Housing: recent developments

Nic Madge and Jan Luba QC present the latest legislative developments, plus cases on human rights, tenancy v licence, assured tenancies, assured shorthold tenancies, possession claims, criminal offences, anti-social behaviour, housing allocation and homelessness.

Nic Madge

Jan Luba QC

Politics and legislation

Homelessness

The Homelessness Reduction Bill 2016–17 had its House of Commons second reading on 28 October 2016. It was passed at that stage, with UK government support, and has been committed to a public bill committee for detailed consideration. The House of Commons Library has prepared a useful introduction to the bill: *The Homelessness Reduction Bill 2016–17* (Briefing Paper No 07736, 24 October 2016).

It has also issued an updated version of its briefing paper *Applying as homeless from an assured shorthold tenancy (England)* (Briefing Paper No 06856, 1 November 2016).

Eligibility for social housing and homelessness assistance

On 21 October 2016, the Department for Communities and Local Government (DCLG) wrote to local housing authorities about the commencement of the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2016 SI No 965. The letter explains the effect of the amending regulations and the background to the changes made.

Eligibility for private rented housing

The Immigration Act 2016 (Commencement No 2 and Transitional Provisions) Regulations 2016 SI No 1037 brought the provisions of that Act regulating the provision and termination of tenancies granted to certain migrants into force on 1 December 2016.

On 1 November 2016, the Home Office published draft guidance under Immigration Act (IA) 2014 s33A(6) on the effect of the provisions: *Draft guidance on taking reasonable steps to end a residential tenancy agreement within a reasonable time*. It covers:

- when an offence is committed;
- some of the factors that would be considered appropriate as reasonable steps to end a residential tenancy agreement involving an occupier who is disqualified from renting as a result of his or her immigration status; and
- the timescales that would be considered reasonable in taking these steps.

The Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc) Regulations 2016 SI No 1060 brought the final version of the statutory guidance into force on 1 December 2016. These regulations also include the prescribed form of notice of eviction/end of tenancy to be used by landlords pursuant to IA 2014 s33D(3).

Private renting in Wales

The Housing (Wales) Act 2014 (Commencement No 8) Order 2016 SI No 1066 (W 255) (C 75) brought into force the following provisions of Part 1 of that Act (Regulation of private rented housing) on 23 November 2016: ss4, 9, 11, 13, 28, 30–33, 35, 43 and 44 and also ss 5–8, 10, 12, 29, 34, 40–42 and 46 to the extent not already in force.

Human rights

Article 3

- **Smirnova v Ukraine**
  App No 1870/05,
  13 October 2016

Ms Smirnova, a retired single woman, lived in a small one-bedroom flat. It had recently been privatised and she had acquired it in equal shares with her adult son, Y. In November 2001, she was visited by two unfamiliar men, VS and AN, who offered to buy half of the flat for US$700. She refused. VS and AN warned her that she would regret her decision, because Y, who lived elsewhere, had offered the other half of the flat as a gift to VS, who intended to move into the flat and create intolerable living conditions for her. Shortly after, Y signed a notarised gift deed transferring his title to half of the flat to VS. From November 2002, AN, VS and their acquaintances regularly visited the flat, demanding that she sell it. On numerous occasions they broke the locks, insulted and harassed her, and caused damage to her property. AN and VS continuously demanded that Ms Smirnova move out and sell her share. On different occasions:

- AN hit her in the chest, inflicting a bruise and causing soft tissue swelling.
- AN, VS and several strangers broke into the flat, and VS, who was irritated by the barking of her dog, kicked her and chased her out. Later, she found her dog's dead body in a garbage container.
- VS arrived in the flat after 11 pm, opened the balcony door and held it open for some four hours with freezing temperatures outside.
- VS hit her on the head and stomach, inflicting concussion and blunt trauma of the abdominal wall. He also hit Ms Smirnova's daughter on the head and other parts of the body, inflicting cerebral concussion and bruising of legs and arms. Ms Smirnova received inpatient hospital treatment.
- VS and AN installed from two to six strangers in the flat. They were mostly young males who behaved in a discourteous way. They organised loud parties; damaged and stole belongings; created insanitary conditions; carelessly used electricity, gas and appliances; and frequently left the entrance door open.

As she was unable to withstand such living conditions and was afraid for her life and limb, Ms Smirnova effectively moved out. AN and VS continued to harass and assault her for several years. Ms Smirnova took unsuccessful court proceedings to rescind her son's gift deed. In 2004, she instituted civil proceedings seeking the dispossession of VS and AN. After a number of appeals, that claim was, in the main, unsuccessful. On numerous occasions between 2002 and 2007, Ms Smirnova complained to the local police. On various dates, police officers came to the flat in response to her calls for help, but refused to institute criminal proceedings. However, in July 2007, the regional police instituted criminal proceedings following a complaint of extortion lodged by another woman who had been forced to abandon her flat. They joined Ms Smirnova's complaints concerning extortion to those criminal proceedings. As a result, AN and VS were arrested and placed in custody.

In 2012, all the defendants were found guilty of extortion. They were sentenced to 11 and 10 years' imprisonment. The court ordered the confiscation of all their personal property and awarded Ms Smirnova UAH 35,273.47 in pecuniary and UAH 30,000 in non-pecuniary damage for the harassment. She complained to the European Court of Human Rights (ECtHR) that the state authorities had failed to protect her physical and psychological integrity, home and private life from serious intrusions.

