# **Housing:** recent developments

**Jan Luba QC and Nic Madge highlight important cases on human rights, possession, anti-social behaviour, the Rent Act 1977, long leases, allocation, homelessness, and housing and children.**

**Jan Luba QC**

**Nic Madge**

* Due to the volume of case law reported in this article, material under the 'Politics and legislation' heading has been held over until October's issue.

## Human rights

### Annulment of title and eviction

- **Malayevy v Russia**
  App No 35635/14,
  18 July 2017

A married couple, VF and GF, lived in a flat owned by the City of Moscow under a social housing agreement. VF applied for the privatisation of the flat. His wife chose not to participate in the transaction. In May 2004, after privatisation, VF sold the flat to LM, Mr Malayev's mother. The text of the sale contract stated that LM paid RUB 300,000 to VF for the flat. However, according to Mr Malayev and Mrs Malayeva, in reality, LM paid RUB 2,500,000. In September 2006, LM died. Mr Malayev inherited the flat. His family, including Mrs Malayeva, moved in and lived there. The official documents stated that VF did not move out and continued to live in the flat. However, Mr Malayev and Mrs Malayeva stated that VF moved to the suburbs, but they let him keep the flat registered as his place of residence so that he could continue to receive social benefits in Moscow. In July 2007, Mr Malayev transferred the title to half of the flat to his sister by way of gift.

In April 2011, VF lodged a complaint with law enforcement authorities. He alleged that he had not sold the flat to his relative LM and that he had not received any money from her. He had continued to live in the flat and had let Mr Malayev move into the flat temporarily in view of problems that he had been having with his wife. In subsequent proceedings, the court established that, at the time of the privatisation and sale of the flat, VF had not been able to understand his actions or control them. An expert's report stated that 'VF suffered from organic personality syndrome and vascular dementia which had developed long before he had applied for privatisation of the flat … [His condition] had prevented him from understanding his actions or controlling them' (para 12). The court invalidated all the transactions with the flat and transferred it to the ownership of the City of Moscow. It ordered the eviction of Mr Malayev and Mrs Malayeva. They complained to the European Court of Human Rights (ECtHR) alleging breaches of article 8 and article 1 of Protocol No 1.

The ECtHR found that there was no violation of article 1 of Protocol No 1. From the outset, the civil proceedings resulting in the forfeiture of Mr Malayev's title were instituted by a private individual, VF, who sought to restore his own right to reside in the flat that had originally been the property of the City of Moscow. The City of Moscow, when invited by the court to take part in the proceedings as a third party, did not file a separate claim in respect of the flat and chose not to attend the proceedings. The court concluded that the case concerned, in substance, a dispute between private parties. Such disputes do not as such engage the responsibility of the state under article 1 of Protocol No 1. Accordingly, the court's task was to assess whether the domestic courts' adjudication of the dispute between VF and Mr Malayev was given in accordance with domestic law and to ascertain that their relevant decisions were not arbitrary or manifestly unreasonable. There was no reason to conclude that the Russian authorities had applied the legal provisions manifestly erroneously or so as to reach arbitrary conclusions. Although Mr Malayev argued that the national courts had failed to recognise that he had acquired the flat in good faith, he had not raised that in the domestic proceedings. Accordingly, the national courts' decisions did not constitute interference with his right to the peaceful enjoyment of his possessions.

There was, however, a violation of article 8. It was not disputed that the flat was Mr Malayev and Mrs Malayeva's 'home' or that their eviction amounted to an interference with their right to respect for their home. However, the lawfulness of the eviction was not in dispute and was an automatic consequence of the termination of Mr Malayev's title. It catered for the needs of VF, a vulnerable person who had originally resided in the flat under the social housing agreement. When considering whether the interference was 'necessary in a democratic society', the ECtHR noted that the margin of appreciation in housing matters is narrower when it comes to the rights guaranteed by article 8 than those in article 1 of Protocol No 1. The eviction order was made automatically by the domestic courts after they had terminated Mr Malayev's title to the flat. They made no further analysis as to the proportionality of the measure. Although the national courts took into account the interests of VF, they did not weigh those interests against Mr Malayev's and Mrs Malayeva's right to respect for their home. Once the courts had invalidated Mr Malayev's title to the flat, they gave that aspect paramount importance, without taking into account their housing needs. The national judicial authorities thus failed to provide the applicants with a proper review of the proportionality of their eviction. The court found no causal link between the violation and the pecuniary damage claimed and so rejected that claim. However, it awarded €7,500 in respect of non-pecuniary damage.

