Recent developments in housing law

In this month's round-up, **Jan Luba QC** and **Nic Madge** focus on key cases including those regarding human rights, long leases, housing allocation and homelessness.

POLITICS AND LEGISLATION

For reasons of space, this material is being held over until October 2015 *Legal Action*.

CASE-LAW

Human rights

Article 8

■ Jones v Canal and River Trust

A2/2015/1197,
21 May 2015

Lewison LJ has granted Matthew Jones permission to appeal against the decision of McGowan J ([2015] EWHC 534 (QB), 6 March 2015; June 2015 *Legal Action* 42). Several other claims have been stayed pending the outcome of the appeal.[1]

■ River Clyde Homes Ltd v Woods

Sheriff Court of North Strathclyde,
15 April 2015;
2015 Hous LR 33

A registered social landlord raised an action for recovery of possession against a tenant under a short Scottish secure tenancy, relying on a mandatory ground for possession under the Housing (Scotland) Act 2001. It averred that the tenant had allowed a third party to reside with her in the property contrary to assurances given at the outset of the tenancy and that she had pled guilty to an offence amounting to anti-social behaviour in breach of the tenancy agreement. The tenant opposed the action on the ground that eviction would be disproportionate and an unnecessary interference with her rights under article 8(2) of the European Convention on Human Rights (the convention). The landlord submitted that the tenant had not overcome the threshold of advancing a seriously arguable defence.

Sheriff CG McKay held that the absence of any ability to challenge the veracity, or at least the presumed implication, of the conduct averred by the pursuers as the reasons for their notice to quit under Scottish legislation significantly lowered the threshold for the tenant to introduce the issue of proportionality as a defence. The defender, on the basis of her averments in answer, could demonstrate that she did not consent to the use of her address by the third party, that he had not resided with her and that the conviction admitted by her was not anti-social behaviour in the context of her tenancy agreement. The defender was entitled to lead evidence to challenge the reasons for the notice to quit.

Strasbourg cases

■ Sargsyan v Azerbaijan

App No 40167/06,
16 June 2015

The applicant was Armenian. He alleged that, following a civil war, he had been prevented from returning to his home village and having access to his property there. He claimed that the absence of compensation and the denial of access to his home and to the graves of his relatives amounted to continuing violations of article 1 of Protocol No 1 and of article 8 of the convention. He also alleged violation of article 13 in that no effective remedy was available in respect of the above complaints.

The Grand Chamber of the European Court of Human Rights (ECtHR) upheld the claims: 'The impossibility for the applicant to have access to his home and to his relatives' graves without the Government taking any measures in order to address his rights or to provide him at least with compensation for the loss of their enjoyment, placed and continues to place a disproportionate burden on him' (para 260).

■ Bolotin v Russia

App No 35786/04,
[2015] ECHR 707,
16 July 2015

The applicant had taken part in the emergency operations at the site of the Chernobyl disaster. As a result, he had suffered radiation exposure. Those facts entitled him to state-provided housing. In November 2004, a court ordered that he be granted accommodation. The judgment was not complied with and his attempts to enforce it failed.

The ECtHR held that there had been a violation of article 6 of the convention on account of the non-enforcement of the judgment. Also there had been a breach of article 1 of Protocol No 1 because a judgment for the provision of accommodation amounted to a 'possession' that the applicant had been unable to enjoy. It awarded €6,000 for non-pecuniary damage.

■ Morari and Spiridonov v Moldova

App Nos 4771/09 and 7170/09,
7 July 2015

The applicants were retired police officers entitled to be allocated social housing. When it was not provided, they obtained court orders requiring the authorities to house them. The orders were not complied with.

The ECtHR held that there had been violations of article 6 of the convention and article 1 of Protocol No 1 on account of the non-enforcement of the judgments. It awarded €3,600 to each applicant for non-pecuniary damage and over €10,000 to the first applicant, who had established the extra costs he had incurred in renting private accommodation.