The ECtHR reiterated that the obligation of governments under article 1 to secure to everyone within their

jurisdiction the rights and freedoms defined in the European Convention on Human Rights (ECHR), taken together with article 3, which provides '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment', requires states to put in place effective criminal law provisions to deter the commission of offences against personal integrity, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Although state authorities may not be expected to set in motion the criminal law machinery in every case where neighbours, household members or other individuals engage in trivial disputes and seek to settle an ongoing personal conflict by involving the criminal justice authorities, it is important that measures of effective protection against domestic violence and other types of harassment are put in place for vulnerable persons, including reasonable steps to prevent likely ill treatment.

Where an individual makes a credible assertion of having been subjected to repeated acts of domestic violence or other types of harassment, however trivial the isolated incidents might be, it falls on the domestic authorities to assess the situation in its entirety, including the risk that similar incidents would continue. This assessment should, above all, take due account of the psychological effect that the risk of repeated harassment, intimidation and violence may have on the victim's everyday life. Where it is established that a particular individual has been systematically targeted and future abuse is likely to follow, apart from responses to specific incidents, the authorities may be called upon to implement an appropriate action of a general nature to combat the underlying problem.

In this case, the court noted the repeated and premeditated nature of the verbal and physical assaults over several years. Some instances of violence, resulting in injuries, were very serious. The repeated physical and verbal attacks caused Ms Smirnova profound mental suffering, distress and constant fear for her life and limb. This suffering was aggravated because the violence and harassment occurred in the privacy of her own home. That prevented any outside help. The treatment to which she was subjected reached the threshold of severity falling within the ambit of article 3. It engaged the state's positive duty under article 3 to put in motion the protective legislative and administrative framework. Although the principal miscreants were eventually prosecuted and sentenced to significant prison terms, it took the state authorities over 12 years to resolve the matter. There was accordingly a violation of article 3. The ECtHR also found a breach of article 8. It awarded €4,000 in respect of non-pecuniary damage.

Article 8

- **Milashenko v Russia**
  App No 74150/11,
  30 August 2016

From 1984, Mr and Mrs Milashenko lived in a flat provided to them by their former employer, a state-owned company (company no 1). Between 1984 and 2005, company no 1 was restructured several times and became a joint-stock company (company no 2). In 1998, Mr Milashenko was made redundant. In 2005, he and company no 2 concluded a social tenancy agreement in respect of the flat. In 2006, he applied to the local authorities for the flat to be transferred into his name by way of privatisation. In 2008, the local authorities replied that the block of flats in which his flat was situated was registered in the state register as 'special housing', which was dormitory accommodation. The flat could not therefore be acquired by way of privatisation. In court proceedings, an eviction order was made against Mr and Mrs Milashenko. They complained under article 8 that there had been a violation of their right to respect for their home.

The ECtHR has asked the parties:

1. Has there been an interference with the applicants' right to respect for their home?
2. If so, was that interference in accordance with the law, did it pursue a legitimate aim and was it necessary in terms of article 8?

Article 1 of Protocol No 1

- **Popova v Russia**
  App No 59391/12,
  4 October 2016

In 1971, a local factory, which was the owner of a block of flats, assigned a flat to P under a social housing agreement. In 1992, the title to the building was transferred to Chelyabinsk Municipality. P resided in the flat as a tenant until his death in December 2010. Following his death, Chelyabinsk Municipality started to register the flat as vacant in order to assign it to another person eligible for social housing. However, it turned out that, according to the documents, the flat was no longer municipal property and that it belonged to L. The head of the municipality's administration department asked the regional prosecutor to look into the situation. The prosecutor established that the flat had been subject to a number of transactions which appeared to be fraudulent and involved the names of people who had lost their passports. He forwarded details to the police for further inquiries.

In June 2011, the 'owner' sold the flat to Ms Popova. In December 2011, the Tsentralniy District Court annulled Ms Popova's title to the flat and transferred it to the municipality. The court also ordered her eviction. It ruled that the last 'owner' should return the sum Ms Popova had paid for the flat. However, the last 'owner' died in December 2013 and the judgment against him remained unenforced. Ms Popova brought an action against the state, alleging that the local authorities' inaction had resulted in her buying a flat from a person who had no right to sell it to her. Her claim was dismissed. She complained to the ECtHR that she had been deprived of her flat in contravention of article 1 of Protocol No 1.

It was common ground that the flat constituted Ms Popova's possession and that the revocation of her title amounted to an interference with her rights under article 1 of Protocol No 1. The court found that a fair balance was not struck between the demands of the general interests of the community and the requirements of the protection of Ms Popova's property rights. The repossession of the flat by the municipality constituted a disproportionate burden on her. Once the fraud was discovered, the authorities failed to exercise diligence or to act in good time in order to secure repossession of the flat. The court rejected the government's argument that Ms Popova was herself responsible for the situation because she had bought a flat which had been the subject of two prior transactions within a short period of time. The registration service had found those transactions to be in compliance with applicable laws and approved them. Further, she was deprived of ownership without any compensation or the provision of replacement housing from the state.

There was accordingly a violation of article 1 of Protocol No 1. With regards to the claim for pecuniary damage, the court considered that the most appropriate form of redress would be to restore Ms Popova's title to the flat and to annul the eviction order. On an equitable basis, it also awarded €5,000 in respect of non-pecuniary damage.

