wrongly considered the hypothetical question of what would have happened had the existing warning been an ordinary warning, rather than a final written warning. It held that the tribunal should instead have focused on the actual reasoning of the respondent and asked whether, applying the objective standard of the reasonable employer, it acted reasonably in dismissing the claimant. This would depend on how it took account of the final written warning.

- **Stratford v Auto Trail VR Ltd** UKEAT/0116/16/JOJ, 31 October 2016

The claimant was dismissed for misconduct, his employer having taken into account expired disciplinary warnings. The employer formed the view that, given his poor disciplinary record, it was likely that conduct issues would arise in the future. The claimant brought a claim of unfair dismissal. The employment tribunal found the dismissal to be fair. The claimant appealed. The EAT upheld the decision on appeal and found that employment tribunals could take into account expired warnings as part of the overall circumstances under ERA 1996 s98(4) in considering whether a dismissal was fair or unfair. The facts of the previous misconduct, the fact that a warning was given and the fact that it had expired, were all relevant matters.

Effect of appeal on dismissal

The following case considered whether an employee could bring claims of unfair dismissal and wrongful dismissal when his/her dismissal had been successfully overturned on internal appeal.

- **Folkestone Nursing Home Ltd v Patel** UKEAT/0348/15/DM; UKEAT/0006/16/DM, 1 June 2016

The claimant was dismissed for gross misconduct on the basis of two disciplinary allegations. He appealed against his dismissal and his employer overturned the decision to dismiss but the appeal only addressed one of the two allegations. The claimant was dissatisfied with this outcome and viewed himself as dismissed, and brought claims of unfair and wrongful dismissal in the employment tribunal. The employment tribunal did not view the dismissal as having been revoked and found that the claimant was both unfairly and wrongfully dismissed. Both parties appealed against that judgment. The EAT found that the employment judge had not referred to *Salmon v Castlebeck Care (Teesdale) Ltd and others* UKEAT/0304/14/DM; [2015] IRLR 189. By applying the principles from that case, the EAT found that the claimant's dismissal was revoked and his employment reinstated.

1 Available at: www.acas.org.uk/index.aspx?articleid=5768
2 See also page 8 of this issue.
3 www.acas.org.uk/index.aspx?articleid=5071

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Housing: recent developments

Jan Luba QC and Nic Madge present the latest political and legislative developments, together with cases on whether an agreement was a tenancy or a licence, possession, assured shorthold tenancies, the Rent Act 1977, long leases, houses in multiple occupation, anti-social behaviour, housing allocation and homelessness.

Jan Luba QC

Nic Madge

Politics and legislation

Homelessness Reduction Bill

On 20 February 2017, the UK government published new and updated factsheets providing further background information on the measures within the Homelessness Reduction Bill. The factsheets now cover:

1. threatened with homelessness;
2. duty to provide advisory services;
3. assessment and personal plans;
4. prevention;
5. relief;
6. help to secure and suitability;
7. non-cooperation;
8. reviews;
9. duty to refer;
10. codes of practice;
11. local connection for care leavers;
12. updating the code of guidance; and
13. secondary legislation.

The bill has passed all its House of Lords stages without amendment and now awaits royal assent. The House of Lords Library has produced a useful briefing: *Homelessness Reduction Bill: briefing for Lords stages* (Lords In Focus LIF-2017-0016, 13 February 2017).

Homelessness in England

The UK government announced in the autumn statement 2015 that the Department for Work and Pensions' temporary accommodation management fee, paid to local housing authorities to assist with accommodating the homeless in England, would be replaced by a Department for Communities and Local Government (DCLG) grant from April 2017. On 15 March 2017, DCLG announced that the new flexible homelessness support grant will be paid from 1 April 2017. It is based on a new funding model directing resources to the areas with the greatest need and will help councils to plan their homelessness services with more certainty. The funding allocated for the next two years is £186m and £191m. A further £25m has been set aside for London boroughs to work together to provide accommodation for homeless families.

Abolition of the Right to Buy and Associated Rights (Wales) Bill

This bill was introduced on 13 March 2017 in the National Assembly for Wales by the Welsh government. When passed, it will abolish the statutory right to buy in Wales from 12 months after royal assent. The details are set out in the *Explanatory memorandum incorporating the regulatory impact assessment and explanatory notes* (Welsh government, March 2017).

Private rented sector

From 6 April 2017, a rent repayment order (RRO) may be made by a First-tier Tribunal (Property Chamber) on the application of a local housing authority or a tenant if a landlord commits certain offences related to rented property: Housing and Planning Act (HPA) 2016 s40 and the Housing and Planning Act 2016 (Commencement No 5, Transitional Provisions and Savings) Regulations 2017 SI No 281. The landlord may be required to repay up to 12 months' rent. Where the rent was paid with universal credit or housing benefit, a RRO may require the landlord to pay the council a sum equivalent to the benefit received in the relevant period.

The Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017 SI No 367 set out how a local housing authority must deal with any monies recovered through RROs made under HPA 2016 Pt 2 Ch 4 and any financial penalties received under Housing Act (HA) 2004 s249A. Any such monies may be retained provided that they are used to fund council functions under HA 2004 Pts 1–4 or HPA 2016 Pt 2 or are expended in connection with the enforcement of, or promotion of, compliance with the law of housing or landlord and tenant by a landlord or property agent as they relate to private rented housing. If not used for those purposes, the monies must be paid into the Consolidated Fund.

