights (such as the right to adequate housing) should be included in a UK Bill of Rights and whether the present definition of a 'public authority' in

Human Rights Act 1998 s6 should be enlarged. The consultation closes on 30 September 2012. (See also August 2012 *Legal Action* 3 and 4.)

Legal aid in housing cases

The Legal Services Commission (LSC) has published statistical data for 2011/2012 indicating the scale of assistance that was provided through legal aid and the Legal Help scheme (and the county court duty possession schemes) in housing and other cases.¹² The data indicates that there were 530 housing contracts granted to suppliers of legal services (down from 546 in 2010/11) and that 14,028 applications were made for legal aid certificates in housing cases.

Under-occupation in social housing

The UK government has published a revised version of its impact assessment dealing with the likely effects of the introduction of HB reductions for working age households under-occupying social housing: *Housing benefit: under occupation of social housing* (Department for Work and Pensions, June 2012).¹³ Using revised projections, it now reports that the introduction of the size criteria is likely to affect an estimated 660,000 HB claimants living in the social rented sector at the time of its introduction in 2013/14. Of those, the figure likely to lose all HB entitlement has been revised up from 20,000 to 40,000 claimants.

The CIH has published a new briefing note on *How to ... reduce under-occupation* (CIH, June 2012).¹⁴ It advises social landlords on how to make moves to smaller properties a positive choice for tenants and includes several practical examples of organisations that run successful schemes.

Eviction for domestic violence

The pilot scheme to test domestic violence protection orders (DVPOs) made under Crime and Security Act 2010 ss24–33 concluded on 30 June 2012.¹⁵ The UK government is now evaluating the results and expects to publish the outcome of the evaluation in summer 2013. Until the results are available, the government has announced that the orders will remain available in the Greater Manchester, Wiltshire and West Mercia police force areas. Around 320 DVPOs have been issued since the scheme began in June 2011: Home Office news release, 2 July 2012.

Housing possession cases

In the first quarter of 2012, 15,152 properties were repossessed by county court bailiffs in England and Wales, a one per cent increase on the first quarter of 2011: *Court statistics quarterly. January to March 2012* (Ministry of

Justice (MoJ) statistics bulletin, June 2012).¹⁶ The full annual court statistics for the calendar year 2011 show that 215,264 claims for possession were issued in the county courts, an increase of 5,000 on the previous year: *Judicial and court statistics 2011* (MoJ, June 2012).¹⁷

HUMAN RIGHTS

Article 8

■ **Birmingham City Council v Lloyd** [2012] EWCA Civ 969, 4 July 2012

Dean Gibbs was a secure tenant. He died in August 2009. Some time during the next month, Mr Gibbs's brother, Richard Lloyd, moved into the flat without the knowledge or consent of those responsible for Mr Gibbs's estate or the council. Mr Lloyd was already a council tenant of another property, but an order for possession had been made against him for non-payment of rent. In November 2009, Mr Lloyd visited the council's neighbourhood offices, informed a housing officer that he was living in Mr Gibbs's flat, and sought to raise a claim for HB. He was told that he would remain liable for the rent on the other property until he served a notice to determine his tenancy, but he was warned that if he did so, and then was not allowed to take a tenancy of the flat, he would be likely to be held to be voluntarily homeless. In the subsequent possession claim, Mr Lloyd served a defence which effectively accepted that he was a trespasser in the flat, but contended that he should be allowed to remain on the ground that evicting him would be a disproportionate interference with his right to respect for his home under article 8 of the European Convention on Human Rights ('the convention').

A recorder dismissed the claim for possession. He noted Mr Lloyd's history of depression; his financial circumstances, which would render it difficult for him to find other accommodation if he was evicted from the flat; the effort and expenditure that he had incurred in setting up his own web design business; and confusion about the circumstances in which Mr Lloyd gave up his tenancy. Furthermore, this was not a case where the occupier of the property concerned had been guilty of nuisance, anti-social behaviour or criminal activity.

The Court of Appeal allowed the council's appeal. After referring to *Manchester City Council v Pinnock* [2010] UKSC 45, *Hounslow LBC v Powell* [2011] UKSC 8 and *Corby BC v Scott* [2012] EWCA Civ 276, Lord Neuberger MR said that if it is only in very highly exceptional circumstances that it would be appropriate for the court to consider a

proportionality argument on behalf of a tenant, 'it must be at least as true, indeed ... even more true, in the case of someone who entered the property as a trespasser and has remained a trespasser' (para 12). He continued:

... the defendant in this case was not merely a trespasser in the property concerned at the time the possession order was sought but he never has had any right to occupy the premises, whether under contract or statute. He entered the property as a trespasser and a trespasser he has remained (para 13).