Fully mutual housing co-operatives

■ Southward Housing Co-operative Limited v Walker and Hay

[2015] EWHC 1615 (Ch),
8 June 2015

Southward was a fully mutual housing co-operative registered under the Industrial and Provident Societies Act 1965 and Housing Associations Act 1985 s5. The defendants were members of the co-operative and had a share in it. Southward granted them a weekly tenancy in April 2011. The tenancy agreement provided that Southward would 'only end this tenancy with a Notice to Quit on one of the grounds set out in … this agreement'. The stated grounds included non-payment of rent. Between September 2011 and December 2013, significant rent arrears accumulated, in part during periods when jobseeker's allowance (JSA) and housing benefit (HB) were stopped. By the end of October 2013, the arrears were £3,644.35. By September 2014, the defendants had reduced their arrears to approximately £1,000 and promised to repay the balance at the rate of £20 per month. In the meantime, Southward had served a notice to quit and commenced possession proceedings, claiming that it had validly terminated the agreement in accordance with its express terms and that it conferred no security of tenure (see *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52, 9 November 2011; [2012] 1 AC 955). The defendants argued that: (i) the agreement was one for an uncertain term that, by virtue of Law of Property Act (LPA) 1925 s149(6), was to be treated as a tenancy for a term of 90 years; (ii) the statutory provisions excluding fully mutual housing-co-operatives from security of tenure

should be interpreted compatibly with articles 8 and 14 of the convention to provide the defendants with assured or secure tenancies; (iii) the decision to serve a notice was unlawful in a public law sense; and (iv) the making of a possession order would be disproportionate.

Hildyard J rejected all the defendants' contentions and made a possession order. He construed the agreement as meaning that the right to serve a notice to quit was dependent on the existence of one or more of the grounds specified and so the tenancy had to be treated as one for an uncertain duration. Although the parties envisaged that the defendants would stay at the property for a long time, it was not their intention that they should be legally entitled to enjoy the premises for life. Accordingly, because construing the agreement as a 90-year tenancy under LPA 1925 s149(6) confounded the parties' intentions and fundamental aspects of the agreement, it was to be treated as a contractual licence. As such, the periodic licence was determined by the notice to quit. With regard to the human rights arguments, any differential treatment or discrimination was not the consequence of any 'other status' within the meaning of article 14. Further, it did not automatically or necessarily follow that the defendants' treatment was less favourable, in the round, than that of secure or assured tenants. Hildyard J held that any difference in treatment, if not eliminated, was much attenuated. In any event, the distinction and any difference of treatment accorded by statute to tenancies entered into by fully mutual housing co-operatives and other forms of tenancy was not irrational or manifestly inappropriate. Further, Southward was not exercising functions of a public nature for the purposes of Human Rights Act 1998 (HRA) s6(3)(b) and so was not a public body. Hildyard J also rejected the argument that a defence to the possession claim based on articles 8 and 14 could be maintained even though Southward was not a public body acting as such. Finally, reading down the Housing Act (HA) 1985 or the HA 1988 in accordance with HRA s3 so as to treat the agreement as a secure or assured tenancy would subvert the will of parliament. Nor was there any justification for the making of a declaration of incompatibility.[2]

Fair housing

■ Texas Department of Housing and Community Affairs v Inclusive Communities Project

No 13–1371,
25 June 2015

The US government provides low-income housing tax credits that are distributed to housing developers. The project, a Texas-based non-profit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under the Fair Housing Act, alleging that the Texas department responsible for distributing the credits had caused or continued segregated housing patterns by allocating too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighbourhoods.

The US Supreme Court upheld the reliance on the act in this way and remitted the claim for trial.

Transfer of tenancies

■ Guerroudj v Rymarczyk

[2015] EWCA Civ 743,
14 July 2015

In 2011, Oxford City Council granted Salim Guerroudj and Katarzyna Rymarczyk a joint secure tenancy. Later, their relationship broke down. Both issued proceedings under Family Law Act 1996 Pt IV seeking a transfer of the tenancy into their names. HHJ McIntyre eventually transferred the tenancy into Rymarczyk's sole name. He concluded that, as a result of a disability, Guerroudj would be in priority need and so was someone to whom the local authority would owe the duty of providing accommodation under HA 1996 Pt 7. Guerroudj appealed.

The Court of Appeal dismissed the appeal. The judge 'had (just) enough to go on'. He had information about Guerroudj's back condition, GP letters from 2011 and a decision of the First-tier Tribunal (Social Entitlement Chamber) that he was entitled to employment and support allowance. He had found that was a principal reason for the council offering them the flat in the first place. It was not unreasonable to conclude that, having treated him as (in effect) a priority once, the council would do so again. Underhill LJ stated that 'a court deciding a transfer of tenancy application which wishes to take into account the parties' prospects of re-housing will often have to proceed – to the extent that it feels comfortable about doing so – on the basis of an educated judgment: fortunately, many judges at least will have some experience in this field because of the County Court's jurisdiction under section 204' (para 20).

