Housing: recent developments

Nic Madge and Jan Luba QC present the latest legislative developments, plus cases on human rights, possession claims, public authorities, service charges, harassment, housing allocation, homelessness, and housing and children.

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Politics and legislation

Social housing security of tenure

The Housing and Planning Act 2016 (reviewed at page 13 of this issue) contains provisions, foreshadowed in the July 2015 budget, to review the use of 'lifetime' secure tenancies with a view to limiting their use by local authorities in England. On 4 May 2016, the UK government published *Lifetime tenancies: equality impact assessment* (Department for Communities and Local Government (DCLG)), assessing the impact of this policy. The House of Commons Library has produced a briefing paper which reviews the evolution of the policy into legislative form: *Social housing: the end of 'lifetime' tenancies in England?* (No 07173, 27 May 2016).

Social housing rents

The Welfare Reform and Work Act 2016 contains provisions that introduce a new rent regime for registered providers of social housing in England. The Act – and regulations made under it – give the secretary of state the power to exempt a local authority fully or partially from the new requirements if he considers that the local authority would be unable to avoid serious financial difficulties if it were to comply. Guidance has been issued on the process for obtaining an exemption: *Information for local authorities on exemptions from the requirements of the Welfare Reform and Work Act 2016 and related regulations* (DCLG, 26 May 2016). It sets out an expectation that a local authority should explore thoroughly what it can do to mitigate any financial risk without recourse to an exemption, including looking at all contractual commitments.

A new briefing paper from the House of Commons Library provides information on the 'pay to stay' scheme, which would impose higher rents on higher income tenants of social housing, and explains those details of the mandatory scheme that have been announced to date: *Social housing: 'pay to stay' at market rents* (No 06804, 23 May 2016).

Social housing allocation

The House of Commons Library has published an updated version of its helpful briefing paper *Allocating social housing* (England) (No 06397, 18 May 2016), which describes the operation of Housing Act (HA) 1996 Part 6.

Renting to migrants

In May 2016, the Home Office published updated versions of:

- its guidance to help landlords, homeowners and letting agents carry out the necessary right to rent checks: *A short guide for landlords on right to rent*; and
- its code of practice for landlords, homeowners and letting agents affected by the introduction of right to rent immigration checks: Code of Practice on Illegal Immigrants and Private Rented Accommodation.

New housing law

A new Renters' Rights Bill has been introduced in the House of Lords by Baroness Grender. It would:

- give prospective tenants access to a database of rogue private landlords;
- prevent such landlords from obtaining houses in multiple occupation (HMO) licences;
- control fees charged to tenants; and
- make electrical safety checks mandatory.

The bill had a second reading on 10 June 2016 (*Hansard* HL Debates Vol 773, col 972).

The Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) Order 2016 SI No 587 came into force on 20 June 2016. It designates the parishes listed in the Schedule to the Order as rural areas under HA 1985 s157(1)(c) and provides for Chichester, the Malvern Hills, Shropshire and Wychavon to be designated regions under s157(3) in relation to dwelling-houses in the designated rural areas.

The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2016 SI No 518 came into force on 1 June 2016. By the Order, the secretary of state approves a code of practice relating to the management of residential property by landlords and others who discharge the management function. The approved code is the Service Charge Residential Management Code, published by the Royal Institution of Chartered Surveyors (RICS). The section of that code headed 'RICS guidance notes' has not been approved.

The Houses in Multiple Occupation Act (Northern Ireland) 2016 received royal assent on 12 May 2016. Its purpose is to enable better regulation of HMOs in Northern Ireland, by introducing a system of licensing and new provisions about standards of housing. It also streamlines the definition of HMOs and clarifies the law. The Act will be brought into force by departmental orders (s90).

Landlord possession claims

In the three months January to March 2016, 38,053 landlord possession claims were started in county courts, down 10 per cent from the same quarter in 2015: *Mortgage and landlord possession statistics in England and Wales: January to March 2016* (Ministry of Justice, 12 May 2016). The majority (63 per cent) were social landlord claims but this proportion has fallen from 83 per cent in 1999. In contrast, 23 per cent of claims made were accelerated claims brought under Civil Procedure Rules (CPR) 55 Pt II and this proportion has risen 11 percentage points since January to March 2009. There were 29,049 orders for possession, 19,728 warrants of possession and 10,968 repossessions by county court bailiffs, down eight per cent, five per cent and three per cent, respectively, on the same quarter last year. The seasonally adjusted figures for repossessions by bailiffs show an increase of five per cent when compared with October to December 2015, reversing the downward trend seen over the previous three quarters.

The Legal Aid Agency has published an updated list of all its funded housing possession court duty schemes in county courts in England, arranged alphabetically by court and identifying the current LAA contract holder for each court: *All housing possession court duty schemes and service providers* (May 2016).

Homelessness

A new House of Commons Library briefing paper reviews the practice, adopted by many local housing authorities in England, of requiring assured shorthold tenants who have been served with a notice of the landlord's intention to seek possession under HA 1988 s21 to remain in occupation until a possession order or bailiff's warrant has been obtained, before accepting a statutory duty under the homelessness provisions of HA 1996 Part 7: *Applying as homeless from an assured shorthold tenancy (England)* (No 06856, 17 June 2016).