- **Lunina and Mukhamedova v Russia**
  App Nos 7359/14 and 69173/14,
  13 June 2017

The ECtHR considered two further cases in which the state authorities succeeded in evicting and annulling the titles of people who had innocently purchased flats from vendors who had fraudulently obtained title.

The court again saw no reason to depart from the conclusions reached in *Gladysheva v Russia* App No 7097/10, 6 December 2011; February 2012 *Legal Action* 11, *Stolyarova v Russia* App No 15711/13, 29 January 2015; April 2015 *Legal Action* 42, *Medvedev v Russia* App No 75737/13, 13 September 2016; November 2016 *Legal Action* 39, *Kirillova v Russia* App No 50775/13, 13 September 2016 and *Popova v Russia* App No 59391/12, 4 October 2016; December 2016/January 2017 *Legal Action* 38. The defects in procedures resulting in the loss by the state of its real property should not have been remedied at the expense of bona fide owners of the property. Restitution of property to the state or municipality, in the absence of any compensation paid to the owner, imposed an excessive burden on the owner and failed to strike a fair balance between the demands of the public interest on the one hand and the owners' rights to the peaceful enjoyment of their possessions on the other. The consequences of any mistake made by a state authority must be borne by the state and errors must not be remedied at the expense of the individual concerned.

The court found that there was a violation of article 1 of Protocol No 1. It ordered full restitution of the applicants' titles to the flats and the annulment of the eviction orders, and awarded €5,000 in respect of non-pecuniary damage.

- **Shvidkiye v Russia**
  App No 69820/10,
  25 July 2017

Ms Shvidkaya bought a flat in the Kaluga Region with the intention of exchanging it for a flat in Moscow. In October 2002, the Committee for

Exchange of Housing authorised the exchange of a flat in Moscow belonging to K with Ms Shvidkaya's flat. However, in later court proceedings, it was established that a former occupant of the Moscow flat (B) had falsified a court judgment authorising the assignment of that flat to K. The court invalidated K's social tenancy agreement and the exchange of the flats between K and Ms Shvidkaya. It declared the transactions null and void and ordered her eviction. It also ordered K to pay her RUB 732,000. Ms Shvidkaya complained to the ECtHR that there was a breach of article 8.

The ECtHR noted that Ms Shvidkaya had already lived in the flat for almost seven years when her eviction was ordered. The flat was her 'home' for the purposes of article 8. The eviction amounted to an interference with her right to respect for her home. The court accepted that the interference had a legal basis in domestic law and pursued the legitimate aim of protecting the City of Moscow (as the owner of the flat) and the rights of individuals in need of housing. The central question was, therefore, whether the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'.

After referring to *Connors v UK* App No 66746/01, 27 May 2004, and *McCann v UK* App No 19009/04, 13 May 2008, para 50, the court found that the domestic courts had not weighed the interests of the City of Moscow against Ms Shvidkaya's right to respect for her home. Once they had found that the earlier transactions had been unlawful and had to be annulled, they gave that aspect paramount importance, without seeking to weigh it against Ms Shvidkaya's arguments. The national courts failed to balance the competing rights or to determine the proportionality of the interference with Ms Shvidkaya's right to respect for her home. Accordingly, the interference complained of was not 'necessary in a democratic society'. There was a violation of article 8. The court rejected the claim for pecuniary damage representing the value of the flat in Moscow because it did not discern any causal link between the violation found and the pecuniary damage alleged. It did, though, award €7,500 in respect of non-pecuniary damage.

- **Shevchuk v Ukraine**
  App No 30854/09,
  19 June 2017

Ms Shevchuk cohabited with VG as an unregistered life partner in his flat from 1985 until his death in 2005. Initially, the flat belonged to the municipality but VG privatised it in 1993 and obtained an ownership certificate, which was in his name only. Later, VG drew up a will, bequeathing the flat to his grandson, AG. After VG's death, Ms Shevchuk brought a claim against AG and the privatisation authorities, seeking a declaration that she, as a member of the deceased's family who had permanently resided in the flat prior to his death, retained the right to a protected tenancy. She sought to invalidate the flat's privatisation and its transfer to AG.

