# **Housing:** recent developments

**Jan Luba QC and Nic Madge** **highlight recent political and legislative developments as well as cases on human rights, possession claims, harassment and eviction, long leases, anti-social behaviour, houses in multiple occupation, allocation, homelessness and community care.**

**Jan Luba QC**

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## Politics and legislation

### Housing Ombudsman

David Connolly has been appointed as the interim Housing Ombudsman with effect from 5 June 2017. He replaces the former housing lawyer Denise Fowler, who has taken up a position as chief executive of a housing association.

On 21 April 2017, a memorandum of understanding was agreed and entered into by the Housing Ombudsman and the Homes and Communities Agency, acting through its Regulation Committee, as the regulator of social housing. The memorandum sets out the functions of each organisation and describes the arrangements for co-operation and communication between the two bodies in relation to their respective functions.

### Private renting

Freedom of Information Act requests made to local councils in England and Wales produced responses from three-quarters of them indicating that: (1) 651 landlords were convicted of housing offences between January 2015 and December 2016; and (2) those landlords were fined a total of £3m – an average of about £4,600 per conviction: Tom Wall, 'Bristol housing charity tops list of UK's most-prosecuted landlords', *Guardian*, 5 May 2017.

The UK government has issued three sets of guidance materials for local housing authorities in England relating to the use of their powers to tackle poor practice in the private rented sector:

- *Civil penalties under the Housing and Planning Act 2016: guidance for local housing authorities* (Department for Communities and Local Government (DCLG), April 2017);
- *Rent repayment orders under the Housing and Planning Act 2016: guidance for local housing authorities* (DCLG, April 2017); and
- *Obtaining and using tenancy deposit information: explanatory booklet for local housing authorities* (DCLG, April 2017).

The House of Commons Library has produced three new briefing papers on the private rented sector:

- *Banning letting agent fees in England* (Briefing Paper No CBP-7955, 28 April 2017) outlines the current law on letting agents' fees imposed on tenants and the initial responses to the UK government's proposal to ban them in England. The paper includes information on current practice in Scotland, Wales and Northern Ireland.
- *The regulation of letting and managing agents (England)* (Briefing Paper No SN06000, 28 April 2017) describes the current regulatory regime in England. Comparisons are drawn with policy in the devolved nations.
- *Private rented housing: the rent control debate* (Briefing Paper No SN06760, 3 April 2017) provides an overview of the debate around rent control/regulation and includes some information on a small selection of international rent regimes.

A new study has compared the effectiveness of different forms of regulation of private renting in Ireland with existing approaches in England: *Regulation of the private rented sector in England using lessons from Ireland* (Joseph Rowntree Foundation, April 2017).

### Homelessness

The House of Commons Committee of Public Accounts has reported that the number of homes built in England has lagged behind demand for decades and that the effects of this shortfall reveal themselves in the growing barriers people face in getting on the property ladder, or simply affording their rent, with a consequent growing problem of homelessness: *Housing: state of the nation. Sixty-third report of session 2016–17* (HC 958, 28 April 2017).

The Scottish parliament's Local Government and Communities Committee has launched a call for written evidence on homelessness. The committee wants to find out the reasons why people can find themselves homeless or threatened with homelessness and what can be done to tackle this effectively. The closing date for receipt of submissions is 14 June 2017.

### Housing and disability

The House of Commons Women and Equalities Committee has recommended that the UK government act to improve access to the built environment for disabled people: *Building for equality: disability and the built environment. Ninth report of session 2016–17* (HC 631, 25 April 2017). It advises that housing standards need to be future-proofed to produce meaningful choice in housing. It recommends that the UK government should raise the mandatory minimum to Category 2, the equivalent of the former Lifetime Homes standard, and apply it to all new homes – including the conversion of buildings such as warehouses or former mills into homes.

### Housing and mental health

Shelter, in partnership with the research agency ComRes, conducted a two-stage research project in early 2017 to explore the relationship between housing and mental health: *The impact of housing problems on mental health* (Shelter, April 2017). The key findings were that:

- 21 per cent of adults interviewed said a housing issue had negatively impacted upon their mental health in the last five years;
- housing affordability was the most frequently referenced issue by those who saw housing pressures having had a negative impact upon their mental health; and
- three in 10 of those who have had a housing problem or worry in the last five years not only said that it had had a negative mental impact, but that they had had no issue with their mental health previously.

### Supported housing

Two House of Commons committees have jointly reported that it is inappropriate to use the local housing allowance rate in regulating housing benefit payments for supported housing provision and recommended that a new supported housing allowance, banded to reflect the actual cost of provision in the sector, should be introduced instead: *Future of supported housing. First joint report of the Communities and Local Government and Work and Pensions Committees of session 2016–17* (HC 867, 1 May 2017). The committees note concerns that the UK government's proposed reforms could lead to a serious shortfall in the availability of supported housing.

### Mobile homes

The UK government is undertaking a review of the Mobile Homes Act 2013 in its application to park homes. The review is in two parts: (1) the fairness of charges, the transparency of site ownership and the experience of harassment (a consultation on part 1 closed on 27 May 2017); and (2) how effective local authority licensing has been, how well the procedures for

selling mobile homes, making site rules and pitch fee reviews are working and whether 'fit and proper' controls need to be applied in the sector: *Review of park homes legislation: call for evidence – part 1* (DCLG, April 2017). The part 2 consultation paper will be issued after the general election.