A new Shelter briefing paper examines the recent rise in the number of

homeless households being placed by local housing authorities in England in temporary accommodation outside their home areas: *Home and away: The rise in homeless families moved away from their local area* (May 2016). It considers what is driving this rise; the impact on households and local authorities; the policies and practices that are governing its use; and areas where changes are needed. The research focuses on what is happening in London, with lessons for other areas of England. To accompany the Shelter briefing, a new guide has been issued: *Best practice in placing homeless households in temporary accommodation out of area* (National Homelessness Advice Service, May 2016). The practice examples come from local authorities.

Housing conditions

The worst housing conditions are to be found in the private rented sector. A new House of Commons Library briefing paper looks at the possible adoption of a minimum property standard, compared with the current risk-assessment-based model of the Housing Health and Safety Rating System (HHSRS): *Housing fitness in the private rented sector* (No 7328, 24 May 2016). Issues reviewed include the regulatory burden on landlords and inconsistent interpretation and enforcement of the HHSRS.

Help with housing costs

In May 2016, the Department for Work and Pensions published an updated version of its guidance for local authorities on handling applications made by tenants for discretionary housing payments: *Discretionary housing payments guidance manual including local authority good practice guide*.

Human rights

Article 8

- **McDonald v McDonald**
  [2016] UKSC 28,
  15 June 2016

Ms McDonald had a mental disorder. Her parents raised money from Capital Homes Ltd to buy a property so that she could have a place to live for the foreseeable future. The money was secured by a mortgage. The conditions of the mortgage prohibited the grant of a tenancy to a tenant who was assisted by social security. Mr and Mrs McDonald granted their daughter an assured shorthold tenancy. Ms McDonald paid the rent with housing benefit and Mr and Mrs McDonald used that money to pay the sums payable to Capital Homes Ltd. They became unable to pay the mortgage instalments. The mortgagee appointed receivers, who, as agents of Mr and Mrs McDonald, served a HA 1988 s21(4) notice seeking possession. Ms McDonald defended the subsequent possession claim, contending that a possession order would infringe the right to respect for her home guaranteed by article 8 of the European Convention on Human Rights (ECHR). HHJ Corrie made a possession order. Ms McDonald appealed. The Court of Appeal dismissed her appeal ([2014] EWCA Civ 1049; September 2014 *Legal Action* 44).

The Supreme Court dismissed a further appeal. Lord Neuberger and Lady Hale, in a joint judgment with which the other justices agreed, stated:

In the absence of any clear and authoritative guidance from the Strasbourg court to the contrary … it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants (para 40).

The statutory provisions reflected the state's assessment of where to strike the balance between the article 8 rights of residential tenants and the article 1 of Protocol No 1 rights of private sector landlords when their tenancy contract has ended. They continued:

To hold otherwise would involve the convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the convention is … to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the convention could be invoked to interfere with the A1P1 rights of the landlord, and in a way which was unpredictable (para 41).

After reviewing a number of Strasbourg authorities (but not *Ivanova and Cherkezov v Bulgaria* App No 46577/15, 21 April 2016; [2016] ECHR 373; June 2016 *Legal Action* 40, which was published after argument in *McDonald*), Lord Neuberger and Lady Hale concluded: ' … while we accept that the Strasbourg court jurisprudence … does provide some support for the notion that article 8 was engaged … there is no support for the proposition that the judge could be required to consider the proportionality of the order which he would have made under the provisions of the 1980 and 1988 Acts. Accordingly, … we would dismiss this appeal … ' (para 59).[1]

Possession claims

Possession claims online

- **Crosby v Birmingham City Council**
  Birmingham Civil Justice Centre,
  8 March 2016

Birmingham granted an introductory tenancy to Ms Crosby for a trial period of one year. Rent arrears accrued and Birmingham served a HA 1996 s128 notice. Ms Crosby did not request a review. Nevertheless, the council carried out a review and wrote to Ms Crosby stating that it would go to court to evict her. It issued a claim form through the Possession Claim Online (PCOL) procedure (CPR 55.10A). A district judge made a possession order and a warrant was issued. Ms Crosby applied to suspend the warrant

Although the court had no power to do so, it adjourned that application and, in the meantime, Ms Crosby appealed the possession order.

On appeal it was argued that the PCOL claim form provided that the landlord must give the 'grounds for possession' as 'rental arrears' or 'mortgage arrears'. It was suggested that the council must have completed the 'rental arrears' option. It was argued that although rent arrears might have been the reason for seeking eviction, they were not 'the ground'. HHJ Worster rejected that argument. He was satisfied that 'grounds' did not mean statutory grounds. It was a looser term.

It was also argued that CPR Practice Direction (PD) 55B para 5 provides that: 'A claim may be started online if … it includes a possession claim for residential property by (a) a landlord against a tenant, solely on the ground of arrears of rent.' HHJ Worster stated that the use of the word 'solely' was a good indication that the procedure was not intended to deal with anything other than claims where the issue was rent arrears. The online forms were not designed for an introductory tenancy claim: 'PCOL should not be used for possession claims in introductory tenancy cases' (para 32). The council had started the claim 'using the wrong procedure'. However, he continued:

There is no litigation advantage short of a lesser issue fee and some saving in time. There is no prejudice to the other party. The presence or absence of prejudice to the other party is often the decisive factor in whether to strike out for abuse of process … If the use of PCOL … had removed the scrutiny of the court, or changed the procedure to the detriment of the other party, then I could see that there would be a good argument for saying this was an abuse of process. But it has not. The merits of this claim have been unaffected by the use of PCOL (paras 37 and 40).