Possession claims

Introductory tenants

■ Newark and Sherwood Homes v Gorman

[2015] EWCA Civ 764,
3 June 2015

In 1997, the council elected to operate an introductory tenancy regime on a trial basis for one year. In 2011, Gorman was granted an introductory tenancy. In March 2012, the council began a possession claim against him. He defended the claim, arguing that he was a secure tenant because the 1997 decision had only authorised the introductory tenancy regime for one year. The trial judge rejected that argument and made a possession order. He appealed.

The Court of Appeal dismissed the appeal. The 1997 decision had to be read against all the background material, including a report from officers. Properly construed, the decision had been to introduce an introductory tenancy regime and to require monitoring during the first year.

Reasonableness

■ Glasgow West Housing Association Ltd v Harasimowicz

2015SCGLA46,
Sheriffdom of Glasgow and Strathkelvin,
20 May 2015

In December 2013, the defendant tenant left her home and spent a year living in Poland. No rent was paid. By the time of the hearing of the claim for ejectment, there were arrears of £2,973 in respect of a monthly rent of £260. Her last HB had been paid in December 2013. The defendant was without work but did not qualify for JSA or HB, so the rent remained unpaid. A sheriff granted a decree for ejection.

On appeal, Sheriff Principal CAL Scott QC dismissed the appeal, stating that 'it was entirely reasonable for the sheriff to grant decree for recovery of possession'. He continued: '[A]ppeals … should never amount to an appellant … requesting that the court should give … "a second chance" or should find greater sympathy … Too often … appeals are lodged with grounds which … are speculative and woolly' (para 11).

Rents

■ Trustees of the Israel Moss Children's Trust v Bandy

[2015] UKUT 276 (LC),
1 June 2015

Nigel Bandy occupied a ground-floor flat under a regulated tenancy at a fair rent. The landlord sought an increase in the registered rent from the previous figure of £657.50 a month to a new figure of £825. The rent officer registered a new fair rent of £722.50. Bandy considered that the new rent was too high and referred it to the First-tier Tribunal (FTT) for reconsideration under Rent Act 1977 s70. Neither party requested an oral hearing. The FTT summarised the parties' submissions and, after a short explanation of relevant legal principles, determined that the open market rent of the flat, if modernised and centrally heated, would have been £1,200 a month. It then considered the actual condition of the premises and decided that this required a deduction of £600 a month. It then made a

deduction of 20 per cent from the adjusted open market rent of £600 a month to reflect scarcity. The result was an uncapped fair rent of £480 a month. The landlord appealed, contending that the FTT had given insufficient reasons for making the deduction from the market rent.

Martin Rodger QC, deputy president, allowed the appeal. The decision of the FTT was flawed. The reasons did not explain how the deduction was quantified; nor did they address the fact that the FTT's deduction was much greater than the deduction proposed by the landlord. The deputy president set the original decision aside and remitted the appeal for redetermination.

■ Helena Partnerships Ltd v Brown

[2015] UKUT 324 (LC), 25 June 2015

Michael Brown was an assured tenant. In April 2014, his social landlord gave notice under HA 1988 s13(2) proposing a new rent of £77.65 a week in place of the previous rent of £72.87. He referred the notice to the FTT. It reduced the rent to £32.98. The landlord appealed, raising an issue as to the tribunal's jurisdiction. It said the tenancy agreement provided an internal mechanism for rent increases and therefore the tribunal had had no jurisdiction. Such jurisdiction could not be conferred by consent.

Martin Rodger QC, deputy president, dismissed the appeal. The landlord's interpretation of its own tenancy agreement was misconceived.

Tenancy deposits

■ Khuja v Chowdhury

Oxford County Court, 14 May 2015

The defendant was granted an assured shorthold tenancy in July 2011. A deposit of £800 was paid. The deposit was not protected until June 2013. The claimant landlord subsequently served two HA 1988 s21 notices. Both claims for possession were dismissed. The deposit had not been protected nor the prescribed information supplied within 30 days of the deposit being received and the deposit had not been returned (HA 2004 s215 as amended).

District Judge Vincent held that: (i) no s21 notice can be valid where the deposit was protected late unless either a claim for the penalty has been determined or the deposit returned in full or less any agreed deductions; and (ii) if either of those events occurs after the s21 notice has been served, it does not make an invalid s21 notice valid.

