Recent developments in housing law

Possession claims on the rise; private rented sector subject to scrutiny; new guide on housing and mental health; and important decisions over human rights, adverse possession and allocation claims. Jan Luba QC and Nic Madge provide their monthly round up.

POLITICS & LEGISLATION

Changes in housing law

Two new statutes make changes to a variety of aspects of housing law.

The Deregulation Act 2015 contains provisions that will:

- address 'retaliatory evictions';
- change the rules on Housing Act (HA) 1988 s21 notices;
- relax restrictions on short-term lets in London;
- reduce the qualifying period for the right to buy;
- remove the power to require councils to prepare housing strategies; and
- amend the law on tenancy deposits.

An explanation of the policy behind the first two provisions is given in *Policy statement on amendment to Deregulation Bill* (DCLG, February 2015). The policy justification for the third is set out in *Promoting the sharing economy in London: Policy on short-term use of residential property in London* (DCLG, February 2015).

The Consumer Rights Act 2015 contains provisions that:

- repeal and replace earlier statutes and secondary legislation dealing with unfair terms in tenancy agreements and other contracts; and
- require letting agents to publish their fees.

There was a consultation earlier this year on the draft guidance that the Competition and Markets Authority (CMA) will issue on the new unfair terms provisions (*Draft guidance on unfair contract terms – Consultation document*, CMA, 26 January 2015).

Possession claims

The latest official statistics show that in the last three months of 2014 there were 10,380 warrants executed by county court bailiffs in England and Wales in possession claims brought by landlords (*Mortgage and Landlord Possession Statistics Quarterly, England and Wales – October to December 2014*, MoJ, February 2015). That is an increase of 8 per cent on the same period in 2013. The total number of bailiff repossessions in such cases in the full year 2014 was 41,965. That is up 11 per cent on 2013 and represents the highest annual figure since such data began to be collected in 2000.

Earlier this year, the UK government issued proposals for a significant increase in civil court fees, including the costs of issuing possession claims and of making applications in such proceedings (for example, to suspend a warrant) (*Enhanced Court Fees – The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation*, MoJ, January 2015). The accompanying impact assessment considers the likely effects of the proposed increase in possession claim fees (*Enhanced Court Fees for Possession claims and for General Applications in civil applications* – IA No 043/2014, MoJ, January 2015).

Housing and legal aid

The latest official statistics indicate that the volume of legally-aided housing cases halved between April to June 2012 and April to June 2013 (*Legal Aid Statistics in England and Wales – July to September 2014,* MoJ, December 2014). In the last quarter, there was a 9 per cent decrease compared to the same quarter the previous year. This decrease was mainly in legal help, which makes up 80 per cent of housing volume. The trend in civil representation has remained stable.

Private renting

The housing minister has told the House of Commons that as a result of a 2012–2013 initiative to tackle the letting of unauthorised outbuildings, there have been an estimated 2,800 private landlords facing prosecution, 530 buildings prohibited and 145 sheds demolished (*Private Rented Housing: Written Question 220713*, Parliamentary Business, January 2015).

The UK government has published the outcome of its consultation on the content of the Private Rented Sector Energy Efficiency Regulations (Domestic) which would set the minimum energy efficiency standard at an E Energy Performance Certificate (EPC) rating for all categories of domestic private rented property (*Government response to 22 July 2014 – Consultation on the domestic regulations (England and Wales)*, DECC, February 2015). An accompanying impact assessment measures the likely effects of the proposals (*Final Stage Impact Assessment for the Private Rented Sector Regulations* – IA No 0168, DECC, February 2015). A recent report has set out new approaches for London councils to work with private landlords on energy measures and raising standards (*Engaging Private Landlords in Energy Efficiency*, EDF Energy and Future of London, December 2014).

The Local Government Association (LGA) and the Chief Fire Officers Association (CFOA) have jointly called for legislation on mandatory installation and repair of smoke alarms in rented dwellings and the introduction of mandatory annual electrical safety checks by landlords (*The Fire and Rescue Service: Making our Nation Safer*, LGA and CFOA, February 2015). The Household Safety (Carbon Monoxide Detectors) Bill 2015, a private member's bill, would have introduced a requirement that a functioning carbon monoxide detector be installed in all newly-built and all rented residential properties but failed to secure sufficient parliamentary time.

