Housing: recent developments

Legislative and policy updates, and key cases on housing allocation, human rights, assured and secure tenancies, ASBOs, HMOs, long lessees, tenants of mortgagees, homelessness and community care. Nic Madge and Jan Luba QC provide their monthly round-up.

Nic Madge

Jan Luba QC

Politics and legislation

Housing and Planning Bill

Having completed its passage in the House of Commons, this important UK government bill is now moving through the House of Lords. The Lords' Library has produced a useful free briefing explaining the issues for consideration at the various procedural stages in the Lords: *Housing and Planning Bill 2015–16: briefing for Lords stages* (LLN-2016-0004, 22 January 2016)

Private rented sector: migrants

On 1 February 2016, the obligations imposed on private landlords by Immigration Act (IA) 2014 Pt 3, to avoid letting to migrants without appropriate immigration status, came into force in relation to all residential property in England: the Immigration Act 2014 (Commencement No 6) Order 2016 SI No 11.

Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2016 SI No 9 art 16 introduces a newly updated code of guidance for landlords and agents with effect from the same date: *Code of practice on illegal immigrants and private rented accommodation* (Home Office, February 2016).

The order also contains an updated list of those documents that a landlord or agent must obtain from a prospective tenant in order to establish an excuse under IA 2014 ss24–26 for having let without complying with the statutory requirements.

The Residential Landlords Association (RLA) has found that 72 per cent of landlords it surveyed did not understand their new statutory obligations ('Government failing landlords on right to rent', RLA news item, 1 February 2016). It reports that more than 90 per cent of landlords said they had received no government information on the new provisions. The survey also found that 44 per cent of landlords will only rent to those with documents that are familiar to them, such as passports. This may cause problems for the estimated 17 per cent of UK nationals without a passport. It could lead landlords into difficulty in avoiding discriminatory practices, despite the advice given in *Avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector: a code of practice for landlords* (Home Office, October 2014).

Further information on the new provisions is given in House of Commons Library Briefing Paper no SN07025 (12 February 2016) and in *Right to rent document checks: a user guide* (Home Office, February 2016).

Private rented sector: terms and information

The UK government has revised its model assured shorthold tenancy agreement first published in September 2014. The new version reflects relevant legislative changes: *Model agreement for an assured shorthold tenancy and accompanying guidance* (Department for Communities and Local Government (DCLG), February 2016).

The government has also updated its guide *How to rent: the checklist for renting in England* (DCLG, February 2016). The guide is for both tenants and landlords in the private rented sector and is intended to help them understand their rights and responsibilities.

Private rented sector: rents

The latest statistics on rents paid in Great Britain show that rents rose by 2.5 per cent in the year to December 2015: *Index of private housing rental prices, October to December 2015* (Office for National Statistics, February 2016). Private rents increased by 2.7 per cent in England, 0.7 per cent in Wales and 0.9 per cent in Scotland. Rents increased in all the English regions, with the greatest increase in London (3.9 per cent).

Social housing allocation

The Local Government Ombudsman (LGO) has published a new report about its experience with complaints about how councils have dealt with applications for social housing allocation: *Full house: councils' role in allocating social housing – focus report: learning lessons from complaints* (LGO, January 2016).

The report was prompted by a rise in complaints and enquiries to the LGO from people unhappy with the way their housing application had been dealt with. A significant proportion were from applicants denied access to their council's housing allocation as a result of the new qualification requirements introduced following the Localism Act 2011 amendments to Housing Act (HA) 1996 Pt 6. In many cases, the LGO found fault in the way councils had implemented these changes. The report includes case studies and advice on good practice.

A new article, 'Uses of macro social theory: a social housing case study' (2016) 79 Mod Law Rev 76, draws on a sample of local authority allocation schemes to reflect on the growing category of households excluded from such schemes because of their former housing deviance or some other disqualification.