It would have been a disproportionate reaction to an irregularity to set aside the possession order. HHJ Worster only allowed the appeal to the extent that he disallowed the council its costs of issue.

Only or principal home

- **Westminster City Council v Ageymang**[2]
  County Court at Central London,
  12 October 2015

In 1999, Westminster granted Mr Ageymang a secure tenancy of a two-bedroom property. In 2007, he commenced employment in West Africa. His cousin and child moved into the property. Subsequently, the cousin's partner and child also moved in. In 2014, Westminster suspected that Mr Ageymang did not occupy the property as his only or principal home, so that the 'tenant condition' in HA 1985 s81 was not satisfied, and so had lost security of tenure. Westminster served a notice to quit and issued a claim for possession.

Deputy District Judge Ackland found that since 2007 other people had lived at the property and that Mr Ageymang 'probably spends less than six months a year in the UK'. The court found that he wished to retire in the UK. His absence was sufficiently continuous and lengthy for the presumption to arise that he did not occupy the property as his only or principal home. However, he intended to return to the UK permanently sometime between September 2019 and September 2025. It was reasonably practicable for him to do so. That timeframe was 'reasonable' and therefore the presumption had been rebutted. Westminster appealed.

HHJ John Mitchell dismissed the appeal. He took judicial notice that in London demand for housing outstrips supply and held that this was a matter which should be considered when determining what was a reasonable time in which to return. However, in view of the defendant's frequent and regular contact with the property, four to ten years was a reasonable period. Had it not been for his frequent returns to the property, four to ten years might not have been a reasonable period in which to return.

Surrender and re-grant

- **Haringey LBC v Ahmed and Ahmed** [2016] EWHC 1257 (Ch), 27 May 2016

In 1988, Mr Ahmed and Ms Shaheeda Ahmed moved into a four-bedroom house under a joint secure tenancy granted by Haringey. Although it purported to be in both of their names, only Mr Ahmed signed the agreement. For reasons that were unclear, shortly afterwards and before the family entered possession, Mr Ahmed and his mother Mrs Hasna Ahmed entered into a second joint tenancy of the property. Before the second tenancy was entered into, there was no agreement to surrender the first tenancy. In 2002, Mr Ahmed left the property. He requested that the tenancy be transferred into the names of his wife and mother as joint tenants. Mr Ahmed and his mother agreed to terminate the second tenancy and, in 2006, a third tenancy was granted to Mrs Hasna Ahmed as a sole tenant. In 2010, Mrs Hasna Ahmed left the property and served a notice to quit to determine the third tenancy. Haringey then brought a claim for possession of the property.

HHJ Jarman QC dismissed the claim. Mr Ahmed had signed the first tenancy as Ms Shaheeda Ahmed's agent. The first tenancy, to which Ms Shaheeda Ahmed was a joint tenant, had never been determined. As both the second and third tenancies were granted to different people they did not take effect as a surrender and re-grant of the first tenancy. The second and third tenancies therefore took effect as concurrent tenancies. The notice to quit had only determined the third tenancy and Haringey was therefore not entitled to possession.

Public authorities

- **R (Macleod) v Governors of Peabody Trust** Court of Appeal, 10 May 2016

Mr Macleod has applied for permission to appeal from the Administrative Court's dismissal of his application for judicial review of Peabody's decision to refuse the exchange of his assured tenancy with a Scottish secure tenancy. The Administrative Court had found that Peabody had not been exercising a public function in relation to his tenancy ([2016] EWHC 737 (Admin); May 2016 *Legal Action* 40).

Service charges

- **Christopher Moran Holdings Limited v Carrara-Cagni** [2016] UKUT 152 (LC), 22 March 2016

Christopher Moran Holdings (CMH) was both the head lessee of a block of flats and the sub-lessee of a penthouse flat. Ms Carrara-Cagni was the sub-lessee of another flat in the building. Two conservatories, enclosing sections of a roof terrace, were added to the building in the early 1970s, at a time when none of the parties had any interest in the building. In 2012, CMH commenced a programme of major works to the exterior of the building, at a cost of almost £1.38m. The works included the installation of new windows and patio doors in each of the flats. The penthouse conservatories, which were in a poor state of repair, were demolished and rebuilt at a cost of £91,334. CMH claimed that the other sub-lessees were liable to contribute through service charges to the cost of works that it had carried out to the conservatories. In 2015, Ms Carrara-Cagni applied to the First-tier Tribunal (FTT) under Landlord and Tenant Act 1987 s27A for a determination of her liability to contribute towards the cost of the works. CMH claimed that the conservatories were part of the main structure of the building, which it covenanted to repair at the expense of the service charge.

The FTT found that the conservatories had been constructed in breach of an absolute prohibition on alterations contained in the head-lease and a similar prohibition in the sub-lease of the penthouse flat and so the sub-lessees were not liable to contribute towards the cost of their repair, but instead should contribute a lesser sum which the FTT considered would have been required to be spent on repairs to the original structure if the conservatories had never been built. CMH appealed.

Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), allowed an appeal. It turned entirely on the proper construction of the terms of the underleases. The finding that the conservatories had been constructed in breach of the covenants in the underlease was not justified on the evidence, and was supported only by the apparent concession that the underlease had been granted before the conservatories were constructed. There was no basis on which it could be inferred that the conservatories were created after the date of grant. The sum disallowed by the FTT could properly be added to the service charge.