Homelessness

Local authorities are increasingly placing homeless households in out-of-borough accommodation. Earlier this year, Waltham Forest Council consulted on policy changes to enable it to place more households in temporary accommodation outside its district (*Proposed changes to guidelines relating to the location of temporary accommodation for homeless households*, Waltham Forest LBC, January 2015). Wandsworth Council's latest homelessness review indicates that a third of its private rented sector offers were out of borough (*Report by the Director of Housing and Community Services on Homelessness Activity: Housing and regeneration overview and scrutiny committee*, Wandsworth LBC, 21 January 2015). In response to a parliamentary question on the issue, the housing minister said '[w]e have made it clear that no council should be sending tenants en masse to a different part of the country' (*Council Housing: Written Question 219933*, Parliamentary Business, January 2015). On 3 February 2015, another minister told the House of Lords that '[t]his Government has made it clear that no council should be sending tenants en masse to a different part of the country' (*Temporary*

accommodation: Written question HL4465, Parliamentary Business, February 2015)

The Joseph Rowntree Foundation (JRF) and Crisis have published the latest report from a five-year (2011–2016) study that provides an independent analysis of the impact on homelessness of recent economic and policy developments in England (*Homelessness Monitor 2015*, JRF and Crisis, February 2015).

Shelter Cymru has developed a tool for embedding person-centred principles in frontline homelessness services (*Guide to the service-user standard for Welsh homelessness services*, Shelter, 2015). It was designed by service users in order to help further the aims of Housing (Wales) Act 2014, Part 2 (Homelessness) which comes into force in April 2015.

The NSPCC has published a new report on homelessness which deals with the prospects for babies living in homeless households (*An unstable start – All babies count: spotlight on homelessness*, NSPCC, February 2015).

The organisation Homeless Link has published a manifesto on the action needed to tackle the housing and homelessness crisis (*Let's make the difference: A manifesto to end homelessness*, Homeless Link, 2015).

Transfers and mutual exchanges

The UK government has established a £500,000 fund to support local authorities in England and their partner private registered providers in using the provisions in the Localism Act 2011 for handling tenant transfers (s145) and social housing allocation (ss146–147) with a view to increasing mobility for existing social tenants (*Social Housing Mobility Funding Scheme Bidding prospectus*, DCLG, February 2015).

The Chartered Institute of Housing (CIH) has published the results of an online survey on how housing organisations support mobility for their existing tenants (*Moving on: Findings from our housing mobility survey*, CIH, 2015). CIH have also published a new briefing note on *How to promote mobility among existing tenants* (CIH, 2015).

Housing and anti-social behaviour

The UK government had intended that the injunction provisions in Anti-social Behaviour, Crime and Policing Act (ABCPA) 2014 Part 1 would be brought into force in January 2015 but they were only commenced on 23 March 2015 by Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 8) Order 2015 SI No 373 art 4. The delay was caused by the need to amend legal aid arrangements for defendants. Following a consultation exercise, the government has now published its detailed changes to remuneration for legal aid services in these ASB injunction cases (*Anti-social Behaviour, Crime & Policing Act 2014: Changes to remuneration for legal aid services – Response to Consultation*, MoJ, January 2015)

The Anti-social Behaviour (Authorised Persons) Order 2015 SI No 749 enables local authorities to give housing associations the power to issue community protection notices (CPN) and fixed penalty notices under the ABCPA 2014.

Right to buy

The Welsh government has initiated a consultation on the future of the right to buy in Wales (*The Future of the Right to Buy and Right to Acquire – A White Paper for Social Housing*, Welsh government, January 2015). The deadline for responses is 16 April 2015.

On 22 January 2015, the minister for communities and tackling poverty at the Welsh government agreed to an application by Carmarthenshire County Council, made under current statutory arrangements, to suspend the right to buy in its area for an initial period of five years.

Regulating social landlords

The regulator of social landlords in England, the Homes and Communities Agency (HCA), has recently issued three regulatory notices to social landlords concerned with breaches of the statutory consumer standards designed to protect tenants. The notices were addressed to:

- Merlin Housing Society concerning annual gas safety inspection failures;
- Blackpool Council following a balcony collapse that endangered tenants; and
- Circle Anglia HA for its poor performance in relation to housing repairs.