Tenancy or licence?

- **Holland v Oxford City Council**
  [2016] EWHC 2545 (Ch),
  17 October 2016

Over a number of years, during the annual St Giles Fair in Oxford, Mrs Holland occupied two parcels of land 'in the general vicinity of the Lamb and Flag public house' (para 3). The land was part of a public highway in the ownership of the relevant highways authority, namely Oxfordshire County Council. The highway was, however, closed during the fair. Mrs Holland asserted an annual periodic tenancy over the land for the 'Fair Period', sought declaratory relief as to the extent of the two sites, and claimed damages for breach of covenant for quiet enjoyment arising out of her contention that, in 2013, 2014 and 2015, and in breach of covenant, she was denied the full use of her sites and, as a result, was unable to deploy a particular fairground attraction (a 'ride' called 'the Cyclone'). The council denied that Mrs Holland had a tenancy. Its case was that she had no more than a licence, granted annually.

Although documents referred to 'Conditions of Letting' and to site holders being 'tenants of the fair', Master Bowles found that the arrangements between the council and Mrs Holland did not give rise to a grant of exclusive possession. She was accordingly a licensee. She did not have the benefit of the implied covenant for quiet enjoyment upon which her monetary claims were based. The claim was dismissed.

Assured tenancies

Rent increases

- **Chouhan v The Earls High School**
  [2016] UKUT 405 (LC),
  15 September 2016

In 1990, Dudley Borough Council granted Mr Chouhan a weekly tenancy of part of a house (formerly used as the headmaster's house) in the grounds of The Earls High School, Halesowen. Although local authorities cannot grant assured tenancies (Housing Act (HA) 1988 Sch 1 para 12), the agreement signed by Mr Chouhan described the tenancy as an assured tenancy. It took effect as a secure tenancy (HA 1985 s80). The rent was £395 per month. The agreement stated that the landlord could increase or decrease the rent by serving notice on the tenant, but that 'the amount of any increase in rent shall not be such as will increase the rent above the level of rent which a rent assessment committee would determine for the premises if the rent assessment committee had jurisdiction to determine the rent in accordance with the Housing Act 1988 section 14' (para 8).

In November 2011, the freehold interest in the school house was transferred to the Official Custodian of Charities and,

in January 2012, the custodian granted a head lease of premises including the school house to The Earls High School, for a term of 125 years. In July 2015, agents acting for the school served a notice proposing a new rent of £520 per month. It referred to HA 1988 s13(2). The guidance notes on the form notified Mr Chouhan that if he did not accept the new proposed rent, he was entitled to refer the notice to the First-tier Tribunal (FTT). Mr Chouhan did so, but the FTT concluded that the tenancy was not an assured tenancy to which s13 applied because it contained a contractual provision for varying the rent (s13(1)(b)) and accordingly it had no jurisdiction to consider the proposed rent increase. Mr Chouhan appealed.

After referring to *Helena Partnerships Ltd v Brown* [2015] UKUT 324 (LC) and *Contour Homes Limited v Rowen* [2007] EWCA Civ 842, Martin Rodger QC, Deputy President, dismissed the appeal. When the interest of the landlord was transferred to the Custodian of Charities and subsequently became vested in the school, the tenancy agreement ceased to be a secure tenancy and became an assured tenancy. Section 13(1)(b) excluded from the ambit of the statutory rent determination procedure any assured tenancy that contained a contractual rent review mechanism binding for the time being on the tenant.

Martin Rodger QC stated: '[I]t is not possible for parties, by agreement, to confer jurisdiction on a court or statutory tribunal which parliament has said is not to have jurisdiction in the circumstances of their case' (para 22). The purpose of referring to s14 in the clause relating to rent increases was that 'it should be used as a contractual yardstick to regulate the level of rent increases and to prevent the landlord from requiring an increase above the level of the rent which would be determined by a rent assessment committee (or now by the FTT) "if" that body had jurisdiction' (para 24). The only way in which the tenant could challenge the new rent was in proceedings before the county court as an application for a declaration that the rent specified in the notice exceeded the rent that a rent assessment committee would determine for the premises if it had jurisdiction under s14, or by declining to pay the increased rent and defending any subsequent possession claim.

Assured shorthold tenancies

Deposit

- **Baptiste v Barham**[1]
  County Court at Croydon,
  12 November 2015

Ms Barham was granted an assured shorthold tenancy in 2004. She paid a deposit of £525. There was no evidence that the deposit was protected. The tenancy was renewed in September 2005 and August 2006. The deposit of £525 continued to be held as security. In or about 2007, Mr Baptiste purchased the property from the original landlord with Ms Barham in situ. In November 2007, the tenancy was renewed for a term of 12 months and thereafter it continued on a statutory periodic basis. The agreement signed in 2007 was silent as to the deposit. It contained a provision for the protection of the deposit; however, the amount was left blank. Ms Barham stated in evidence that she had notified Mr Baptiste about the deposit of £525 paid to the original landlord and had showed him a copy of her previous tenancy agreements, which referred to the deposit.