In Scotland, a new licensing system for mobile home sites with permanent residents came into force from 1 May 2017 under Housing (Scotland) Act 2014 Pt 5. The Scottish government has issued detailed guidance about its operation: *Guidance to local authorities on the licensing system for mobile homes sites with permanent residents* (April 2017).

## Human rights

### Article 1 of Protocol No 1

- **Strekalev v Russia**
  App No 21363/09,
  11 April 2017

Prior to Russian privatisation legislation, the City of Moscow owned a flat where N and her son B lived as tenants under a social housing agreement. N died in 1993 and B died in 1994. In June 2002, the municipal authority authorised an exchange of flats between N, whose name had not been removed from the tenant register, and K. In October 2002, the Moscow Housing Department transferred the title to the flat to K under the privatisation scheme. In November 2002, K sold the flat to Mr Strekalev. His title to the flat was registered and he moved in with his family. In August 2003, the police opened a criminal investigation into the fraudulent acquisition of the flat by K. Later, the prosecutor brought a civil claim on behalf of the Moscow Housing Department seeking annulment of all the transactions on the flat, Mr Strekalev's eviction and restitution of the flat to the City of Moscow.

In April 2006, a district court granted the prosecutor's claims. It established that the flat allegedly exchanged by K had never existed and that all the documents submitted by K for the exchange of flats had been forged. It reinstated the city's title to the flat and ordered Mr Strekalev's eviction. Later, the court dismissed his claim against the City of Moscow for damages, finding that there was no causal link between his loss of title to the flat and the City of Moscow's actions. Appeals were dismissed. Mr Strekalev was evicted, but, in March 2014, the district court suspended the eviction proceedings for one year and Mr Strekalev moved back into the flat. In August 2014, the Housing Department entered into a permanent social tenancy agreement with him and in October 2014 it transferred ownership of the flat to him under the privatisation scheme. In the European Court of Human Rights (ECtHR), he alleged that he had been deprived of his flat in contravention of article 1 of Protocol No 1 and that his eviction had amounted to a violation of article 8.

After referring to *Gladysheva v Russia* App No 7097/10, 6 December 2011; *Stolyarova v Russia* App No 15711/13, 29 January 2015; *Medvedev v Russia* App No 75737/13, 13 September 2016; *Kirillova v Russia* App No 50775/13, 13 September 2016; and *Popova v Russia* App No 59391/12, 4 October 2016, the court repeated that defects in procedures resulting in the loss by the state of its real property should not be remedied at the expense of bona fide purchasers. Restitution of property to the state or municipality, in the absence of any compensation paid to its former owner, imposed an individual and excessive burden on the latter and failed to strike a fair balance between the demands of the public interest on the one hand and applicants' right to the peaceful enjoyment of their possessions on the other. The court saw no reason to hold otherwise in this case. There was a violation of article 1 of Protocol No 1. There was a clear link between the violation found and the damage caused to Mr Strekalev. The court awarded €1,518 in respect of pecuniary damage and, making its assessment on an equitable basis, €1,500 in respect of non-pecuniary damage. The court decided that it was not necessary to examine separately the admissibility and the merits of the complaint under article 8.

**Comment**: For a similar case, in which the ECtHR found a breach of article 1 of Protocol No 1 and awarded €38,321 in respect of pecuniary damage and €5,000 in respect of non-pecuniary damage, see *Klimenko v Russia* App No 18561/10, 2 May 2017.

- **Vaskrsić v Slovenia**
  App No 31371/12,
  25 April 2017

Mr Vaskrsić was the subject of enforcement claims brought by three different creditors. His house was seized and sold at public auction. He and his family were evicted with the assistance of the police.

The ECtHR found that the sale amounted to a violation of article 1 of Protocol No 1. The interference with Mr Vaskrsić's right to peaceful enjoyment of his possessions was in accordance with the law and served the legitimate aim of protecting the creditors. However, the house was sold for half its market value. The enforcement court did not consider any alternative measures, despite the fact that Mr Vaskrsić appeared to have been employed and to have had a monthly income. The relevant domestic legislation did not explicitly place an onus on the enforcement court to opt for less intrusive enforcement measures or set any minimum threshold in respect of the amount of debt owed. Even a minor debt could be enforced by means of the judicial sale of a house. Although there is a wide margin of appreciation, the state failed to strike a fair balance between the aim sought and the measure employed. The court awarded €77,000 in respect of pecuniary damage and €3,000 in respect of non-pecuniary damage.

## Possession claims

### Water charges

- **Rochdale Boroughwide Housing Ltd v Izevbigie**
  [2017] EWHC 790 (Ch),
  7 April 2017

Rochdale sought possession on the ground of arrears of rent. The rent included charges for water supplied. HHJ Bird, sitting as a High Court judge, determined the preliminary question: '[I]s the claimant a reseller within the meaning of the Water Resale Order 2006 by reason of the agreements entered into between the claimant and the intervener (United Utilities Water Limited)?' (If Rochdale was a reseller, it was entitled only to make a small administrative charge and would have to pass on to tenants any discounts or reductions received – see *Jones v Southwark LBC* [2016] EWHC 457 (Ch); April 2016 *Legal Action* 39).