Harassment and eviction

- **Tyto v Narang**[3] County Court at Brentford, 12 May 2016

The defendant landlord, through an agent, granted a six-month assured shorthold tenancy to the claimant at a rent of £850pcm. The claimant, her husband and their three daughters moved into the property. The claimant had previously paid the agent £1,500, comprising £750 rent in advance and £750 deposit in relation to another property owned by a different landlord. The agent carried those sums over. The tenancy agreement made no reference to a deposit and no money was protected in an authorised tenancy deposit scheme. The tenancy agreement contained no term prohibiting the claimant from sharing possession. The defendant alleged that the claimant was in breach of her tenancy agreement by moving the other members of her family into the property and asked her to leave. When the family did not leave, he excluded them by fitting a new lock. The local authority provided emergency accommodation comprising a single room with a shared bathroom and kitchen. The claimant obtained an injunction requiring the defendant to readmit her and not to interfere further with her quiet enjoyment of the property. However, he refused to readmit the other members of the family, on the basis that they were not named in the order. The defendant's agent and family were verbally abusive and the claimant and her family returned to the local authority accommodation. The claimant brought a claim for damages for trespass to land and breach of quiet enjoyment in respect of her unlawful eviction, trespass to goods and failure to protect her tenancy deposit. The defendant did not attend the trial.

Deputy District Judge McConnell struck out the defence and gave judgment for the claimant in the sum of £29,394.15 as follows:

- £22,540 for trespass to land and breach of quiet enjoyment, representing £140 per night for 161 nights in the local authority accommodation until a date one month after the expiry of the fixed term, being the notional date by which the defendant could lawfully have gained possession (adopting the approach taken in *Kazadi v Martin Brooks Lettings Estate Agents Ltd and Faparusi*, September 2015 *Legal Action* 51, and the range of nightly rates in other cases as summarised in *Aiyedogbon v Best Move Estate Agent Ltd*, June 2012 *Legal Action* 35);
- £1,095 in special damages for possessions lost in the eviction;
- £650 under HA 2004 s214(3A), in repayment of the claimant's tenancy deposit (although the written tenancy agreement had contained no deposit term, such a term could be inferred from the retention of monies by the agent that were originally paid as a deposit – albeit to a different landlord – and not accounted for by the requirement to pay one month's rent in advance, together with the agent's account statement to the defendant which made reference to a deposit);
- £1,625 under HA 2004 s214(4), being 2.5 times the deposit, on the basis that it was 'precisely the sort of case that illustrates why protection is needed', there had been a professional agent, and there had been a denial that a deposit had been taken;
- £1,500 in aggravated damages and £1,500 in exemplary damages, noting that the awards were towards the lower end of the range, on the basis that the 'circumstances on the grounds were relatively low key' and the defendant had acted in part on the basis of a misunderstanding that the claimant was in breach of her tenancy; plus
- interest of £484.15.

- **Sypniewski v Wakelin**[4] County Court at Bournemouth, 21 December 2015

Mr Sypniewski had an assured shorthold tenancy. He paid a deposit of £400 during the fixed term. The term expired, creating a statutory periodic assured shorthold tenancy. He claimed damages for breach of covenant, wrongful eviction, harassment and interference with goods, and applied to commit the landlord for contempt. The torts included:

- disconnecting the utilities between 13 September 2015 and 14 October 2015;
- changing the lock on 10 October 2015, thereby evicting him, and not readmitting him until ordered to do so on 14 October 2015;
- installing CCTV cameras and motion-activated lights to spy on Mr Sypniewski;
- smashing the windscreen and windows of the tenant's truck and two cars;
- disconnecting the utilities on 18 November 2015 (and not reconnecting them);
- on 19 December 2015, wrongfully evicting Mr Sypniewski for a second time, by giving the police false information.

The landlord also failed to comply with any of the tenancy deposit provisions of the HA 2004. At the start of the trial, the landlord was debarred from defending, due to a failure to comply with directions, including the filing of evidence.

Describing Mr Wakelin's actions

as among the worst he had seen, consisting of a sustained campaign, District Judge Willis awarded damages of £31,514.90 assessed as follows:

- General damages: £17,720
- Aggravated damages: £2,000
- Exemplary damages: £5,750
- Statutory damages: £2,400 plus £400 deposit
- Special damages: £3,000
- Interest: £244.90

The district judge awarded a further £8,000, payment of which was to be suspended on condition that the landlord return the claimant's belongings.

- **Begache v Noreen**[5]
  County Court at Birmingham, 29 March 2016

Ms Noreen, a landlord, evicted her tenant, Mr Begache, who was a single man, while he was on holiday. Ms Noreen then began to use the property as her family home. When the tenant returned from holiday, he obtained an interim injunction requiring his readmission. The landlord initially failed to comply and there was an incident involving pushing and shoving. When the tenant was readmitted, the property was dirty and some of his belongings were missing. The tenant stayed with friends while excluded from the property.

District Judge Kelly made a final injunction protecting the tenant's quiet enjoyment of the property, and awarded £6,675 in damages, calculated as follows:

- £200 per night for the 16 nights the tenant had to stay elsewhere;
- £300 for the period of perhaps one week while the tenant was on holiday, and unaware that he had been dispossessed, but the landlord was in possession (a sum greater than the amount of rent for that period);
- £250 for the poor state of the property upon readmission;
- £425 for missing possessions;
- £1,500 in aggravated damages; and
- £1,000 in exemplary damages.