Mr Baptiste served a HA 1988 s21 notice in November 2014. Ms Barham raised in her defence the failure of her landlord to protect the tenancy deposit and claimed compensation pursuant to HA 2004 s214(4). Mr Baptiste subsequently withdrew the s21 proceedings and gave Ms Barham a cheque for £525, though he argued that he was not obliged to do so as he was not the landlord who had received the deposit. He then protected the deposit. The prescribed information was provided on 8 July 2015 and stated that the deposit was registered with the Tenancy Deposit Scheme on 23 June 2015.

Ms Barham continued with the claim for recovery of sums pursuant to s214. She argued that when Mr Baptiste purchased the property, he acquired the original landlord's rights and obligations as to the tenancy, including any statutory obligations relating to the deposit. Additionally, she argued that, pursuant to HA 2004 s215A (as inserted by Deregulation Act (DA) 2015 s32), where a landlord received a deposit before April 2007 and continued to hold that deposit against a statutory periodic tenancy that began after 6 April 2007, the provisions of s213 would have been complied with if the landlord protected the deposit by 23 June 2015. In this case, Mr Baptiste had complied with the requirements of the DA 2015 by protecting the deposit within 90 days but he had failed to serve the prescribed information by the deadline of 7 July 2015, contrary to HA 2004 s213(6) read together with s215A(3).

District Judge Hay held that: (i) Mr Baptiste had acquired the obligation to protect the deposit when he purchased the property; and (ii) he had not complied with the requirements of s213(6). He found that: it was not a flagrant disregard of the rules by Mr Baptiste; he was not a professional landlord; he had returned the deposit; he had eventually protected the deposit; and he was only a day late with the service of the prescribed information. The judge awarded one times the amount of the deposit, ie £525.

- **Russel-Smith v Uchegbu**
  [2016] SC EDIN 64,
  30 September 2016

Four Edinburgh University students took a lease of a flat. The tenancy was a short assured tenancy (Housing (Scotland) Act 1988 s32). A tenancy deposit of £1,550 was paid to the landlady in May 2015. She admitted that she breached her statutory duty and failed to lodge the deposit in an approved tenancy deposit scheme in accordance with the Tenancy Deposit Schemes (Scotland) Regulations 2011 SI No 176 (TDS(S) Regs). Three tenants sued her for sanction for her breach of statutory duty in the maximum sum available of £4,650. Despite several warnings from the council, and after the commencement of that action, the money was eventually paid into an approved scheme some 240 days late (excluding the 30 working days grace the landlady was given by TDS(S) Regs reg 3). The landlady also failed to provide the tenants with information in accordance with TDS(S) Regs regs 3 and 42. Breach of the regulations was admitted. The court therefore had to determine what level of sanction was appropriate.

Sheriff T Welsh QC stated that 'in assessing the level of sanction the function of the court is to impose a fair, proportionate and just sanction in the circumstances of the case, always having regard to the purpose of the regulations and the gravity of the breach' (para 7). It was important that the landlady had admitted her non-compliance. Equally, the deposit was returned to the tenants who had been 'greatly inconvenienced, deprived of their full regulated entitlement to protection but not actually prejudiced' (para 7). The defender had learned her lesson. However, he continued, 'the regulations are there to be complied with for the protection of tenants. Also, the breach in this case is aggravated by the fact the landlady must be taken to have known of and ignored or at least procrastinated in implementing her obligation to lodge the deposit and inform the tenants, because the council were twice in communication with her' (para 7).

In arriving at the level of sanction, the sheriff took the rent for the days when the deposit was not protected (£1,550 divided by 334 multiplied by 270, producing a figure of £1,253) and then added £600 to reflect the fact that the landlady was repeatedly officially informed of her obligations and still failed to comply. Although this was not wilful defiance of the regulations, she was 'dilatory in attending to her obligations' (para 9). The total sanction was £1,853.

Note: The Scottish law contained in the TDS(S) Regs is different from that in England and Wales.

Possession claims

Equality Act and adjournments

- **Birmingham City Council v Stephenson**
  [2016] EWCA Civ 1029,
  27 September 2016

Mr Stephenson was the introductory tenant of a flat. He suffered from paranoid schizophrenia. The council received complaints about noise coming from his flat, including loud music and television, arguments and the moving of furniture at night. The council decided to terminate his tenancy and seek possession. It served notice of seeking possession. Mr Stephenson requested a review of that decision, but the decision was upheld on review. The council issued a claim for possession. At the first hearing, the council accepted that Mr Stephenson was disabled for the purposes of the Equality Act (EA) 2010, but said there were no substantial grounds for defending the claim and that the council's action in terminating the tenancy was a proportionate means of achieving a legitimate aim.

Mr Stephenson was not present, but his solicitor explained to Deputy District Judge O'Connell that he had only been able to see Mr Stephenson on the Friday before the hearing when he was able to take initial instructions. He asked for a short adjournment in order to file and serve a fully pleaded defence. That request was refused and the judge made a possession order, stating that there was no more than a tenuous possibility of a defence with 'nothing concrete' but 'plenty from the council about the difficulties that they had had'. Mr Stephenson 'had had ample time to seek advice from solicitors and put in some form of defence but he thought [the solicitor] had no real argument to advance' (para

9). An appeal to a circuit judge was dismissed.