Housing and mental health

The National Housing Federation (NHF) has published *The Mentally Healthy Society – The report of the taskforce on mental health in society* (NHF, 2015). The charity Mind has published a new guide to housing and mental health for people living with a mental health problem and wanting information about housing options (*The Mind guide to housing and mental health*, Mind, 2015).

HUMAN RIGHTS

Article 8 and article 14

■ Secretary of State for Defence v Nicholas

[2015] EWCA Civ 53
4 February 2015

In May 2005, Defence Estates, acting on behalf of the Secretary of State for Defence, granted Squadron Leader Nicholas a licence of a house. Mrs Nicholas, his then wife, moved into the house with him. Some time before April 2008, the marriage broke down and Squadron Leader Nicholas moved out. On 22 May 2008, Defence Estates gave notice requiring Mrs Nicholas to vacate the property by 24 August 2008. Later, Defence Estates sent her a questionnaire about her personal circumstances in order to conduct what they described as a 'proportionality exercise'. Mrs Nicholas did not reply to that questionnaire. The claimant then began possession proceedings against her. She argued that the fact that Crown licensees have no security of tenure amounts to unlawful discrimination as a result of article 8 of the European Convention on Human Rights (the convention) in combination with article 14 and that the MoD was acting unlawfully in seeking possession. Burton J made a possession order ([2013] EWHC 2945 (Ch), October 2013 *Legal Action* 32). Mrs Nicholas appealed.

The Court of Appeal declined to answer the general question as to whether tenancies granted by the Crown should continue to be exempt from any form of security of tenure. It confined itself to considering whether Mrs Nicholas's particular convention rights had been violated. In considering whether or not there was discrimination under article 14, the court took two comparators; first, a licence from a private sector provider; and, second, a licence granted if the Crown had been added to the list of bodies that satisfy the landlord condition in Housing Act 1985 s80. In the first case, the licence would have had no security of tenure because private sector licences do not attract security. In the second case, although the distinction between a licence and a tenancy would not have not mattered (HA 1985 s79(3)), there could have been no secure tenancy as a result of HA 1985 Sch 1, para 2. Further, although in some cases a spouse is entitled to continue to occupy the matrimonial home if the property-owning spouse leaves, the statutory codes of security of tenure give no protection to former spouses. Either way, there had been no violation of Mrs Nicholas' convention rights, because there had been no relevant difference in treatment which had had an adverse effect. As there had been no disadvantageous treatment of Mrs Nicholas as compared with persons in relevantly similar or analogous situations, the question of objective and reasonable justification did not arise. The Court of Appeal also rejected a contention that the licence had not been properly determined.

Article 8 and article 1 of Protocol 1

■ Stolyarova v Russia

Application No 15711/13,
29 January 2015

In 2005, the applicant bought a former council flat from a private owner. The council later discovered that a much earlier transfer of the

flat – and an earlier acquisition of private ownership – had been invalid. A court set aside the applicant's title to the flat and made a possession order. The applicant remained in occupation awaiting eviction. She complained to the European Court of Human Rights (ECtHR) that her rights under article 8 and article 1 of protocol 1 had been breached.

The court found breaches of both article 1 of protocol 1 and article 8. To be compatible with article 1 of protocol 1, an interference with the peaceful enjoyment of possessions must fulfil three conditions: it must be carried out 'subject to the conditions provided for by law', which excludes any arbitrary action on the part of the national authorities; it must be 'in the public interest'; and must strike a fair balance between the owner's rights and the interests of the community. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified. The defence that the interference with her rights was proportionate, given the demands of those on the social housing waiting list and the applicant's own right to join that list, was rejected. She had been stripped of ownership without compensation or provision of replacement housing from the state. The court stated that the mistakes or errors of state authorities should serve to the benefit of the persons affected, especially where no other conflicting private interest is at stake. In other words, the risk of any mistake made by the state authority must be borne by the state and the errors must not be remedied at the expense of the individual concerned. The court ordered the full restitution of the applicant's title to the flat and the annulment of her eviction order and awarded €7,500 in respect of non-pecuniary damage.