The effect of the first instance decision would 'involve the recorder usurping the council's role as the entity responsible for allocating its housing stock' (para 17). Lord Neuberger added:

It would ... be wrong to say that it could never be right for the court to permit a person, who had never been more than a trespasser, to invoke article 8 as a defence against an order for possession. But such a person seeking to raise an article 8 argument would face a very uphill task indeed, and, while exceptionalism is rarely a helpful test, it seems to me that it would require the most extraordinarily exceptional circumstances (para 18).

Mr Lloyd was 'well short of being able to cross the high threshold which an occupier with no domestic legal right to occupy his home, and miles away of the threshold which an occupier who has never been anything other than a trespasser has to cross' to be able to invoke article 8 and to defeat a claim for possession (para 25). It was a case in which a district judge considering Mr Lloyd's case on its face, and taking all the facts Mr Lloyd relied on as correct, should have decided peremptorily that the article 8 argument was not maintainable and should not have let it go to trial.

■ **R (JL) v Secretary of State for Defence**

[2012] EWHC 2216 (Admin), 30 July 2012

Mrs JL was married to an army officer. He was violent to her and abused one of their daughters. In July 1989, he resigned from the army. Although the army no longer had any duty to house Mrs JL, on compassionate grounds, because of her husband's misconduct towards her and the family, she was granted a licence of accommodation in Leeds where her children attended a boarding school. Even if there had been a tenancy, there could be no assured tenancy as a result of HA 1988 Sch 1 para 11. In 2005, a notice to quit was served. By this time Mrs JL suffered ill-health, was registered disabled and had to use a

wheelchair. She defended possession proceedings relying on article 8. Collins J made a possession order in May 2009 (*Defence Estates v JL* [2009] EWHC 1049 (Admin); August 2009 *Legal Action* 33).

In February 2011, the secretary of state decided to enforce the possession order. Mrs JL brought a claim for judicial review of this decision. She argued that there had been a failure to have regard to considerations of mandatory relevance; that the decision to enforce the possession order was a disproportionate interference with her article 8 rights; and that the decision was unreasonable. She claimed that, as a matter of common humanity, the defendant was required to take into account the absence of suitable alternative accommodation and the consequences of eviction.

Ingrid Simler QC, sitting as a deputy High Court judge, dismissed the claim for judicial review. After referring to *Pinnock* (see above) and *Powell* (see above), she said that, absent some form of security of tenure, tenants rarely, if ever, have a domestic law defence against a possession claim by a landlord. She noted that Mrs JL's counsel was unable to identify any authority to support the proposition that consideration of the absence of suitable alternative accommodation and the consequences of eviction 'were of mandatory relevance' (para 45). She continued:

The suggestion that the common law should be developed so that a public authority's decision to seek the execution of a possession order can be subjected to a searching or intensive review would be inconsistent with parliament's intention as expressed in s89 of the Housing Act 1980 (para 46).

By granting the possession order, Collins J decided that the defendant was entitled to possession ... particularly in circumstances where Leeds City Council has accepted that it owes the claimant a duty under its homelessness functions, the defendant was not obliged, when deciding to seek to enforce the possession order by way of a writ of possession, to have further regard to any specific aspect of the claimant's circumstances. These were not matters of mandatory relevance (para 47).

In any event, when deciding to enforce the possession order, the defendant did have regard to [Mrs JL's] circumstances (para 48).

The deputy High Court judge accepted the claimant's submission that article 8 was still engaged at the enforcement stage of the possession order. However, although proportionality can be considered at the enforcement stage in appropriate cases, it did not have to be considered in every case: 'Where [proportionality] could have been raised

and addressed, it will be difficult for the tenant successfully to invoke it absent a marked change in circumstances or some other exceptional reason justifying its consideration' (para 61). In this case, given that Mrs JL could not remain indefinitely and in view of her long-standing physical and mental health difficulties, there was no evidence to suggest that eviction now carried any greater impact than in three, six or 12 months' time.

