Housing: recent developments

Jan Luba QC and Nic Madge round up important cases on human rights, possession claims, return of deposit, committal for contempt, long lessees, housing allocation and homelessness.

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Politics and legislation

Due to the large number of important decisions reviewed in this article, material that would appear in this section has been held over until next month.

Human rights

Article 8 and article 1 of Protocol No 1

- **Vrzić v Croatia**
  App No 43777/13,
  12 July 2016

In February 2009, Mr and Ms Vrzić and their company, MN, entered into an agreement with MG and his company, E, acknowledging their debt of 580,000 Croatian kunas (HRK) to MG and their company's debt of HRK180,000 to company E. In order to secure the overall loan, Mr and Ms Vrzić used their house as collateral, allowing MG to register a charge on it. It was stipulated that unless the outstanding debts were paid by 1 May 2009, the creditors would be entitled to institute enforcement proceedings for payment of the debt through the sale of the house. In October 2009, MG and his company E instituted proceedings, seeking the judicial sale of the house. The outstanding debt was HRK703,643.05. In November 2009, the Poreč Municipal Court made an order for sale and issued an enforcement order. After various further procedural steps, the house was sold at auction to MG for HRK821,040 (approximately €109,000) and title was granted to him on condition that he paid HRK821,040 as the purchase price.

Mr and Ms Vrzić appealed against that decision, arguing that the judicial sale had been disproportionate since the true value of their house had been about €700,000. The appeal was dismissed and the municipal court transferred ownership of the house to MG. Mr and Ms Vrzić complained that there had been a breach of article 8 and article 1 of Protocol No 1 to the European Convention on Human Rights.

The European Court of Human Rights (ECtHR) found that there was no breach of either article. Even though Mr and Ms Vrzić had not yet been evicted, an eviction order had been issued and might be enforced at any time. That amounted to an interference with the right to respect for their home. In considering whether the interference was prescribed by law and pursued a legitimate aim, it was primarily for the national authorities, notably the courts, to interpret and apply the domestic law, since national authorities are particularly qualified to settle such issues. The national courts' decisions ordering their eviction were in accordance with domestic law. The interference pursued the legitimate aim of protecting the buyer's lawful title to the house.

The central issue was whether the interference was 'necessary in a democratic society'. The court referred to *McCann v UK* App No 19009/04, 13 May 2008, *Ćosić v Croatia* App No 28261/06, 15 January 2009, *Paulić v Croatia* App No 3572/06, 22 October 2009, *Orlić v Croatia* App No 48833/07, 21 June 2011, *Bjedov v Croatia* App No 42150/09, 29 May 2012, and *Brežec v Croatia* App No 7177/10, 18 July 2013. However, the situation in the present case was different inasmuch as the other parties in the enforcement proceedings were either a private person, namely MG, or private enterprises, namely a bank and a company. The court continued:

[T]he approach in such cases is somewhat different and ... a measure prescribed by law with the purpose of protecting the rights of others may be seen as necessary in a democratic society ... Unlike [those other cases], [Mr Vrzić and Ms Vrzić] complain that the payment of their debts was enforced by the sale of their home ... [They] voluntarily used their home as collateral for their loan (paras 67–68).

Further:

When the enforcement order for the sale of their house was issued, [they] did not challenge that order by means of an appeal ... By not objecting to the enforcement order, which specifically concerned the sale of their house, [they] tacitly agreed to its sale in the enforcement proceedings (para 70).

The sale of [their] house in the enforcement proceedings was a consequence of [their] failure to meet their contractual obligations ... [They] agreed and accepted that the payment of their outstanding debts would be enforced through the sale of their house (paras 71–72).

There was no violation of article 8.

With regard to article 1 of Protocol No 1, even though the interference to Mr and Ms Vrzić's possessions did not involve expropriation by the state, they were deprived of their property. That interference was prescribed by law and pursued a legitimate aim, namely, protecting the creditors and the purchaser of the house. The interference was proportionate to the legitimate aim pursued. The price received by Mr and Ms Vrzić was reasonably related to the value of the property. They were not made to bear an individual or excessive burden.

The court also rejected the contention that the enforcement measures were not accompanied by procedural safeguards, but it did note that 'although article 1 of Protocol No 1 contains no explicit procedural requirements, the proceedings at issue must afford the individual a reasonable opportunity of putting his or her case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision' (para 110). The fact that Mr and Ms Vrzić could not challenge the valuation of the house as assessed by the court was attributable to their own behaviour in not actively participating in the assessment of the value of the house, even though they had an opportunity to do so at a hearing held for exactly that purpose and by submitting timely objections to the expert's valuation report. In view of this, the court could not accept their arguments concerning deficiencies in the rules of the enforcement proceedings.

Article 1 of Protocol No 1

- **Bukovčanová v Slovakia**
  App No 23785/07,
  5 July 2016

Ms Bukovčanová and the other applicants were co-owners of a residential house. The statutory rent-control scheme that applied meant they: (i) had to accept that their flats were occupied by particular tenants; (ii) could charge them no more than the maximum amount of rent fixed by the state; (iii) could not unilaterally terminate the leases; and (iv) could not sell the flats other than to the tenants. They argued that the rent-control scheme imposed restrictions on their right to peaceful enjoyment of their possessions in breach of article 1 of Protocol No 1.