The Court of Appeal allowed a second appeal. After referring to Civil Procedure Rules (CPR) Pt 55, Lewison LJ stated that the rules envisage that at the time of the first hearing, or indeed at a subsequent hearing, the tenant may well not have served the defence and that judgment should not be entered in default of defence. Had Mr Stephenson been a well-resourced individual, with no mental disability, the view that he had had ample time in which to consult solicitors and give them instructions might well have been sustainable. However, the council's own evidence showed that he was living on benefits and had been seen begging in the local shopping parade. The deputy district judge had also failed to take account of his mental health problems. As the solicitor had only taken preliminary instructions, it was unrealistic to have expected him to have formulated a full defence by the time of the hearing. The repeated references by his solicitor to 'proportionality' ought to have alerted the judge to the real possibility of at least a pleadable defence under the EA 2010. If the judge had approached the issue in the structured way laid down by the Supreme Court in *Aster Communities Limited v Akerman-Livingstone* [2015] UKSC 15; [2015] AC 1399, and in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213, he would have reached the following conclusions:

- Mr Stephenson was disabled.
- It was at least arguable that there was a sufficient causal link between his mental disability and the conduct on which the decision to evict him was based. That was enough to raise a prima facie case of discrimination on the ground of disability. The burden would then shift to the council to establish that evicting Mr Stephenson was a proportionate means of achieving a legitimate aim.

Lewison LJ concluded that:

... the flaw in both the deputy district judge's approach and the council's respondent's notice [was] to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the well being of Mr Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr Stephenson out on the street. For example, he could be given support from social services in reminding him of appointments that have been made for him to receive medication. He might be given support from mental health professionals. His medication could be changed or its dosage increased. Sound attenuation measures could be installed in his flat. There could be specific agreement on permitted hours for the playing of music rather than the general prohibition on anti-social behaviour contained in the tenancy conditions. The council might seek an injunction prohibiting the anti-social behaviour under the Anti-social Behaviour, Crime and Policing Act which would require supervised compliance. Or the council might provide him with more suitable alternative accommodation (para 22).

The Court of Appeal remitted the case to the county court to give further directions.

Hospital room

- **Sussex Community NHS Foundation Trust v Price**
  High Court (Queen's Bench Division), 7 October 2016

Ms Price suffered a broken femur and had a number of operations on her knee. In August 2015, after surgery, she was admitted to a rehabilitation facility run by Sussex Community NHS Foundation Trust. By the time of the possession claim, she no longer had any need to take up a bedroom in the unit. She had the same mobility level as before the surgery. She was able to live at home, albeit with some help from social services. She could not use stairs but, with a walking frame, could walk 40 metres. She had not required a nurse since November 2015 and had declined all therapy. Her former solicitors initially planned to oppose any possession claim and to pursue a claim for judicial review, but no challenge was launched. Ms Price did not appear and was not represented at the hearing.

HHJ Coe QC made a possession order. The trust had clearly established the right to possession of the bedroom. A much-needed bed had been taken up by somebody who did not need it. Ms Price had simply refused to leave the facility. From a medical point of view, she had recovered as much as she was going to. The trust had an overwhelming case and she had not put forward any defence.

Enforcement

- **Cardiff CC v Lee (Flowers)**[2]
  [2016] EWCA Civ 1034, 19 October 2016

Cardiff obtained a suspended possession order against Mr Lee, a secure tenant, based on allegations of anti-social behaviour. After further allegations, it then sought to enforce the order by obtaining a warrant. No application was made for permission to issue a warrant. Mr Lee applied to suspend the warrant. District Judge Scannell dismissed the application to suspend. She found that Mr Lee had breached his tenancy and that the warrant had been appropriately issued under CPR 83.26. Mr Lee appealed. HHJ Bidder QC dismissed the appeal. He held that although the landlord required the court's permission before a warrant for possession could be requested where 'under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled' (CPR 83.2(3)(e)), the issue of the warrant was voidable and not void. Mr Lee made a second appeal to the Court of Appeal.

The Court of Appeal dismissed the appeal. It was common ground that CPR 83.2 applied. Although 'not strictly an issue' before the Court of Appeal (para 8), Arden LJ agreed that HHJ Bidder QC was right to apply CPR 83.2. She noted (at para 3):

The purpose of the rule is obviously to provide a layer of judicial protection for a tenant whom the landlord wants to evict ... [C]learly CPR 83.2 addresses what might reasonably have been considered to be a weakness of the system, namely that [until the introduction of the rule] there was no judicial scrutiny of the landlord's case that the conditions had been breached. That judicial scrutiny occurs under CPR 83.2 without the tenant having notice of the application. Nonetheless it is a level of protection which the rules give him and which can be seen to have been given to a tenant for good reason.

She continued (at para 23):

... CPR 83.2 contains an important protection for tenants ... [A]ll landlords should in the case of conditional orders for possession have to establish that the condition entitl[ing] them to the possession has been fulfilled before the tenant become[s] embroiled in an eviction from his home.

However, in this case, the failure to do so was a procedural defect that the court was empowered to cure under CPR 3.10 by dispensing with the need for a prior permission application and proceeding to validate the warrant where the circumstances justified that course. The issue of the warrant was not invalid unless the court so ordered. Arden LJ concluded (at para 31):

In this case, a genuine mistake was made but if the landlord could not show that it had made a genuine mistake in its error of procedure or that it knew that it was not entitled to proceed in this way and of course if it knew that it was not entitled to possession, then the outcome of the case would have been very different ... [CPR 83.2] is not to be taken lightly. Social landlords must ensure that from now on their systems are such that the same mistake will not be made in future.