On the defendant's counterclaim under HA 2004 s214 (as amended), District Judge Vincent noted: 'At one end of the scale will be cases where there has been a failure to protect a deposit through no fault of the landlord, and the time limit has been missed by a very small amount. At the other end of the scale will be cases where there has been a flagrant disregard for the rules and the deposit has been dissipated in some way.' This case fell somewhere between the two. The landlord was a professional landlord. There was no good reason for him not to be fully aware of his responsibilities. His own company managed the property. On the other hand, the deposit was eventually protected. There was no dishonesty. District Judge Vincent awarded twice the amount of the deposit, ie £1,600.[3]

Harassment and eviction

Damages

■ Kazadi v Martin Brooks Lettings Estate Agents Limited and Faparusi

Edmonton County Court, 14 May 2015

Kazadi was granted a one-year fixed-term tenancy on 25 March 2006. The monthly rent was £650 and a deposit of £1,300 was paid. On expiry of the fixed term, it became a statutory periodic tenancy (period 1). A further fixed-term tenancy was entered into on 19 April 2008. On expiry of the further fixed-term tenancy, Kazadi remained in occupation under a statutory periodic tenancy until his unlawful eviction on 11 January 2014 (period 2). The landlord, Faparusi, failed to protect the deposit and/or provide the prescribed information under both periods. There were problems with the central heating system from the outset, which was not fully functional, and the toilet, which did not flush properly. A number of reports were made to the managing agents over the course of the tenancy. On 8 January 2014, an employee of the managing agents visited Kazadi. He tried to force his way into the property, was abusive and told Kazadi that he would be evicted. Kazadi told him that he would not leave until the correct legal process had been followed. On 11 January 2014, Faparusi came to the property accompanied by a group of eight men. Kazadi's visitors were thrown out of the property and on Kazadi's return, he was held down by the group. Following a struggle, a bladed article was held up close to one of his eyes. He was told that if he continued to struggle, he would lose his eye. Kazadi was held in the flat until the police arrived some 20–25 minutes later. The police escorted Kazadi out of the property after giving him a few minutes to collect some belongings, but would not help him regain entry to the property. Later that evening, Kazadi was contacted by an agent of Faparusi and told to collect his possessions. On his arrival, his belongings were thrown out of the window and onto the street. However, not all his possessions were returned. Kazadi was forced to sofa surf with friends for 277 days until securing alternative accommodation due to his student status and reliance on housing benefits. Kazadi's solicitors contacted the managing agents on a number of occasions requesting disclosure of the identity of the landlord and that Kazadi be readmitted to the property otherwise proceedings would be issued. No reply was ever received with the result that an injunction and an order under Landlord and Tenant Act (LTA) 1985 s1 was sought against the managing agents. At the injunction hearing, Kazadi was not readmitted to the property, but Faparusi was added as a defendant in absentia, following the agents notifying the court of his involvement.

The managing agents failed to file a defence and were debarred from defending. Faparusi's defence was later struck out for breach of an unless order.

At the disposal hearing, District Judge Silverman was referred to *Thompson v Commissioner of Police for the Metropolis*; *Hsu v Commissioner of Police for the Metropolis* [1998] QB 498; *Deelah v Rehman* (*Housing Law Casebook* sixth edition at 09.21); *Boyle v Musso* March 2011 *Legal Action* 27; *Alabbas v Uppelle* December 2014/January 2015 *Legal Action* 32; *Fakhari v Newman* June 2010 *Legal Action* 35; *Drane v Evangelou* [1978] 1 WLR 455 and *Simmons v Castle* [2012] EWCA Civ 1039, 26 July 2012. He made an award against Faparusi as follows:

- £1,300 (1× the deposit) for the tenancy deposit breach for period 1 when the statutory requirement was still fairly new;
- £2,600 (2× the deposit) for the tenancy deposit breach for period 2, when the landlord should have been aware of the law;
- £1,000 for the assault on 11 January 2014;
- £300 for the false imprisonment;
- £4,450.52 in special damages for the possessions that were never returned;
- £6,825 for disrepair based on a 15 per cent reduction in rent over a period of 70 months;
- £31,850 for unlawful eviction at a rate of £175 a day for 186 days (the six months it would have taken for the landlord to gain possession lawfully);
- £3,000 aggravated damages; and
- £2,000 exemplary damages.