A first instance court rejected her claim as unsubstantiated. The Court of Appeal overruled that judgment and allowed her claim. The Supreme Court rejected the defendants' appeals. Accordingly, she obtained an ownership certificate for the flat in her name. However, that certificate was later set aside by the Civil Chamber of the Supreme Court, which allowed an extraordinary appeal and upheld the first instance court's judgment. Later, Ms Shevchuk was evicted. She complained to the ECtHR that the failure by the Supreme Court to inform her of the extraordinary appeal breached article 6 and that her eviction violated article 8.

The ECtHR has posed the following questions to the parties:

- Did Ms Shevchuk have a fair hearing in the determination of her civil rights and obligations, in accordance with article 6? In particular, were the principles of legal certainty and equality of arms respected in the extraordinary review procedure before the Supreme Court?
- Has there been a violation of the applicant's rights under article 8 or article 1 of Protocol No 1?

**Enforcement against property**

- **Šidlauskas v Lithuania**
  App No 51755/10,
  11 July 2017

Mr Šidlauskas bought an apartment in 1994. In 1998, he lost his regular job and was unable to pay for utilities. In 2000, the utility provider instituted civil proceedings for a debt of 2,861 Lithuanian litai (LTL) (approximately €828). It obtained judgment in 2003 and the case was transferred to a bailiff for enforcement. The bailiff organised a public auction at which the apartment was sold to a third party for approximately €982. In a civil claim, Mr Šidlauskas argued that the sale of his apartment was unlawful because, under domestic law, taking a person's home to enforce a court judgment was only permitted when the debt in question was larger than LTL 3,000 and because enforcement should have begun against other property which was not his only home.

The District Court dismissed his claim. The Regional Court quashed the first instance judgment and allowed Mr Šidlauskas's claim in its entirety. The Supreme Court amended the judgment to award damages assessed at the moment of the sale of the apartment. It awarded LTL 12,100 (approximately €3,504). Mr Šidlauskas complained that he had been unlawfully deprived of his apartment, and that the damages awarded to him by the domestic courts had been insufficient for him to acquire a new comparable apartment. He alleged breaches of article 8 and article 1 of Protocol No 1.

The ECtHR found that there had been a violation of article 1 of Protocol No 1. It reiterated that article 1 of Protocol No 1 requires a fair balance to be struck between the demands of the general interest of the community and the requirements of the protection of individuals' fundamental rights. Such a balance will not be achieved where an individual has to bear a disproportionate and excessive burden. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and notably whether the measure imposes a disproportionate burden on the applicant. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference. Where there is 'an extreme disproportion' (para 43) between the value of the expropriated property and the compensation awarded, only very exceptional circumstances can justify such a situation.

In this case, the damages awarded by the Supreme Court were about four times lower than the amount he claimed (€14,770). It was not disputed by the parties that the amount claimed by Mr Šidlauskas corresponded to the apartment's market value at the time when he had submitted that claim, nor was it disputed that €3,504 had not been sufficient for him to acquire a new comparable apartment at the time when that award was made. While the court did not consider that the disproportion between the market value of the apartment at the time when the applicant submitted his claim and the compensation received by him was 'extreme', the domestic courts needed to provide adequate reasons to justify that difference. The Supreme Court did not provide sufficient reasons. Although Mr Šidlauskas had made it clear that he had not had a home following the unlawful sale of his apartment, and that the amount of damages which he claimed was intended to cover the purchase of a new comparable apartment, it did not appear that the Supreme Court took any account of his ability to obtain a new home. The domestic courts failed to strike a fair balance between his right to the peaceful enjoyment of his property and any competing general interest. Awarding him compensation that was several times below the market value of his apartment at the time when he submitted his claim to the domestic courts and which was insufficient for him to obtain a new comparable apartment imposed an individual and excessive burden on him.

The ECtHR awarded €11,580 in respect of pecuniary damage (the market price of the apartment in 2007 when Mr Šidlauskas submitted his claim to the domestic courts, after subtracting his debt to the utility service provider and the amount already awarded to him by the domestic courts) and €6,500 in respect of non-pecuniary damage.