Criminal offences

Squatting

- **Marie, Raquin and Ruffo**
  Tribunal de Grande Instance, 6ème chambre, Lyon, Case No 16216000244, 20 October 2016

A number of squatters entered a house in Lyon, France. They sat in the garden, drinking wine and champagne that they had taken from the wine cellar and then used furniture from the house to barricade the doors and windows in an attempt to prevent the police from entering. They were charged with the offence of entering or remaining in the residence ('*domicile*') of another, contrary to article 226-4 of the French *Code pénal*. The evidence of the owner of the house was that it had been in her family for generations, but she had lived elsewhere since 2005 while building works were being carried out. The works were delayed due to her ill health. Photographs showed some furniture in the house, but the owner stated that there was no bed and she had no personal belongings there. The toilet did not function.

Mme Mazaud, a judge sitting with two assessors, returned verdicts of not guilty ('*relaxe*') because there was insufficient evidence that the property was a *domicile*. See too *Mahdi, Pillet and Viallet* Cour d'Appel, 4ème chambre, Lyon, Dossier No 15/01829, 31 March 2016, where the court stated that a *domicile* was the place where a person lives or has the right to call their home.

Anti-social behaviour

Ombudsman complaint

- **Complaint against Bron Afon Community Housing Ltd**
  Public Services Ombudsman for Wales Case No 201503581, 15 September 2016

Ms X, an owner-occupier, made complaints to Bron Afon Community Housing about anti-social behaviour by one of its tenants. She alleged that over a number of years, Bron Afon failed to

investigate her complaints effectively.

The ombudsman found that, in the main, Bron Afon made reasonable efforts to resolve her complaints. When matters escalated, it took action in accordance with the relevant procedures. There were, though, a number of shortcomings in that Bron Afon failed to manage her expectations and was not rigorous enough in its record-keeping. It also failed to communicate effectively with Ms X about the way in which it was managing her complaints. The ombudsman recommended that Bron Afon should apologise, issue a reminder to its staff about the importance of record-keeping and consider what lessons should be learnt.

Housing allocation

- **Holley v Hillingdon LBC**
  [2016] EWCA Civ 1052,
  1 November 2016

Mr Holley lived in a council property that had been occupied by his late grandparents. He did not qualify for a statutory succession because his grandfather had been a successor tenant. The council's housing allocation scheme contained this provision about aspiring second successors (see para 5, emphasis in original):

... no further succession will be allowed. The only exception to this is where the potential second successor is agreed to be vulnerable and meets the following criteria:
1. Have a clear housing need ***and***
2. Be aged 65 yrs+ or 50 yrs+ with learning difficulties ***and***
3. Have lived at the property for the last 10 years or as long as the property has been available.

Mr Holley satisfied all the conditions for the exception, except that relating to his age. He was only in his 30s. When the council sought possession, he contended that it had, without justification, discriminated against him on the grounds of his age. This was because he did not satisfy the age criterion in the allocation scheme and that was why it had decided to evict him.

HHJ Karp made a possession order. She rejected the defence under ECHR article 14 on grounds that were not challenged on appeal. Instead, before the Court of Appeal, Mr Holley advanced a contention that: (a) the 'second succession policy' was unlawful because it did not contain on its face, or permit, the exercise of any residual discretion; and/or (b) even if there existed such a residual discretion, the council had failed to give it proper consideration in this case. Rather, it had concluded that failure to satisfy the age criterion was the end of the matter, and the judge had, wrongly, reached the same conclusion.

The council's primary submission in response was that the effect of the House of Lords' decision in *R (Ahmad) v Newham LBC* [2009] UKHL 14 was to do away with any requirement for a residual discretion to be included within a housing allocation scheme, in a departure from a line of earlier authorities. The Court of Appeal rejected that response. It held that *Ahmad* could not be considered authority for that proposition. It said:

The allocation scheme under review in the Ahmad *case plainly contained provision for the exercise of a residual discretion: see per Lord Neuberger at paragraph 34. That case was a challenge based on irrationality, rather than an unlawful fettering of discretion. The* Ahmad *case does not therefore provide a short answer to this part of the appeal, although it does require the court to think long and hard before finding that a local housing authority's allocation policy is unlawful* (para 27).

Nevertheless, the challenge to the legality and operation of the relevant provision of the allocation scheme could not be made out in this case. Even if, correctly construed, the provision did fetter the council's discretion on allocation, its decision to evict Mr Holley rather than consider granting him the tenancy in exercise of its residual discretion was immaterial because:

His case for allocation of this house, however much it may generate human sympathy, simply came nowhere near that degree of exceptionality that gave him a real rather than fanciful prospect of success under a residual discretion, however widely framed, as to allocation of public housing (para 31).

- **Vinniychuk v Ukraine**
  App No 34000/07,
  20 October 2016

The applicant was a council tenant. As a result of her temporary absence in prison, the council sought and obtained possession of her home. She was evicted and the flat was relet. She subsequently sought the setting aside of the possession order and was successful in the Supreme Court. In subsequent proceedings, the local courts refused to evict the new occupier but in 2005 ordered the council to provide her with accommodation equivalent to her former home. From 2005 to 2008, the council failed to allocate her any accommodation. She complained to the ECtHR.