■ Akhverdiyev v Azerbaijan

Application No 76254/11,
29 January 2015

The applicant and his family lived in a house that he owned in an area that the local authority designated for redevelopment. Private developers, acting with the sanction of the local authority, began decanting occupiers. The applicant was unwilling to leave but, as his neighbours left, their homes were demolished. His house was isolated in a demolition site and continued occupation became impossible. He unsuccessfully took civil proceedings in the domestic courts. He had to leave the house and, when he did so, his house was demolished. He complained to the ECtHR that his rights under article 8 and article 1 of protocol 1 had been breached.

The court found that there was interference with the applicant's possessions, as they were taken by the state and his house was demolished. This interference amounted to a 'deprivation of possessions'. The local authority had not complied with domestic legal requirements and so the demolition of the house had not been 'according to law' and breached article 1. It was not necessary to examine separately the article 8 complaint. The question of compensation was not ready for decision.

■ Saghinadze v Georgia

Application No 18768/05,
13 January 2015

The Ministry of the Interior took possession of the applicant's 'cottage', which had been his home for more than 10 years, and turned it into a police station. On 27 May 2010, the court decided that, in addition to giving rise to a breach of article 8, there was also a violation of article 1 of protocol 1 (see *Saghinadze v Georgia* No 18768/05, 27 August 2010, paras 108, 117–118 and 122). The parties could not agree a remedy. The applicant estimated the value of the property to be no less than US $1,000,000. In reply, the government commented that, although the 'cottage' itself had consisted of 20 rooms, the applicant and his family had occupied only three of those rooms. The government offered to transfer to the applicant the ownership of two apartments and pay €3,000 compensation. The ECtHR accepted that the offer satisfied the complaint.

Article 8

■ Lattimore v Dublin City Council

[2014] IEHC 233,
9 May 2014

Lattimore claimed that the council had breached article 8 of the convention in refusing to allow him to succeed to the tenancy of premises which his deceased parents had first rented in 1956 when he was 12 years old and in failing to allow an independent assessment of proportionality.

After a review of Irish, UK and European case law, O'Neill J refused a claim for certiorari. The clear thrust of the authorities is that a housing authority cannot be an independent tribunal for the purposes of making a determination on such a proportionality issue. Although that decision should have been made by a body independent of the council, all relevant material was before the council officer who made the decision and considered by her. There was no evidence that her decision was contaminated by irrelevant or impermissible material. The decision made by her was not in any sense disproportionate.

Article 6 and the Equality Act 2010

■ Moore and Coates v Secretary of State for Communities and Local Government

[2015] EWHC 44 (Admin),
21 January 2015

The minister responsible for planning policy decided that planning appeals concerned with the establishment of Gypsy and Traveller sites should be 'recovered' for central government decision.

Gilbart J held that the practice of recovering all such appeals, or an arbitrary percentage of them, was unlawful discrimination under the Equality Act 2010. The effect of the approach of the secretary of state was also to breach article 6 of the convention by reason of the delays it caused.

Australia

■ Burgess v Director of Housing

[2014] VSC 648,
17 December 2014

Burgess lived with her son in a house rented from the director of housing. She trafficked in heroin. The director of housing served a notice to vacate and the Victorian Civil and Administrative Tribunal first granted a possession order, and then at the director's request, issued a warrant. Burgess sought orders of certiorari quashing the decisions of the director of housing and the tribunal. She argued that the director had failed to observe any requirement of natural justice, breached his own policy and failed to take into account relevant considerations. She also claimed there was a breach of the Victorian Charter of Human Rights and Responsibilities Act 2006 s38.

MacAulay J, sitting in the Supreme Court of Victoria, found that the decision to apply for the warrant was unlawful and was amenable to certiorari. There had been a failure to consider Burgess's health and wellbeing. There had been jurisdictional error and breach of her charter rights.