**Environmental issues**

- **Jugheli v Georgia**
  App No 38342/05,
  13 July 2017

Mr Jugheli and other applicants lived in different flats in a residential block in central Tbilisi. The building was located approximately four metres from a thermal power plant that originally burned coal, but later natural gas, to generate power. After an accident in 1996, an expert's report disclosed that no major repairs had been carried out since 1986. In 2000, the plant was privatised. The occupants of the flats complained that the plant's dangerous activities were not subject to the relevant regulations and that it emitted toxic substances into the atmosphere, negatively affecting their well-being. In the following years, further reports referred to:

- excessive concentrations of $SO_2$, CO and $NO_2$ in the air;
- the emission of smoke and black dust;
- mucocutaneous disorders, conjunctivitis, bronchitis, bronchopulmonary and other pulmonary diseases, allergies, different types of cardiovascular disease and anoxemia, which could lead to other serious disorders; and
- noise in excess of the permissible limits.

Civil proceedings in the local courts were only partially successful. The residents complained to the ECtHR that their rights under article 8 had been breached.

The court noted that article 8 is not violated every time environmental pollution occurs. There is no explicit right in the European Convention on Human Rights (ECHR) to a clean and quiet environment, but where

an individual is directly and seriously affected by noise or other pollution, an issue may arise under article 8. The adverse effects of any environmental pollution must attain a certain minimum level if they are to fall within the scope of article 8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no arguable claim under article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city. Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

Taking into consideration the evidentiary difficulties involved, the ECtHR will have regard primarily, although not exclusively, to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case. However, the court cannot rely blindly on the decisions of the domestic authorities, especially if they are obviously inconsistent or contradict each other. In such situations, it has to assess the evidence in its entirety. The court further noted that article 8 does not merely compel states to abstain from arbitrary interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private or family life. Regard must be had to the fair balance that has to be struck between the competing interests of individuals and the community as a whole. States enjoy a certain margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR.

In this case, the period of slightly less than a year and nine months during which the applicants were exposed to harmful emissions from the plant was sufficient to trigger the application of article 8. The ECtHR found that there had been an interference with their rights that reached a sufficient level of severity to bring it within the scope of article 8. The plant's dangerous activities before and after its privatisation and the failure to address the resultant air pollution negatively affected the applicants' rights under article 8. The court stated:

*In the context of dangerous activities in particular, states have an obligation to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks* (para 75).

In this case, the government did not present any relevant environmental studies or documents informative of its policy towards the plant and the air pollution emanating from it. Notwithstanding the margin of appreciation, the state did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life. There was accordingly a violation of article 8. The court awarded €4,500 to each applicant in respect of non-pecuniary damage.

- **Bigashev v Russia**
  App No 71444/13,
  27 June 2017

Mr Bigashev was born in 1927 and was a second world war veteran with a category 2 disability. Works carried out to a public road near his house between 2000 and 2002 repeatedly caused his property to flood. It was submerged by melted snow and groundwater every year. The house was seriously damaged and became uninhabitable. The local authorities disobeyed court orders to conduct repair works that would have prevented further damage. Despite three judgments in his favour, the road was not repaired until October 2014. In January 2011, he and his wife applied to the authorities to be placed on the municipal housing list. He was not provided with any accommodation. He complained that the failure to comply with the judgments was a breach of article 6 and article 1 of Protocol No 1.

The ECtHR found breaches of both articles. The municipal authorities had engaged in unauthorised road construction next to the house without proper project documentation. They also repeatedly failed to enforce the judgments in his favour or enforced them belatedly. The delay in the enforcement of one judgment was a year and three months. It was caused by the combined failure of the domestic authorities to open the enforcement proceedings in a timely manner and of the town administration to take prompt action. The court noted that in *Gerasimov v Russia* App No 29920/05, 1 July 2014, it had held that a delay in the enforcement of a judgment of more than six months was unreasonably long and inconsistent with ECHR requirements. The court dismissed a claim for pecuniary damage because Mr Bigashev had failed to substantiate it with documents but awarded €1,950 in respect of non-pecuniary damage.

## Possession claims

### Assured shorthold tenancies

- **Assured Property Services Limited v Ooo**[1]
  County Court at Edmonton,
  30 June 2017

Ms Ooo was an assured shorthold tenant. The landlord served a Housing Act (HA) 1988 s21 notice. On 2 May 2017, District Judge Cohen made a possession order under the accelerated procedure without a hearing. Ms Ooo made an application to set aside the order on the basis that no gas certificate had been provided at the outset of the tenancy (or subsequently). The landlord accepted that it had not supplied a gas certificate at the outset, but contested the claim that one was never served.