After referring to *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 and considering the terms of three agreements between United Utilities Water Ltd and Rochdale, HHJ Bird held that Rochdale was not a reseller of water. The agreements provided that Rochdale was to provide 'collection services' for United Water. Unlike *Jones v Southwark*, Rochdale was not under a contractual obligation to pay for services provided by United Water.

- **Southwark LBC v SH**[1]
  County Court at Lambeth,
  29 March 2017

Southwark claimed possession against a secure tenant under Housing Act (HA) 1985 Sch 2 Ground 1 ('Rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed'). The arrears amounted to £1,461.97 when proceedings were issued on 24 June 2016. The claim was defended on the basis that:

1. A refund for overpaid water rates was due following the decision in *Jones v Southwark LBC* (see above). As a result, the claim had included rent not lawfully due.
2. There had been no variation in the agreement between Southwark and Thames Water and so Southwark was continuing to charge the defendant more than was permitted under the Water Resale Order 2006.
3. There were outstanding issues in relation to the defendant's entitlement to housing benefit between April and June 2016.
4. It was not reasonable to make a possession order.

The water rates refund of £676.10 was made on 3 July 2016 and arrears of housing benefit amounting to £1,515.68 were paid on 31 July 2016. These brought the rent account into credit.

Deputy District Judge Rollason dismissed the claim and ordered Southwark to pay the defendant's costs. The figures in the particulars of claim were 'wholly incorrect' and the imminent water rates refund 'should never have been included' in the claim. In relation to the rent arrears caused by housing benefit arrears, proceedings should not have been commenced due to the outstanding issues. The judge referred to para 2.6 of the Pre-Action Protocol for Possession Claims by Social Landlords.

### Death and notices to quit

- **Hackney LBC v Henry**[2]
  County Court at Clerkenwell and Shoreditch,
  23 March 2017

Mrs Henry was a secure tenant of Hackney. On 6 September 2013, she died intestate. Hackney decided that her son, Mr Henry, was not entitled to succeed to the secure tenancy. On 1 May 2014, Hackney delivered a notice to quit to the property, addressed to the personal representatives of Mrs Henry, and expressed to expire on 1 June 2014 'or the day on which a complete period of your tenancy expires next after 28 days from the service of this notice' (the saving clause). However, it did not send a copy of the notice to the Public Trustee until over 17 months later, on 5 November 2015. Hackney issued a claim for possession based on the expiry of the notice to quit, alleging that the tenancy had been determined on 1 June 2014. Mr Henry defended the claim, alleging that he had in fact succeeded to the tenancy, but also that, in any event, the notice to quit was of no effect because:

- upon Mrs Henry's death, her estate vested in the Public Trustee under Administration of Estates Act 1925

s9(1), so that the Public Trustee was the legal tenant (*Wirral BC v Smith* (1982) 4 HLR 81);
- under Law of Property (Miscellaneous Provisions) Act 1994 s18(1), the notice to quit was only 'sufficiently served' if (and when): (a) 'it' had been 'left at or sent to' the property; and (b) 'a copy of it' had been 'served' on the Public Trustee; and
- under Protection from Eviction Act 1977 s5(1), the notice to quit had to be 'given' (ie, sufficiently served) not less than four weeks before the date on which it expired.

At the hearing of a preliminary issue, Hackney accepted that, if the notice was served on the Public Trustee after the date on which it was expressed to expire, it was of no effect. However, it submitted that the date of expiry was not 1 June 2014 but was to be calculated by the saving clause, which ran from the date on which a copy was sent to the Public Trustee (ie, the date of sufficient service under s18(1)).

Deputy District Judge Brafield accepted Mr Henry's submissions that:

1. Section 18(1) provided that the document left at the property was 'the notice' and the document sent to the Public Trustee was merely 'a copy'. The notice was 'served' when it was left at the property (*Re 88 Berkeley Road* [1971] Ch 648), albeit that it was not yet 'sufficiently served' for the purposes of s18(1). Therefore, on its plain meaning, the saving clause ran from the date the notice to quit was left at the property and not the date on which the copy was sent to the Public Trustee.
2. Even if the saving clause could be construed as Hackney proposed, it would not meet the common law requirement of clarity to the reasonable recipient (*Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749). In the context of s18(1), this required clarity not only to the Public Trustee (as tenant), but also to the prospective personal representatives at the property (as addressees). In addition to being contrary to the plain meaning, Hackney's interpretation would require the prospective personal representatives to engage in the kind of complex and difficult exercise – including obtaining contextual information to which they were not privy (ie, the date on which a copy was sent to the Public Trustee) (cf *Mannai* at 779) – which meant the notice to quit could not be said to be clear (*Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 WLR 638).

The possession claim was dismissed.

**Setting aside possession orders**

- **Watford Community Housing Trust v Fagg**[3]
  County Court at Watford,
  12 April 2017

Ms Fagg was granted a 'starter' tenancy by Watford Community Housing Trust on 1 June 2015. During that tenancy, Watford served a HA 1988 s21 notice and obtained a possession order. That possession order was never executed. On 3 June 2016, after the making of the possession order, the parties entered into a five-year fixed-term assured shorthold tenancy of the same property. However, Watford claimed that rent arrears of over £2,000 accumulated and obtained an outright possession order, under HA 1988 Sch 2 Ground 8.