A new House of Commons Library briefing paper describes the current regulatory regime in England relating to private landlords and their agents and considers: (1) early reactions to the government's intention to introduce a ban on fees for tenants; and (2) comparisons with policy in the devolved nations: *The regulation of letting and managing agents (England)* (Briefing Paper No SN06000, 27 February 2017).

Housing and anti-social behaviour

The House of Commons Library has published updated versions of its two helpful briefing papers on anti-social behaviour and housing: *Anti-social neighbours living in private housing (England)* (Briefing Paper No SN01012, 27 February 2017); and *Tackling anti-social behaviour in social housing (England)* (Briefing Paper No SN00264, 24 February 2017).

Regulating social housing

The regulator of social housing in England (presently the Homes and Communities Agency (HCA)) was granted powers to charge fees under the Housing and Regeneration Act 2008. It set out initial proposals for fees in a discussion paper in 2014 and held a statutory consultation at the end of 2016. It has now announced that it will delay the introduction of fees for social housing regulation to October 2017: *Consultation on introducing fees for social housing regulation: decision statement* (HCA, March 2017).

The new fees are: a one-off flat-rate registration fee of £2,500 for successful registration with the regulator; a fixed annual fee of £300 for landlords with fewer than 1,000 social housing units; and an annual per unit fee of £4.72 for landlords with 1,000 or more social housing units – with the fee charged at group level rather than for each individual entity on the register.

Social landlords will pay 50 per cent of the annual fee for 2017 to 2018: *Decisions about the principles in accordance with which the regulator's fees are to be set; and about the charging of fees* (HCA Decision Instrument 12, March 2017).

Housing in England

The latest statistics on housing in England were released on 2 March 2017: *English Housing Survey: headline report 2015–16* (DCLG). The figures show that:

- there are an estimated 22.8m households in England;
- of those, 14.3m or 63 per cent are owner-occupiers;
- the private rented sector remains larger than the social rented sector;
- the private rented sector accounts for 4.5m or 20 per cent of households; and
- the social rented sector accounts for 3.9m or 17 per cent of households.

Housing and young people

The Universal Credit (Housing Costs Element for claimants aged 18 to 21) (Amendment) Regulations 2017 SI No 252 restrict entitlement to the housing cost element of universal credit for young people aged 18–21, with limited exceptions, from 1 April 2017. A useful House of Commons Library briefing paper sets out the exemptions and reviews the potential impact of the measure: *Housing cost element of universal credit: withdrawing entitlement from 18–21 year olds* (Briefing Paper No SN06473, 8 March 2017.)

Housing and disabled people

A new House of Commons Library briefing paper provides information on the inquiry by the UN Committee on the Rights of Persons with Disabilities into the impact of government policies on the rights of disabled people since 2010, including housing impacts: *The UN Inquiry into the Rights of Persons with Disabilities in the UK* (Briefing Paper No CBP-7367, 6 March 2017).

In December 2016, the Equality and Human Rights Commission launched a formal inquiry into the lack of accessible and adaptable housing available for disabled people in Britain. The inquiry is now calling for evidence, and invites disabled people and relevant organisations to share their experiences of housing and tenancy support provision. Findings and recommendations will be published in late 2017 or early 2018.

Homelessness statistics

In response to concerns about the way in which official data on homelessness in England is being presented by the UK government, the Director General for Regulation at the UK Statistics Authority wrote to Baroness Grender on 20 February 2017 setting out further advice he would provide to DCLG. He wrote: 'I hope that these actions taken together will provide greater clarity ahead of DCLG's longer-term statistical developments coming to fruition.' On 7 March 2017, the DCLG junior minister Lord Bourne wrote to peers, apologising for references to statistics not having been 'framed in the correct context'.

Tenancy or licence?

- **Camelot Property Management Ltd v Roynon**[1]
  County Court at Bristol, 24 February 2017

Bristol City Council entered into an agreement with Camelot Property Management Ltd to allow guardians to be placed in a former elderly persons' home. By their presence, the guardians would provide a measure of security. Camelot gave Mr Roynon permission to occupy two rooms as a guardian. He had shared use of a kitchen, washing and living areas with other occupants who had similar agreements. The written agreement stated that it created a licence, not a tenancy. One clause provided that Mr Roynon was given 'permission to share the living space'. However, Mr Roynon was given keys to the two rooms. Camelot sought possession. The court considered, as a preliminary issue, whether Mr Roynon had a tenancy or a licence.

HHJ Ambrose found that Mr Roynon's occupation was for a periodical term and for a rent. No other guardian could access his rooms. The rooms were for his use alone. He was not required to share them with anyone. Accordingly, he had exclusive possession. Having regard to *Street v Mountford* [1985] 1 AC 809, HL, Mr Roynon had an assured shorthold tenancy of the two rooms.

Possession claims

Article 8

- **Flagship Housing Group v McAllister**[2]
  County Court at Cambridge, 31 October 2016

In April 2013, Flagship granted Ms McAllister, a former member of the Traveller community, an assured tenancy. She was a victim of domestic violence and suffered from depression, anxiety and back pain. She had a 15-year-old daughter who suffered from serious asthma and panic attacks. In 2014, Ms McAllister was introduced to cannabis as a form of pain relief by an acquaintance. He also introduced her to a number of people who came to the property to smoke cannabis and, in return, they paid for the cannabis that Ms McAllister used. In November 2014, the police searched the property and charged her with possession of cannabis with intent to supply. She pleaded guilty on the limited basis that she had only supplied to the small group who attended the property and had only done so to fund her own medical use.