Local authority landlords in England made only 127,300 lettings during 2014/15. This was a decrease of 11 per cent compared with the 142,900 made in 2013/14, and follows a general decrease from 326,600 in 2000/01: *Local authority housing statistics: year ending March 2015, England* (DCLG, January 2016)

Homelessness

The House of Commons Library has published the following new free briefing papers on homelessness and its prevention and related housing issues:

- Briefing Paper no SN02007 (7 January 2016) provides background information on the problem of rough sleeping and outlines UK government policy on the issue.
- Briefing Paper no SN02110 (7 January 2016) covers the increase in the number of homeless households placed in temporary accommodation by local authorities in England and outlines various initiatives aimed at reducing those numbers.
- Briefing Paper no SN04244 (20 January 2016) contains an overview of the housing options available to serving and ex-military personnel in England seeking accommodation.
- Briefing Paper no SN03012 (18 January 2016) outlines the powers of councils to tackle empty housing and other relevant initiatives to bring housing stock back into use.
- Briefing Paper no SN06272 (3 February 2016) provides information on claimants affected by the reduction in housing benefit (HB) when under-occupying a social rented home.

Housing conditions

The challenge of tackling unsafe and unhealthy housing: report of a survey of local authorities for Karen Buck MP (Dr Stephen Battersby, December 2015) records the growth in the private rented sector and the challenges posed

by financial constraints affecting local authority enforcement activity.

Paying a high price for a faulty product (Citizens Advice/New Policy Institute, December 2015) paints a broader picture of poor housing conditions in the private rented sector and the need for action to address them.

A new House of Commons Briefing Paper no SN06041 (8 December 2015) provides an overview of the law on tackling infestations in privately rented housing, together with a summary of the powers available to local authorities.

Housing law reform

The Renting Homes (Wales) Act 2016 received royal assent on 18 January 2016. It enacts provisions about tenancies and licences based on Law Commission recommendations and establishes two new kinds of contract for the purpose of renting homes in Wales.

Human rights

- **Budimir v Croatia**
  App No 14303/11,
  28 January 2016

In 1985, Draško Budimir was granted a 'specially protected tenancy' agreement for a flat in Split. The flat had been confiscated from a private owner in 1948. When Croatia became independent in 1991, it enacted the Specially Protected Tenancies (Sale to Occupier) Act, with regulations for the sale of socially owned flats to holders of specially protected tenancies under favourable conditions of sale. However, the Act excluded the holders of specially protected tenancies in most privately owned flats. In 1997, Mr Budimir asked to purchase the flat from Split Municipality. It did not reply. In 2001, he brought a civil action for the Restitution of Expropriated Property, seeking a judgment in lieu of a contract of sale. The claim was dismissed on the grounds that he had not, in fact, acquired a specially protected tenancy. In 2007, the flat was returned to an heir of its previous owner. In 2011, the new owner brought a civil action seeking the eviction of Mr Budimir. In 2012, he and his family moved out of the flat and, in 2013, the heir withdrew her claim. Mr Budimir complained to the European Court of Human Rights (ECtHR) under art 1 of Protocol No 1 taken alone and in conjunction with art 14, and art 8.

The ECtHR dismissed his claims. Specially protected tenancies were abolished in 1996, a year before the European Convention on Human Rights (ECHR) entered into force in respect of Croatia. Therefore, Mr Budimir did not have a sufficient proprietary interest in respect of the flat to constitute a 'possession' within the meaning of art 1 of Protocol No 1. In relation to the alleged violation of art 8, the ECtHR applied the principle of subsidiarity (viz the ECHR is subsidiary to the national systems safeguarding human rights). It reiterated that it may only deal with a matter after all domestic remedies have been exhausted. In this case, while the proceedings for his eviction were pending, Mr Budimir moved out of the flat of his own free will, with the result that the heir withdrew her claim. Mr Budimir 'did not make use of the opportunity to argue his case before the national courts and to give them the possibility to assess all the circumstances pertinent to his right to respect for his home' (para 53). After referring to *Ćosić v Croatia* App No 28261/06, *Paulić v Croatia* App No 3572/06, and *Orlić v Croatia* App No 48833/07, the court stated: '[I]t was open to the applicant in the present case … to argue before the national authorities that … his right to respect for his home had been violated, contrary to article 8 … The national authorities, including the Constitutional Court, would thus have had the opportunity to respond to such arguments' (paras 54–55).