POSSESSION CLAIMS

Reasonableness

■ Glasgow Housing Association Ltd v Stuart

Sheriffdom of Glasgow and Strathkelvin at Glasgow,
2014SCGLA65,
26 November 2014

Since 2005, Stuart had been the tenant of a flat on the tenth floor of a multi-storey residential block under a Scottish secure tenancy agreement. In May 2013, police officers discovered five cannabis plants, together with growing equipment in a small hall cupboard. The equipment comprised a single 400 watt sodium lamp, a fan and a filter, with some reflective sheets attached to the ceiling to reflect the light on to the plants. They also found a small quantity of herbal cannabis in the living room. The cannabis plants had been

growing for approximately five weeks, were approximately one foot high and of no material monetary value given their immaturity. In September 2013, he tendered a plea of guilty to a charge on summary complaint of producing a controlled drug and was fined £300. He was of previous good character. No actual alarm, distress, annoyance or nuisance was caused to any person residing, visiting or engaged in lawful activity, in the vicinity of the flat. Apart from cultivating the five cannabis plants, he had not breached any term of the tenancy agreement and Glasgow had no cause to take issue with him regarding his conduct or his compliance with the terms of the tenancy agreement. Glasgow claimed possession.

Sheriff S Reid found that Stuart had breached a term of the tenancy agreement not to use the premises for illegal or immoral purposes. Although Glasgow had a ground for recovery of possession under Housing (Scotland) Act 2001, Sch 2, para 1, it was not reasonable to make an order for possession. The sheriff granted a decree of absolvitor in favour of Stuart.

Legitimate expectation

■ Leicester CC v Bulbulia

[2014] EWCA Civ 1526,
15 October 2014

Mr and Mrs Bulbulia were joint tenants. They wanted to separate. At a meeting with a housing officer, various assurances were given that Mrs Bulbulia could continue to occupy the property and could exercise the right to buy in her own name. It appears that Mr Bulbulia then gave notice to terminate. In a subsequent possession claim, HHJ Hampton found that there was a legitimate expectation that the local authority would not terminate the tenancy on the ground that one joint tenant had given notice and that the right to buy could proceed in the name of the remaining tenant alone. However, she held that this did not prevent termination on other grounds. It appears that the local authority then sought possession on HA 1985 Sch 2, Ground 13 (accommodation for the disabled) on the basis that they had altered the property to meet the needs of Mr Bulbulia and that he was no longer residing there. HHJ Hampton made a possession order.

Arden LJ refused permission to appeal. There was no real prospect of success on appeal because the point that the legitimate expectation should have been put more widely was not taken at trial and, therefore, was not dealt with in the judgment. It was too late to take it on appeal.

ASSURED SHORTHOLD TENANCIES

Deposits

■ Tenzin v Russell and Clark

[2015] CSIH 8A,
28 January 2015

Russell and Clark granted Tenzin a lease. A deposit of £750 was paid. A second lease was granted from 1 May 2012 to 17 December 2012. It was agreed that the deposit held by the defenders in respect of the first lease would be used as the deposit in the second lease. The landlords failed to pay the deposit to the scheme administrator of an approved scheme. After vacating the premises, Tenzin claimed £2,250, a sum equivalent to three times the amount of the tenancy deposit, pursuant to the Tenancy Deposit Schemes (Scotland) Regulations 2011 (2011 SSI No 176). On summary application, Sheriff Holligan granted declarator that the pursuer was entitled to payment of £2,250. The landlords appealed, contending that the amount of three times the deposit was excessive, and any decree should accordingly be for a lesser sum. They submitted that they had admitted the breach and were in breach for only 34 days. They also claimed that the sheriff had ignored the fact that the amount to be paid should be an amount 'not exceeding' an amount equal to three times the deposit. They argued that the regulations were new and complex and that the largest awards should be reserved for the most serious of cases.

The Court of Session Extra Division, Inner House, refused the appeal. Sheriff Principal Pyle stated that the court could find no fault with the sheriff's reasoning. He had reached the conclusion that the breach by the defenders was indeed a serious one. There was no basis upon which the court would be entitled to interfere with the decision he reached. The defenders had over four months after the regulations had first come into force to register the deposit with one of the approved schemes. They chose not to do so.

■ Jenson v Fappiano

Sheriffdom of Lothian and Borders,
at Edinburgh,
2015SCEDIN6,
28 January 2015

The defender was an 'amateur' private landlord, in the sense that he was not a seasoned or professional landlord. The claimant was his first tenant. A deposit of £1,000 was paid. The landlord failed to protect it or give the requisite information about deposit protection. After the tenancy ended, the deposit was repaid. The claimant asked the court to impose a penalty for non-protection of the deposit in accordance with Housing (Scotland) Act 2006 s121 and the Tenancy Deposit Schemes (Scotland) Regulations 2011 No 176.