The local authority's Family Intervention Partnership (FIP) became involved due to the daughter's poor school attendance and academic performance. Following initial difficulties, the FIP made significant progress. Her attendance rose to 98 per cent and her academic performance improved. The daughter's panic attacks reduced. Following Ms McAllister's guilty plea, Flagship served notice seeking possession pursuant to HA 1988 Sch 2 mandatory Ground 7A and discretionary Grounds 12 and 14. The FIP social workers met with Flagship,

seeking to persuade it not to seek possession on a mandatory ground. After initially refusing to engage on the basis that it had a 'zero tolerance policy' on drugs that would be applied regardless of the circumstances of an individual case, Flagship agreed to consider placing Ms McAllister on a 12-month starter tenancy. However, there was a further incident when police attended the property to speak to her adult son, who was visiting. The police found 40g of cannabis and £800 in cash in Ms McAllister's bedroom drawer. Her son claimed full responsibility for the cannabis and was given a caution. Ms McAllister denied any knowledge of the cannabis and no action was taken by the police against her. However, in view of the further incident, Flagship issued a claim for possession on Grounds 7A, 12 and 14. Ms McAllister admitted that the grounds were made out on the basis of her guilty plea, but defended the claim arguing that a possession order would constitute a breach of the article 8 rights of her and her daughter, and that a suspended order on Grounds 12 and 14 would be the proportionate course.

HHJ Yelton found that the defendant and her son had lied, and that she had continued to use cannabis at the property after her conviction. However, noting the principles set out in *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231; [2014] HLR 23 (per Lewison LJ at para 15), he held that it would be disproportionate for the family to be evicted in light of: (a) the evidence of her medical conditions; (b) the evidence from the FIP social worker in relation to her daughter (who had now entered her GCSE year); and (c) the fact that there was no evidence of any complaints from her neighbours. Accordingly, the claim on Ground 7A was dismissed and a three-year suspended possession order granted on Grounds 12 and 14.

Assured shorthold tenancies

Tenancy deposits

- **Manu Ventures Ltd v Sida**[3]
  County Court at Clerkenwell and Shoreditch,
  23 January 2017

Mr Sida was an assured shorthold tenant. After the expiry of the fixed-term tenancy, he became a statutory periodic tenant. He accrued rent arrears of approximately £6,500. He defended the subsequent possession claim by alleging that the claimant offshore company, which owned several residential and commercial properties, had failed to protect his deposit (HA 2004 s214).

After considering *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669; [2013] HLR 42, and noting the decision of District Judge Jenkins in *Chaudry v Cooley* November 2016 *Legal Action* 40, District Judge Sterlini ordered the landlord to pay two penalty awards, one for failure to protect the £1,200 deposit in respect of the contractual tenancy and one relating to the statutory periodic tenancy. District Judge Sterlini, in ordering the maximum penalty for each of the breaches (total £7,200), stated that parliament had intended that the remedy available for failure to comply with s214 should be punitive. The fact that the landlord had entrusted the responsibility for management to agents did not absolve it from culpability. Nor was the fact that the penalty was a windfall for the defendant relevant.

- **Amak Property Investments (London) Ltd v Sonny**[4]
  County Court at Central London,
  15 September 2016

The claimant landlord sought possession under the accelerated procedure. Ms Sonny filed a defence relying on the MyDeposits scheme rules (7th edn, clause C1.5), which specified that service of the prescribed information constituted an 'initial requirement' of the scheme for the purposes of HA 2004 s213(4). The landlord had failed to serve the prescribed information within 30 days. A possession order was made without the judge considering the defence. Ms Sonny applied to set aside the possession order but her application was dismissed because a deputy district judge considered that the defence had no reasonable prospect of success. Ms Sonny appealed.

Recorder Klein allowed the appeal, finding that the application to set aside should have been allowed. In view of the scheme rules, service of the prescribed information was an initial requirement and the failure to comply with it within 30 days meant that s215(1A) applied and the HA 1988 s21 notice could only be served if HA 2004 s215(2A) (the return of deposit) was met. The landlord needed to return the deposit (with agreed deductions) or have a claim in relation to it settled, before a valid s21 notice could be served.

Rent Act 1977

Registered rents

- **Saint v Kightley**
  [2016] UKUT 459 (LC),
  31 October 2016

Ms Saint occupied a flat under a Rent Act regulated tenancy. From June 2014, the registered fair rent was £885 per quarter. In 2015, her landlord, Mr Kightley, made a new application for the registration of a rent of £1,350 per quarter. The application was made on the grounds that there had been a change of circumstances due to improvements. The rent officer determined a fair rent of £941.50 per quarter of which £104 per quarter was said to be 'attributable to services'. This represented the maximum fair rent as calculated in accordance with the Rent Acts (Maximum Fair Rents) Order 1999 SI No 6 (RAMFRO). The landlord objected to the rent determined by the rent officer and the matter was referred to the First-tier Tribunal (FTT). The FTT assessed the fair rent without an oral hearing after inviting written representations and inspecting the property. It determined the fair rent at £1,362 per quarter. It did not specify any amount for services, which it said was 'not applicable'. The FTT stated that the capping provisions of the RAMFRO 'do not apply because [of] 15% exemption'. Ms Saint appealed, alleging that the reasons given were inadequate.