Regarding costs, the trial had been split over two days in November 2015 and March 2016. Between the two dates, the tenant had made a Part 36 offer, which he beat at trial. Because the offer was not made '21 days before trial', the full Part 36 consequences did not apply (CPR 36.17(7)(c)), but the court decided that the beating of the offer nevertheless justified assessing costs on the indemnity basis from the expiry of the period for acceptance of the offer (essentially the costs of the second day of trial).

Housing allocation

- **R v Ali-Balogun and others**
  Inner London Crown Court, 4 May 2016

The defendant was a housing officer at Southwark Council. In return for bribes, she altered council records to show applicants were 'homeless', when some owned homes that they were renting out and others were in the UK illegally. She approved at least 23 bogus applications for housing between 2003 and 2005, which included applications based on fake birth certificates, passports and wage slips. At trial, she was found guilty of misconduct in public office. Sentencing her to five years' immediate imprisonment, HHJ Mark Bishop said that as a result of her conduct: 'At least 20 properties were occupied by tenants not entitled to occupy them and they occupied them for many years.'

The court also imposed sentences on some of the applicants involved in the frauds. They were found guilty of obtaining services by deception or attempting to do so and were sentenced to periods of imprisonment, suspended sentences and community service. The council is seeking to recover possession of the properties let in the course of the fraud, some of which were later purchased under the right to buy at a discount.

Homelessness

Priority need

- **Mohammed v Southwark LBC**[6]
  County Court at Central London, 18 December 2015

Mr Mohammed applied to Southwark for homelessness assistance. He provided a GP's letter stating that he suffered from depression, was prescribed anti-depressants and was awaiting therapy. Later, Mr Mohammed's brother was murdered. He was badly affected. The council applied the test in *Pereira* and found that Mr Mohammed was not 'vulnerable': HA 1996 s189(1)(c). On review, a letter was provided from an NHS psychological therapist. It set out the results of a mental state assessment, in which Mr Mohammed was found to be in the moderate to severe range for both depression and anxiety. The letter mentioned that he was experiencing bereavement after the death of his brother and that should he be made homeless 'it will have a significant impact on his well-being and ability to cope, and likely increase his symptoms of low mood and anxiety and it would also significantly impact on his ability to engage with counselling sessions …'.

The council served a 'minded to' letter acknowledging that in light of the Supreme Court decision in *Hotak v Southwark LBC* [2015] UKSC 30 there had been a deficiency in the original decision, but it was minded to uphold the finding of no priority need. Further representations were made to the effect that, if homeless, Mr Mohammed would be significantly more vulnerable than an ordinary homeless person. The council made no enquiries of the NHS psychological therapist, nor did it obtain its own medical advice. It issued a review decision upholding the finding of no priority need.

Recorder Hochhauser QC allowed an appeal. In the absence of guidance from *Hotak* as to the meaning of the term 'significantly' (in the phrase 'significantly more vulnerable' adopted in that case), he held that – by analogy with the definition of 'substantial' in Equality Act (EA) 2010 s212 – it simply meant 'more than minor or trivial'. He further held that if clinical depression is a 'mental illness' for the purposes of HA 1996 s189(1) or a 'disability' for the purposes of EA 2010 s149(1), which in his judgement it was, and an applicant was likely to suffer more harm by the exacerbation of that mental illness by reason of being rendered homeless than an ordinary person would, then he or she is to be regarded as vulnerable for the purposes of s189(1)(c).

A fair reading of the medical evidence was that, if rendered homeless, Mr Mohammed's mental illness and his disability would worsen, and therefore he was significantly more vulnerable than ordinarily vulnerable. Before departing from the tendered prognosis, any reasonable council, complying with the public sector equality duty, would have made further enquiries of the psychological therapist or obtained its own medical advice. The fact that the council did not was evidence that it did not approach the matter 'with rigour' as required by *Hotak* (at para 78). The decision was one that no reasonable council could have reached without making further enquiries.

Intentional homelessness

- **EC v Stirling Council**
  [2016] ScotCS CSOH 55, 20 April 2016

The claimant was a private sector tenant. In April 2015, she was served with a notice setting out 10 reasons why the landlord had decided to terminate the tenancy. In May 2015, she renewed her application for housing benefit to pay her rent for the property. In June 2015, she applied to Stirling for homelessness assistance. She said that: she had recently left her flat to move in with her boyfriend; it was her intention to form a stable relationship with him and to reside with him on a long-term basis; her boyfriend had later reverted to his use of heroin; she did not want to continue residing with him in these circumstances; and so she had left. The council made enquiries at the boyfriend's address but he did not respond. It decided that her last settled accommodation had been at her own flat and that she had become homeless intentionally from it. That decision was upheld on review.

The claimant sought judicial review, contending that the accommodation with her boyfriend had broken the chain of causation since her abandonment of her flat, and that she had become homeless from her boyfriend's accommodation through no fault of her own.