The ECtHR found a breach of article 1 of Protocol No 1. It noted that in *Bittó and others v Slovakia* App No 30255/09, 28 January 2014, the court had found that: (i) the rent-control scheme amounted to an interference

with the applicants' property; (ii) that interference had constituted a means of state control of the use of their property to be examined under the second paragraph of article 1 of Protocol No 1; (iii) it had been 'lawful' within the meaning of that article; (iv) it had pursued a legitimate social policy aim; and (v) it had been 'in accordance with the general interest' as required by the second paragraph of that article; but (vi) the implementation of the rent-control scheme failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property. As a result, there had been a violation of their rights under article 1 of Protocol No 1. The court had no reason to reach different conclusions on these points in the present case. It awarded damages.

Articles 6 and 8

- **Kashchuk v Ukraine**
  App No 5407/06,
  2 June 2016

Mr Kashchuk owned a house made of beaten earth walls. In February 1996, the village where the house was situated suffered extensive groundwater flooding. Following the flood, its floors were covered with water (about 45cm deep) and the walls were damp. It was not deemed feasible to carry out repairs. A commission of experts appointed by the city council concluded that the house was dilapidated, uninhabitable and should be demolished. The council approved the report and recommended that the local authorities dealing with housing issues resettle Mr Kashchuk and others similarly affected to hostels on a temporary basis. The local authorities further recommended that he turn to his employer for help in solving his housing problem. He brought a civil claim seeking the allocation of free accommodation for his family but in 2003 the Zavodskyy District Court dismissed his claim because he had declined two offers of resettlement and had not informed the authorities of real estate that he had inherited in 1990. He complained under article 6 that the domestic proceedings had been unfair and under article 8 of a breach of his right to respect for his home.

The ECtHR dismissed the complaint. It found no indication of arbitrariness or bad faith in the domestic courts' factual and legal assessment of his case. With regard to article 8, the court observed that he neither attributed the damage caused to his home by the groundwater flooding to the state nor blamed the authorities for their failure to prevent that damage. His complaint concerned the authorities' continued failure to provide his family with free accommodation thereafter. Although 'the essential object of article 8 … is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals' (para 52). However, 'article 8 does not guarantee the right to have one's housing problem solved by the authorities nor does it give anyone the right to be provided with a home … Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision … In socio-economic matters such as housing, the margin of appreciation available to the state is necessarily a wide one' (para 53). There was no indication that the domestic authorities had acted arbitrarily or otherwise exceeded the margin of appreciation afforded to them in the field of state housing regulation. There was no failure on the part of the state to comply with its positive obligations under article 8. The complaint was rejected as manifestly ill-founded.

Possession claims

Suspended possession orders

- **City West Housing Trust v Massey; Manchester & District Housing Association v Roberts**
  [2016] EWCA Civ 704,
  7 July 2016

In both cases, the tenancy agreements contained terms that the dwelling houses were not to be used for unlawful purposes. In both cases, cannabis was grown on the premises and there was therefore a clear breach of the terms of the tenancy agreement. The tenants claimed that they were not responsible and had no knowledge of the use of their property. They were disbelieved in whole or part on their evidence. Judges made suspended possession orders, conditional on the tenants' performance of their covenants in future and mechanisms for surprise inspections of their property by their landlords. The housing associations appealed against the suspension of the possession orders.

The Court of Appeal noted that the making of suspended possession orders is necessarily a fact-sensitive exercise and concluded that the district judges were entitled to make the orders that they made and so the orders were not open to review. Arden LJ noted the circuit judge's reference to 'the generous ambit of discretion' under Housing Act (HA) 1988 s9 (para 25). In both cases, the tenants were not found to be primarily responsible for the cannabis cultivation and there was no evidence of previous offences or breaches. Both tenants expressed a willingness to comply with the terms of the tenancy in future. The Court of Appeal did give 'some limited guidance' for the future, although it made it clear 'that a judge's failure to follow this guidance would not of itself be a ground on which an appellate court could set the exercise by a judge of their discretion' (para 7). Arden LJ noted that the leading authority as to the exercise of discretion is *Sandwell MBC v Hensley* [2007] EWCA Civ 1425; [2008] HLR 22 where the Court of Appeal overturned a suspended possession order because there was no basis on which the assistant recorder could have been satisfied that the tenant would observe the terms of his tenancy in future. In that case, Gage LJ, referring to criminal convictions at the premises, said (at para 17): 'The more serious the offence, the more serious the breach. Convictions of several offences will obviously be even more serious. In such circumstances, it seems to me that the court should only suspend the order if there is cogent evidence which demonstrates … a sound basis for the hope that the previous conduct will cease' (cited at para 14 of the present judgment). Referring to 'cogent' evidence for the hope that the previous conduct will cease, Arden LJ said:

47. 'Cogent' evidence that there is a sound basis for hope that the previous conduct will cease is not simply evidence which shows there is some basis on which it could be said that the tenant will observe the terms of his tenancy in future. The adjective used by Gage LJ was not 'credible' but 'cogent'. To be 'cogent', the evidence must be more than simply credible: it must be persuasive. There has to be evidence which persuades the court that there is a sound basis for the hope that the previous conduct will cease or not recur.