Sheriff T Welsh QC noted that this was Fappiano's first letting experience. He was not a serial non-complier with the regulations which would attract higher sanction. His non-compliance was partially remedied when he received legal advice about his obligations. He attended at court for the hearing and appeared to the judge 'to be thoroughly chastened by the whole process and experience'. Sheriff Walsh stated '[i]gnorance of the regulations is, however, no excuse. Non-compliant landlords can expect no mercy from the courts if they conduct their business in flagrant disregard to statutory controls' (para 14). However, this was not a case of 'repeated and flagrant non-participation in, or non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale' (para 15). He ordered the landlord should pay a penalty equal to one third of the deposit (£333.33).

TRESPASSERS

Adverse possession

■ Best v The Chief Land Registrar

[2015] EWCA Civ 17,
21 January 2015

The registered freehold owner of a house died in 1996. The house was vandalised. In 1997, Best entered the property and did work to it. He repaired the roof and took other steps to make it wind and watertight. Later, he replaced ceilings, skirting boards and electric and heating fitments. He also plastered and painted walls. In November 2012, he applied to register title to the property on the basis that he had been in adverse possession 'for the period of 10 years ending on the date of the application', as required by Land Registration Act 2002, Sch 6, para 1. The Chief Land Registrar, through an officer, notified Best that he was going to cancel his application, because he judged that Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 s144 which criminalised trespass by 'living in' residential buildings, prevented him from relying on any period of adverse possession, which involved a criminal offence, to establish the basis for an application for registration as the proprietor. Best sought judicial review. Ouseley J held that the mere fact that the adverse possession was based on criminal trespass did not and should not preclude a successful claim to adverse possession. He quashed the Chief Land Registrar's decision ([2014] EWHC 1370 (Admin); 7 May 2014; July 2014 *Legal Action* 53). It appears that the Secretary of State for

Justice, as an interested party, appealed.

The Court of Appeal dismissed the appeal. It accepted, as a starting point, the principle that rights should not be derived from criminal acts. 'There is … a general and fundamental principle of public policy that a person should not be entitled to take advantage of his own criminal acts to create rights to which a court should then give effect' (para 44). This, however, is not an absolute rule or principle, unyielding to any circumstance. There was no evidence that parliament, when passing s144, ever actually considered the issue of adverse possession, or that it ever thought that there was a mischief which had to be dealt with in relation to the effect of LASPO on adverse possession. Parliament correctly made the assumption that adverse possession could be founded on acts of criminal trespass. It should be taken to have thought that the public policy advantages of adverse possession at common law meant that the mere fact that the adverse possession was based on criminal trespass did not and should not preclude a successful claim to adverse possession. The Chief Land Registrar's decision was founded on an error of law as to the effect of s144.

■ Belford v Glass

[2014 NIQB 134,
22 December 2014

Morgan LCJ dismissed an appeal in a claim in which Ivan Glass claimed to have established a possessory title to a semi-derelict tower known as The Stump by reason of more than 12 years continuous adverse possession in accordance with Limitation (Northern Ireland) Order 1989 SI No 1339 (NI 11) art 21.

LONG LEASES

Service charges

■ Waaler v Hounslow LBC

[2015] UKUT 17 (LC),
28 January 2015

The council claimed, as service charges, costs incurred in carrying out a scheme of major works to an estate in Hounslow. The works were extensive and included the replacement of the flat roof to each block with a pitched roof. Additionally, the council replaced the original wood-framed windows with new metal-framed units. This in turn necessitated the replacement of the exterior cladding and the removal of underlying asbestos. Of the residents on the estate, about 850 were secure tenants and 140 were long lessees whose leases were created under the Housing Act 1985 right to buy scheme. The resulting service charges were more than £55,000 per lessee. Three lessees sought a determination as to whether these sums were payable under Landlord and Tenant Act 1985 ss18–30. The First-tier Tribunal (Property Chamber) decided that, subject to some relatively minor adjustments, they were payable. The lessees appealed.