After reviewing the authorities on the extent to which obtaining settled accommodation can amount to a supervening event capable of breaking the chain of causation from earlier intentional homelessness (up to and including *Haile v Waltham Forest LBC* [2015] AC 1471), Lord Clarke dismissed the claim. He said (at paras 18–19):

The expression 'settled accommodation' does not find its place in the relevant statutory provisions. It is, it appears, a product of judicial law making that has been employed by the judiciary in the cases discussed. As Ackner LJ pointed out, however, what is a 'settled residence' is a question of fact and degree depending upon the circumstances of each individual case. The Shorter Oxford English Dictionary *defines 'settled' as 'fixed, established, unchanging'. Lord Neuberger in* Haile *at paragraph 80 referred to 'permanent rehousing after the deliberate homelessness' as capable of breaking the chain of causation.*

Provided the [council] understood and applied the law in question correctly, in accordance with the statutory provisions as explained by the courts, the questions of fact involved were for them and them alone. It is not the function of this court in a petition for judicial review to open up their decision on the facts ***provided****, their conclusions are based on facts and evidence which can support their conclusion* (emphasis in original).

On the facts, there had been ample material to justify the council's conclusion that the accommodation with the boyfriend was not 'settled'. Lord Clarke said (at para 21):

I am satisfied that they approached the legal question that they had to ascertain in this case, correctly, and

exercised their judgment in relation to a matter which is one of fact and degree in a way that was entirely legitimate. They were entitled to hold that the effective cause of the petitioner's homelessness was her previous intentional conduct, but for which she would not have been homeless.

Discretionary accommodation and advice and assistance

- **R (Smajlaj) v Waltham Forest LBC** [2016] EWHC 1240 (Admin), 26 May 2016

Ms Smajlaj was a single woman and an Albanian national. She was acknowledged to have been the victim of human trafficking to the UK and she was granted one year's discretionary leave to remain. She applied to Waltham Forest for homelessness assistance. It provided interim accommodation but, after enquiries, issued a decision that, although she was homeless and had not become homeless intentionally, she did not have a priority need. The decision letter (HA 1996 s184) indicated that the interim accommodation would be withdrawn a week later and added that:

We do however, have a duty to offer you advice and assistance to help find your own accommodation … Kindly refer to the copy of the information booklet … that was given to you to assist you in your securing alternative accommodation … [As to hostels,] [i]n most cases residents have their own room and share other facilities with other residents. These hostels are however only suitable for single people. If you are interested and would like to apply to be registered on the scheme please contact the Housing Advice Team …

Ms Smajlaj sought a review (HA 1996 s202) and accommodation pending review (HA 1996 s188(3)). She also asked, in the alternative, that the council exercise its power to provide her with accommodation: HA 1996 s192(3). The council declined to provide accommodation and Ms Smajlaj sought judicial review.

Her grounds were: (1) that the council had failed properly or at all to make a decision under s192(3) either by failing to make any decision at all or by failing to make a housing needs assessment prior to making any decision; and (2) that the council had failed properly to carry out its duty under HA 1996 s192(2) to provide the applicant with advice or assistance in any attempt she may make to secure accommodation available for her occupation, in that it had failed to carry out, prior to giving any advice, a housing needs assessment as required by s192(4), or any advice and assistance provided was inadequate.

Judge Grubb, sitting as a deputy High Court judge, allowed the claim. On the first ground, two letters, when taken together, did constitute the council's belated response to the claimant's application for accommodation under s192(3). However, even when read together, those letters did not establish that a housing needs assessment was made, or was properly made, prior to the decision not to exercise the discretion to provide accommodation under s192(3). The decision was accordingly flawed. On the second ground, the council had indeed failed to carry out its duty under s192(4) to undertake a housing needs assessment prior to carrying out its duty to provide advice and assistance under s192(2).

Suitability of accommodation

- **R (Plant) v Somerset CC and Taunton Deane BC** [2016] EWHC 1245 (Admin), 26 May 2016

The claimant established his home, without permission, on land owned by Somerset (SCC). It brought a claim for possession, intending that the land be redeveloped as a Travellers' site. The claimant applied to Taunton Deane (TD) for homelessness assistance. The possession claim was adjourned to await the outcome of that application. TD accepted that it owed the main housing duty (HA 1996 s193) because the claimant was homeless, in priority need and had not become homeless intentionally. The claimant sought judicial review against both councils to prevent possession being recovered until the homelessness duty had been fully performed.

Permission was granted and the possession claim was stayed. That enabled the claimant to remain in his home as 'temporary accommodation' pending discharge of TD's duty. TD then made an offer of a one-bedroom bungalow, which the claimant refused. He claimed that he needed remotely situated and quiet accommodation. The council decided that the offer had been suitable and that its duty had ended: s193(7). That decision was upheld on review. The claimant filed an appeal in the county court: s204. In that appeal, the council accepted that the reviewing officer had failed to take account of particular medical evidence and the appeal was determined by consent. The council proposed to conclude a further review in May 2016.

However, in April 2016 the judicial review claim came to trial. The claimant sought a quashing of the decision by SCC to proceed with the possession claim, contending that to do so before he had adequate alternative accommodation infringed his rights under article 8 of the ECHR.

Cheema-Grubb J dismissed the claim. She said (at paras 44 and 46):

SCC does not owe any duty to C to provide a home. … I am quite satisfied that an action to seek recovery of possession of the land occupied by C as a trespasser for over three years now is proportionate and that SCC is not in breach of its public law duties or C's convention rights by pursuing its possession order now. … During the years that this claim has been before the court the circumstances have moved on, the claim as originally formulated against SCC is academic and, as I have already stated, the effect of TDBC firstly accepting, and then discharging a housing duty towards C makes a fundamental difference to the proportionality arguments.

The claimant's interests were sufficiently protected by the review underway, the possibility of an appeal to the county court against any adverse review decision, and the discretionary powers of TD to provide accommodation pending review and/or appeal.