48. This court has repeatedly made it clear that when making an SPO the court has to make a judgment about the future and that the focus at this stage is on the future and not the past … By stating the requirement to be 'cogent' evidence that there is a sound basis for hope for the future, the standard is pitched at a realistic level. On the one hand, the tenant does not have to give a cast-iron guarantee. On the other hand, a social landlord does not have to accept a tenant who sets out to breach the terms of his tenancy and disables the landlord from providing accommodation in more deserving cases.

49. There is no principle that the cogent evidence regarding future compliance must stem solely from the tenant himself, without any regard to how others might behave. The likelihood or possibility of action by others, or even the perception that others might take action, may in an appropriate case be evidence which supports an overall assessment that there is a real hope of compliance in the future. For example, a tenant who has mental health problems affecting his ability to comply might be able to show that his compliance in future is made likely because of support received from others. Similarly, the inclusion of an inspection condition in a SPO might provide support for an assessment that the tenant will comply in future, if his fear of being evicted is sufficiently strong and he thinks the risk of inspection is real rather than illusory.

With regard to the resources of the social landlords, judges, when framing conditions of suspended possession orders, have to be careful not to expect social landlords 'to do more than is reasonable, having regard to all the circumstances'. '[S]ocial landlords may be expected in some circumstances to be ready to take an active role, as an ordinary incident of checking on their housing stock. Similarly, the police may be expected to have a general interest in keeping an eye on what goes on in their area. It will be a matter of evaluation for the district judge whether the prospect of inspection in fact, or the perception of a risk of inspection, is sufficient to support an overall assessment that there is cogent evidence which provides real hope that the terms of the tenancy agreement will be properly respected in future' (para 50).

Dishonest evidence from a tenant does not prevent the court from finding cogent grounds, but 'even a person who genuinely wants to comply with his tenancy agreement in the future may give false evidence and make up a false story because he thinks that the truth is unlikely to be plausible or acceptable' (para 51). However, '[t]enants should realise that if they lie in their evidence to the court they run the risk that the court will find that their evidence is not to be trusted on other matters and that the court will not accept assurances from them for the future. Giving false evidence is a very serious matter and it may have very serious consequences for the tenant' (para 52). The court reiterated that an application for a suspension of a possession order involves not just the exercise of discretion but also the making of findings of fact on the basis of which the discretion is to be exercised.

Warrants

- **Southwark LBC v MM**[1]
  County Court at Lambeth,
  15 June 2016

The defendant was a secure tenant. In 2007, Southwark obtained a possession order on the ground of rent arrears but did not take any steps to enforce it. Later, the council applied under Civil Procedure Rules r83.2(3)(a) for permission to issue a warrant as the possession order was more than six years old. However, in December 2015, the defendant had to leave work after being diagnosed with depression. She was also undergoing tests for dementia and was under the care of a consultant and the memory clinic. She was struggling to manage her rent due to her memory problems. In opposing the application, it was submitted that, due to the change in circumstances, Southwark should bring new proceedings so that the defendant could file a defence based on reasonableness and any Equality Act 2010 argument.

After considering *Duer v Frazer* [2001] 1 WLR 919, District Judge Burns dismissed Southwark's application due to the significant change in the defendant's circumstances since the possession order was made.

Return of deposit

- **Yeomans v Newell**[2]
  County Court at Canterbury,
  25 May 2016

The landlord granted an assured tenancy in 2011. A deposit of £300 was taken but not protected with the Deposit Protection Service (DPS) until November 2015. On 22 December 2015, the landlord authorised DPS to return the deposit. On 23 December 2015, a HA 1988 s21 notice was served. However, the tenant did not actually receive the deposit money via DPS until 19 February 2016. The tenant defended the subsequent possession claim on the basis that the deposit had not been returned in full when the s21 notice was served.

The court accepted the analogy of the return of a deposit by cheque even when the cheque had not been cashed. The tenant 'had the ability' to obtain the deposit money once it had been authorised for full repayment. The court held that the deposit had been 'returned in full' on 22 December 2015 because it was 'available to the tenant' from that date, prior to service of the s21 notice.

Note: Cf *Ahmed v Shah*, County Court at Bradford, June 2015.[3]

Committal for contempt

- **Gill v Birmingham City Council**
  [2016] EWCA Civ 608,
  28 June 2016

In 2012, Birmingham obtained an injunction preventing Mr Gill from harassing a former partner who was a secure tenant. She alleged that he breached the injunction between December 2015 and January 2016. He was arrested and charged with harassment and other public order offences. Birmingham applied to commit him for breach of the injunction in respect of those matters and other less serious complaints. He pleaded guilty in the magistrates' court and was sentenced to six weeks' imprisonment. In Birmingham's committal application, he admitted the incidents to which he had pleaded guilty but denied others. All the allegations were found proved. HHJ Wall sentenced him to 14 months and 23 days' imprisonment. He appealed.