In the Upper Tribunal, AJ Trott FRICS allowed the appeal and remitted the case to the FTT to explain in greater detail how it arrived at its decision. He stated: 'The FTT owes a general duty to give clear reasons for its decision' (para 13). After referring to *Flannery v Halifax Estate Agencies Ltd* [2000] 1 ALL ER 373 at 377 and *Trustees of the Israel Moss Children's Trust v Bandy* [2015] UKUT 276 (LC), he said: '[T]he appellant finds herself facing a rent increase of 54% above the previous registered fair rent and 45% above the figure determined by the rent officer. The FTT's determination (£1,362 per quarter) is also higher than the figure which the landlord wanted the rent officer to register (£1,350 per quarter). In these circumstances it is incumbent on the FTT to give a full and clear explanation of how it arrived at its determination of the rent' (para 15).

The FTT had referred to the open market value of the property in a 'usual' condition, based on what is described as its 'own knowledge of market rent levels in the area of Nottinghamshire'. However, the FTT 'did not specify what it meant by usual condition, either in terms of repair, decorative condition or the type of amenities that were offered, eg central heating or double glazing. Nor did the FTT give any details of the knowledge upon which it relied or whether it took account of, and if so how, the four comparable flats … referred to in the landlord's written representations, or whether, and if so how, it took account of the rent officer's comment that the uncapped rent was £1,300 per quarter' (para 16). The judge did not consider that the FTT's 'bald reliance on its unspecified local knowledge [was] sufficient to enable the appellant to understand how the FTT reached its decision' (para 17).

Long leases

Service charges

- **Knapper v Francis**
  [2017] UKUT 3 (LC),
  10 January 2017

A 999-year lease of a chalet in a holiday park provided that the lessee was required to pay the lessor 'such sum or sums as the lessor may reasonably require on account of the said service charge'. The issue in an appeal to the Upper Tribunal was whether, in determining the reasonableness of an amount demanded on-account of relevant costs before they were incurred, a tribunal was required or permitted by Landlord and Tenant Act 1985 s19(2) to take into account facts that were not known at the date of the demand but became known only later.

Martin Rodger QC, Deputy Chamber President, held that a tribunal must assess the reasonableness of a sum at the date when the demand was served. The fact that certain work was not in fact carried out or was not carried out to a reasonable standard was therefore irrelevant. This did not, however, mean that the tribunal was prohibited from taking into account any matters that were unknown to the landlord at the date of the demand. A tribunal could, for example, have regard to the fact that the provision of a particular service could have been obtained for a considerably lower sum than was estimated by the landlord.

Houses in multiple occupation (HMOs)

Prosecutions

- **Waltham Forest LBC v Tuitt**[5]
  Thames Magistrates' Court,
  11 November 2016

Mr Tuitt was the freehold owner of a house, converted into four self-contained flats. The house was in an area of selective licensing under Waltham Forest's scheme and the HA 2004. Mr Tuitt had no licence or licences. Waltham Forest prosecuted him for three offences under HA 2004 s95(1), alleging that he required three licences, one for each of the occupied flats in the house. Mr Tuitt defended, claiming that the s85 requirement was that '[e]very Part 3 house must be licensed under this Part' and so the information laid against him was wrong in law. He maintained that he only required one licence for the whole

house, not each flat. ('House' is defined at HA 2004 s99 as 'a building or part of a building consisting of one or more dwellings'.)

District Judge McIvor held that Mr Tuitt's interpretation of s99 imperilled the policy objective of HA 2004 Pt 3, and, having regard to s79(2) and (3), would mean that a block of 20 flats would not need to be licensed if just one flat was leased to a registered provider of social housing to sublet to a tenant. Mr Tuitt's other submission, that the extent of the 'house' varied from time to time according to its occupied parts, was also rejected. He was found guilty and sentenced to a fine of £4,000 for each offence. He was ordered to pay costs exceeding £12,000. Mr Tuitt has appealed by way of case stated.

- **Birmingham City Council v Khan**[6]
  Birmingham Magistrates' Court, 14 November 2016

Birmingham prosecuted Mr Khan for failure to obtain an HMO licence, breaching the Management of Houses in Multiple Occupation (England) Regulations 2006 SI No 372 (HMO Management Regs) and acts likely to interfere with his tenants' peace and comfort (Protection from Eviction Act 1977 s1(3A)).

The magistrates found Mr Khan guilty. With an accomplice, he had intimidated his tenants to make them leave the property and threatened to change the locks if they did not do so. The property was unlicensed between 13 December 2014 and 28 December 2015 and breached the HMO Management Regs. Breaches included general disrepair, insufficient smoke alarms, a tripping hazard on the stairs, a sparking electrical socket and holes in the ceilings. They sentenced him to 150 hours of unpaid work, fined him £2,000, and ordered him to pay costs of £5,070.93 and a victim surcharge.

- **Bristol City Council v Alternative Housing**[7]
  Bristol Magistrates' Court, 2 November 2016

Alternative Housing was a property management company that arranged lettings and managed properties on behalf of private landlords in Bristol. The company was a registered charity and was responsible for housing some very vulnerable tenants. After Bristol City Council's inspection of three HMOs in December 2014, breaches of the HMO Management Regs were found. These were successfully prosecuted in January 2016. An emergency remedial action notice and a Building Act notice were also served in respect of one of the properties. Follow-up inspections of that property in December 2015 and February 2016 found conditions had worsened, with blocked drains discharging sewage into the back yard. The waste pipe to the kitchen sink was disconnected so the waste was pouring into a bucket. In addition, there were other items of poor repair, missing smoke detectors, dampness in the bedrooms and no gas available to provide heating or hot water. Warnings produced no action and Bristol prosecuted again.