Challenging decisions

- **R (Smajlaj) v Waltham Forest LBC** [2016] EWHC 1240 (Admin), 26 May 2016

This claim for judicial review (see facts above) also raised an issue as to whether the way in which a council performed (or failed to perform) a duty it owed to a homeless person, or as to how it addressed a power vested in it, could be the subject of a statutory review under HA 1996 s202. On that question the judgment states (at para 139):

Putting it succinctly, the s184 decision determines what, if any, of the duties set out to persons who are homeless or threatened with homelessness arise under Part 7. Consequently, a decision (such as the s184 decision in the present case) that determines that the housing authority is satisfied that the individual is homeless (but not intentionally), eligible for assistance but is not satisfied that she has a priority need, means that a decision is made that the duties in s192 are owed to the claimant rather than (if the defendant had also been satisfied that the claimant was a 'priority need') that the 'full' duty in s193 is owed to the claimant. The claimant's dispute with the defendant that she has a 'priority need' is a dispute as to 'what duty' is owed to the claimant under 'ss190 to 193 and 195 and 196' falling within s202(1)(b). By contrast the claimant's challenge to the discharge or exercise of the obligation under s192 – to provide advice and assistance under s192(2) and to consider whether to provide accommodation on a discretionary basis under s192(3) – is not a challenge to a decision as to 'what duty' is owed to the claimant falling within s202(1)(b) of the Housing Act 1996. It is a challenge to the legality of the exercise (or failure to exercise) the statutory duty which it is accepted applies to the claimant.

The only provision permitting statutory review of the manner in which a duty was discharged was s202(1)(f), which enables a review of the 'suitability' of accommodation provided. Other challenges to the way in which a duty was being performed (or not performed), or to the failure to exercise a power, could only be pursued by judicial review.

Appeals

Costs

- **Lopes v Croydon LBC** [2016] EWCA Civ 465, 24 May 2016

Ms Lopes applied to Croydon for homelessness assistance. It decided that she had accommodation in Portugal and was not 'homeless'. That decision was upheld on review. Ms Lopes lodged an appeal under HA 1996 s204 seeking an order that the review decision be varied to a finding that she was 'homeless'. In those proceedings, she filed a witness statement exhibiting a new letter from the owner of the property in Portugal indicating that Ms Lopes could not live there. The council accepted that this was new material, which could support a fresh application for homelessness assistance, and indicated that it would be prepared, instead, to withdraw its review decision and reopen its enquiries.

In those circumstances, Ms Lopes should have requested the dismissal of her appeal (CPR PD 52A para 6). Instead, an order was agreed allowing her to 'withdraw' the appeal on the basis that the court would determine questions of costs on the papers following submissions. HHJ Bailey made the order sought and later awarded Ms Lopes 85 per cent of her costs (abated from 100 per cent to reflect the fact that she had not achieved all the relief sought – variation of the review decision – but merely its withdrawal).

The Court of Appeal (sitting as judges of the High Court) granted the council permission to appeal to the High Court against the costs order. The council had 'a realistic prospect of establishing that

the judge was in error' because:

In short the council was, originally and on review, entitled to make the findings that it did. What then happened was that the appeal was rendered academic by the production of the ... letter. That could realistically be said to be good reason not to award the applicant her costs. The council should have recovered its costs subject to the costs protection provided for a legally aided litigant. At the highest there should have been no order as to costs – the default order envisaged by Stanley Burnton LJ in R (M) v Croydon London Borough Council *[2012] 1 WLR 2607 [77] (para 70).*

Comment: The latest review of the principles governing the question of what costs order should be made on the compromise of claims and appeals from decisions of public authorities is given in *R (Tesfay and others) v Secretary of State for the Home Department* [2016] EWCA Civ 415 at paras 5–15.

Second appeals

- **Handley v Lake Jackson (and other appeals)**
  [2016] EWCA Civ 465,
  24 May 2016

The Court of Appeal listed three cases together (including *Lopes* above) to give guidance on the correct route of appeal in relation to, inter alia, decisions made by circuit judges in the county court on HA 1996 s204 appeals. Normally, an appeal from a decision made on a s204 appeal would be a 'second appeal' to the Court of Appeal, for which only that court could give permission to appeal: Access to Justice Act 1999 s55 and CPR 52.13. The Court of Appeal held that this restriction only applies where there has been a 'hearing of the appeal' in the county court. It does not apply to decisions made on the papers or otherwise made without the appeal being heard. The correct position is (see para 54):

i) If the county court judge has heard the appeal and ruled on the issues ... any appeal will lie only to the Court of Appeal. Permission must be sought from the Court of Appeal and the second appeal test will apply.

ii) In respect of the costs of the appeal to the county court, any appeal will lie to the Court of Appeal;

iii) It would be open to the county court judge to grant permission to appeal to the Court of Appeal in respect of the costs of the appeal to the county court and the normal test for permission will apply. It would also be open to the Court of Appeal to grant permission applying the same test.

iv) If there has not been what can properly be regarded as a hearing of the appeal, any appeal (which is almost certainly to be one on costs) is to the High Court judge and the normal test will apply.

Accordingly, in the *Lopes* case, the correct route of appeal in respect of the costs order made without the homelessness appeal having been heard was to the High Court, and either the county court judge or the High Court could have given permission to appeal applying the usual test for permission to appeal.