Siobhan McGrath, Chamber President, allowed the appeal in part. The tribunal had not erred in deciding that the costs of replacing the flat roof with a pitch roof were reasonable. However, at the tribunal hearing, there was no evidence that the windows themselves were in substantial disrepair. The failure of the hinges could be classified as disrepair but this was a result of the weight of the double thickness windows and was a design defect. There was no evidence that any consideration had been given to the financial impact on the lessees of replacing both the windows and the cladding. Where works going beyond those required to remedy disrepair are carried out, the financial impact of any particular course of action may have relevance to the question of whether costs have been reasonably incurred. In this case, the council had failed to demonstrate that alternative methods of addressing the problems with the hinges had been explored and, having regard to the level of costs ultimately charged to the lessees, the tribunal ought not have been satisfied that the council's decision to incur the costs was reasonable or that the whole of the cost of the replacement windows and cladding had been reasonably incurred.

Recognition of tenants' associations

■ Rosslyn Mansions Tenants' Association v Winstonworth Ltd

[2015] UKUT 11 (LC),
13 January 2015

HHJ Huskinson held that the Upper Tribunal (Lands Chamber) has jurisdiction to hear an appeal from the First-tier Tribunal on an application for a certificate of recognition of a tenants' association under Landlord and Tenant Act 1985 s29. He set out the proper approach to be taken on such an application.

HOUSING ALLOCATION

■ R (Alemi) v Westminster City Council

CO/4559/2014,
15 January 2015

The council added a new provision to its housing allocation scheme made under HA 1996 Part 6 (which was a choice-based letting (CBL) scheme). It provided that:

Homeless applicants will not be eligible to bid via CBL until 12 months after the date of acceptance, with the exception of applicants assessed with mobility category 1 or 2 or who require community supportive housing (para 2.1.3).

The claimant was a homeless applicant and sought a judicial review, contending that the new provision operated to deprive her of the statutory 'reasonable preference' to which she was entitled under Part 6. After a contested hearing, Philip Mott QC, sitting as a Deputy HIgh Court Judge, gave permission for a judicial review of the legality of the provision.

■ R (Ward) v South Cambridgeshire DC

[2014] EWCA Civ 1736,
9 December 2014

The claimant was an Irish Traveller. She applied to be allocated a pitch on one of the council's two Gypsy and Traveller sites. The council had a points-based system for pitch allocation but its policy included a 'compatibility clause' which provided:

Pitches will be allocated on our sites in a similar way to the points system used in social housing … It is however recognised that each site is a distinct community, and it is important that we avoid incompatibility between residents. In view of SCDC's obligations to the long-term sustainability of the site communities, and its duty of care to existing residents, we reserve the right to determine, on occasion, that it may not be appropriate to offer a pitch to a particular applicant.

We will consult with existing residents before making an offer of a pitch and if it becomes apparent that the presence of any individual would cause friction on a particular site, then we will not be able to make an offer to the applicant for that site.

Both sites were mainly occupied by English Gypsies/Travellers and the claimant was concerned that if she reached the top of the list for a pitch she would be refused it. HHJ Mackie QC refused her application for judicial review of the compatibility clause ([2014] EWHC 521 (Admin), 4 February 2014) and she appealed.

Elias LJ refused a renewed application for permission to appeal. Although the clause was arguably unlawful, any claim was premature. The claimant's application had not been refused. She had yet to secure sufficient points for a pitch to be offered. If she did so in future, and the compatibility clause was then applied, she might have a claim.

■ **Ealing LBC v Notting Hill Housing Trust**
[2015] EWHC 161 (Admin), 29 January 2015
A housing association property was empty after a tenant had moved out and it was awaiting allocation to a new tenant. In respect of the period it remained vacant, the association claimed exemption from council tax under Class B which provides exemption for:

a dwelling owned by a body established for charitable purposes only, which is unoccupied and has been so for a period of less than 6 months and was last occupied in furtherance of the objects of the charity.

The Valuation Tribunal held that, if the owner was a housing association, there would be a statutory presumption that the last letting had met the terms of the Class B exemption (see July 2014 *Legal Action* 54). On an appeal by the council to the High Court, Mostyn J held that the wording of the Class B exemption imposed a requirement for the association to show that the conditions for the exemption were satisfied. There could be no presumption in its favour but 'a short written representation by the applicant (which might usefully be done on some kind of standard form) which addresses all four conditions directly and which states: (a) that based on the material held by the applicant the conditions are met; and, (b) that the statement is true to the belief of the representor, should normally be enough' (para 19).