District Judge Lethem held that where a landlord had accepted that no gas safety certificate had been served prior to occupation of the premises by the tenant, it had contravened Gas Safety (Installation and Use) Regulations 1998 SI No 2451 reg 36(6). In view of Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 SI No 1646 reg 2(1)(b), that omission invalidated the s21 notice. The judge set aside the possession order and dismissed the claim for possession with an award of costs to the tenant.

## Anti-social behaviour

### Injunctions

- **Harlow DC v McGinley**
  [2017] EWHC 1851 (QB),
  14 June 2017

In December 2015, Harlow obtained final injunctive relief pursuant to Local Government Act 1972 s222 and Town and Country Planning Act 1990 s187(b) against 35 named Travellers and 'persons unknown' who had camped without authorisation. That injunction was due to expire on 15 June 2017. There was evidence that the consequences of the unlawful encampments were that:

- human excrement was left at each site, causing a serious risk to health;
- large amounts of rubbish were left behind when the defendants moved on, including LPG cylinders;
- considerable damage was caused to the land;
- security and protective measures had been forcibly removed; and
- community tensions had resulted.

Harlow applied to vary the injunction: to extend the date of the order beyond midnight on 15 June 2017; to include a further parcel of land within its scope; and to include five further named defendants within the terms of the order. Although there had been 'a quite dramatic decrease' (para 16) in the number of unauthorised encampments within the district of Harlow, there had been a concomitant increase elsewhere. Defendants had also collected household and commercial waste, often from unsuspecting members of the public and businesses, and then fly-tipped it elsewhere.

Jay J acceded to the application. He described the consequences of the defendants' behaviour as 'frankly horrendous', not merely in terms of the environment, but in terms of the clean-up costs, which, in one case, involved 'a sum of up to half a million pounds' (para 17). There was evidence that many of the defendants had residential addresses in the north of England and had nothing to do with the Harlow area. The balance of convenience was overwhelmingly in favour of granting injunctive relief in the form sought. Further, it was proportionate to make a district-wide order.

- **Abdulrahman v Circle 33 Housing Trust Ltd**
  Court of Appeal (Civil Division),
  29 June 2017

Mr Abdulrahman was the assured tenant of a flat. The flat shared a communal front door and letterbox with the flat next door. In 2014, he put superglue in the lock of the communal door, which prevented access to the property. In June 2015, Circle 33 obtained an injunction restraining him from blocking the landlords', their employees' or contractors' access to the property during reasonable hours to carry out repairs. The order provided that service could be effected by inserting it through the letter box of his flat. That was done. Contractors attended the property to undertake maintenance works. While repairing a fuse, the electricity was cut off for a short period of time. Mr Abdulrahman brandished his walking stick at the contractors and shouted abuse at them. The contractors were forced to leave the premises without finishing the work.

The following day, having requested access the week before, one of Circle 33's employees attended the flat. He found the unopened letter containing the injunction on the floor outside. Mr Abdulrahman did not answer the door. Circle 33 applied to commit him

for contempt. HHJ Baucher found that he had breached the injunction twice and committed him to prison for 28 days, suspended for two years. Mr Abdulrahman appealed, arguing that the injunction had been inadequately served.

The Court of Appeal dismissed the appeal. Under Civil Procedure Rules 1998 r81.8, the court was entitled to dispense with service by the usual route and make an order in respect of service by an alternative method or at an alternative place. The court had jurisdiction to make an order that the injunction would be properly served if put through Mr Abdulrahman's letter box. That had been done. Mr Abdulrahman had been in court when the injunction had been granted and he had been aware at all times of its terms.

- **Hastoe Housing Association Ltd v NB**[2]
  County Court at Oxford,
  11 May 2017

NB was an assured tenant. He had a diagnosis of organic personality disorder and a complex clinical presentation that was similar to someone with a pervasive development disorder such as autism spectrum condition. As part of his overall dysfunction, he had behavioural deficits, in particular in his ability to communicate. Hastoe, his landlord, alleged that he had behaved in a way capable of causing nuisance and annoyance to his neighbours, contractors and its staff. The allegations dated back to 2002 but focused on events between March and June 2016. Hastoe sought an injunction under Anti-social Behaviour, Crime and Policing Act 2014 s1. Although NB accepted some of the allegations, he argued that the imposition of an injunction amounted to disability discrimination, contrary to the Equality Act (EA) 2010, and that Hastoe had failed to make reasonable adjustments in relation to his disability.