- **Zakharov v Russia**
  App No 66610/10,
  5 November 2015

In 1999, Yevgeniy Zakharov moved in with his partner, B. She had a room in a communal council flat held under a social tenancy agreement. Mr Zakharov and B lived together in that room for the following 10 years. They never married but cohabited as husband and wife. In 2009, B died. Her neighbours locked Mr Zakharov out of the flat. The local housing authorities told him he had to vacate the room since he had no legal right to occupy it. The legal code only recognised succession by 'members of [the] family'. A regional court rejected his claim to the room and he complained to the ECtHR alleging a violation of art 8.

The court has asked the parties:

- Has there been an interference with the applicant's right to respect for his home, within the meaning of art 8(1)? If so, was that interference in accordance with the law? Did it pursue a legitimate aim, and was it necessary in terms of art 8(2)?
- Alternatively, has the state fulfilled its positive obligations in the present case to ensure that the applicant's right to respect for his home under art 8 was exercised effectively?

- **Dzaurova v Russia**
  App No 44199/14,
  3 November 2015

In December 1994, Isiyat Dzaurova was granted the status of 'internally displaced person' (IDP). In 2003, she moved into a flat that had been allocated to her in a municipal temporary housing facility for IDPs. Ms Dzaurova lived there until 2013, when the village council sought her eviction. She had no security of tenure. The local court granted possession, a decision upheld by the Supreme Court. Both hearings were conducted in her absence. She was evicted and complained to the ECtHR.

The court has asked the parties: has there been an interference with the applicant's right to respect for her home, within the meaning of art 8(1)? If so, was that interference necessary in terms of art 8(2)?

- **Chornenko and others v Ukraine**
  App No 59660/09,
  3 December 2015

Tetyana Chornenko and her family occupied a room in a corporate dormitory, classified as public housing stock and managed by a joint stock company. She had a protected tenancy contract. In 2002, at the request of the joint stock company, they moved into temporary accommodation so capital renovation works could be carried out. While they were away, the company converted the dormitory into an apartment building. Mrs Chornenko and her family were forced to leave the temporary accommodation. They and some other former residents of the dormitory returned to the building they had previously occupied and settled in the unfinished apartments, despite the company's objections. A district court found that she had illegally occupied the premises under reconstruction and ordered her eviction, but that decision was overturned on appeal. In 2008, the company instituted new eviction proceedings. The district court ordered the eviction of Mrs Chornenko and her family and others who had moved back into the building. She complained to the ECtHR.

The court has asked the parties: did the applicants have a fair hearing in the determination of their civil rights, as required by art 6(1)? In particular, did the judicial authorities provide an adequate response to their argument concerning the existence of a protected tenancy agreement between them and the building owner? Has there been a violation of art 8?

Assured tenancies

- **Derwent Housing Association Limited v Taylor**[1]
  Court of Appeal (Civil Division),
  19 January 2016

Mrs Taylor had an assured tenancy in her sole name. She and her husband lived in the property as their matrimonial home. She left in 2013 and, in February 2014, served a notice to quit that was allegedly defective. Derwent accepted it as terminating the tenancy. Mr Taylor remained and defended possession proceedings. A possession order was made. On appeal, Mr Taylor argued that, under Family Law Act 1996 s30(4), his continued occupation was to be treated as occupation by Mrs Taylor as tenant, and that Derwent was under a positive obligation to protect his enjoyment of rights under art 1 of Protocol No 1 to the ECHR and art 8.

The Court of Appeal dismissed the appeal. Mrs Taylor's notice was sufficient in common law to end the tenancy. Section 30 only applies where there is a continuing entitlement to occupy, not when that entitlement has been ended. There was no occupation or tenancy of Mrs Taylor on which Mr Taylor could base continuing s30 rights. There was also no ECHR violation.