Alternative Housing did not attend the hearing. Fines and costs totalled £16,000.

Rent repayment orders

- **Welham v Hussain**
  Residential Property Tribunal, LON/00AC/HMA/2016/0004, 27 July 2016

Mr Hussain was the freehold owner of a house with a number of bedrooms, and shared kitchen, bathroom and toilet amenities. In 2008, he obtained an HMO licence, but it expired in March 2013. In the interim, he adapted the property by extending into the roof to create a studio flat. He said he thought that the property was no longer an HMO, because there were only two floors sharing, and so he did not seek to renew the licence. There were four assured shorthold tenants of rooms with the right to shared use of communal facilities. In March 2016, at Willesden Magistrates' Court, he pleaded guilty to an offence under HA 2004 s72(1). The magistrates imposed a fine of £3,500, a victim surcharge of £120 and made a costs order of £2,446.69 (£6,066.69 in total). The tenants applied for rent repayment orders.

After considering *Parker v Waller* [2012] UKUT 301 (LC) and HA 2004 s74(6), the tribunal took into account the total amount of relevant payments received during the period when the offence was being committed and Mr Hussain's conduct and financial circumstances. Over the relevant period, Mr Hussain received rent from the four tenants totalling £15,486.32. In addition, he received rental income from the studio flat in the loft. He was a professional landlord. He had some knowledge that the property was subject to the HMO licensing regime. In the absence of any supporting evidence, the tribunal treated his explanation for not seeking a new licence in 2013 with some caution. The tribunal found it appropriate to start with a figure of 75 per cent of the net profits and the fine and costs. The tribunal was satisfied that there was no adverse conduct on the part of any of the tenants. It made four rent repayment orders totalling £5,000.

Anti-social behaviour

Injunctions

- **Birmingham City Council v Pardoe**
  [2016] EWHC 3119 (QB), 5 December 2016

Birmingham claimed that, over a period of years, Mr Pardoe and other defendants 'had repeatedly engaged in a particularly unpleasant form of anti-social behaviour by targeting elderly and vulnerable persons and charging them excessive sums for building works which were unnecessary and/or shoddy' (para 2). The council sought an injunction under Anti-social Behaviour, Crime and Policing Act (ABCPA) 2014 s1. Some of the allegations related to matters occurring many years previously. ABCPA s21(7) states: 'In deciding whether to grant an injunction … a court may take account of conduct occurring up to six months before the commencement day.' Mr Pardoe contended that its effect was that the court was precluded from taking into account conduct prior to 23 September 2014. HHJ Worster rejected that contention, and held that s21(7) does not limit the conduct which can be considered in deciding whether it is just and convenient to grant an injunction. Mr Pardoe appealed.

Holroyde J dismissed the appeal. After considering *Stevens v South East Surrey Magistrates' Court and Surrey Police* [2004] EWHC 1456 (Admin), *R (Chief Constable of West Mercia Constabulary) v Boorman* [2005] EWHC 2559 (Admin) and *R v McGrath* [2005] EWCA Crim 353; [2005] 2 Cr App R (S) 85 (cases decided under the Crime and Disorder Act 1998), he noted that anti-social behaviour will, by its very nature, generally involve a course of conduct. It is often the cumulative effect of anti-social behaviour over a period of time, rather than the individual acts, that causes serious harm. In many cases, there will be at least some interval of time between the earliest conduct complained of and an application to the court for an injunction.

Against that background, to interpret s21(7) as a provision which limits the court's power under s1, and requires the court wholly to ignore behaviour prior to 23 September 2014, would lead to absurd results. Past behaviour may be probative of more recent behaviour and it is possible that a respondent accused of anti-social behaviour after 23 September 2014 may wish to rely on his/her own earlier conduct by way of defence. It would also be very surprising if the court, in considering whether it was just and convenient to grant an injunction, was required to ignore evidence which was logically highly relevant to that decision. Evidence of conduct prior to 23 September 2014 might militate either in favour of or against the granting of an injunction.

Holroyde J found that s21(7) is:

… a genuinely transitional provision which permits the court, in deciding whether qualifying behaviour has been proved for the purposes of an application under s1, to take account of conduct occurring on or after 23 September 2014, and not merely of conduct occurring on or after the commencement date of 23 March 2015. It does not prevent a court from taking account of conduct prior to 23 September where evidence of such conduct (assuming there is no other bar to its admissibility) is relevant to the issue of whether the applicant authority can prove anti-social behaviour by the respondent since 23 September 2014. Nor does it prevent a court from taking account of conduct prior to 23 September where evidence of such conduct (again assuming there is no other bar to its admissibility) is relevant to the court's evaluation of whether it is just and convenient to grant an injunction (para 43).