Ms Fagg applied to have the possession order set aside under Civil Procedure Rules 1998 (CPR) r3.1(2)(m), read with CPR r3.1(7). She submitted that the possession order had been made on the basis of erroneous information (*Roult v North West Strategic Health Authority* [2009] EWCA Civ 444; [2010] 1 WLR 487) because Watford had, without showing a contractual entitlement so to do, sought to enforce the second tenancy on the basis of arrears accrued under the first tenancy. Ms Fagg claimed that there were no arrears at the time of service of the HA 1988 s8 notice or at the time of the possession hearing, as they were all attributable to the first tenancy.

Deputy District Judge Wright accepted those submissions. The outright possession order was set aside, and Ms Fagg was given the opportunity to file and serve a defence and counterclaim. Watford has since served a notice of discontinuance.

## Harassment and eviction

**Damages**

- **Isaac v Parke**[4]
  County Court at Edmonton,
  15 February 2017

In January 2011, Mr Parke granted Mr Isaac, a 67-year-old man, an assured shorthold tenancy of a flat at a monthly rent of £850. Mr Isaac paid a deposit of £2,850. The deposit was not protected in accordance with the HA 2004. Most of Mr Isaac's rent was paid as housing benefit by standing order, but he made up a small monthly deficiency himself. Mr Isaac regularly visited friends and relatives in the Caribbean. He travelled to Belize on 13 November 2015. He left his Audi car outside the property. Mr Isaac's own payment towards the rent was not paid in December and in early January 2016 his rent account was in debit by just under £100. When he returned to the property on 16 February 2016, he found that the locks had been changed. He applied for an injunction, but Mr Parke had re-let the property on 7 February for 12 months at an increased monthly rent of £1,050. Mr Isaac spent seven weeks in a hostel before renting 'a little single room' with a shared bathroom.

Deputy District Judge Ramsden found that Mr Parke's conduct relating to the deposit was reprehensible. There was no mitigation to persuade him not to order return of the deposit plus the maximum penalty under HA 2004 s214(4) of three times the deposit. The total awarded in respect of the deposit was £10,800.

The judge stated that the law does not accept that a tenancy can be abandoned. Despite this, Mr Parke decided that 'he could risk it and pursue an argument that the claimant had abandoned the premises. He turned a blind eye as to whether or not his concept of abandonment was sufficient … the eviction was not only unlawful but it was all a calculated risk' (paras 69–71). The case was not as serious as some because there was no violence or threats of violence, but Mr Isaac was without a home for seven weeks. The judge awarded:

- general damages at the rate of £200 per night (49 × £200 = £9,800);
- exemplary damages of £3,000; and
- aggravated damages of £500.

The total sum of the judgment was £24,100 plus interest, calculated at four per cent on the general damages. There was no claim for special damages in respect of belongings, but the judge ordered the return of items that Mr Parke still retained.

- **Diaz v Karim**
  [2017] EWHC 595 (QB),
  21 March 2017

From June 2014, Mr Diaz rented a bedroom with shared facilities from Mr Karim. Rent arrears accrued and Mr Karim began a possession claim in the County Court at Lambeth. Mr Diaz brought a claim in the High Court for trespass to goods and land, against his landlord, Mr Karim, claiming that in September 2015, when he was out, Mr Karim came to his room and disposed of all his possessions, many of which were very valuable. The claim form stated that the claimant's expectation was that he would recover more than £900,000 but not more than £1m in damages. The claim was denied in its entirety.

In giving judgment, HHJ Parkes QC, sitting as a judge of the High Court, stated:

*Neither the claimant nor the defendant was a satisfactory witness. Each was consumed with dislike for the other; each was angry and excitable; and neither seemed to me to be committed to giving a calm or balanced account of events to the court. It was difficult to give credence to the evidence of either man. Each of them gave evidence which was implausible* (para 27).

However, he found that on 3 September 2015 the defendant lost patience with the claimant and unlawfully entered his room and threw out his possessions. Those included a number of books, two computers, a hard drive, a camera, many academic notes, political documents relating to the claimant's work as cultural co-ordinator of the Azanian National Union, and a number of cultural artefacts, including some coloured gemstones. HHJ Parkes QC found that the measure of damage should be the market value of the goods at the date of conversion or trespass. He rejected the claimant's 'inflated and exaggerated claim'. He compensated him 'in very approximate terms for the market value of the lost goods' by awarding the sum of £5,000 (para 48).

## Long leases

**Service charges**

- **Southwark LBC v Akhtar and Stel LLC**
  [2017] UKUT 150 (LC),
  20 April 2017

Ms Akhtar and Stel LLC held the long lease of a flat, initially granted pursuant to the right to buy. It included an obligation to pay service charges. A schedule to the lease provided that estimated service charges for each year would be paid in advance in quarterly instalments. Before 1 April each year, the landlord would give notice setting out the estimated charge for the coming financial year and that sum would be collected in equal instalments on the following four quarter days. After the following 1 April, the tenant would be given a final account setting out the actual service charge for the year.