- **Christian Action (Enfield) Housing Association Ltd v Walters**[2]
  Edmonton County Court,
  7 December 2015

Ms Walters was an assured tenant. Her rent was paid by HB. In November 2014, she became a student. She said she told Christian Action about this and that rent would be paid quarterly, when she received her grant payments. Arrears built up, but were paid off in January 2015. However, they then built up again. Christian Action issued proceedings and in April 2015 a possession order was made under HA 1988 Sch 2 Ground 8. Possession was delayed for the maximum six weeks. In July 2015, Christian Action applied for and obtained a warrant, with an eviction date of 2 September 2015. On 13 August 2015, Christian Action wrote to Ms Walters, stating unequivocally that she could avoid eviction by paying off the arrears. She said that in a subsequent phone call to Christian Action, she was given an arrears figure of £780.90, which she paid before the eviction date (it later transpired that the amount was a few pounds short, but no particular issue was raised about the accuracy of her account of the call). Despite this, Ms Walters was evicted. She made a without notice application on the same day, seeking re-entry. She was acting in person and a housing officer appeared for Christian Action. The application was adjourned for a full hearing, apparently with re-entry ordered on an interim basis. At the adjourned hearing, the application to set aside the warrant was dismissed. Christian Action applied for a warrant of restitution. Ms Walters, now represented, defended that application,

on grounds of abuse of process and oppression.

The court concluded that the possession order, made on mandatory grounds, stood and that it was precluded by HA 1980 s89(1) from staying possession for a period in excess of six weeks. The judge stated:

I harbour considerable doubts about whether it was right for the claimant to adopt a procedure that was inconsistent with their correspondence and which had raised in the mind of the defendant a legitimate expectation that she could avoid the execution of the warrant. I have to say that if an argument had been advanced not of oppression but of an estoppel then I might well have been minded to list this matter for a further consideration with proper arguments before the court. That has not been the approach of the defendant who has rested on the oppression and by necessary analogy of whether I should stay a warrant for restitution …

… it would be inappropriate for me to stay or discharge the warrant of restitution and with something of a heavy heart … I must dismiss the application to stay the warrant of restitution.

I do [urge] the claimant to look at the world through the eyes of their tenants, to consider with their lawyers whether their procedures are open and transparent enough as to prevent the sort of situation that has emerged in this case.

Secure tenancies

Development and consultation

- **Bokrosova v Lambeth LBC**
  [2015] EWHC 3386 (Admin),
  24 November 2015

The council began a public consultation over plans to redevelop its Cressingham Gardens estate. It set up sub-groups to consider options and test opinion. Five options were consulted upon (options 1–3 concerned refurbishment and options 4 and 5 were about partial and full demolition). In March 2015, before the sub-groups' reports had been presented, options 1–3 were abandoned.

Laing J allowed a claim for judicial review. After referring to HA 1985 s105, *R (Moseley) v Haringey LBC* [2014] UKSC 56 and *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, she held that the decision to remove options 1–3 from the consultation had been unlawful. She was not satisfied that it was highly likely that if the council had not acted unlawfully, in the way it did, it would, nonetheless, have made the decision it did. She made a declaration and a quashing order.

ASBOs

- **R (Carney) v North Lincolnshire Council**
  Divisional Court,
  27 January 2016

Lincolnshire applied for an ASBO under Crime and Disorder Act 1998 s1(1) against John Carney, who had verbally attacked various people associated with the local authority, made allegations of serious impropriety against them and had threatened one person with violence. A judge made an ASBO prohibiting him from engaging in any behaviour likely to cause harassment, alarm or distress to any of Lincolnshire's employees. In the Divisional Court, on an appeal by way of case stated, Mr Carney argued that the judge had used the wrong standard of proof and that the ASBO was not necessary and proportionate.

The Divisional Court held that there was no basis for concluding that the judge had failed to apply the criminal standard of proof. There had been threatening and distressing conduct, and he was entitled to conclude that it had been persistent and serious enough to justify making an ASBO. There had been personal threats, intimidation, allegations of personal abuse and abuse concerning employees' physical disabilities. The fact that Mr Carney might genuinely have believed his accusations was irrelevant.