The Court of Appeal allowed the appeal. The relevant approach that should be taken by courts where there are concurrent criminal and committal proceedings in respect of the same incident or incidents is set out in *Lomas v Parle (Practice Note)* [2003] EWCA Civ 1804; [2004] 1 WLR 1642 at paras 46–49. The first court to sentence must not anticipate or allow for a likely future sentence. It is for the second court to reflect the prior sentence in its judgment, in order to ensure the defendant is not punished twice for the same act. It is essential that the second court should be fully informed of the factors and circumstances reflected in the first sentence. HHJ Wall was entitled to sentence in respect of the breaches that constituted the offences to which he had already pleaded guilty in the magistrates' court. However, the sentence of 14 months and 23 days was manifestly excessive. The judge had failed to take into account the fact that Mr Gill had very properly pleaded guilty in the magistrates' court to the two most serious offences and was deeply frustrated in his inability to see his son. The sentence was reduced to one of 12 months' imprisonment.

- **Birmingham City Council v Alexander**
  County Court at Birmingham,
  [2016] EW Misc B16 (CC),
  8 June 2016

On three occasions, Mr Alexander breached an interim injunction by causing loud music and banging. This had a significant effect on his neighbour. After a final order was made, he breached it on two occasions when there were loud voices and loud banging. He admitted those breaches. HHJ Worster found that the case passed the custody threshold. He imposed a sentence of six weeks' imprisonment, comprising 21 days for the first three breaches concurrent and 21 days for the second two breaches concurrent, the two parts being consecutive. However, as it was the first time Mr Alexander had appeared to be sentenced, and because of his admissions and apology, he suspended sentence for 12 months on terms that he keep to the injunction.

Long lessees

Service charges

- **Cardiff Community Housing Association Ltd v Kahar**
  [2016] UKUT 279 (LC),
  27 June 2016

Cardiff Community Housing Association granted a weekly tenancy of a flat to Ms Kahar. The tenancy agreement included a term requiring the payment of a service charge of £14.60 per week, but failed to identify the services that were to be provided. A leasehold valuation tribunal held that Ms Kahar was not obliged to pay any service charge. The housing association appealed.

Martin Rodger QC, deputy president of the Upper Tribunal (Lands Chamber), allowed the appeal. The omission to include details of the services for which the charge was payable created some uncertainty over what was to be provided, but did not relieve the tenant of the obligation to pay the agreed sum towards those services, whatever they were.

Costs in the Upper Tribunal

- **Willow Court Management Company (1985) Ltd v Alexander**
  [2016] UKUT 290 (LC),
  21 June 2016

The Upper Tribunal gave guidance as to the application of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI No 1169 r13 (ie the power of the First-tier Tribunal to award costs against parties who have behaved unreasonably within the proceedings).

'Unreasonable' conduct includes conduct that is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. Conduct will only be unreasonable where there is no reasonable explanation for it. The unreasonable behaviour must also be related to the proceedings and is therefore unlikely to include an unreasonable refusal to pay service charges.

The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The failure to take legal advice or form a view before issuing proceedings does not of itself amount to unreasonable conduct. Likewise, the withdrawal of a claim, even at a late stage in the proceedings, ought to be encouraged not discouraged by an order for costs. The withdrawal of a claim would only amount to unreasonable behaviour if it could be shown that the claim was fanciful or without merit from the outset. While lying to the tribunal will constitute unreasonable conduct, a poor understanding or recollection of events will not.

Once the tribunal has established that conduct has been unreasonable, it must then consider whether or not it is appropriate to make an order. It does not automatically follow that unreasonable behaviour will result in a costs order being made. At the second stage, it is essential for the tribunal to consider whether, in the light of the unreasonable conduct, it ought to make an order for costs or not. It is only if it decides that it should make an order that a third stage is reached, when the question is what the terms of that order should be. It is not limited to awarding the costs occasioned by the unreasonable conduct, albeit that will be a relevant factor in deciding the amount to be awarded. Moreover, it does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

Such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had notice of the application and been given a reasonable opportunity to make submissions. Those submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise), the respondent should be given the opportunity to respond to the criticisms and offer any explanation or mitigation. A decision to dismiss such an application can be

explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. It should identify the conduct that the tribunal has found to be unreasonable, list the factors that have been taken into account in deciding it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid.

Housing allocation

- **R (Jones) v Luton BC**
  [2016] EWHC 2036 (Admin),
  3 August 2016

Mr and Mrs Jones were joint secure tenants of a two-bedroom council house. Mrs Jones died in 2012. Mr Jones died in May 2015. Their son, the claimant, remained in occupation with: (1) his civil partner; and (2) that partner's brother. The brother had complex health issues including diabetes. He was looked after by the claimant and by his own brother (the claimant's partner). In addition, the claimant and his partner both suffered from chronic depression.