■ **R (Harrow Community Support Limited) v Secretary of State for Defence**

[2012] EWHC 1921 (Admin),
10 July 2012

A residents' association applied for judicial review of a decision by the secretary of state to locate a Ground Based Air Defence (GBAD) system and military personnel on the roof of a residential tower block in Leytonstone for the duration of the 2012 Olympics. It alleged failure to carry out an adequate consultation process and a breach of article 8 and/or article 1 of Protocol No 1. It also argued that the secretary of state should order the Royal Engineers immediately to build a standalone tower or gantry somewhere on Wanstead Flats where there was plenty of space and, in the alternative, that hotel accommodation should be made available to those residents who objected to living below the GBAD.

Haddon-Cave J refused permission to apply for judicial review because the grounds were unarguable in law and in fact and the proceedings were not brought promptly. He held that the establishment of an Air Security Plan, involving the deployment of a GBAD system, was essential to protect the 2012 Olympics. The GBAD system had been subject to the most rigorous examination at the highest level. There were no other options or alternative sites which would secure the objectives of the plan. Any fears about the location of the high velocity missiles on the roof of the block causing danger were objectively unfounded because they did not depend on 'high explosives' but relied on kinetic energy (para 23(6)). Haddon-Cave J said that in matters of national security and deployment of the Armed Forces, the courts should 'be very slow to review the exercise of prerogative powers ...' (para 24). The deployment of military personnel and equipment for national security and defence of the realm purposes 'has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not inquire' (para 24). After referring to a number of authorities, he concluded that the contention that the secretary of state was in breach of his duty to consult was unarguable in law. The answer to the claimant's article 8 point was the government's article 2 duty to protect the right to life, to defend the realm and

to protect national security. The deployment was for the legitimate purpose of national security and public safety. Its 'proportionality' was overwhelming.

Article 6

■ **Globa v Ukraine**

App No 15729/07,
5 July 2012,
[2012] ECHR 1375

Mr Globa had been at the top of the waiting list for a Town Council apartment. A vacant apartment was wrongly allocated to people below him on the list. He took court proceedings and obtained a judgment that the occupiers be evicted; he be allocated the flat; and the occupiers be rehoused.

The Town Council failed to comply with the order and enforcement measures failed. He complained to the European Court of Human Rights (ECtHR).

It rejected his claim under article 8 (right to respect for his home) because although he had an enforceable right to enter and occupy the flat, he had never done so and others had established their home there. It upheld his complaint that the failure to enforce the judgment amounted to a breach of article 6 and awarded him €5,000 compensation.

■ **Huseynov v Azerbaijan**

App No 56547/10,
26 June 2012,
[2012] ECHR 1094

In 1998, Mr Huseynov was given an occupancy voucher for a flat in a residential building in Baku by the City Executive. However, he found that the flat was occupied by internally displaced persons (IDPs) from Nagorno-Karabakh. Later the same year, the Yasamal District Court made an order evicting the IDPs. However, the IDPs refused to comply with the judgment and the competent authorities did not take any measures to enforce it for many years. The judgment was only enforced in April 2012.

The ECtHR found that the factual circumstances of this case were similar to *Gulmammadova v Azerbaijan* App No 38798/07; [2010] ECHR 625, paras 18–24. The complaints and legal issues raised were identical. The government had not put forward any fact or argument capable of persuading the court to reach a different conclusion in respect of the present application. There was, accordingly, a violation of article 6(1) and article 1 of Protocol No 1. The court awarded €13,200 in respect of pecuniary damage and €3,600 in respect of non-pecuniary damage.

POSSESSION CLAIMS

■ East Lothian Council v Duffy

[2012] Scot SC,
9 May 2012

The council agreed that Mr and Mrs Duffy could sub-let their council house temporarily. After they had moved out and the sub-tenants had moved in, Mr and Mrs Duffy notified the council that they had found housing elsewhere. They wrote:

... we will not be returning to [the house] on the 4th of August 2009. We would be very grateful if you could help out [the sub-tenants] with their housing problem ... (para 6.4).

The council replied:

I acknowledge your notification to end the above tenancy as of 12 August 2009 ... All keys must be returned to this office by 10.00 am on 12th August 2009. If the keys are returned late, then your tenancy will continue until the day after they are handed in (para 6.5).

The council later claimed possession on the basis that: the tenancy had ended; or it continued but the tenants were not in occupation and it was reasonable to grant possession.

Sheriff Braid held that the tenancy had not ended. The tenant's letter did not give the 28 days' notice required by the tenancy agreement and the council's reply was not an agreement to waive this defect. On the contrary, it asserted that the tenancy would continue until the keys were returned (which they had not been).