He continued (at para 44):

i) Where an application for an injunction under Part 1 of the 2014 Act is based on an allegation of actual anti-social behaviour, as opposed to an allegation of threatened anti-social behaviour, the applicant authority must satisfy the court of the first condition under section 1(2) by proving on the balance of probabilities that the respondent has engaged in anti-social behaviour which occurred after 23 September 2014. If such behaviour is not proved, the court has no jurisdiction to grant an injunction.

ii) Evidence of the respondent's conduct prior to 23 September 2014 cannot in itself satisfy the first condition. But (assuming there is no other bar to its admissibility) such evidence may be taken into account by the court at the first stage, where it is relevant (whether as similar fact evidence, or to rebut a defence, or in any other way) to the issue of whether the respondent engaged in anti-social behaviour after 23 September 2014.

iii) Evidence of the respondent's conduct prior to 23 September 2014 (again assuming there is no other bar to its admissibility) may also be taken into account by the court at the second stage, when considering whether it is just and convenient to grant an injunction.

Committal

- **Wolverhampton City Council v Green and Charlesworth**
  [2017] EWHC 96 (QB),
  20 January 2017

In December 2014, HHJ Owen QC granted an injunction against persons unknown, pursuant to Local Government Act 1972 s222, prohibiting car cruising in the Black Country area. The order and the schedule attached to it gave a definition of car cruising, which included vehicles performing any of a list of specified prohibited activities that caused, or were capable of causing, any one of a list of specified prohibited consequences. In December 2016, Mr Green (aged 20) and Mr Charlesworth (aged 19) each admitted breaches of that order involving driving in a convoy of nine cars, travelling at speed and causing excessive noise. Some of the activity was filmed and uploaded to social media.

Holroyde J stated (at para 19):

When determining the appropriate sanction for an admitted breach of injunction of this kind, the court has a number of objectives. First, the sanction is intended to ensure compliance in the future with the court's order. Secondly, it is intended to protect the public who would be affected by future breaches and who have been affected by past breaches. Thirdly, it is intended as a punishment to those who have breached the order, to bring home to them the seriousness of breaching a court's injunction.

There was no doubt that the seriousness of the conduct made it necessary to pass custodial sentences. He sentenced Mr Green to four months' detention in a young offender institution suspended until February 2018 on condition that he comply with the injunction, and Mr Charlesworth to three months' detention, suspended on the same terms.

- **Sutton LBC v Kelman**
  County Court at Kingston-upon-Thames,
  [2016] EW Misc B26 (CC),
  13 October 2016

An injunction prevented the defendant from entering an exclusion zone and from threatening, shouting or swearing at named persons. He admitted nine breaches of the injunction. They included: going to a property, banging on windows and doors and demanding to be let in; calling a vulnerable man 'a fucking cunt'; kicking and damaging a kitchen side panel; entering a property, shouting at the occupant, grabbing his phone and throwing it against a wall; and grabbing the occupant and pushing him against a wall. The defendant had also been charged with harassment and assault and, after pleading guilty, was sentenced to 18 weeks' custody, suspended for 18 months.

District Judge John Smart stated that court orders have to be complied with and that he had to mark the court's disapproval of disobedience to court orders. He had regard to the Sentencing Council's *Breach of a protective order: definitive guideline* and the decision of the Court of Appeal in *Slade v Slade* [2009] EWCA Civ 748 (ie, where someone has previously been sentenced, the second court should not so much reflect 'the prior sentence' in its judgment as decline to sentence for such of the conduct as has already been the subject of punishment in the criminal court). The district judge gave credit for the defendant admitting the allegations, although he did not sense that there was any real remorse on his part. He took into account the fact that the defendant had found somewhere to live, was sorting his life out and had no need to go back to the premises. The judge extended the duration of the injunction so that it coincided with the 18 months' suspended sentence in the magistrates' court and committed the defendant to prison for one month, but suspended the sentence on the basis that the defendant did not commit any further breach of the injunction.

- **Birmingham City Council v Pearmain**
  County Court at Birmingham,
  [2016] EW Misc B35 (CC),
  7 November 2016

The defendant was aged 19. It appears that an injunction was granted to prevent him threatening his mother or going to the street where she lived. He breached the order in May 2016. He was arrested and bailed, but then breached the order again three times in June. He spent some time in custody, but breached the order again in September.

HHJ Worster stated that these sorts of breaches justified a custodial sentence measured in months. However, as the defendant had already spent the equivalent of three months in custody, the judge imposed a further month's custody but suspended it for a period of 12 months on condition that he keep to the terms of the injunction.

- **Newcastle City Council v Murtha**
  County Court at Newcastle-upon-Tyne,
  [2016] EW Misc B34 (CC),
  17 October 2016

The Court of Protection made an injunction restraining the defendant from entering the house of a 79-year-old man who lacked capacity and lived alone. Mr Murtha breached the injunction by entering the premises twice in one day. He had previously been imprisoned for breaches of the injunction.

District Judge Jackson noted that Mr Murtha had been evicted from the property he rented and was no longer in the area where the victim lived. After deciding that the breaches were at the lowest end of the spectrum, the judge concluded that any form of custodial sentence would be inappropriate. Sentence was adjourned on the basis that the case would be returned to the list and considered if any further breaches were proved.

- **Birmingham City Council v Phillips**
  County Court at Birmingham,
  [2016] EW Misc B32 (CC),
  1 November 2016

Police were called on at least 200 occasions to the premises where Mr Phillips' mother and father resided. Birmingham obtained an injunction under the ABCPA 2014 preventing him from going there. Mr Phillips admitted breaching that injunction on seven occasions. There had been several previous breaches.

Recorder Khangure QC stated that it was quite clear that Mr Phillips was in 'blatant breach' of the order (para 7). He imposed a custodial sentence of 26 weeks.