The claimant applied to the council for the grant of a fresh tenancy of the house to him. The council's housing allocation scheme stated:

Non-successors

If a tenant of the council dies and there is another member of the household who does not have the right to succeed but who:

> *had been living with the tenant for the year before the tenant's death (this does not include lodgers or B&B guests) or*
>
> *had been resident and looking after the tenant for the year before the tenant's death or*
>
> *has lawfully accepted responsibility for the tenant's dependants*

the council will consider offering a new tenancy where the landlord is satisfied this is a priority when viewed in the context of other demands on housing needs in the area. If a new tenancy is considered, this could be either in the same accommodation or in suitable alternative accommodation.

The council's housing appeals and review panel (HARP) decided not to offer a tenancy of the property, but instead to offer the tenancy of a one-bedroom property elsewhere for the claimant and his partner. The HARP considered that the partner's brother was not a dependant of the claimant or a member of his household.

Judicial review was sought on the basis that the decision that the brother was not a dependent member of the household was wrong in law and/or that it failed to respect the brother's right to respect for his 'family life' (Human Rights Act (HRA) 1998 Sch 1 article 8).

Roger ter Haar QC (sitting as a deputy High Court judge) dismissed the claim. He said (para 32):

In my judgment, the HARP was entitled on the evidence before it to take the view that [the brother's] medical condition was not sufficient to render him a dependent member of the family of the claimant.

The brother had only moved into the home shortly before the late Mr Jones died. The medical evidence did not establish that he could not live independently from the claimant and his partner. Given the limited time he had resided with them, the HARP was entitled to find that he was not a member of the claimant's household.

- **YA v Hammersmith and Fulham LBC**
  [2016] EWHC 1850 (Admin),
  27 July 2016

The claimant arrived in the UK from Somalia when aged six. He was taken into care by the council at the age of 11. At 14, he was granted indefinite leave to remain in the UK. Between the ages of 12 and 16 he committed a number of offences of violence, dishonesty and possession of drugs. None of the offences was committed after January 2012 and all were 'spent': Rehabilitation of Offenders Act (ROA) 1974 s4.

When aged 19, he applied to the council for social housing. His application was supported by his social worker and the care leavers' housing panel but was refused. The council's allocation scheme excluded from qualification for housing (see HA 1996 s160ZA(7)) the following class of applicants:

Applicants who have been guilty of unacceptable behaviour which makes them unsuitable to be a tenant. Examples of such unacceptable behaviour include: ... illegal or immoral behaviour ...

The council refused to consider the claimant for housing allocation because he was not a qualifying person under its scheme.

Judicial review was sought on the basis that: (1) it was unlawful for the council to take account of the spent convictions; and (2) there had been discrimination against the claimant – as a care leaver – contrary to HRA 1998 Sch 1 article 14.

Peter Marquand (sitting as a deputy High Court judge) allowed the claim on the first ground but rejected the second. He said (para 49):

In my judgement, in this case, it was not lawful to base a decision about the claimant on the offences that he was convicted of and it was not lawful to base a decision on the conduct constituting those offences because section 4 of the ROA prohibits it where the convictions are spent and section 7(3) is not applicable.

On that basis, the decision was unlawful, as it relied on the convictions which were spent.

Article 14 was applicable because: (1) the housing allocation scheme was within the ambit of article 8; (2) the status 'care leaver' was an 'other' status for article 14 purposes; and (3) the exclusion in the scheme discriminated against care leavers as they were statistically more likely to engage in criminal/anti-social behaviour. However, there had been no infringement of article 14 because, on the facts, the discrimination was 'justified':

The evidence is that [the qualifying class] is designed to minimise the risk of those with behaviours that would have an adverse impact on others being allocated housing through the housing register. Not only does this improve the environment for relevant residents in general but it reduces the risk of the defendant expending limited resources on legal proceedings in the event that [it] is necessary to take proceedings ... (para 84).

- **R (Woolfe) v Islington LBC**
  [2016] EWHC 1907 (Admin),
  15 July 2016

The claimant lived with her mother in a private rented one-bedroom flat. She was 22 and pregnant. Because two of the mother's children had been taken into care, the council's children's services department told the claimant that it would apply for a care order for the new baby if she continued living in the flat with her mother.

The claimant applied for homelessness assistance (HA 1996 Pt 7). The council accepted that it owed her the main housing duty under HA 1996 s193(2) and provided her with temporary accommodation in the private sector.

The claimant also applied for social housing under the council's allocation scheme. She was awarded 110 points (10 homeless points and 100 residence points). That was too few points to bid successfully for any properties that became available (the threshold was 120 points). The claimant argued that she was entitled to an additional 90 points under the council's 'new generation scheme', which was open to the adult children of tenants living in the council's area with their parents.

Judicial review was sought on the basis that:

1) the points threshold for bidding was unlawful as it prevented applicants to whom a 'reasonable preference' must be given (HA 1996 s166A), but who had less than 120 points, from bidding for properties and it operated in breach of Children Act (CA) 2004 s11(2) for applicants with children; and

2) the council had misapplied its policy by failing to award the additional 90 'new generation' points.