However, a possession order was granted. The tenants were not occupying, did not defend the claim, and, although the sub-tenants had been model occupiers, it was reasonable to grant the council possession so that it could relet to those in greater housing need.

■ Islington LBC v Jones and others

[2012] EWHC 1537 (QB),
1 June 2012

The defendants were protestors who established an encampment on Finsbury Square in the council's area. They had no right to do so but insisted on their right to maintain a peaceful demonstration. The council's claim for possession of the land and for injunctions to require the occupiers to keep off the square was resisted by reliance on the human rights of the defendants.

Hickinbottom J held that overwhelmingly the balance favoured the council as it was lawfully entitled to immediate possession, a significant period of occupation had been tolerated and there was no definite time when the

occupation would otherwise end. Possession orders and injunctions were granted.

SECURE TENANCIES

Only or principal home

■ Islington LBC v Boyle

UKSC 2012/0047,
18 June 2012

The Supreme Court has refused permission to appeal against the Court of Appeal's decision that a possession claim had been wrongly dismissed and should be remitted for trial. The application did not raise an arguable point of law of general public importance. The Court of Appeal's remit to the court below was based on a correct interpretation of the tenant condition in HA 1985 s81 (see [2011] EWCA Civ 1450; [2012] HLR 18; February 2012 *Legal Action* 11).

Succession

■ Solihull MBC v Hickin

[2012] UKSC 39,
25 July 2012

In 1980, the council let a house to Mr and Mrs Hickin on a weekly secure tenancy. They lived there together with their daughter, Elaine Hickin. In 2001, after the failure of their marriage, Mr Hickin left the house, never to return. Elaine Hickin continued to live in the house with her mother, as their only or principal home. Mrs Hickin died in 2007. Following her death, the council served a notice to quit on Mr Hickin, and then issued possession proceedings against Elaine Hickin. District Judge Hammersley made a possession order. HHJ Oliver-Jones QC allowed an appeal. The Court of Appeal allowed the council's appeal ([2010] EWCA Civ 868; [2010] 1 WLR 2254; September 2010 *Legal Action* 36). Elaine Hickin appealed to the Supreme Court.

The Supreme Court dismissed the appeal (Lords Mance and Clarke dissenting). The HA 1985 did not alter the common law position: Mr and Mrs Hickin had jointly constituted the 'tenant'. The tenancy subsisted even after the death of Elaine Hickin's mother, with her father as the sole tenant. Since he was not living at the property, he had lost his statutory security of tenure (HA 1985 s81) and the contractual tenancy had been validly terminated by the notice to quit.

ASSURED TENANCIES

Rent arrears and bankruptcy

■ Sharples v Places for People Homes Ltd

UKSC 2012/0074,
5 July 2012

The Supreme Court has refused an application by a bankrupt tenant for permission to appeal from a Court of Appeal decision that a possession claim for rent arrears did not infringe the prohibition on obtaining a remedy against a bankrupt in respect of a debt (Insolvency Act 1986 s285(3)(a)). The reasons for refusal include the statement that the Court of Appeal's judgment 'was plainly right' (see *Places for People Homes Ltd v Sharples*; A2 *Dominion Homes Ltd v Godfrey* [2011] EWCA Civ 813; [2012] L&TR 9; September 2011 *Legal Action* 35).

HARASSMENT AND EVICTION

Damages

■ Hussain v Mir

Clerkenwell and Shoreditch County Court,
6 July 2012¹⁸

Mr Hussain, a single man, was the assured shorthold tenant of one room, with shared facilities, in a house in multiple occupation (HMO). The initial tenancy was granted on 19 July 2010 at a rent of £350 per calendar month for six months. On the expiry of that fixed term, a new fixed-term tenancy agreement was granted, at the same rent, for a period of one year, expiring on 18 December 2011. There were six other rooms in the property, each let on separate tenancies.