Faparusi was also ordered to return the deposit of £1,300. The managing agents were ordered to pay £400 for the pre-eviction harassment and 5 per cent of the costs for their failure to comply with LTA 1985 s1.[4]

Long leases

Relief from forfeiture

■ Safin (Fursecroft) Limited v Estate of Dr Said Ahmed Said Badrig (deceased)

[2015] EWCA Civ 739, 10 July 2015

Safin was the leasehold owner of a block of flats. In 1970, it granted a sub-underlease of a flat for a term of 63 years to Dr Said Ahmed Said Badrig. In 2012, Safin began proceedings for possession against the 'Estate of Dr Said Ahmed Said Badrig (Deceased)' for non-payment of rent and service charge. The claim was settled by a consent order, which provided relief from forfeiture if payments were made within a certain time. They were not made in time, but all sums were received slightly less than two months after the deadline. The defendants made an application to extend the time for payment. HHJ David Mitchell granted the extension. Safin appealed.

The Court of Appeal dismissed the appeal. The judge, in granting the defendant an extension of time, had not made any error of principle or wrongly taken into account matters he ought not to have done or wrongly failed to take into account matters that he should have done. His decision was not outside the range within which reasonable disagreement is possible. He had power to extend the time limits in the consent order. He was correct in exercising his discretion in accordance with the principles and guidance in *Pannone v Aardvark Digital Ltd* [2011] EWCA Civ 803, 12 July 2011; [2011] 1 WLR 2275. Although the power to extend time should be exercised sparingly in such a case as this, he was right to take into particular account that the context was one in which a tenant sought relief from forfeiture. 'It is well established that the court regards a condition of re-entry under a lease as merely being security for the rent. That is why, where the court has granted relief from forfeiture on condition of payment of arrears of rent or other action by the tenant by a specified date, the court will grant further time if it would be just and equitable to do so' (para 73).

Service charges

■ Arnold v Britton and others

[2015] UKSC 36, 10 June 2015

Leases of holiday chalets obliged the lessees to pay a 'proportionate part' of the lessor's costs of providing specified services (para 7). They also provided that this would be a fixed sum, increasing by specified proportions at specified times. That charge was £90 in the first year, rising by 10 per cent a year thereafter. On the lessor's construction, the lessees would be liable to pay over £550,000 a year at the end of the term. The lessor issued proceedings seeking declarations about the true construction of the provisions and that they did not come within LTA 1985 s18. A circuit judge found that they were service charges within the meaning of s18. Morgan J allowed an appeal ([2012] EWHC 3451 (Ch), 3 December 2012), holding that the clauses provided for a fixed charge increasing by fixed proportions at specified times and so were not service charges within the meaning of s18. An appeal to the Court of Appeal was dismissed.

The Supreme Court dismissed a further appeal. The covenants clearly referred to fixed sums increasing in a specified manner. They were not service charges within the meaning of s18. It followed that the charges could not be challenged as being unreasonable in amount under s19.

■ The Gateway (Leeds) Management Limited v Naghash and another

[2015] UKUT 333 (LC), 16 June 2015

Bahareh Naghash and Iman Shamsizadeh were long lessees of two flats in a mixed-use development close to the centre of Leeds that contained 640 residential apartments, a 218-room hotel, some office and commercial space, and car parking for up to 500 vehicles. The Gateway was the management company, obligated to provide services in return for the payment of service charges. The services included a gym, a concierge facility and a high-specification CCTV system. The lessees challenged the service charges and in separate decisions the FTT reduced the sums payable for the gym and the CCTV. The management company appealed, primarily on the ground that the charges for the gym and CCTV were not service charges within the meaning of LTA 1985 s18, and that the FTT had accordingly not had jurisdiction to consider the challenges to them.

Martin Rodger QC, deputy president, dismissed the appeal. The obligation to contribute towards these costs was an obligation to contribute towards the cost of providing services and properly formed part of a service charge within the meaning of s18(1)(a). The suggestion that the costs were fixed, rather than variable according to the costs incurred in connection with the provision of the services, was 'an impossible argument'. He also rejected a complaint about the adequacy of the FTT's reasons for its decision.

■ Union Pension Trustees Ltd and another v Slavin

[2015] UKUT 103 (LC), 11 May 2015

It was a term of a lease that the lessor could recover from the lessee 'any other costs and expenses reasonably and properly incurred in connection with the Landlord's Property including without prejudice to the generality of the forgoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder'.

The Upper Tribunal held that this did not entitle the lessor to recover its legal costs from previous litigation before the Leasehold Valuation Tribunal. The clause had to be read in the context of the lease as a whole. It was telling that another clause expressly referred to the recovery of legal costs, whereas the above clause did not.