Holman J rejected the first ground but allowed the claim on the second. As to the first, the scheme accorded 'reasonable preference' by points. It was not unlawful thereafter to set a minimum number of points before an applicant could bid. The council's housing allocation arrangements had also been informed by a regard to the need to safeguard and promote the welfare of children and therefore satisfied CA 2004 s11.

As to the second ground, the council had misapplied the 'new generation scheme' rules in the claimant's case. Although the claimant presently lived independently, the scheme was open to an applicant who had been 'living continuously as an agreed member of the household of an Islington resident for at least three out of the last five years'. The refusal to award her 90 points under that scheme was quashed.

- **R v Danyaal**
  Birmingham Crown Court,
  24 June 2016

In 2014, the council identified serious concerns relating to the role of the defendant, a senior housing needs officer who dealt with applications for housing. She was suspended from work and an internal audit investigation was instigated.

The investigation found that the defendant had submitted and processed six fraudulent homeless applications between 2011 and 2013, three of which had resulted in tenancies being granted. She had fabricated identities and personal information relating to herself and her mother. Disciplinary proceedings subsequently

resulted in her dismissal.

Criminal proceedings were also initiated by the council. The defendant was sentenced to three years' imprisonment for fraud: 30 months for one count relating to social housing fraud and six months for two offences relating to job references. Her sister, Samara Malik, was sentenced to 10 months' imprisonment on one count relating to social housing fraud.

All the properties obtained by the deception have since been recovered.

Homelessness

Applications

- **R (Hoyte) v Southwark LBC**[4] [2016] EWHC 1665 (Admin), 8 July 2016

The claimant was a single homeless woman with a history of mental health problems and a diagnosis of depression. She applied to the council for homelessness assistance. A report from a clinical psychologist advised that she had a major depressive disorder and was quite a high suicide risk. The council obtained an opinion from NowMedical, which advised that there were no active suicidal thoughts that would prompt emergency or enhanced psychiatric care. The council also obtained GP records and noted that there were no records of any active suicidal plan or risk. It decided that the claimant was not vulnerable and did not have a priority need: HA 1996 s189(1)(c).

On the following day, on her account, the claimant formed the intention to commit suicide and embarked on a plan to do so, which involved travelling by bus. On the bus, she received a phone call from her GP, who was concerned about her and persuaded her to come to the surgery. The GP noted from the consultation that there was clear suicidal ideation. She was referred to a community mental health (CMH) nurse who advised that she was very low in mood and had active suicidal thoughts with plausible evidence of plan and intent.

The appellant's solicitors sent letters from the GP and the CMH nurse to the council with a covering letter stating that she was making a fresh application for homelessness assistance as there were new facts, namely the events relating to the intention to commit suicide. The council decided that there were no new facts, as the history of suicidal ideation was previously known to it. The claimant sought a judicial review of that decision. The question was whether the latest application was based on exactly the same facts as the previous application: *R v Harrow LBC ex p Fahia* [1998] 1 WLR 1396; (1998) 30 HLR 1124 and *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340; [2005] HLR 34.

Amanda Yip QC (sitting as a deputy High Court judge) held that the council's earlier decision could only be sensibly interpreted as meaning that, having reviewed all the evidence before it, it had concluded that there was no significant suicide risk. On the evidence, it could not be said that the more recent plan to commit suicide, and the accounts from the GP and nurse, was simply new evidence of an existing situation nor were they matters that could be described as trivial or fanciful. The new application could not be considered by any reasonable authority to be based on exactly the same facts. The claim for judicial review was granted and the decision was quashed. The council was ordered to accept the fresh application and to determine it in accordance with HA 1996 Pt 7.

Applications and interim accommodation

- **Complaint against Eastbourne BC** Local Government Ombudsman Complaint No 14 016 569, 29 February 2016

Mr X lived in private rented accommodation. His landlord intended to sell the property and served a HA 1988 s21 notice seeking possession, which expired on 1 July 2014. Mr X applied to the council for assistance on 25 June 2014. No formal homelessness application was taken and no interim accommodation provided. On 24 July 2014, the landlord changed the locks and Mr X approached the council again. It was required to provide interim accommodation if it had 'reason to believe' that: (1) he may be homeless; and (2) he may be in priority need: HA 1996 s188. The council decided neither condition was satisfied.

The Local Government Ombudsman (LGO) found the council at fault in both respects. As to the former ('may be homeless'):

69. Mr X had no defence to possession proceedings because the landlord was entitled to regain possession to sell the property. In this situation the code states that the secretary of state considers it is unlikely to be reasonable for a tenant to occupy the property beyond the date in the s.21 notice (1 July 2014). To do so would only incur court costs and place an unnecessary burden on the courts.

70. Officer A's notes show ... he advised Mr X not to leave his flat until the landlord had obtained a possession order. No reasoning for this decision has been given. This is fault.

71. I find that in the absence of an agreement with the landlord for Mr X to stay longer, the council should have provided Mr X with interim accommodation from the date the s21 notice expired on 1 July 2014.