On 3 July 2011, Mr Mir, the landlord, visited the property and told the occupants that they had to move out. He claimed that he had not received rent (which had been paid to his agent). The following day, Mr Mir returned to the property. Some of the tenants had left, but Mr Hussain and two others remained in occupation. Mr Mir told them to leave. Mr Hussain went out to buy food. On his return, Mr Mir and the lettings agent were outside the property. They again told him to leave and a locksmith changed the lock to the front door. Mr Hussain tried to get into the front garden, but the agent pushed him. After Mr Hussain had called the police three times, the agent attacked him. He pushed him violently and he fell to the ground. The agent kicked him in the back and chest. Mr Hussain suffered soft tissue injuries to his neck and back and grazes to his elbows. He telephoned for an ambulance and was taken to hospital. He was discharged from hospital later that evening. On his return to the property, he was allowed into the property by one of the other tenants to collect

his belongings but was not permitted to remain. He stayed with a friend for 29 nights, sleeping on the floor. He then made an application for homelessness assistance and was provided with temporary accommodation in a hostel. He was still living in a hostel some five months later. Some six weeks after the eviction, the property was on the market as available to rent under one tenancy for the whole of the property. Mr Mir did not file an acknowledgement of service and judgment in default was obtained. Mr Mir did not attend the assessment of damages hearing.

District Judge Stary awarded the following damages:

- £1,000 for the assault;
- general damages for breach of covenant of £300 per night for 29 days sleeping on the floor/sofa and £190 per night for 14 nights in the hostel, taking into account that Mr Hussain had a duty to mitigate his loss and so damages should not be awarded for the whole of the remainder of the fixed-term tenancy (total £11,360);
- aggravated damages of £2,000;
- exemplary damages of £1,800 because Mr Mir had avoided the legal costs of evicting by falsely claiming failure to pay rent as an excuse to evict; and
- the return of the deposit plus interest in the sum of £172.19.

The total damages amounted to £16,332.19.

■ **Oyzen v Bell-Gam**

Croydon County Court,
11 July 2012¹⁹

Mr Oyzen was the assured shorthold tenant of a one-bedroom flat. Before moving in, he viewed the premises and noted that they were dirty. The bed mattress was stained and there was animal hair all over the carpets. Despite being advertised as fully furnished, there was no furniture other than the dirty bed, a bamboo two-seater sofa, a coffee table, an old cooker and a fridge. He was assured by the landlady's agent that they would attend to these issues but they never did so. On arrival at the premises on 21 January 2011, there was no electricity or gas supply. The meters were in a part of the building controlled by the landlady, to which Mr Oyzen did not have access. The landlady returned on 23 January 2011 with £20 on the electric key and told Mr Oyzen that he would have to pay her back.

On 24 January 2011, Mr Oyzen tried to use the washing machine, but water poured out and he heard the sound of sparking. He contacted the fire brigade, which attended and was able to gain access to the part of the building where the meters were located in order to turn off the electricity supply. The landlady attended the following day with her son. She shouted at Mr Oyzen and accused him of having 'wrecked her property'. She

continued to shout and wave her arms about in an erratic manner, and refused to listen to him. She subsequently told him to get out. Mr Oyzen was forced to sleep on the streets as he had no other accommodation available. Except for a period of three weeks when he was able to stay in a hostel arranged by St Mungo's, he was living on the streets from 25 January 2011 until 5 April 2011.

District Judge Major awarded the following damages:

- general damages following the unlawful eviction at the daily rate of £200 for 70 days (total £14,000);
- aggravated damages of £2,000;
- exemplary damages of £1,500; and
- interest and costs.

FREEDOM OF INFORMATION ACT 2000

■ **Camden LBC v Voyias and the Information Commissioner**

[2012] UKUT 190 (AAC),
6 June 2012

The applicant asked the council to provide him with a list of all the empty residential premises in its borough that were not owned by a private individual. The council refused. It relied on the exemption in Freedom of Information Act 2000 s31(1)(a) (ie, prevention of crime). The Information Commissioner decided that the exemption applied. The applicant's appeal was allowed by the First-tier Tribunal (FTT), which ordered disclosure (see *Voyias v Information Commissioner* [2011] UKFTT EA 0007 (GRC); November 2011 *Legal Action* 38).

The council appealed to the Upper Tribunal. It allowed the appeal and remitted the case for rehearing by the FTT. There had been an error in law in taking too narrow a view of the scope of enquiry when considering the public interest in the prevention of crime.

SAFETY OFFENCES

■ **Leicestershire Fire Service v Price**

Leicester Crown Court,
12 July 2012

The defendant's company, Launch Padz Developments, began converting a building into 75 single and communal student flats. The facilities were considered unsafe by Fire Service inspectors, who issued a prohibition notice preventing anyone living in the property until the problems were rectified. In breach of the notice, students began to move into occupation. The fire authority prosecuted for three offences under the Regulatory Reform (Fire Safety) Order 2005 SI No 1541 for breach of the notice. The defendant pleaded

guilty, but magistrates considered the matter so serious that they committed him to the Crown Court for sentence.