Houses in multiple occupation

- **Herefordshire Council v Rohde**
  [2016] UKUT 39 (LC),
  15 January 2016

Herefordshire made a declaration under HA 2004 s255 that, although a property did not fulfil the tests for a house in multiple occupation (HMO) under s254, it was an HMO as it reasonably believed that it had 'significant use' as an HMO. The owner appealed to the First-tier Tribunal (FTT). The FTT inspected the property and found that, on the day of its inspection, there was no HMO use, as the property did not at that moment in time qualify as an HMO since it did not appear that there was anyone in occupation. The FTT purported to revoke the declaration. Herefordshire appealed to the Upper Tribunal (UT).

Judge Elizabeth Cooke sitting in the UT allowed the appeal. The FTT did not have in mind the fact that the HMO declaration would be valid if the significant use test was met, even if the house stood empty on one or more days during the year. If the FTT had had that in mind, it might also have been aware of the presumption in s260: the starting point of the appeal had to be that the significant use test was met, unless the contrary was shown. In this case, 'manifestly the contrary is not shown by the fact that on a particular occasion the house was unoccupied' (para 15). The FTT made a decision solely on the basis of the physical state of the property in February 2015, rather than taking into account all the evidence available to the local authority in addition to its own later inspection. If the FTT had focused more on the significant use test, it would have appreciated that any significant use at any stage, even for one day in the year, would make the property an HMO and the actual use on the specific day the FTT visited was of rather less importance. Judge Cooke held that, on the basis of the evidence before her, Herefordshire was right to conclude that the property was an HMO. She confirmed the decision of the local authority.

Long lessees

Service charges

- **Geyfords Ltd v O'Sullivan, Grinter, Shaw, Morgan and Bonsor**
  [2015] UKUT 683 (LC),
  17 December 2015

Geyfords Ltd was the freehold owner of a block of flats. Ms O'Sullivan was the leasehold owner of a flat within the block. She, and a number of other lessees, contended before the Leasehold Valuation Tribunal (LVT) that the service charge for a number of years was not payable. Geyfords, after instructing solicitors and counsel, successfully resisted the application. Geyfords subsequently sought to recover its legal costs from those proceedings as an administration charge under the lease. In doing so, it relied on a clause of the lease that required the lessees to pay a proportion of 'all other expenses (if any) incurred by the lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development'. Ms O'Sullivan and the other lessees contended before the LVT that legal costs incurred in the previous proceedings were not recoverable under this clause. The LVT agreed and Geyfords appealed to the UT.

Martin Rodger QC, deputy president, dismissed the appeal. Clear and unambiguous terms are required to impose what is an onerous and unusual payment obligation, and the tribunal should not bring within the general words of a service charge clause anything that does not clearly belong there. The words 'proper and convenient management and running', used in the context of a mixed residential and commercial building, are not words that have a precise meaning which either clearly includes or clearly excludes the activity of litigating over the collection or quantification of sums required to repair the building. While 'management' may sometimes include obtaining professional advice, including legal advice, and even litigation, the words 'management and running' were not sufficiently clear to include proceedings to enforce the obligation of an individual leaseholder to make a payment to the landlord. Moreover, commercial sense dictated that one would expect the employment of clear language for onerous and unpredictable burdens to be imposed on a lessee.

Unfair contract terms

- **Burrell and others v Helical (Bramshott Place) Ltd**
  [2015] EWHC 3727 (Ch),
  18 December 2015

The defendant owned the freehold to a retirement village. The claimants asserted that provisions in their long leases requiring them to pay fees on assignment for the transfer of their leases were unenforceable pursuant to the provisions of the Consumer Credit Act 1974 and the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083.

David Casement QC, sitting as a deputy High Court judge, granted the defendant's application for summary judgment. He found that the defendant did not provide credit to the claimants in the transfer fee provisions and therefore they had no real prospect of succeeding. There was no other compelling reason why the matter should proceed to trial.