Following a trial, HHJ Clarke found that it was not just and convenient for an injunction to be imposed and discharged an earlier interim injunction. She stated:

*Upon balancing all of the circumstances of the case, including giving careful consideration to the undoubted effect of the defendant's anti-social behaviours upon employees of Hastoe and neighbours and visitors, I am satisfied that the imposition of an injunction, with or without a power of arrest, is not a proportionate means of achieving a legitimate aim in this case. It is disproportionate because:*

*i) the defendant's behavioural deficits arise because of his disability, are not within his conscious control and could lead to a breach of the injunction outside his conscious control;*
*ii) any breach of the injunction could lead to eviction from his home on a mandatory ground of possession;*
*iii) in my judgment it is more likely than not that the legitimate aim of protecting the employees of Hastoe, residents and visitors from the defendant's anti-social behaviour can largely be achieved by means of reasonable adjustments; and*
*iv) I consider the distress caused to the defendant by the imposition of an injunction is disproportionate to the risk of continuing anti-social behaviour despite the implementation of reasonable adjustments.*

*In addition, the attachment of a power of arrest to any such injunction would, in my judgment, significantly increase the disproportionality as any breach may cause him to face arrest and detention until he can be dealt with by the court. I consider that in light of his disabilities this would have a devastating effect on the defendant.*

Hastoe was ordered to pay NB's costs.

### Committal

- **Walsall Housing Group v Robinson**
  County Court at Walsall,
  [2017] EW Misc 9,
  30 May 2017

In March 2016, Walsall Housing Group, a provider of social housing, granted Mr Robinson a five-year fixed-term tenancy. Very soon after, his neighbours began to experience problems of anti-social behaviour, principally noise nuisance through shouting and screaming, the banging of doors, etc. The landlord sought an injunction to restrain Mr Robinson from causing or permitting such behaviour to continue. He attended court in September 2016 and gave an undertaking to desist from such anti-social behaviour and ensure that nobody else engaged in it. That undertaking was breached on many occasions.

In January 2017, after a committal application, he was sentenced to 12 weeks' imprisonment, suspended on condition that he comply with his undertaking. However, it was apparent that the real problem was the behaviour of his daughter, who was effectively living with him. Within seven days of the making of the suspended committal order, the neighbours experienced further repeated noise nuisance. There was a further application to commit him.

HHJ Gregory was satisfied that there had been 14 further breaches of the undertaking given in September 2016. Although the usual consequence was that the suspended sentence order should be implemented, with a further period of imprisonment added, Mr Robinson had signed a deed of surrender and left the property. The judge stated:

*Mr Robinson is not guilty of criminal misconduct. The reality is that he has shown himself to be a weak man, wholly incapable of controlling the behaviour of his daughter and wholly incapable of recognising his responsibility to his neighbours to ensure that everybody can live in peace and harmony. He has done ... the decent thing at the eleventh hour by simply going* (para 12).

He sentenced him to four months' imprisonment concurrent on each of the breaches, suspended for six months on terms that he keeps away from the property and does not return to that address at any time for any reason.

## Rent Act 1977

### Appeals to the First-tier Tribunal

- **Hill v Helix Housing Association**
  [2017] UKUT 238 (LC),[3]
  7 June 2017

Mr Hill, a Rent Act tenant, appealed to the First-tier Tribunal (FTT) against a rent officer's determination that had almost doubled his rent. The FTT allowed the appeal, but then after receiving a letter from the landlord, issued a second decision, which it described as a 'reviewed decision'. It stated that it had considered the housing association's request for permission to appeal 'and having reviewed its decision and being satisfied that a ground of appeal is likely to be successful, it hereby remakes that decision' (para 21). The FTT did not say what ground of appeal it considered was likely to be successful, nor had the housing association identified any error of law (or any other error) in the original decision when it had requested permission to appeal. Mr Hill appealed to the Upper Tribunal (UT). Shortly before that hearing, the housing association took legal advice on the issues raised in the appeal, and its solicitors wrote to the tribunal conceding that the appeal should be allowed.