72. I cannot understand how Officer A can have reached the view Mr X still had accommodation available to him when the landlord had changed the locks and evicted Mr X.

Mr X was in receipt of disability living allowance (DLA) (high rate for care and low rate for mobility). As to whether he 'may have priority need', the LGO stated:

63. It is very concerning that all three of the council's officers who reviewed Mr X's file in July 2014 believed it was for Mr X to prove his case of priority need, rather than the council's duty to make enquiries and satisfy itself. This highlights a training need for officers.

64. The focus of the officers was on whether Mr X's physical and mental health conditions were stable. Unless the officers had relevant medical qualifications, I cannot see they had enough information to decide Mr X was not vulnerable to be on the streets without input from appropriate professionals. I also find that although Mr X was in receipt of DLA care (high rate) and mobility (low rate) none of the officers enquired about the type of care Mr X required or currently received. It is difficult to see how an applicant in receipt of high rate DLA care would not be in priority need.

65. I am very concerned officers noted Mr X was not adequately dressed and did not appear to know where his medication was, but decided he was fine to sleep on the streets. Mr X's physical presentation and confusion were further indications that his mental health condition may not have been as stable as assumed and that he might require care support.

The LGO's overall assessment was that:

73. The list of failures I have identified indicate to me the council did aggressively 'gatekeep' Mr X's homelessness application with a view to avoid providing him with interim accommodation.

74. I find the council only provided interim accommodation and made required enquiries after the threat of legal action by a charity.

The LGO recommended an apology, compensation and staff training.

Eligibility

- **Samuels v Lewisham LBC**[5] County Court at Central London, 18 March 2016

The appellant was a Jamaican national. She entered the UK in December 2001. She had four young children, aged between one and 10, all of whom had British citizenship. In 2011, she was evicted by her former partner and was accommodated by the council's children's services department. She then made an application to the Home Office for leave to remain in the UK as a parent.

In January 2015, she was granted leave to remain under Immigration Rules Appendix FM para D-LTRPT.1.2. (Appendix FM was introduced in July 2012 in order to codify the circumstances in which a person should be granted leave to enter or remain in the UK pursuant to HRA 1998 Sch 1 article 8: *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).) Her leave was initially subject to a condition that she should have no recourse to public funds (NRPF). The NRPF condition was lifted in June 2015, because she was destitute and/or the best interests of her children required it.

In July 2015, children's services gave notice that her accommodation was being withdrawn because 'you have been granted access to public funds and you are now eligible to claim mainstream benefits to meet your housing and financial needs'. The appellant applied to the council for homelessness assistance: HA 1996 Pt 7. It decided that the appellant was not 'eligible' for homelessness assistance as she was a person from abroad subject to immigration control and did not fall within any of classes A–F of Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 reg 5(1). The decision was upheld on review.

The appellant argued that a literal interpretation of reg 5(1) resulted in unjustified differential treatment as between those (such as herself) who were granted leave to remain pursuant to article 8 under the Immigration Rules, and those who were granted article 8 leave outside the Immigration Rules, under a residual discretion. On a literal interpretation of reg 5(1), the former are not eligible for homelessness assistance whereas the latter are eligible.

Recorder Powell QC dismissed an appeal. Reg 5(1) resulted in differential

treatment as between certain people granted leave to remain in the UK on the basis of their article 8 rights, who have been granted recourse to public funds. That differential treatment did not pursue a legitimate aim, was manifestly without reasonable foundation and was contrary to article 8 read with article 14. However, it was not 'possible' to achieve the interpretation proposed by the appellant by applying HRA 1998 s3 and a judge of the county court has no power to make a declaration of incompatibility.

Comment: It is understood that the UK government is currently considering amending reg 5(1) so that it expressly covers those granted leave under Appendix FM.

- **R (HC) v Secretary of State for Work and Pensions and others** UKSC 2015/0215, 7 March 2016

An appeal panel has granted permission to appeal from the judgment of the Court of Appeal ([2015] EWCA Civ 49) in these linked cases concerning the eligibility for housing assistance of *Zambrano* carers (see *Zambrano v Office national de l'emploi* Case C-34/09, 8 March 2011; [2011] All ER (EC) 491).

Priority need

- **Ward v Haringey LBC**[6] County Court at Central London, 22 February 2016

The appellant was a single man aged 50. He had had a history of mental illness since childhood. He applied to the council for homelessness assistance. It decided that he was not in priority need as he was not vulnerable. The council commissioned medical advice from NowMedical that was based on the pre-*Hotak* approach to vulnerability (see *Hotak v Southwark LBC* [2015] UKSC 30; July/August 2015 *Legal Action* 50). The reviewing officer applied the post-*Hotak* approach but did not revert to NowMedical to invite it to reconsider its advice. The decision was upheld on review.

Recorder Powell QC allowed an appeal. He held that '[o]n any fair or reasonable reading' of the medical advice and information available on review, the *Hotak* criteria were made out and the finding to the contrary was 'irrational' (para 49). 'Indeed … it is difficult to comprehend the review decision consistent with proper application of the *Hotak* test' (para 65). The judgment also contains a useful discussion of the meaning of the phrase 'significantly more vulnerable': see para 68.