Tenants of mortgagees

- **JSC BTA Bank v Zharimbetov and others**
  Commercial Court,
  13 November 2015

The claimant bank held a charging order over a property. It applied for orders for possession and sale. The property was worth more than £5m. The third defendant claimed that he had previously held a one-year assured shorthold tenancy at a rent of £125,000. Before that expired, he took a 50-year lease at a rent of £50,000 per year. He explained that the owners had wanted a long-term tenant. The bank claimed the lease was a sham. The fact that a 50-year term was unusual and was the maximum

allowed by Law of Property Act 1925 s99 suggested that it had been deliberately created to defeat the claim.

Although the court had no valuation evidence before it, Burton J stated that a 50-year lease was worth almost as much as a freehold and would have a seven-figure value. It was unlikely that the tenant actually felt he had 'taken on liability' for the lease, as it was a substantial asset that could be disposed of, or alternatively he would only be paying £50,000 per year in 2065. Section 99(6) required that the lease reserve the best rent that could reasonably be obtained, having regard to the circumstances of the case. It was difficult to see how the court could take the tenant's case that the owner had wished to get rid of the property cheaply into account where there was a substantial interest being disposed of in breach of freezing and charging orders. The judge made possession and sale orders to 'not be enforced for two months' so that the tenant could: (1) make arrangements for moving out; and/or (2) make an application for a hearing at which he could give evidence and be cross-examined in person about whether the lease was made in good faith.

Housing allocation

Allocation schemes

- **R (VC) v North Somerset Council (Equality and Human Rights Commission intervening)**[3]
  CO/3801/2015,
  2 February 2016

The council adopted a housing allocation scheme containing a 'local connection' qualifying condition for applicants. The council applied the same scheme to allocation of pitches on its Gypsy/Traveller sites. The effect was that the claimant, an Irish Traveller who did not have a local connection to North Somerset, was denied the opportunity of an allocation.

He sought judicial review on a number of grounds including, in particular, that the council had failed to pay due regard to its public sector equality duty under Equality Act 2010 s149 and that the local connection requirement was indirectly discriminatory in relation to Gypsies and Travellers. He contended that many ethnic Gypsies and Travellers still lived a nomadic lifestyle (in the absence of sufficient permanent sites to meet their accommodation needs) and that, in consequence, the local connection requirement was likely to have a disproportionately adverse effect on that community. His case was supported by the Equality and Human Rights Commission.

The council did not file any evidence to suggest that it had discharged its s149 duty or to support its position that any discrimination could be objectively justified.

Collins J approved a consent order by which the council was to pay the costs of the claim and to:

- place the claimant on its housing register; and
- review its housing allocations scheme, specifically with reference to the s149 duty.

Homelessness

Eligibility

- **Samin v Westminster City Council**
  [2016] UKSC 1,
  27 January 2016

Wadi Samin, an EU national, was not a 'worker' or otherwise 'economically active'. He applied to the council for homelessness assistance. The council decided that he was a person from abroad who was not eligible for assistance because he did not have a right of residence in the UK: HA 1996 s185(1). That decision was upheld on review and appeals in the county court and the Court of Appeal were dismissed. Mr Samin argued that, as he was socially isolated and suffered from poor mental and physical health, it would be disproportionate for the UK to withhold housing assistance in his case.

The Supreme Court unanimously dismissed his further appeal. It held that where a national of another EU member state is not a worker, self-employed or a student and has no, or very limited, means of support and no medical insurance, it would undermine the whole thrust of the EU directives if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence or the right against discrimination was invoked. Even if there was a category of exceptional cases where proportionality would come into play, Mr Samin did not fall into it.

Intentional homelessness

- **LW (AP) v Stirling Council**
  [2015] CSOH 162,
  4 December 2015

The petitioner had a history of mental health issues. With the support of a council caseworker, she found a private sector tenancy. She was advised that while she would receive HB in respect of the rent, there would be a shortfall of about £10.80 per week due to deductions from that HB to recoup an overpayment of benefit made to her at an earlier point in time. She was also advised of the importance of meeting her obligations under the tenancy, in particular to pay the shortfall from other sources of income.