Housing and children

- **R (N) v Greenwich LBC**
  CO/2533/2016,
  25 May 2016

The claimant was a child, aged seven, and a French citizen. His mother was a Gambian national who had overstayed her visitor's visa. She was not eligible for housing. She and the child were evicted from their accommodation and applied to Greenwich for housing. The council produced an assessment report and a decision that the claimant was not a 'child in need' under Children Act (CA) 1989 s17. The claimant applied for judicial review of that decision and for an interim injunction to require provision of accommodation pending the claim. It was submitted that: (1) the decision that he was not a child in need was unreasonable and irrational; (2) the 'right to rent' restrictions in Immigration Act (IA) 2014 s21 deprived his mother of the option to rent privately pending the hearing, due to her immigration status; and (3) they would become street homeless without interim accommodation. The council argued that they could stay with friends or family members, or in bed and breakfast accommodation.

Andrew Thomas QC, sitting as a deputy High Court judge, granted the injunction application. The judicial review claim raised a strong prima facie case because: (1) the assessment report had suggested friends or family as a fallback in the short term while the mother found accommodation, but it had not identified particular individuals; (2) if it was correct that the mother would be prevented from being able to rent privately due to IA 2014 s21 then there was no immediate prospect of her finding suitable accommodation in the short term; and (3) the suggestion that they stay in bed and breakfast had not been considered in the assessment report, and the actual cost of it compared with the mother's resources had not been properly considered. It would be a significant detriment to the child if he did not have appropriate accommodation and if he were separated from his mother pending the hearing of the claim, when he had never been separated from her before. The balance of convenience was on the child's side.

- **R (O) v Lambeth LBC**
  [2016] EWHC 937 (Admin),
  28 April 2016

The claimant was a child. Lambeth refused to provide accommodation and support for her and her mother under the provisions of CA 1989 s17. On the need for support, the social worker inferred that the previous sources of support, on which they had lived before presenting to the local authority, remained available, but that between the first and second assessments by the council, the mother had ceased to have funds paid into her bank account to avoid them being visible and to present a more compelling (but false) account of destitution. On the need for accommodation, the social worker assessed that the mother had access to a more extensive network of support available to her than she was prepared to disclose in the assessment and that people in her community network of friends and others could continue to accommodate her.

A claim for judicial review was pursued on the basis that it was irrational for the assessing social worker to conclude that the claimant and her mother were neither homeless nor destitute, and consequently that the assessment under s17 was unlawful.

Helen Mountfield QC (sitting as a deputy judge of the High Court) dismissed the claim. There had been an adequately detailed and thorough enquiry, and the conclusions that the assessing social worker drew from: the fact of support previously having been available over a long time; gaps and inconsistencies in the evidence; and lack of explanation for the sudden withdrawal of this support could not be castigated as irrational (see also page 34).

- **Saleem v Wandsworth LBC**
  [2015] EWCA Civ 780,
  21 July 2015

Ms Saleem was the mother of three children. She was evicted from private sector rented accommodation for rent arrears of more than £7,000. She applied to Wandsworth for homelessness assistance under HA 1996 Part 7. It provided interim accommodation but was later satisfied that she became homeless intentionally. Her rent had previously been covered by housing benefit, but that stopped because she failed to tell the relevant department that she was cohabiting with her husband. Her subsequent failure to pay rent was therefore a 'deliberate' act: HA 1996 s191. The decision letter said that the council had decided that a period of 28 days was reasonable for her to make her own arrangements for accommodation. No application was made for a review of the decision.

The council served notice to quit and, when it expired, issued the claim for possession of the temporary accommodation. Ms Saleem filed a defence alleging that the bringing of the possession claim was, and the making of a possession order would be, in breach of the duty to have regard to the best interests of children under CA 2004 s11 and that the decision to evict was not made taking account of the need to safeguard and promote the welfare of the children. At trial, District Judge Hugman made a possession order. He found that the council was entitled to refuse to conduct a needs assessment of the children until the court made a possession order and that CA 2004 s11 did not provide a defence to the claim.

The Court of Appeal dismissed an appeal. There was no duty to conduct an assessment under s11 prior to the bringing or conclusion of the possession claim. Even if there had been such a duty, the facts of the case did not show any basis for interfering with the possession order that was made, as there was no link between the making of that order and a failure to conduct such an assessment.

On 22 March 2016, an appeal panel of the Supreme Court (including the President, Lord Neuberger) refused Ms Saleem's application for permission to appeal 'because the application does not raise an arguable point of law'.

1 For a commentary on article 8 and private sector occupants, see 'Small earthquake in Bulgaria; not many dead', *Journal of Housing Law*, July 2016, page 1.

2 Anna Bennett, solicitor, Devonshires and Victoria Osler, barrister, London.

3 Muneeb Gill, MTG Solicitors and Daniel Clarke, barrister, London.

4 Catherine Hose, solicitor, Shelter Dorset Advice Service and Tony Ross, barrister, London.

5 Sean Gilmore, solicitor, Community Law Partnership, Birmingham and Tom Royston, barrister, Manchester.

6 Mensah Sarbah and Danny Dedman, solicitors, GT Stewart Solicitors and Catherine O'Donnell, barrister, London.

Nic Madge and Jan Luba QC are circuit judges. They would like to hear of relevant housing cases in the higher or lower courts. The authors are grateful to the colleagues at notes 2 to 6 for transcripts or notes of judgments.