- **Walsall Housing Group v Carter**
  County Court at Walsall,
  [2016] EW Misc B30 (CC),
  12 October 2016

In 2011, Mr Carter was convicted of racist harassment towards a neighbour's 12-year-old daughter. In 2014, he was convicted of racist abuse towards other members of the same family and was sentenced to nine months' imprisonment. In April 2016, an injunction was granted preventing Mr Carter from causing or threatening any nuisance or annoyance towards the family. Mr Carter breached the terms of the injunction immediately after service and was given an immediate custodial sentence of six weeks' imprisonment. He subsequently purged that contempt and was released from prison. He breached the injunction on three further occasions by: (i) shouting verbal abuse and threatening behaviour, including using the words 'fucking dickhead'; (ii) saying to another member of the family, 'Tell you what. Come around the corner away from my mum's house and I'll fight you'; and (iii) abusing a plumber and using racist language.

Recorder Tidbury stated that a custodial sentence was inevitable. There had been a continuing series of breaches that made the case more serious. The sentence imposed for the contempt of court was imprisonment for eight weeks.

- **Birmingham City Council v Whitsey**
  County Court at Birmingham,
  [2016] EW Misc B37 (CC),
  24 November 2016

Birmingham made a committal application against Mr Whitsey in respect of three breaches of an injunction made pursuant to ABCPA 2014 s1 in the Birmingham Youth Court. He was aged 18. He accepted that on one day he breached the injunction on three occasions by being within an exclusion zone on two different occasions and by riding a motorbike in a dangerous manner causing smoke to come off it, revving it and riding it at speed.

HHJ McKenna referred to: (i) the three principal objectives of sentencing (punishment for breach, a desire to secure future compliance and rehabilitation of the defendant); (ii) the sentencing guidelines; and (iii) *Willoughby v Solihull MBC* [2013] EWCA Civ 699. The aggravating features included the fact that Mr Whitsey was a repeat offender who was the subject of a suspended sentence. The breaches all took place over a relatively short period following the making of the initial interim order and the most recent breaches took place within a short period, not only of the making of the final injunction order, but also of the imposition of a suspended sentence. In the ordinary course of events, a defendant in the position of Mr Whitsey could expect nothing less than an immediate custodial sentence. However, he was only just 18 when these breaches occurred and, after a period of being alienated from his parents, was back living with his mother and stepfather, who were present in court to show their support. HHJ McKenna decided not to impose an immediate custodial sentence or to activate the suspended sentence. He imposed three concurrent sentences of 12 weeks' imprisonment, suspended on terms that the defendant comply with the terms of the injunction.

Housing allocation

- **R (Osman) v Harrow LBC**
  [2017] EWHC 274 (Admin),
  21 February 2017

Harrow's amended housing allocation scheme reduced the priority previously given to applicants from overcrowded households in privately rented accommodation (described in the scheme as 'homeseekers'), while preserving high priority for its own overcrowded council tenants who were making transfer applications. The claimant was an overcrowded private tenant who had been in Band

A. Following the amendment to the scheme, she was placed in lower Band C. She sought a judicial review of the amended scheme on the basis that it: (a) unlawfully discriminated against those in the private rented sector contrary to Human Rights Act (HRA) 1998 Sch 1 articles 8 and 14; and (b) in consequence did not secure that a reasonable preference was given to applicants occupying overcrowded housing or otherwise living in unsatisfactory housing conditions: HA 1996 s166A(3).

Robin Purchas QC, sitting as a deputy High Court judge, dismissed the claim. As to whether such a claim might be advanced at all under article 14 read with article 8, he held that 'for the purposes of the present scheme there is a relevant comparison to be made between the transfer and homeseeker groups in that arbitrary discrimination between the two so as to affect their article 8 rights would in principle come within article 14' (para 65). However, on the facts, the council's evidence had advanced a logical and legitimate reason for the difference in treatment: 'The intention was that by reducing the priority preference [for those in the private sector] to the same as homeless cases the incentive to decline offers through [the homelessness] route would be removed. There is no evidence before the court to challenge that advice or its basis as reported by the officers. Moreover that was in my judgement a legitimate aim for the purposes of article 14 and otherwise' (para 66). The claimant had been given some preference in the scheme by placement in Band C and the claim that this was not a 'reasonable' preference had not been made out.

Homelessness

Eligibility

- **GO v Aberdeen City Council** [2017] CSOH 9, 20 January 2017

A Polish national had been trafficked to the UK in October 2014. After months of physical and sexual abuse, she and her adult son went to the police. With the assistance of voluntary agencies, she and her son were granted a joint tenancy of a council house. The son lost his job and the couple faced eviction for rent arrears. On her subsequent application for homelessness assistance, the council decided that she was not 'eligible' as she was not a worker or jobseeker and enjoyed no right of residence in the UK. She sought judicial review on the grounds that a trafficked EU national enjoyed a right of residence in the country to which they had been trafficked under articles 21 and 45 of the Treaty on the Functioning of the European Union or that failure to accommodate her would amount to interference with her rights under HRA 1998 Sch 1 article 4.