The petitioner paid the shortfall for a period of four months, but thereafter arrears began to accrue. The landlord served notice and obtained possession. On her later application for homelessness assistance, the council decided that the petitioner had become homeless intentionally. She applied for a judicial review contending that, as evidenced by a letter from a community psychiatric nurse, she had been subject to mental health issues and unable to manage her finances. Her grounds were that the reviewing officer had either: (1) failed to address the mental health issues; or (2) given insufficient weight to the evidence; or (3) reached a perverse conclusion.

Lady Wolffe dismissed the petition. She said:

In terms of the guidance in the Code [of Guidance on Homelessness], it is acknowledged that a person suffering from mental illness may be unlikely to have acted deliberately. In other words, mental illness might deprive that person of the ability to act deliberately or with purpose in a way relevant to the intentionality test ... Notwithstanding what the petitioner's counsel said under reference to those passages of the CPN letter detailing the petitioner's mental health difficulties in 2006, there was no medical assessment that would evidence her suffering from mental illness at the material time [in 2014] (para 31).

In relation to the second ground of challenge, I agree with the ... submission that this ground amounts to no more than a complaint that the decision-taker did not give certain factors the weight that the petitioner would have wished. This is not a permissible ground of judicial review of administrative decision-taking. Once there is relevant material before a decision-taker, the weight to attach to it is a matter for it to assess. It is not enough to say another decision would have been reached (para 34).

... it cannot be said that the decision-taker had no basis of fact from which the requisite intentionality could be found. More properly, as this was an assessment of matters of fact vested by parliament in the decision-taker, it cannot be said to be one that no reasonable decision-taker properly directing itself as to its task and on the basis of the material before it, could have reached (para 33).

Local connection

- **R (Tanushi) v Westminster City Council and Hillingdon LBC**
  Administrative Court,
  22 January 2016

The claimant applied to Westminster for homelessness assistance. It accepted that she was homeless, had a priority need and had not become homeless intentionally. It provided her with temporary accommodation and referred her application to Hillingdon on the basis that the conditions for a local connection referral were made out. If Hillingdon accepted the referral, because it agreed that the referral conditions were satisfied, the main housing duty would fall on it.

The two councils disagreed as to whether they had come to an agreement about whether the conditions were satisfied and on which council the housing duty lay. Westminster withdrew the temporary accommodation.

The claimant sought judicial review and interim accommodation pending a hearing. On her application for permission to apply for judicial review and a continuance of an interim injunction, the two councils submitted that the court should summarily determine whether there had been a binding agreement between them and, if so, whether Hillingdon had been entitled to resile from it or rescind it.

Timothy Dutton QC, sitting as a deputy High Court judge, held that there was insufficient evidence to determine summarily whether there had been an agreement between the councils and whether a council could resile from or rescind any such agreement. He urged the defendants to resolve their dispute between themselves. Meanwhile, the balance of convenience required that the interim injunction be continued. Permission to apply for judicial review against both defendants was granted.

Housing and community care

- **North Yorkshire CC and a Clinical Commissioning Group v MAG (by his litigation friend, the Official Solicitor) and GC**
  [2016] EWCOP 5,
  18 January 2016

The council was responsible for providing care and accommodation to MAG, a severely disabled man. In

2006, it arranged for a social landlord to provide a ground-floor flat in which he lived and received care. The flat was not suitable for wheelchair use. The respondent could only move around it by pulling himself along the floor and crawling. This caused physical problems to his hands, knees and thighs. He could not go outside because the flat had no garden. He could not have a sleep-in carer because there was only one bedroom.

The council agreed that he had been deprived of his liberty for nine years by these arrangements but applied to the court to approve their continuance and to determine issues about his capacity to enter into a tenancy agreement.

District Judge Glentworth, sitting in the Court of Protection, refused to sanction the deprivation of liberty (see February 2016 *Legal Action* 46). The council appealed.