Intentional homelessness

- **Huda v Redbridge LBC** [2016] EWCA Civ 709, 12 July 2016

Mr Huda applied to the council for homelessness assistance. The council decided he was homeless, eligible and had a priority need, but had become homeless intentionally. That decision was upheld on review in 2010.

Mr Huda was provided with temporary accommodation on a licence to occupy private sector accommodation. It was granted pursuant to HA 1996 s190(2) (the duty to provide the intentionally homeless with accommodation for a reasonable period). By administrative oversight, no action was taken to withdraw that accommodation.

In 2012, he was asked to leave. His solicitors asserted that he had been allowed to remain in the property for so long that it had become 'settled' accommodation, meaning he could no longer be regarded as having become homeless intentionally. On his fresh application for homelessness assistance, the council decided that the s190(2) accommodation was not settled accommodation. The decision was upheld on review. HHJ Hand QC dismissed an appeal.

On a second appeal to the Court of Appeal, Mr Huda argued that he had become an assured shorthold tenant of the temporary accommodation and this made it more likely that the accommodation was settled. Alternatively, Protection from Eviction Act 1977 s3 applied so as to furnish him with at least some security from eviction.

The Court of Appeal dismissed the appeal. The reviewing officer's finding that Mr Huda's occupation had been under a licence was a finding of fact and was not perverse. The finding that the s190(2) duty had come to an end did not change the basis of his occupation, which continued to be by virtue of his licence. The conclusion of the reviewing officer, that the accommodation had not been settled, was open on the facts.

- **Complaint against Hackney LBC** Local Government Ombudsman Complaint No 15 005 688, 10 February 2016

Ms X applied to the council for homelessness assistance. On 2 February 2015, it decided that although eligible, homeless and in priority need (she had dependent children), she had become homeless intentionally. It then failed to secure temporary accommodation for her pursuant to its duty under HA 1996 s190(2). The LGO found the council at fault for failure to fulfil that duty. Not only did it fail to secure accommodation, it also:

- failed to arrange a housing needs assessment until 27 February 2015;
- failed to provide an interpreter for that meeting, so that it had to be deferred to 16 March;
- failed to notify the outcome of the assessment in writing;
- wrongly told the applicant she could obtain a discretionary housing payment, when she could not; and
- wrongly told her she could obtain its help with rent in advance and a deposit, when she could not.

The LGO also stated (para 35):

The council says it will not help Ms X with a deposit from any of its own schemes because it found her intentionally homeless. It has not provided any policy that says this. The council has a duty to provide advice and assistance in obtaining accommodation to Ms X and those in the same situation as her. The council has provided no justification for excluding the intentionally homeless from its schemes.

It was recommended that the council apologise, provide help with a deposit and rent in advance, and pay compensation.

Suitability

- **Begum v Tower Hamlets LBC**[7] County Court at Central London, 1 December 2015

Mrs Begum was a single parent with four children, then aged 10, eight, three and two. After long-term domestic violence, she moved into a refuge in the council's area in September 2013. Her children started school in the borough in October 2013 and the youngest attended nursery in the borough. One of the children had a diagnosis of severe attention deficit hyperactivity disorder and Mrs Begum was in receipt of DLA and carer's allowance for her.

The council accepted that it owed the main housing duty: HA 1996 s193. It placed the family in temporary accommodation out-of-borough (in Bexleyheath). This meant the family had a daily commute of five hours to school and back each day, which was causing considerable disruption to the children's education and well-being.

In April 2015, the council agreed to carry out a fresh review of the 'suitability' of that accommodation, following the judgment in *Nzolameso v City of Westminster* [2015] UKSC 22; June 2015 *Legal Action* 45. On that review, it confirmed that the temporary accommodation was suitable and, in terms of the daily commute, concluded that the children must simply 'bear the consequences of their mother's decision' to continue their education in-borough.

On appeal, Mrs Begum challenged the suitability of the location of the property and asserted that the council had failed to consider properly the children's best interests and comply with its obligations under CA 2004 s11.

Recorder Steynor held that the review decision was unlawful for want of proper consideration of the needs and well-being of the children, particularly the disruption that would be caused to their education by being forced to change schools. There had been an alarming failure to apply the judgment of Lady Hale pertaining to 'best interests' of children in out-of-borough homelessness cases. The appeal was allowed with costs and the review decision was quashed.

1 Serdar Celebi, solicitor, Cambridge House Law Centre.

2 This case was first noted on Nearly Legal.

3 Noted at http://nearlylegal.co.uk/2015/08/s-21-and-return-of-deposit/

4 Liz Davies, barrister, London and Eva Chrysostomou, solicitor, Southwark Law Centre.

5 Connor Johnston, barrister, London.

6 Dr Tim Baldwin and Adrian Marshall Williams, barristers, London.

7 Maria Moodie, barrister, London and John Gorringe, solicitor, TV Edwards.

Jan Luba QC and Nic Madge 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 1 and 4 to 7 for transcripts or notes of judgments.