Southwark carried out major works in 2012. It claimed to have served a notice in accordance with the lease dated 12 February 2013, headed 'Estimate Charge: Major Works … Refurbishment 2012'. The estimated charge for the flat was £40,701.57, relating to the three financial years between 1 April 2012 and 31 March 2015. A year later, Southwark gave the lessees another notice specifying a higher figure. Both notices set out costs actually incurred

by the landlord but not yet charged to the tenant, in accordance with HA 1985 s20B. Breakdowns of charges for other works, professional fees and administration charges were set out in separate notices.

Ms Akhtar denied receiving the notices. Both lessees claimed that they were invalid, arguing that the separation of major works service charges from revenue charges was 'not compliant with the requirements of the lease' and that one notice was given 'after the expiry of the financial period to which it related'. The First-tier Tribunal (FTT) accepted these arguments. Southwark appealed.

Judge Elizabeth Cooke allowed the appeal. There was nothing in the lease to prevent Southwark from serving more than one notice in respect of each year, so long as the lessees knew or could reasonably be expected to work out what to pay. After referring to *Southwark LBC v Woelke* [2013] UKUT 349 (LC), the judge stated:

*Time is not of the essence, and so the landlord has flexibility within the year; but that flexibility does not mean that time can be extended indefinitely … The late service of the … notice insofar as it related to 2012–2013 seems to me to have the effect that the landlord has failed to give such a notice for those charges in that year and therefore lost the opportunity to have that estimate paid in the way envisaged by [the lease]. It is free to make a final charge for the major works incurred in 2012–2013 [at a later date]* (paras 34–35).

Although the notice with the estimate for 2012/13 was invalid because it was served too late in the financial year, the sums referred to were payable because Ms Akhtar had waived her entitlement to strict compliance with the lease by entering into a loan on favourable payment terms. Having regard to the incorporation of Law of Property Act 1925 s196 into the lease and Interpretation Act 1978 s7, the notices were validly served even though they were printed and posted by a third party.

## Anti-social behaviour

### Committals

- **Festival Housing Ltd v Baker**
  [2017] EW Misc 4 (CC),
  County Court at Worcester,
  8 February 2017

An Anti-social Behaviour, Crime and Policing Act 2014 injunction was made against Ms Baker on 17 December 2015. A first breach of that order came before HHJ Pearce-Higgins on 23 December 2015. He imposed a one-day sentence of imprisonment that was deemed served. A further injunction was granted on 3 March 2016. A second breach took place and came before HHJ Pearce-Higgins on 3 May 2016. It was proved and Ms Baker was sentenced to 28 days' imprisonment. On 3 August 2016, HHJ Pearce-Higgins made a third injunction, which provided that she was 'forbidden to beg, solicit or accept money from any person in the City of Worcester, and in particular, directly or indirectly from Bruce Green, Sarah Green or any member of their family'. That injunction was breached and HHJ Plunkett imposed a sentence of 80 days' imprisonment. The claimant alleged that Ms Baker breached that injunction on two further occasions, on 25 November 2016 and 2 January 2017, and applied to commit her.

District Judge Mackenzie was disturbed and concerned that Ms Baker, a fragile and vulnerable individual, did not have the assistance of any public funding or a solicitor. He stated: '[I]t has proved impossible now to secure a solicitor for Ms Baker … It is wholly unsatisfactory that the system conspires against a vulnerable individual like this, so that she cannot get the legal aid and solicitor assistance that she really needs' (para 8). However, he concluded that she could have a fair hearing, despite being unrepresented. The judge found the two breaches proved. He continued: 'There has been an appalling history of disobedience to the court orders' (para 27). The mitigating factors were:

(i) The real mischief of these injunctions was to stop begging involving vulnerable members of the public and people known to Ms Baker. Both the current incidents involved begging from a Street Ranger, not a vulnerable individual.
(ii) On both those occasions, Ms Baker had simply asked for 50p. She had not done so in an aggressive way. She had been told 'no' and she did not persist.
(iii) Ms Baker was 'a pretty fragile vulnerable individual … [although] she knows what she is doing, she has got capacity to understand both what she did, and these proceedings, she is, frankly, a pathetic individual who has not been able to stop herself although the period in prison has possibly curtailed her from targeting the individuals that the injunction was particularly aimed at stopping' (para 32).

The judge considered that he had to 'mark the blatant repeat breaches of this injunction with something meaningful' (para 33). Having regard to totality, he sentenced Ms Baker to periods of three months for each offence, to run consecutively. He reduced that by two weeks for the time already served, giving a global sentence of 24 weeks for the two offences.

- **Housing Solutions v Dakin**
  [2017] EW Misc 5 (CC),
  County Court at Slough,
  5 April 2017

Mr Dakin breached an injunction on one occasion by going to see his family within an exclusion zone. That one visit did not involve any abusive or threatening behaviour to anybody else.

District Judge Parker noted that Mr Dakin had 'really significant difficulties, both in terms of understanding and in terms of mental health, which would make it particularly difficult for him to cope with life in general' (para 4). He imposed a sentence of 14 days' imprisonment, suspended as long as the injunction lasted.

### Ombudsman complaints

- **Complaint against Aelwyd Housing Association**
  Case No 201602040,
  5 January 2017

Ms X was a resident in a sheltered housing complex. Another tenant, Mr Y, allowed access to Ms Z who harassed Ms X. Ms X complained about the housing association's handling of her complaint.