■ Oliver v Sheffield City Council

[2015] UKUT 229 (LC), 21 May 2015

The appellant, Hazel St Clare Oliver, was the long leaseholder in a block of flats on the Lansdowne Estate, which was owned by the council. The council carried out citywide major works, which included works on the Lansdowne Estate. Some of the works were eligible for a contribution from a commercial energy company as part of the Community Energy Savings Programme (CESP). In total, 15 of the 25 blocks on the Lansdowne Estate were eligible to receive CESP funding. The contribution to the appellant's block was £43,570.44. The council decided not to pass the CESP directly to the leaseholders as a set-off against their service charge contributions. Rather, the council decided to attribute the money to the funding of works to its citywide housing stock. The effect of this was that every leaseholder's service charge was reduced irrespective of whether their block had been entitled to CESP funding.

The Upper Tribunal allowed the appeal. Where funding has been provided from a third party and the purpose of the funding is specifically intended to meet the cost of certain works, it is impermissible to calculate the amount a leaseholder must pay under a service charge without reference to the receipt of that money. This is because, wherever such funding is provided, the landlord cannot be said to have incurred, in full, the costs of the works. The council could not therefore treat the money as general revenue, which it could apply to the cost of works on other estates or blocks.

■ Edozie v Barnet Homes

[2015] UKUT 348 (LC), 25 June 2015

Barnet was the freehold owner of three blocks of residential flats that contained both secure tenants and long leaseholders. In 2008, Barnet decided to carry out major works in respect of the three blocks and obtained a grant of around £7m, from the Local Development Agency, to pay for some of the costs of the works with the remainder, around £2m, coming from Barnet's own funds. The grant was said to comprise £5.2m for

improvements to flats occupied by secure tenants and £1.8m for the properties occupied by long leaseholders. Catherine Edozie, who was the long leaseholder of two flats within the three blocks, contended that the total grant should have been deducted from the costs of the works so that she was only required to pay a contribution towards the remaining £2m. Barnet contended successfully before the FTT that as it had incurred the entire costs of the works, the leaseholders were all required to pay a contribution towards the full costs of the works (£9m) and that it was entitled to apportion the grant in any manner it saw fit.

The Upper Tribunal dismissed the appeal. The cost of the works could not be challenged on the basis that they had not been reasonably incurred; there was no dispute that the works were necessary or that the cost of £9m was reasonable. The existence of the grant was irrelevant to the question of whether the cost of the works had been reasonably incurred. The sole question was therefore whether the full cost of works had been incurred so as to be recoverable from the leaseholders. Unlike *Oliver v Sheffield CC* (above), the existence of the grant did not mean that the cost of the works had not been incurred; in *Oliver*, the grant was provided by a commercial third party for specified works. In this case, however, Barnet had a far wider discretion as to how the grant money should be spent than was available to Sheffield City Council.

■ Ashleigh Court Right To Manage Company Ltd v De-Nuccio and others

[2015] UKUT 258 (LC), 20 May 2015

A landlord had failed to comply with the Service Charges (Consultation Requirements) (England) Regulations 2003 SI No 1987 by only allowing the inspection of estimates between 9 am and 12 noon on a weekday, which was unreasonable when having regard to the resources of both the landlord and tenant, and because the estimates were not 'available for inspection, free of charge, at that place and during those hours' (para 50).

Criminal prosecutions

Fraud

■ R v Korn

Inner London Crown Court, 5 June 2015

A couple let the flat that they owned to Heidi Korn for a year while they went to Africa on a career break. The rent was £1,600 a month. She then impersonated the owners and fraudulently attempted to sublet the flat for £1,800 a month. She tricked two prospective tenants into paying an £1,800 deposit after sending them emails from a fake account. The fraud was discovered by chance when a contract bearing a forged signature was redirected to the owners in Africa.

Korn was convicted of fraud by false representation. HHJ Wood QC sentenced her to eight months' imprisonment. He said that this kind of fraud was becoming 'increasingly prevalent'. He said: 'Such crime must be deterred because it is all too easy to commit and results in serious harm to many people. It is grossly dishonest. It involves planning and prolonged deception of the victims.'