It held that there had been a breach of ECHR article 8. The failure of the state authorities to rehouse the applicant had an important impact on her rights guaranteed under article 8. The court had not been provided with any evidence that the state authorities took the necessary action with a view to finding an effective and expeditious solution to her housing situation. The court could not discern what measures, if any, were taken by the council to ensure effective realisation of the applicant's right, deriving from the domestic legal order, to be housed by the council after this right had been duly recognised by the domestic courts, which had ordered provision of replacement housing. It said:

As the government have not provided sufficient justification for the important delay in realisation of the applicant's right to be provided with municipal housing following reversal by the domestic courts of their previous judgment divesting her of that right, the court finds that this delay amounted to an unjustified and disproportionate individual burden for the applicant (para 53).

The court awarded the applicant €4,500 in respect of non-pecuniary damage.

Homelessness

Applications

- **R (Abdulrahman) v Hillingdon LBC**
  [2016] EWHC 2647 (Admin),
  28 October 2016

The claimant and her husband were evicted from private rented accommodation and sought homelessness assistance. In December 2013, the council decided that they had become homeless intentionally. The husband unsuccessfully pursued a review and then made an appeal. That was abandoned when he left the country.

Later, in April 2016, the claimant's solicitors made a fresh application to the council. They contended that the application was not based on exactly the same facts as the application which had been refused in December 2013. The two changes in facts relied on were: (1) the claimant's husband had returned to Somalia; and (2) her three older children (in a family of nine children) were no longer residing with her. The council declined to accept and enquire into that new application.

Neil Cameron QC, sitting as a deputy High Court judge, held that, as the council had applied the right legal test, the issue left to be determined was whether, in deciding that the 2016 application was based on exactly the same facts as the 2013 application, it had acted irrationally. He found that the facts were clearly different. The application had changed from a joint application by the claimant and her husband to an application by the claimant alone. The number of people seeking assistance had changed, in that assistance was no longer sought by the husband and three of the nine children. Both those facts are relevant to an application made under HA 1996 Pt 7. He quashed the decision.

Priority need

- **DT v Lambeth LBC**[3]
  County Court at Central London,
  31 August 2016

The appellant was a refugee from Eritrea. He was aged 41 and he had both depression and alcohol dependency. He had been evicted from a housing association assured tenancy on the grounds of rent arrears resulting from two failures to renew his housing benefit claims on time. He applied to the council for homelessness assistance. His interview notes recorded that he had said he suffered from depression and was dependent on alcohol. He completed a medical questionnaire in which he set out details of his symptoms and said he was not able to deal with day-to-day affairs. A NowMedical doctor advised the council that she did not think the medical issues rendered him significantly more vulnerable than an ordinary person. The council decided that he was not vulnerable and so did not have a priority need (HA 1996 s189(1)(c)), and that he had become homeless intentionally due to his failure to renew his housing benefit claims (s191).

A GP's letter and a report from a consultant psychiatrist were presented in support of a review. The psychiatrist advised that: the appellant's depression impaired his motivation, concentration and sense of self-worth; it also rendered him apathetic and unmotivated; his alcohol and cannabis use aggravated his apathy; his apathy in turn resulted in a tendency towards self-neglect; homelessness and the threat of homelessness had in the past aggravated his depression considerably; and his mental and psychological health would be aggravated by homelessness, in particular it would aggravate his sense of low self-worth and worsen his depression.

On review, the council accepted that he suffered from both depression and alcohol dependency. It relied on its

housing officer's observation of his demeanour at interview and noted that he did not require assistance with washing, dressing and other such day-to-day activities. On the rent arrears, it found that there was no evidence from his medical records that his depression or alcohol dependency absolved him from the responsibility of retaining his tenancy.

HHJ Gerald quashed the review decision in both respects. The consultant psychiatrist's report had raised a prima facie compelling case that the appellant was vulnerable and that he had not been capable of managing his affairs at the times when he failed to renew his housing benefit claims. It was insufficient for the decision-maker to reach a contrary conclusion without identifying the key passages in the report and explaining in brief terms why those passages were not accepted, or setting out why further inquiries had not been embarked upon. The failure to identify the obvious points in the psychiatrist's report could only lead to the conclusion that those points had not been taken into account.

The appellant had said in his medical questionnaire that he had not been able to deal with his day-to-day affairs. His housing benefit had been paid directly to the landlord rather than to him. Those two points, together with the psychiatrist's conclusions, should have led to the council considering whether or not ill health had caused the appellant to lead a somewhat chaotic life, as far as maintaining his housing benefit claim was concerned.

- **MQ v Southwark LBC**[4]
  County Court at Central London, 14 September 2016

The appellant was a single woman who had lived in a house in multiple occupation (HMO) for over 10 years. She had previously been subject to sexual assaults and had left the HMO after she had been assaulted by a male tenant in December 2015. She suffered from anxiety and depression, post-traumatic stress disorder, memory loss and asthma. She had been receiving counselling for the earlier sexual assaults and the December 2015 assault was described by her GP as inducing a 'major relapse' in her symptoms. She was on anti-psychotic and anti-depressant medication. In a review decision, the council decided that although the appellant was a disabled person, she was not vulnerable (HA 1996 s189(1)(c)).