Martin Rodger QC, deputy chamber president, allowed the appeal. He noted that the FTT's power to review its own decisions is conferred by Tribunals, Courts and Enforcement Act 2007 s9 and is subject to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI No 1169 (L 8). He stated:

*... the FTT has power to review a decision only if it is satisfied that a ground of appeal on a point of law is likely to be successful. It is important for the integrity of the appellate process, including proper adherence to the restrictions which apply to rights of appeal from tribunals, that the power of review is not abused. It does not provide an opportunity for the FTT to set aside a decision and remake it on grounds which would not justify granting permission to appeal. A successful party is not to be deprived of the benefit of a favourable decision simply on the basis of a change of mind by the FTT, or even an appreciation that it has made a mistake, unless the mistake is one which is likely to provide grounds for a successful appeal* (para 31).

## Long leases

### Service charges

- **Skelton v DBS Homes (Kings Hill) Limited**
  [2017] EWCA Civ 1139,
  27 July 2017

Mr Skelton was the long lessee of a flat. DBS Homes was his lessor. Under the terms of the lease, the lessee was not obliged to pay a service charge until the lessor had served a summary of the costs that the lessor expected to incur. The lessor failed to do this in respect of a number of demands. Around three years later, the lessor served a summary. The lessee contended that the service charge was not payable (Landlord and Tenant Act (LTA) 1985 s20B) because a valid demand for service charges had not been served until more than 18 months after the costs had been incurred and the lessor had failed to serve a s20B(2) notice. HHJ Huskinson, sitting in the Upper Tribunal, held that s20B did not apply to demands for estimated service charges.

The Court of Appeal allowed Mr Skelton's appeal. It was clear from the definition of 'service charge' in s18 that s20B applied to service charges in respect of costs to be incurred as much as costs that had been incurred. It followed that where a lessor served an estimated demand more than 18 months after the costs had in fact been incurred, the sums were not payable. The position was different where a landlord served an estimated demand before the costs were in fact incurred. Further, it was not enough under s20B that the tenant had received the information that the landlord proposed to make a demand. There must be a valid demand for payment of the service charge (*Brent LBC v Shulem*

*B Association Ltd* [2011] EWHC 1663 (Ch)).

- **JLK Limited v Ezekwe** [2017] UKUT 277 (LC), 6 July 2017

The former headquarters of the Liverpool Fire Brigade were converted to provide 93 units of residential accommodation intended for occupation by students. All but six of the units comprised a bed-sitting room with en-suite facilities. Each was let on a long lease with the right to use communal kitchens, lounges, showers and toilets situated on the same floor. For a while, each room was occupied by a student, but the original developer went into administration and the building became entirely vacant. In April 2014, a prohibition order was made under HA 2004 s20, because the communal boiler in the building had ceased to function and there was no longer any supply of hot or cold water. Lessees made applications relating to service charges to the FTT under LTA 1985 s27A. The tribunal decided that the units were 'dwellings' within the meaning of s38 and that it therefore had jurisdiction to determine the applications. The lessor appealed to the UT.

Martin Rodger QC, deputy chamber president, noted that s38 defines a 'dwelling' as 'a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it'. He stated that it was 'a word of wide import capable of having shades of meaning but it generally connotes "a place where a person lives, regarding and treating it as home" (*Uratemp* [*Ventures Ltd v Collins* [2001] UKHL 43; [2002] 1 AC 301 at para 3])' (para 15). He did not accept that the protection of ss18–30 extended only to those occupying residential accommodation as their home:

*Section 38 does not refer to a home or contain any express requirement of residence at all; it is sufficient that the building or part of a building be 'intended to be occupied as a separate dwelling' … The use of the word 'dwelling' seems never to have been treated as sufficient in itself to import a requirement of residence or occupation as a condition of statutory protection. Under the Rent Acts the use of the word 'dwelling' signified premises which were capable of being regarded as someone's home, but the word itself was not understood to mean that a unit of accommodation which was not occupied as someone's home could not be a dwelling* (paras 27–28).

The judge continued:

*If part of a building is physically capable of being occupied as a separate dwelling there seems to me to be nothing in the language, context or purpose of sections 18 to 30 of the 1985 Act to require additionally that it must be occupied as someone's home. I respectfully disagree with the statement to that effect in* King v Udlaw *[[2008] L & TR 28]* (para 32).