Housing allocation

■ R (Alemi) v Westminster City Council

[2015] EWHC 1765 (Admin), 22 June 2015

The claimant was homeless. The council owed her the main housing duty (HA 1996 s193). She applied to join the council's housing register for an allocation of social housing. The council operated a choice-based-letting housing allocation scheme for those on its register. The only applicants on its register were those in the groups entitled to a 'reasonable preference' under HA 1996 Pt 6, including those who were owed homelessness duties (s166A(3)(b)). The council decided to amend its allocation scheme so that applicants owed the homelessness duties could not bid for 12 months after joining the register. The amended scheme was applied to the claimant and she sought a judicial review.

HHJ Blair QC, sitting as a deputy High Court judge, quashed the amendment of the scheme. He held that it amounted to depriving those applicants owed the homelessness duties of any chance of obtaining social housing for a 12-month period. That meant they had no preference at all for that period when the statute required that they should have a 'reasonable' preference.

■ R v Opaleye

Wood Green Crown Court, 11 May 2015

Olufolake Opaleye applied to Barking & Dagenham LBC and obtained a council flat. She failed to declare she had a housing association tenancy in Tower Hamlets. Council officers in the two boroughs worked together to recover both properties. On conviction of two offences under the Theft Act 1968 and an offence under the Fraud Act 2006, the defendant was sentenced to 18 months' imprisonment.

Homelessness

Applications and decisions

■ Complaint against Exeter City Council

Local Government Ombudsman Complaint No 13 011 643, 31 March 2015 (published 1 July 2015)

The complainant (J) left the family home with her two sons and stayed in a women's refuge. When asked to leave the refuge, she applied to the council for homelessness assistance. A council officer interviewed her and decided she was not homeless because she had a home she could return to. The officer printed off a decision letter and gave it to J, together with a leaflet about sleeping on the street.

The ombudsman found that the council:

- did not make enquiries before issuing its 'not homeless' decision;
- did not make enquiries when it began to review this decision;
- closed the case prematurely when J did not attend an interview, without considering her known temporary absence from the area or her vulnerability;
- did not identify her sons as children 'in need' or make a referral to local children's services;
- took too long to complete its review of the homelessness decision; and
- did not seek or take account of all relevant information when carrying out its review.

The ombudsman recommended that the council pay the complainant £1,600 with a further £200 to each of her sons.

Intentional homelessness

■ Mohamoud v Kensington and Chelsea RLBC; Saleem v Wandsworth LBC

[2015] EWCA Civ 780, 21 July 2015

Two mothers lived with their dependent children. On their separate applications for homelessness assistance, the two councils decided that they had become homeless intentionally: HA 1996 s191. Neither decision was made the subject of a request for a review or a county court appeal: HA 1996 ss202–204. Notices to quit were served to end the tenancies of the temporary accommodation that the applicants had been given. Each council sought possession. Possession orders were made.

The orders were appealed on the ground that the judges were wrong to decide that each council had complied with its duty under Children Act (CA) 2004 s11 to discharge their functions having regard to the need to safeguard and promote the welfare of children.

The Court of Appeal dismissed the appeals. The appellants had argued that the councils were under a positive duty to conduct an assessment of the needs of the children – before issuing a notice to quit – for the purpose of finding out what their circumstances might be. The court held that any such duty would have been 'extraordinarily burdensome in terms of cost and resources and – in the overwhelming number of cases – simply futile' (para 68). The scheme of provision for the homeless in HA 1996 Pt 7 and the terms of

CA 1989 Pt 3 already protected the interests of children.

Main housing duty

■ R (Faizi) v Brent LBC

Administrative Court,
17 June 2015

The claimant was homeless. The council owed her the main housing duty (HA 1996 s193). In performance of that, it offered her temporary accommodation. She refused the offer. The council decided that the refusal ended its duty (s193(5)) and that decision was upheld on review. The claimant brought a county court appeal and asked the council to accommodate her pending the appeal. It declined. She applied for permission to seek a judicial review, contending that the main housing duty continued or revived, on the making of an appeal, until a court finally resolved the dispute between an applicant and a council as to whether it had lawfully ended.

Haddon-Cave J refused permission to seek judicial review. HA 1996 s193(5) expressly ended the main housing duty on refusal of an offer. The HA 1996 also conferred a power to accommodate pending appeal: s204(4). It was not seriously arguable that, on the true construction of these provisions, a duty to accommodate automatically continued until the outcome of an appeal.

Having failed to secure permission, the claimant asked for a 28-day extension to an interim injunction she had obtained (requiring the council to accommodate her) on the basis that such a period was necessary to enable her to find other accommodation. The judge rejected the suggestion that 28 days should usually or ordinarily be allowed to an unsuccessful applicant for judicial review in a homelessness case and continued the injunction for only 14 further days.