The Public Services Ombudsman for Wales found that the housing association had been entitled to serve a notice seeking possession upon Mr Y, but it should have given consideration to other means of addressing Ms Z's behaviour, including seeking a civil injunction. In upholding the complaint, the ombudsman was satisfied that Ms X had to make repeated complaints that were not fully addressed. As a result, she moved from the complex. The ombudsman recommended that the housing association apologise and make a payment of £500.

## Houses in multiple occupation

### Licensing

- **Waltham Forest LBC v Khan**
  [2017] UKUT 153 (LC),
  12 April 2017

In considering applications for licences under HA 2004 Pt 3 (the selective licensing of private sector housing), Waltham Forest had regard to the planning status of the premises. As Mr Khan had converted flats without planning permission, Waltham Forest granted licences for one year only with the intention that during that period the planning status of the flats should be regularised. On appeal, the FTT (Property Chamber) increased the period of the licences to five years on the grounds that Mr Khan's compliance with planning requirements was irrelevant to the question of licensing. Waltham Forest appealed.

Martin Rodger QC, Deputy Chamber President, allowed the appeals. Pt 3 licensing should not be seen as an alternative to the use by a local housing authority, which is also a local planning authority, of its powers of enforcement under the Town and Country Planning Act. However, that did not mean that, where a building has been converted to residential use, or an existing residential use has been intensified, in breach of planning control, those circumstances are irrelevant to the decision whether to grant a licence or to its terms. He continued: 'In my judgment it cannot possibly be said that … the issue whether a house has been built or occupied in breach of planning control is irrelevant' (para 45).

### Prosecutions

- **R v Malik**
  Snaresbrook Crown Court,
  12 April 2017

Ms Malik pleaded guilty to renting 'filthy flats' in an extension that was constructed without planning permission. Rental income derived from the illegal extension totalled approximately £108,000.

Recorder Milliken-Smith fined her £2,000 and made a confiscation order under Proceeds of Crime Act 2002 in the sum of £222,000 with two years' imprisonment in default.

- **R v Alternative Housing**[5]

Alternative Housing, a Bristol-based charity, 'which was established to provide accommodation for homeless people with addiction problems, has been convicted of housing offences six times over the past two years, after letting properties with problems including overflowing raw sewage'. It was fined a total of nearly £40,000. Over the same period, the charity received £321,000 in housing benefit.

## Housing allocation

- **R (XC) v Southwark LBC**
  [2017] EWHC 736 (Admin),
  6 April 2017

The claimant was a council tenant. She was a disabled woman living alone. She applied to Southwark for a transfer. Its housing allocation scheme, adopted in November 2013 under HA 1996 Pt 6, gave preference to applicants within the statutory 'reasonable preference' groups and afforded some of those

applicants a 'priority star'. That star rating was available to applicants in work and to those making a community contribution by way of voluntary work. The claimant contended that she could not undertake either paid or voluntary work and challenged the council's scheme. The issues arising on her claim for judicial review were whether the design or operation of the council's priority star scheme indirectly discriminated, contrary to the Equality Act 2010, against the disabled or against women whose caring responsibilities prevented or reduced their ability to work, either for pay or as volunteers.

Garnham J held that 'it is perfectly plain that the effect of the priority star scheme in the present case is indirectly to discriminate against those with disabilities and against women. It is beyond argument, in my view, that to make available a benefit, here a "star" which increases the prospect of achieving preferential housing, which can more readily be acquired by those without a disability, is to discriminate against the disabled by subjecting them to a detriment' (para 74). However, the policy had a legitimate aim (the creation of sustainable and balanced communities and encouraging residents to make a contribution to the local community) and the priority star scheme had a rational connection to that objective. The determinative question was therefore whether 'a priority scheme like the defendant's was the least intrusive measure which could be used without unacceptably compromising the objective' (para 86). The judge held that it was and dismissed the claim. He said:

*Here, the council has devised a scheme which seeks to address the needs of all the classes of applicant in its area. It has made provision for those with priority need, for the homeless and vulnerable, for those who need to move on medical or welfare or hardship grounds. It is entitled, consistent with the secretary of state's guidance, to favour those in work and those who volunteer. I can see no measure less intrusive, less likely to be detrimental to the claimant, which would not undermine the legitimate objective identified by the council and to which I have referred above* (paras 97–98).

- **Darby (administratrix of the estate of Rabbetts deceased) v Richmond on Thames LBC**
  [2017] EWCA Civ 252,
  11 April 2017

Lee Rabbetts applied to Richmond for social housing. He lived with his mother, his sister and her baby. He had a disabling condition causing him to be at risk of death if he picked up any routine infection. As a result, he did not leave the house. His GP wrote to the council stating that his health was at risk while he was sharing accommodation with others. A consultant haematologist also wrote, explaining that it would be disastrous if Mr Rabbetts were to pick up an infection at home and that living with a baby in the household was 'very dangerous'. A health visitor wrote, repeating the request for rehousing.

The council awarded 50 medical priority points out of a total award of 285 points. Its scheme allowed 200 medical points to be awarded where there was a life-threatening condition. Mr Rabbetts' sister and her baby developed infections. Mr Rabbetts contracted a respiratory problem a few days later and died from influenza. Shortly after his death, the council sent him an offer of accommodation. His mother, as administratrix of his estate, brought a claim for damages for negligent handling of the social housing application. The council applied to strike it out.