He was given a suspended sentence order with nine months' imprisonment suspended for 12 months. He was also ordered to pay a sum of £25,000 with £15,000 costs, to be paid within four months, with six months' imprisonment in default.

■ **Health and Safety Executive v Hammersmith and Fulham LBC**

Westminster Magistrates' Court,
11 July 2012

The Health and Safety Executive (HSE) became concerned that the council had not been undertaking annual gas safety checks in respect of all its rented accommodation (including private sector leased properties). The council gave the HSE a list of 297 properties where annual safety checks had 'slipped'. The HSE inspected 20 of those and all were found to contain gas cookers or boilers that should have been checked at least every 12 months.

The local authority pleaded guilty to nine breaches of regulation 36(3)(a) of the Gas Safety (Installation and Use) Regulations 1998 SI No 2451 in relation to lapsed checks, with a further 14 breaches taken into consideration. The council was fined £83,600 and ordered to pay costs of £15,553.

■ **Camden LBC v Kalam and Begum**

Highbury Corner Magistrates' Court,
20 June 2012

The defendants owned a six-bedroom ex-council house which they let to six students. They were prosecuted for failing to apply for an HMO licence and for HMO management offences relating to the lack of fire exits, fire precautions and disrepair. They changed their pleas to guilty on the first day of trial.

They were fined £1,000 each for failing to obtain a licence. Mr Kalam was also fined £2,000 for failing to provide fire precautions and £250 for a broken window. He was ordered to pay £2,508 in costs and Mrs Begum was ordered to pay £2,000 towards the council's costs. District Judge Crane said:

The lack of compliance with the regulations compromised the safety of tenants and possibly put their lives at risk. This would still have applied even if there were only four tenants. These [HMO] regulations are in place to prevent precisely this sort of abuse of tenants and putting them at risk in order to pocket large sums of money without carrying out repairs.

■ Camden LBC v Alba Lopez*Highbury Corner Magistrates' Court,
7 June 2012*

The defendant was prosecuted for failing to apply for an HMO licence in respect of each of two flats, and management offences relating to the lack of fire precautions and shortcomings with respect to the wiring. She pleaded guilty to the failure to licence each flat in multiple occupation and failure to provide adequate structural fire precautions in one flat. Offences of failing to install structural fire precautions in the other flat and of failure to install suitable fire detection and alarm systems in both were taken into consideration. She was fined a total of £2,000 and ordered to pay £1,000 towards the council's costs plus a victim support payment of £15.

PLANNING ENFORCEMENT**■ Windsor and Maidenhead RBC v Smith***[2012] EWCA Civ 997,
18 July 2012*

Ms Smith lived in a caravan on a site which only had planning consent for agricultural use. In 2009, the council obtained an injunction restraining her from bringing 'any further caravans' on to the land (para 5). Ms Smith obtained a converted portacabin on wheels and placed it next to her caravan. The new unit provided shower facilities and was also used to dry and iron clothes. The council applied for committal for breach of the injunction. Globe J held that there had been no breach because the new unit was not a 'caravan'.

The Court of Appeal dismissed the council's further appeal. In the context of the circumstances in which the injunction had been granted, 'caravan' was to be interpreted as applying only to the types of structures already on site. (See also page 25 of this issue.)

■ Brent LBC and Harrow LBC v Sarkari*Harrow Crown Court,
July 2012*

The defendant was a private landlord. He was convicted of breaches of enforcement notices for converting houses into flats and letting them out, even though planning permission to do so had been refused.

He was fined £7,515 and ordered to pay over £18,000 costs. The judge also made a Proceeds of Crime Act 2002 confiscation order for £303,000 in respect of the rent received through the unlawful use of the property, to be paid within six months, with three and a half years' imprisonment in default.

HOMELESSNESS**Eligibility****■ Konodyba v Kensington and Chelsea RLBC***[2012] EWCA Civ 982,
20 July 2012*

The appellant was a Polish national. When she was asked to leave her private rented sector home in 2010, she made an application for homelessness assistance under HA 1996 Part 7. She had worked previously in the UK, and had been self-employed for a period.

The council decided that she was not eligible for assistance (section 185) because although she was an EU national, she was no longer exercising Treaty rights as a worker or self-employed person. She asserted that normally she worked as an employee or on a self-employed basis, but because of illness was temporarily unable to do so: I(EEA) Regs reg 6(2) and (3) implementing article 7 of Directive 2004/38/EC. The reviewing officer decided that her condition was such that her prospects of becoming employed or self-employed in the foreseeable future were not realistic.