HOMELESSNESS

Applications

***Local Government Ombudsman* Complaint**

■ **Southwark LBC**
14 002 981, 9 October 2014
The complainant was homeless. She went to the council's offices to apply for assistance and was seen by a 'filtering officer'. That officer's role is to determine whether an applicant for homelessness assistance is likely to be homeless, eligible for assistance and in priority need, and to signpost such an applicant to the most suitable next course of action. The officer told the complainant she needed proof of employment as evidence of her eligibility. No formal homelessness application was recorded. Having considered HA 1996 s183, the ombudsman found that:
■ the council should have treated the approach as an application for assistance with homelessness;
■ the failure to do so was wrong; and
■ 'the council should ensure that the practice of gate keeping does not occur' (para 30).

Eligibility

■ **Sanneh v Secretary of State for Work and Pensions and linked appeals**
[2015] EWCA Civ 49, 10 February 2015
The claimants were '*Zambrano* carers' ie non-EU citizens responsible for the care of an EU citizen child. They sought to establish that they were entitled to access to social housing and homelessness assistance on the same basis as EU citizens lawfully resident in the UK. They claimed that the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations SI 2012 No 2588 infringed their rights under EU law by barring them from assistance.

The Court of Appeal rejected their claims and held that *Zambrano* carers were only entitled to be given as much assistance under Children Act (CA) 1989 s17 as would enable them to support themselves in order to be the carer for the EU citizen child within the EU. The regulations preventing their access to social housing and homelessness assistance had been lawfully made.

Homeless

■ **Hussain v Waltham Forest LBC**
[2015] EWCA Civ 14, 20 January 2015
The claimant was a housing association tenant. She was a victim of racial harassment and anti-social behaviour. She applied to the council for homelessness assistance, saying that she was in fear of violence from a neighbour. The council was not satisfied that it was probable that her continued occupation of her home would lead to threatened or actual violence for the purposes of HA 1996 s177. Recorder Steynor allowed an appeal from that decision. The council brought a second appeal.

The Court of Appeal, applying *Yemshaw v Hounslow LBC* [2011] UKSC 3, 26 January 2011, held that that the phrase 'other violence' in s177(1) covers not only physical violence (actual or threatened) but other threatening or intimidating behaviour or abuse of such seriousness that it may give rise to psychological harm. The reviewing officer had not applied that test and the matter was remitted to the council to re-take the decision applying the judgment of the court.

Suitability

■ **Nzolameso v Westminster**
2014/0275, 3 February 2015
The Supreme Court has granted Nzolameso permission to appeal against a Court of Appeal decision (see [2014] EWCA Civ 1383, 22 October 2014, and, December 2014 *Legal Action* 34) upholding the council's conclusion that an offer of temporary accommodation near Milton Keynes was suitable and met the council's duty under HA 1996 s193. The appeal was heard on 17 March 2015 and the Supreme Court has unanimously allowed the appeal. It quashed the council's decision that it had properly discharged its duty to secure accommodation for occupation by the appellant. Given the need for the family involved, the court gave its decision immediately, with reasons to follow in due course.

HOUSING AND CHILDREN

■ **R (Scott) v Kensington & Chelsea RLBC**
[2014] EWCA Civ 1336, 14 August 2014
The claimant was a US citizen who was the *Zambrano* carer of her son, a British national aged 11. She was not eligible for homelessness assistance and asked the council to provide accommodation for her and her son under CA 1989 s17. The council declined to assist on the basis that the claimant had the right to reside and work in the UK and could obtain privately rented accommodation for herself and her child. A claim for judicial review was dismissed by Simler J. The claimant appealed, contending that her rights under article 8 of the convention, the EU treaties and CA 1989 s17 had not been recognised.

Arden LJ dismissed a renewed application for permission to appeal. Article 8 gave no right to a home. Nothing in other points taken in reliance on EU law justified a reference to the European Court of Justice. There were no grounds to impugn the council's decision under CA 1989 s17.


Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder; Nic Madge is a circuit judge. They would like to hear of relevant housing cases in the higher or lower courts.