HHJ McKenna, sitting as a deputy High Court judge, struck out the claim (see [2015] EWHC 909 (QB); June 2015 *Legal Action* 45). He held the council did not even arguably owe a duty of care. Such a duty would be inconsistent with the statutory scheme of HA 1996 Pt 6. Remedies available to those disappointed with the operation of that scheme included internal review, judicial review (with interim relief), complaints procedures and the ombudsman.

The Court of Appeal refused a renewed application for permission to appeal. Thirlwall LJ stated:

*The law in this area is settled. The decision of the Supreme Court in* Michael v Chief Constable of South Wales *[2015] UKSC 2, [2015] AC 1732 underscores the proposition that there are very limited circumstances in which it will be held that a public authority acting under statute will be held to owe a common law duty of care. There is nothing in the judgment to give encouragement to the applicant. I am quite sure, as was the judge (see paragraph 24), that the existence of alternative remedies under the Housing Act is yet another obstacle to the common law duty of care contended for. In my view it is insuperable on the facts of this case* (paras 19–20).

## Homelessness

- **Poshteh v Kensington and Chelsea RLBC**
  [2017] UKSC 36,
  10 May 2017

Ms Poshteh was a refugee from Iran, where she had been subject to imprisonment and torture. She had indefinite leave to remain in the UK. Since October 2009, she had been housed in temporary accommodation provided by the council, pursuant to HA 1996 Pt 7. In November 2012, she refused a 'final offer' of permanent accommodation on the ground that it had features (particularly a 'round' window) which reminded her of her prison in Iran, and which would exacerbate the post-traumatic stress disorder, anxiety attacks and other conditions from which she suffered.

On review, the council determined that the offer had been suitable and the refusal of it had brought its duty under HA 1996 s193 to an end. That decision was upheld on appeal by the county court (HHJ Baucher), and by the Court of Appeal (Moore-Bick and McCombe LJJ, Elias LJ dissenting – see [2015] EWCA Civ 711; September 2015 *Legal Action* 54). The Supreme Court granted permission to appeal on the question '[w]hether the reviewing officer should have asked himself whether there was a real risk that the appellant's mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and if so, whether he did in fact apply the right test'.

The Supreme Court dismissed the appeal. The reviewing officer's decision disclosed no error of law. The court said:

*... the appeal on this issue well illustrates the relevance of Lord Neuberger's warning in* Holmes-Moorhouse [v Richmond upon Thames LBC *[2009] UKHL 7] against over-zealous linguistic analysis. This is not to diminish the importance of the responsibility given to housing authorities and their officers by the 1996 Act, reinforced in the case of disability by the Equality Act 2010. The length and detail of the decision-letter show that the writer was fully aware of this responsibility. Viewed as a whole, it reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case. He was doing so, as he said, against the background of serious shortage of housing and overwhelming demand from other applicants, many no doubt equally deserving. He clearly understood the potential importance of considering her mental state against the background of her imprisonment in Iran. His description of the central issue (para 39) has not been criticised* (para 39).

As to the general approach to be taken to appeals from reviewing officers' decisions, the court said:

*... since the creation of a statutory right of appeal to the county court, recourse to the highly restrictive approach adopted 30 years ago in the* Puhlhofer *case (*R v Hillingdon London Borough Council, ex p Puhlhofer *[1986] AC 484) is no longer necessary or appropriate. However, the principles governing the right of appeal to the county court under the 1996 Act have been authoritatively established by the House of Lords in* Runa Begum's *case* [Begum v Tower Hamlets LBC *[2003] UKHL 5] and others following it (including* Holmes-Moorhouse*), and should be taken as settled* (para 42).

Having heard wider arguments as to whether the duties imposed on local housing authorities under HA 1996 Pt 7 gave rise to 'civil rights [or] obligations' for the purposes of Human Rights Act 1998 Sch 1 art 6, the Supreme Court declined to depart from its earlier decision in *Ali v Birmingham City Council* [2010] UKSC 8. The later decision of the ECtHR in *Ali v UK* App No 40378/10, 20 October 2015; (2016) 63 EHRR 20 did not persuade it to change its earlier view.

## Housing and community care

- **R (SG) v Haringey LBC**[6]
  [2017] EWCA Civ 322,
  3 May 2017

The claimant was an asylum-seeker from Afghanistan. She was provided with asylum support pursuant to Immigration and Asylum Act 1999 s95, which included accommodation. She argued that she should be housed by Haringey either under the National Assistance Act (NAA) 1948 or, following a change in the law, the Care Act (CA) 2014. On 28 January 2015, the council refused to provide accommodation pursuant to the NAA 1948 and, on 20 May 2015, decided that the claimant had eligible needs for care and support under the CA 2014 but she was not entitled to be provided with accommodation pursuant to s18 of that Act in order to meet those needs.

On a claim for judicial review, John Bowers QC, sitting as a deputy High Court judge, dismissed the challenge to the January 2015 decision, on the basis that the claimant could not come within the transitional provisions relating to the implementation of

the CA 2014 (see [2015] EWHC 2579 (Admin); October 2015 *Legal Action* 42). But he concluded that the council's process was defective in two important respects in its May 2015 decision taken under the CA 2014. First, the claimant was entitled to have, but did not have, an independent advocate to support her during the assessment process. Second, the council 'did not ask itself the correct questions' during the assessment process by, in particular, failing to give any proper consideration to the claimant's accommodation needs, with the consequence that accommodation was simply not addressed within the assessment. As a result of those two findings, the judge quashed the decision of 20 May 2015, but he declined to grant a declaration that the council was bound to provide the claimant with accommodation pursuant to the CA 2014.