Lord Boyd dismissed the claim. He held:

[50] ... even if [it] was legitimate to look for exceptional circumstances or to undertake a proportionality exercise the petitioner's circumstances do not provide a foundation for a right of residence in the [UK]. It is accepted that she is a victim of trafficking. Fortunately that came to an end in December 2014. It is accepted that she was, at the time of the council's decision, and subsequently experiencing mental health difficulties associated with trafficking. However the petitioner has no ties to the [UK] other than the presence of her adult son, who appears not to be exercising residence rights. She is not economically active and to that extent is a burden on the [UK]. She does not speak English. There is no barrier to her return to Poland where she could access support and services in her own language and there is the potential of support for family and friends.

[51] The only reason for a continued presence in the [UK] is her desire to remain here, though not it seems in Aberdeen where she is seeking to be housed. She does not wish to return to Poland. In my opinion these are not good enough reasons for her to be accorded a right of residence in this country, particularly when to do so would involve a burden on the state. She has failed to provide any link between her status as a victim of trafficking and the right to residence in the [UK]. It is not suggested that she cannot return to Poland, merely that she does not wish to. Nor is it suggested that her mental condition is such that she could only get appropriate treatment in this country. Indeed the evidence suggests that her language skills hamper the provision of appropriate treatment in this country.

Suitable accommodation

- **Barakate v Brent LBC**[8] County Court at Central London, 16 October 2016

Mr Barakate had lived in Brent for over 10 years. When he became homeless, he, his wife and his three daughters were provided with temporary accommodation in Brent. He obtained work in London and his children attended school in Brent (one of his daughters was in the middle of her GCSE course). In discharge of the duty under HA 1996 s193 an offer of private rented sector accommodation in Birmingham was made. On a review, applying its policy on out-of-borough placements, the council determined that, despite its location, the accommodation was suitable. Mr Barakate appealed.

Allowing the appeal, Recorder Alastair Wilson QC stated that:

... in the context of location, the concept of suitability can be seen to be not an absolute one, but a relative one, depending on the availability of something closer [to the 'home' borough]. This relative suitability must, as I see it, have a further important consequence: As soon as one allows the test of suitability to include this relative element, it seems to me inescapable that in cases of far away placements, the test should also include some consideration of the timescale within which more suitable accommodation might be found (para 27).

Accordingly, it is only possible to assess suitability in a 'location' case with the benefit of some indication of 'how long it would be for something better to turn up' (para 30). No such investigation had been carried out by the reviewing officer. The council's initial offer had been based solely on availability 'on the day', without asking: 'How long is it likely to take for something more suitable for [this] family to turn up?' (para 32). The reviewing officer's decision was quashed.

Accommodation pending appeal

- **Fovargue v Lambeth LBC**[9] County Court at Central London, 1 February 2017

Mr Fovargue had social phobia, severe anxiety and depression. There was a history of suicidal ideation and a previous attempt at suicide. The symptoms of his social phobia included a fear of public transport, the avoidance of crowded places, and an impaired ability to enter retail premises including estate agencies. He said he had suffered discrimination when trying to obtain accommodation because of his sexual orientation. His psychiatrist's opinion was that disruption to his therapeutic intervention was likely to put him at 'risk of further mental state destabilisation and risk of suicide'.

On his application for homelessness assistance, the council decided, on review, that he did not have a priority need. He filed a county court appeal. An application for accommodation pending appeal under HA 1996 s204(4) was refused. The decision stated: 'As to your client's personal circumstances, I regret there is nothing in these which leads me to conclude they are out of the ordinary' and that 'I note that the review officer has considered your client's status as a disabled person for the purposes of the equality duty. The reason why your client has no priority need for accommodation is because he did not satisfy the criteria ... It is exceptionally hard to see how the council is in breach of a [public sector equality duty (PSED)] to a person that it does not owe a duty to rehouse.'

An appeal against that decision was filed (HA 1996 s204A) contending that the council had failed to take into account the PSED, by treating the three relevant factors in *R v Camden LBC ex p Mohammed* (1998) 30 HLR 315 as both necessary and sufficient considerations; and that the decision-maker believed that she did not need to take the PSED into account because the reviewing officer had done so in reaching the review decision. It was argued that: (a) the PSED was context-specific and decision-specific; and (b) no reasonable authority could accept the view of the NowMedical adviser over the expert evidence adduced by the applicant.

HHJ Lochrane quashed the decision not to provide accommodation pending appeal and ordered that the main s204 appeal be expedited. The PSED ground succeeded because the decision-maker had failed to discharge the duty in respect of the accommodation-pending-appeal decision, relying instead on an entirely different decision (the review decision). The decision-maker had erred by taking into account the PSED analysis in respect of the priority need decision. This was a fundamental misinterpretation of the required approach.

1 This case was first noted on Nearly Legal (https://nearlylegal.co.uk).
2 Dirghayu Patel, GT Stewart, London, and Daniel Clarke, barrister, London.
3 Carol de Mello, casework support officer (legal team), Shelter, London, and Josephine Henderson, barrister, London.
4 Dambudzo Tenner, Duncan Lewis Solicitors, London, and Josephine Henderson, barrister, London. This case was first noted on Nearly Legal.
5 Dean Underwood, barrister, London. This case was first noted on Nearly Legal.
6 This case was first noted on Nearly Legal.
7 This case was first noted on Nearly Legal.
8 Tim Baldwin, barrister, London.
9 Tony Ross, barrister, London, and Richard Harmer, solicitor, Shelter, London.

Jan Luba QC and Nic Madge are circuit judges. They would like to hear of relevant housing cases in the higher or lower courts. They are grateful to the colleagues above for providing details of the judgments.