On appeal, HHJ Walden-Smith held that the review decision was not clear as to whether the council had considered: the extent of the disability; the likely effects of that disability taken together with her other personal circumstances; and whether she was vulnerable as a result (ie, the approach required by *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811). She quashed the review decision on that ground and also held that the council had failed to consider that the appellant's gender was a protected characteristic for the purposes of the EA 2010.

Suitable accommodation

- **Curran v Solihull MBC**
  [2016] EWCA Civ 963, 21 July 2016

The council owed Ms Curran a housing duty under HA 1996 Pt 7. She was a transgender woman disabled by attention deficit hyperactivity disorder and autism spectrum disorder among other conditions. The council offered her accommodation that it considered suitable. Her case that the accommodation offered was unsuitable was based on various instances of alleged abuse and harassment she had suffered in the area where the property was located. The decision on suitability was upheld on review and HHJ McKenna dismissed an appeal.

On a renewed application for permission to bring a second appeal, Sir Stephen Richards held that the relevant issue was whether the council's duty under EA 2010 s149 was properly discharged in reaching its decision on suitability. Ms Curran asserted that the reviewing officer had failed to assess the likely effect on her mental health of living in the accommodation offered, given her subjective fears about it. Although the reviewing officer had conducted an objective analysis of risk, he did not deal with the point that, subjectively, she would be traumatised by living at the property, notwithstanding the absence of objective risk.

Permission was refused. There was no sufficient prospect of establishing that the reviewing officer had failed to consider the issue of her subjective fears. In any event, the second appeal criteria were not met:

The case involves at best, in my judgment, a highly fact specific question as to whether the applicant's subjective fears were given proper consideration, rather than any broad issue of principle as to whether subjective factors are or are not to be taken into account in the context of suitability (para 11).

Accommodation pending review

- **R (Jackson) v Waltham Forest LBC**
  [2016] EWHC 685 (Admin), 12 February 2016

The claimant was a single man aged 52 with long-standing mental health problems. On release from imprisonment, he applied to the council for homelessness assistance. It decided that he did not have a priority need. It wrote (see para 44):

... You reported a number of psychiatric symptoms including auditory hallucinations, suicidal thoughts, panic attacks, mood swings, low mood and self-esteem problems. You served a prison sentence and have recently been released ... There is no indication that whilst in prison you [were] requiring regular input from prison in reach mental health services. We have not been able to indicate any significance of a severe and enduring mental illness or any disabling psychiatric disorder. You are prescribed some psychotropic medication which may help stabilise your mental state. Although you have some underlying personality difficulties which are responsible for mood instability, you are noted to be independently functional in all activities of daily living ...

The claimant applied for a review and for accommodation pending the outcome of that review. The request for accommodation pending review was refused in a letter which addressed the three criteria identified in *R v Camden LBC ex p Mohammed* (1998) 30 HLR 315, as explained in *R v Newham LBC ex p Lumley* (2001) 33 HLR 124, ie:

1) the merits of the case that the authority's original decision was flawed and the extent to which it could properly be said that the decision was one which was either contrary to the apparent merits or was one which involved a very fine balance of judgment;
2) whether consideration was required of new material, information or argument which could have a real effect on the decision under review; and
3) the personal circumstances of the applicant and the consequences of an adverse decision on the exercise of the discretion.

The claimant sought a judicial review and interim relief pending consideration of that claim. Sweeney J allowed the application for interim relief. He said:

Making every proper allowance in favour of the Mohammed *decision maker and without prejudging the outcome of either the application for permission or the section 202 review, I have concluded that, in the particular circumstances of this case and for the reasons that [counsel for the claimant] has advanced, the claimant has a strong prima facie case that his application for judicial review will succeed upon the overall basis that mere lip service must have been paid to all (in this instance) of the* Mohammed *criteria. That, in my view, means that this is an exceptional case in which it is appropriate for the court to contemplate the grant of the interim relief sought* (para 60).

Housing and children

- **R (S and J) v Haringey LBC**
  [2016] EWHC 2692 (Admin), 28 October 2016

The claimants were children. Their mother's leave to remain in the UK was subject to a condition that she could not have recourse to public funds. She could not obtain welfare benefits and was not eligible for social housing or homelessness assistance. Nevertheless, the council decided that the children were not 'in need' for the purposes of the Children Act 1989 because their mother had 'the means and resources to avoid homelessness and destitution' (see para 32) and it gave its reasons for that conclusion. They included the unreliability of the mother's account as to where she and the children had been living, and her failure to provide information requested from her.

Neil Cameron QC, sitting as a deputy High Court judge, quashed the decision on two grounds (3 and 3A). On ground 3, he was satisfied that the council did not make proper enquiries and took into account irrelevant considerations, namely the failure to provide information in relation to how the mother had paid rent in the past, and the failure to provide wage slips. On ground 3A, he was satisfied that: (a) the finding on 'unreliability' was based, in part, on a failure to provide information which the mother had not been asked to provide; and (b) there had been procedural unfairness because the council's concerns about the lack of information, in particular on how rent was paid in the past and in relation to the mother's wages, were not put to her before adverse inferences were drawn.

1 Trisan Hyatt, barrister, London.
2 See also page 35.
3 Liz Davies, barrister, London and Sarver Lalljee, Lambeth Law Centre.
4 Liz Davies, barrister, London and Gurminder Birdi, solicitor, Cambridge House Law Centre.

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 practitioners at notes 1 and 3–4 for transcripts or notes of judgments.