The Court of Appeal dismissed an appeal from the refusal of that declaration. It held that the role of a local authority under CA 2014 s18, whether it be a duty or a power, only comes into play after a valid determination under s13 has been made to the effect that the relevant individual has accommodation-related care and support needs. As the judge found, the council had wholly failed to address the question of accommodation during its assessment and therefore it had not made a relevant determination under s13 sufficient to trigger the next stage of the process, with respect to accommodation under s18 and the care and support plan required by s23(4)(1)(a). The judge had therefore set the May 2015 assessment aside with the implication that it would have to be undertaken afresh. On the facts of the case, and the judge's findings on those facts, any wider question as to the local authority's role under s18 was premature and did not fall for determination by the judge or by the Court of Appeal.

1 Serdar Celebi, solicitor, Cambridge House Law Centre, and Tim Baldwin, barrister, London.
2 Sandeep Bhabra, solicitor, Shelter, and Daniel Clarke, barrister, London.
3 Lucy Fox, solicitor, ARKrights, solicitors, Watford, and Riccardo Calzavara, barrister, London.
4 James Allie, solicitor, Spence & Horne, London, and Robert Brown, barrister, London.
5. Tom Wall, 'Bristol housing charity tops list of UK's most-prosecuted landlords', *Guardian*, 5 May 2017.
6 See also page 28.

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 at notes 1–4 above for providing details of the judgments.

# **Family:** update

**Hilka Hollmann discusses McFarlane LJ's March 2017 lecture on adoption plus recent case law on Human Rights Act 1998 claims for damages following Children Act proceedings, secure accommodation, domestic violence and contact, and communication of information to those outside the family proceedings.**

**Hilka Hollmann**

## Adoption: the gold standard?

The focus on adoption as the best outcome for children who cannot live and grow up with their birth families due to serious child protection concerns has been the subject of much case law, starting in recent years with *Re B (A Child)* [2013] UKSC 33 and *Re B-S (Children)* [2013] EWCA Civ 1146, and being reviewed in light of the introduction of the 26 weeks' time limit in Children Act (CA) 1989 s32, which has led to speedy proceedings and decisions having to be made quickly, with potentially wide-ranging, severe and irreversible consequences.

While the life of complex or otherwise 'deserving' cases can be extended beyond 26 weeks, this is generally done very cautiously, as urged by the CA 1989 and case law; the focus on getting things done in time is there from the outset. Unfortunately, as far as the author is aware, there are no comprehensive breakdown figures for adoptive placements further down the line and during adolescence, so when evaluating what is best for a child 'throughout [their] life' (Adoption and Children Act 2002 s1(4)) the impact of adoption long-term on a child remains unknown, particularly where there has been early life trauma and in circumstances where the birth family does not agree with the adoption.

McFarlane LJ's Bridget Lindley OBE Memorial Lecture 2017 to the Family Justice Council, *Holding the risk: the balance between child protection and the right to family life*, was thus a timely reminder of the complex issues facing those involved in the process and provides very interesting and insightful food for thought, his three main questions being:

1. Is adoption the best option?
2. How do we know it has worked all right?
3. What about transparency?

The text is available online and is well worth a read.[1] McFarlane LJ concludes that more research is needed, but also that:

*Judges and magistrates are asked to make these decisions by choosing which outcome is best when measured against the individual's whole lifetime. Whilst these are decisions taken in child protection proceedings, they are not just to do with child protection. Indeed, I would say, the adoption decision is not even largely to do with child protection. Making an adoption order radically shifts the tectonic plates of an individual's legal identity (and those of others)* ***for life****. That is a very big thing to do in order to protect that individual from harm during their formative years. Is an order of that magnitude necessary? How do we know that it is indeed the best outcome for the young person whose future life is being decided by the court? And, if I am right that we can no longer be certain that it is, how is it possible to say that by making adoption orders, particularly in the middle to low range of abuse cases, we are indeed getting the balance right between child protection and the right to family life* (emphasis in original).

As there continues to be a push for cuts in the public sector, including legal aid, this will inevitably remain a subject of much discussion, in order to get it right for the child. Judging by the coverage the speech got in the mainstream press, it has hit a nerve that bears exploration and further thought.

## Case law

### Human Rights Act claims and the statutory charge

About two years ago, when family courts started awarding quite significant damages for a local authority's breach of human rights, eg, through the unlawful and over-extensive use of CA 1989 s20 arrangements, local authorities quickly became far more alert to potential claims under the Human Rights Act (HRA) 1998 for declarations and damages, and many reviewed their internal practices of monitoring such placements. That effected a new awareness and ongoing discussions as to the proper and appropriate use, and usefulness, of s20.

It also appears to have resulted in an increased number of applications for public law orders being issued on children who have been in long-term s20 placements. We can probably assume that the increase in issued proceedings is at least in part due to that increased awareness because there were many more cases to follow in which inappropriate use of section 20 led to a claim under the HRA 1998.