HHJ McMullen QC dismissed an appeal. The appellant brought a further appeal on the ground that in deciding that she was '... unlikely to be able to work in the foreseeable future' the reviewing officer had applied the wrong test; he should have asked whether or not she had permanently exited the job market (para 20).

The Court of Appeal dismissed the appeal. It held that if a person is unlikely to be able to work in the foreseeable future, there are no realistic prospects of him/her being able to return to work. The reviewing officer had made no error of law.

Priority need**■ Ijaola-Jokesenumi v UK***App No 45996/11,
16 March 2012,
[2012] ECHR 652*

The applicant applied to Southwark for homelessness assistance under HA 1996 Part 7. She and her husband were foreign nationals but both had leave to remain in the UK. She had four dependent children, none of whom were UK nationals and none of whom had the right to enter or remain in the UK. The council decided that she was homeless but did not have a priority need as she could not rely on the children, who were designated as 'persons from abroad': HA 1996 s185(4). This decision was upheld on review.

The applicant did not exercise the right to appeal because the county court would be obliged to apply the domestic legislation. She did not seek a declaration of incompatibility in respect of the amended legislation (amended following *Westminster City Council v Morris*

[2005] EWCA Civ 1184) because she did not consider it to be an effective remedy as it would not be binding on the government in her case. She applied instead to the ECtHR in Strasbourg. This court posed these questions for the parties:

(1) *What is the immigration status of the applicant's four children? The court observes in this regard that, while they were included on their mother's application for discretionary leave to remain, they do not appear to have been granted such leave in line with their mother's status.*

(2) *Has the applicant exhausted all domestic remedies available to her?*

(3) *Has the applicant been a victim of discrimination contrary to article 14 of the convention, taken in conjunction with article 8?*

Appeals**■ Konodyba v Kensington and Chelsea RLBC***[2012] EWCA Civ 982,
20 July 2012*

This 'eligibility' case (see above) also raises a point of procedure about homelessness appeals under HA 1996 s204. The appellant first applied for homelessness assistance in 2008 at the start of a previous incidence of homelessness. A reviewing officer decided that she was not eligible and HHJ Behar dismissed an appeal from this decision. The appellant obtained permission to appeal to the Court of Appeal on the basis of an argument that, as the mother of a child who had been to school in this country, while she was temporarily working here, she was entitled to reside in the UK as the primary carer of this child under the rule in *Baumbast and R v Secretary of State for the Home Department C-413/99*; [2002] ECR I-7091 and article 12 of Regulation (EEC) No 1612/68. In June 2009, at the hearing of that appeal, the appellant abandoned the *Baumbast* point and her other grounds of appeal failed: see [2009] EWCA Civ 890.

On the new incidence of homelessness in 2010, she sought to resurrect the *Baumbast* point. HHJ McMullen QC held that she could not do so and dismissed her appeal. She brought a second appeal contending that because the point was being raised on a new homelessness application, she was not estopped from pursuing it.

The Court of Appeal held that a point pursued to the Court of Appeal on one homelessness application cannot be resurrected by the same applicant on the same facts on his/her next homelessness application. It would be an abuse for the point to be relitigated.

- 1 Available at: www.legislation.gov.uk/ukxi/2012/1869/pdfs/ukxiem_20121869_en.pdf.
- 2 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/CIH%20briefing%20-%20allocation%20of%20accommodation%20guidance.pdf.
- 3 See: www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120612/halltext/120612h0001.htm#12061238000001.
- 4 See: www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/news/housing-ombudsman---tor/.
- 5 Available at: www.publications.parliament.uk/pa/cm201213/cmselect/cmcomloc/431/431.pdf.
- 6 Available at: www.legislation.gov.uk/ukxi/2012/1547/pdfs/ukxiem_20121547_en.pdf.
- 7 Available at: www.communities.gov.uk/news/newsroom/2186954.
- 8 Available at: www.legislation.gov.uk/ukxi/2012/1821/pdfs/ukxiem_20121821_en.pdf.
- 9 Available at: www.communities.gov.uk/documents/housing/pdf/2179793.pdf.
- 10 Available at: [www.housemark.co.uk/hmresour.nsf/lookup/ASB_BM_report_2012.pdf/\\$File/ASB_BM_report_2012.pdf](http://www.housemark.co.uk/hmresour.nsf/lookup/ASB_BM_report_2012.pdf/$File/ASB_BM_report_2012.pdf).
- 11 Available at: www.justice.gov.uk/downloads/about/cbr/second-consultation/cbr-second-consultation.pdf.
- 12 Available at: www.legalservices.gov.uk/docs/about_us_main/LSC-Stats-Pack-2011-2012.pdf.
- 13 Available at: www.dwp.gov.uk/docs/social-sector-housing-under-occupation-wr2011-ia.pdf.
- 14 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/How%20to%20reduce%20under-occupation.pdf.
- 15 Available at: www.homeoffice.gov.uk/media-centre/news/domestic-violence-protection.
- 16 Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/q1-2012/court-stats-quarterly-q1-2012.pdf.
- 17 Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf.
- 18 Nathaniel Matthews, Hackney Community Law Centre® and Liz Davies, barrister, London.
- 19 Claire Wiles, Hanne and Co, solicitors and Matthew Feldman, barrister, London.