Cobb J allowed the appeal. He held that all substantive decisions in the Court of Protection are governed by the 'best interests test', which the judge had not applied. She had gone straight to a consideration of 'whether the elements of the care package which involve a deprivation of liberty are lawful'. But there were two separate questions that required consideration, namely:

- whether it was in MAG's best interests to live at the property, noting that although he was deprived of his liberty, there was no alternative available that offered a lesser degree of restriction; and
- whether the accommodation provided to MAG was so unsuitable as to be unlawfully so provided, breaching his rights under the ECHR (notably art 5).

Had those questions been asked and answered correctly, the outcome would have been authorisation of the deprivation of liberty at MAG's property and the approval of his current care package.

1 Noted on Nearly Legal.

2 Noted on Nearly Legal.

3 Marc Willers QC and Joseph Markus, barristers, and Parminder Sanghera, Community Law Partnership, Birmingham.

Nic Madge and Jan Luba QC are circuit judges. They would like to hear of relevant housing cases in the lower or higher courts.

Employment: update

Philip Tsamados highlights important policy and legislation changes, and cases on human rights, tribunal procedure, contractual and employment rights, unfair dismissal and mitigation of loss.

Policy and legislation

National living wage

From 1 April 2016, the amounts of the national minimum wage (now rebranded as the national living wage) are changed as follows (National Minimum Wage (Amendment) Regulations 2016 SI No 68 reg 3):

- for workers aged 25 and over: £7.20 an hour;
- for workers aged between 21 and 24: £6.70 an hour;
- for workers aged between 18 and 20: £5.30 an hour;
- for workers aged under 18: £3.87 an hour; and
- for apprentices: remains the same at £3.30 an hour.

The significance of this change is not as extensive as it might at first appear. This is because, in effect, it simply creates a higher hourly rate for those aged 25 and over, the other amounts remaining the same (see November 2015 *Legal Action* 23 for the previous rates).

Zero hours contracts

As previously stated (see November 2015 *Legal Action* 23 and Employment Rights Act (ERA) 1996 s27A(3)), the government has brought into force legislation prohibiting exclusivity clauses in zero hours contracts. The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 SI No 2021 introduced, from 11 January 2016 onwards, protection against unfair dismissal (with no qualifying period of employment applying) for employees and protection against detrimental treatment for workers for a reason (short of dismissal) relating to a breach of s27A(3). Regs 3 and 4 deal with complaints to employment tribunals and the available remedies respectively.

Help with paying employment tribunal fees

From 28 October 2015, HM Courts and Tribunals Service (HMCTS) introduced a simpler system of applying for help with the cost of employment tribunal fees.[1] This has the snappier title of 'Help with fees' in place of 'Fee remission', which, frankly, meant nothing to the average person. Essentially, a simpler application form has to be completed, but there is no need to submit supporting documentation as to qualification. HMCTS will undertake checks directly with the Department for Work and Pensions to determine eligibility and will only ask for proof of means if the need arises. Application can also be made by email [2] rather than just by post as previously.

Cases

Human rights

Employers' monitoring of emails and electronic messages at work

In this modern world, many workers are inclined to take the use of their employers' internet and email facilities for granted. Of course, any usage has to be within parameters set by the employer and not to an extent that interferes with the worker's ability to carry out their work or for inappropriate purposes.

Any monitoring by an employer should be in accordance with notified procedures and take into account the Data Protection Employment Practices Code Pt 3 (monitoring at work) as well as complying with the Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 SI No 2699.

The following case indirectly dealt with whether employers are entitled to monitor personal emails and electronic messages sent through a personal account on work facilities during work hours by considering whether reliance on such information in court proceedings amounts to breach of the right to respect for private life and family life, home and correspondence under European Convention on Human Rights (ECHR) art 8.

- **Bărbulescu v Romania**
  App No 61496/08,
  12 January 2016

Bogdan Bărbulescu was a Romanian employee dismissed when his employer discovered that he had been using his employer's internet facilities to send personal messages from his personal Yahoo Messenger account during work hours. He brought proceedings in the Romanian courts challenging his dismissal, but was unsuccessful at first instance and on appeal. He then brought a claim against the Romanian state in the European Court of Human Rights, arguing that the Romanian courts had not protected his ECHR art 8 rights because they should have