Local connection

■ Johnston v Westminster City Council

[2015] EWCA Civ 554,
3 June 2015

John Johnston, the appellant, lost his private rented tenancy in Eastbourne. He moved to London, where he slept rough. He later applied to Westminster for homelessness assistance. It accepted that he was owed the main housing duty (HA 1996 s193) but made a referral of that duty to Eastbourne Borough Council (s198). Eastbourne accepted the referral and offered to provide accommodation if the appellant presented himself to it. He did not go back to Eastbourne but pursued an unsuccessful review and appeal from Westminster's decision.

Later, he made a further application to Westminster. It decided that he was 'not homeless' as he still had accommodation available to him from Eastbourne pursuant to the earlier acceptance of the referred duty. That decision was upheld on review and on appeal. He brought a second appeal to the Court of Appeal contending that:

- the fact that an applicant might be offered accommodation by another authority that might satisfy s175(1) did not entitle the decision-maker to find that the applicant was not homeless; and
- s175(3) could not be satisfied where the relevant accommodation was hypothetical and unidentified.

The Court of Appeal held that Westminster's decision had been be wrong. The appellant remained homeless unless and until he actually had accommodation: HA 1996 s175. Gloster LJ said: 'Mr Johnston was homeless as at the date of the review decision and … the judge was wrong to hold otherwise' (para 32). However, the court dismissed the appeal because Westminster could, and should, have simply decided that it owed no further duty to the appellant (because the referral earlier made to Eastbourne had been accepted and the duty Westminster had owed pending that acceptance had been brought to an end by it (HA 1996 s200(1))). The review decision on the latest application was varied accordingly

Comment: It is difficult to understand from the judgment how, on a fresh application for homelessness assistance and in respect of the new duties triggered by it, a council can rely on earlier performed and extinguished duties as satisfying the fresh duties it owes.

Suitable accommodation

■ Poshteh v Kensington and Chelsea RLBC

[2015] EWCA Civ 711,
8 July 2015

The applicant was a homeless refugee from Iran. The council owed her the main housing duty (HA 1996 s193). It offered her a unit of HA 1996 Pt 6 accommodation in performance of that duty. On viewing it, the applicant had a panic attack because the round window in it reminded her of her prison cell. On a review, the council decided that the offer was suitable and reasonable for the applicant to accept: HA 1996 s193(7F). HHJ Baucher dismissed an appeal.

The Court of Appeal rejected a second appeal. However 'objectively suitable' offered accommodation might be, given the wording of the pre-amendment s193(7F), it needed to be reasonable for the particular applicant to accept it. The reviewing officer had applied that approach and had regard to the medical evidence. McCombe LJ said (at para 29):

In my judgment, the officer was entitled to conclude, on all the evidence (including the medical materials) that the subjective reminder of the Iranian prison cell caused by this window on her visit was not likely to have a sufficiently adverse effect on her mental health such as to render reasonable her rejection of this offer of accommodation within the meaning of the statute.

Additionally, 'the reviewing officer clearly recognised Ms Poshteh's disability. He conscientiously recognised the public sector equality duty in that respect and was at pains to acquire all information that appeared to him to be necessary for that purpose' (para 41).

■ Complaint against Haringey LBC

Local Government Ombudsman Complaint No 14 003 002,
1 March 2015 (published 1 July 2015)

The complainant was homeless and was owed the main housing duty (HA 1996 s193). She bid for social housing under the council's choice-based letting scheme but was not successful. The council then auto-bid for her and offered her a property as a 'direct let' in discharge of its duty: s193(7). She accepted it reluctantly and applied for a review: s202. The review succeeded but the complainant was not immediately moved out and into suitable accommodation.

The ombudsman found that the council had delayed unreasonably in dealing with a review of the suitability of the accommodation and in identifying a suitable alternative property when the review succeeded. As a result, the complainant had lived in unsuitable accommodation for seven months longer than necessary. The council agreed to pay £1,400 to recognise that injustice.

1 Chris Johnson, solicitor, Birmingham, and James Stark, barrister, Manchester.
2 South West London Law Centre, Toby Vanhegan, barrister, London, and Seye Olaniyan, solicitor, Glazer Delmar, London.
3 Caroline Crawford, senior adviser, Shelter Thames Valley.
4 Hannah Venn-Munns, solicitor, Dowse & Co, London, and Simao Paxi-Cato, barrister, London.

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.