Gypsy and Traveller law update – Part 2



Chris Johnson, Dr Angus Murdoch and Marc Willers highlight important developments in case-law in this area since their last article was published in July 2011 *Legal Action* 11. Part 1 of this update, which highlighted significant legislation and policy, appeared in July 2012 *Legal Action* 21. The authors welcome any case notes or comments from readers.

CASE-LAW

Planning permission

In the past year, there have been a significant number of Administrative Court decisions in cases where Gypsies and Travellers have challenged the decisions made by planning inspectors to refuse them planning permission for caravan sites. Some of those cases concerned the application and interpretation of the planning policy in Office of the Deputy Prime Minister (ODPM) Circular 1/2006 *Planning for Gypsy and Traveller caravan sites*.¹

However, as the authors reported in 'Gypsy and Traveller law update – Part 1', on 27 March 2012 ODPM Circular 1/2006 was replaced by the coalition government's new 'light-touch' planning guidance entitled *Planning policy for Traveller sites* (PPFTS); therefore, in the circumstances, in this article the authors have decided to concentrate on cases which may have a wider and continuing application rather than on those that perhaps are now of no more than historical note.

Gypsy and Traveller status

■ **Medhurst v Secretary of State for Communities and Local Government** [2011] EWHC 3576 (Admin), 8 December 2011

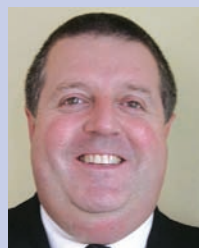
For the purposes of Circular 1/2006 (and its replacement guidance PPFTS) 'Gypsies and Travellers' are defined as follows: 'Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such' (Circular 1/2006 para 15 and PPFTS Annex 1). In *Medhurst*, a planning inspector rejected an appeal against a local authority's refusal to grant the claimant, a Romani Gypsy woman,

planning permission having decided that she did not come within the definition of Gypsies and Travellers for the purposes of Circular 1/2006. The claimant challenged this decision by way of statutory review under Town and Country Planning Act (TCPA) 1990 s288.

Clive Lewis QC dismissed the challenge. He concluded that the extent to which the claimant travelled was not sufficient to constitute a 'nomadic habit of life' and that the policy definition did not breach article 8 of the European Convention on Human Rights ('the convention'), which includes the right to respect for the traditional Gypsy way of life (see *Chapman v UK* App No 27238/95, 18 January 2001; [2001] 33 EHRR 18). Subsequently, the claimant was refused leave to appeal to the Court of Appeal.

Comment: This case provides another example of the difficulties ethnic Gypsies and Travellers face when trying to obtain planning permission for the use of land as a caravan site so that they can live in keeping with their traditional way of life (see *McCann v Secretary of State for Communities and Local Government and Basildon DC* [2009] EWHC 917 (Admin), 24 March 2009 and *Wingrove and Brown v Secretary of State for Communities and Local Government and Mendip DC* [2009] EWHC 1476 (Admin), 7 May 2009). The policy definition places ethnic Gypsies and Travellers in a catch-22 situation. They have to demonstrate that they travel for an economic purpose (or have ceased so doing on the grounds of education, health or old age) in order to be afforded Gypsy and Traveller status and benefit from the government's positive planning advice, at a time when, in the absence of sufficient stopping places and in the face of the draconian legislation contained in the Criminal Justice and Public Order Act 1994, it is extremely difficult for them to pursue a nomadic habit of life (whether seasonally or at all).

Furthermore, the fact that a Romani Gypsy



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 18–19 for transcripts or notes of judgments.