Accordingly, the judge rejected the submission that for a unit of accommodation to be a 'dwelling' for the purpose of s38 it must satisfy the additional requirement of being someone's home.

However, he allowed the appeal because he found that the units were not occupied or intended to be occupied as separate dwellings. As the tenant of each of the units had the right to share a kitchen, lounge, shower and WC with every other tenant on the same floor, it could not be said that each tenant occupied a separate dwelling. The bed-sitting room and the right to use the communal space did not satisfy the requirement because the tenant was not tenant of the whole of that accommodation, but only of part of it; the bed-sitting room was not sufficient, because it was not occupied as the tenant's dwelling, but only as part of it. The judge found that the FTT did not have jurisdiction to consider the applications under s27A, and so dismissed them. (cf Rent Act 1977 s22 and HA 1988 s3, each of which provides that where accommodation is shared with another tenant to a degree which would otherwise prevent the tenant's own separate accommodation from being a 'separate' dwelling, the separate accommodation is nonetheless to be deemed to be entitled to the protection of the Act.)

## Housing allocation

- **R (H and others) v Ealing LBC** [2017] EWCA Civ 1127, 28 July 2017

In October 2012, Ealing decided to modify its housing allocation scheme to introduce provisions rewarding working households (those working a minimum 24 hours per week for 12 of the past 18 months) and model council tenants (those who had a clear rent account for 12 months, had complied with their tenancy conditions and had not engaged in anti-social behaviour). An equality impact assessment (EIA) concluded that there was no evidence that the changes would be discriminatory. They were piloted over a six-month period. A review concluded that the policy changes did not appear to have had a negative impact on any particular protected group.

The modified scheme was fully launched in October 2013. Under the scheme, 20 per cent of available council stock was to be allocated to the two groups: 15 per cent was allocated to the working household priority scheme (WHPS) and five per cent to the model tenant priority scheme (MTPS). The broad aim of the WHPS was to incentivise tenants to work or return to work, and the broad aim of the MTPS was to encourage good tenant behaviour.

The claimants (representing the disabled, women-led non-working households, children and the elderly) contended that the WHPS discriminated indirectly against women, the elderly and the disabled, and that the MTPS directly discriminated against non-council tenants. They succeeded before HHJ Waksman QC on all grounds: [2016] EWHC 841 (Admin); [2016] PTSR 1546; June 2016 *Legal Action* 41.

An appeal by Ealing raised two questions for the Court of Appeal. First, whether the new provisions were unlawfully discriminatory contrary to EA 2010 ss19 and 29 and/or Human Rights Act (HRA) 1998 Sch 1 article 14 in conjunction with article 8. Second, whether, in adopting and maintaining the changes, Ealing was in breach of its public sector equality duty (PSED) under EA 2010 s149, as well as Children Act (CA) 2004 s11. The court held:

1. The changes were indirectly discriminatory within EA 2010 s19(2), with the consequence that the burden was on Ealing to show that they were a proportionate means of achieving a legitimate aim.
2. The judge had accepted that Ealing had a legitimate aim in encouraging tenants to work and to be well-behaved in relation to their tenancy, and that the WHPS and the MTPS were rational means of achieving that aim but he had not been entitled, on the material before him, to find that the methods adopted were not the least intrusive way of achieving those aims.
3. Accordingly, the appeal on that issue would be allowed but the question of justification would not be remitted for reconsideration because Ealing had already embarked on a further review of its scheme.
4. As to discrimination contrary to HRA 1998 Sch 1 article 14, that ECHR right only engaged discrimination within the ambit of another ECHR right. The MTPS, which involved moving council tenants from one settled home to another, was not within the ambit of any ECHR right. Assuming, without finally deciding, that the WHPS was within the ambit of article 8, the judge had again erred in principle in his treatment of the council's case on justification.
5. So, the appeal on that issue would be allowed but the question of justification would not be remitted for reconsideration because Ealing had already embarked on a further review of its scheme.
6. As to the PSED, the council accepted that the initial EIA in 2012 did not pay due regard to the need to eliminate discrimination and to promote equality. In September 2013, an EIA was appended to the proposal for the changes to continue beyond a pilot period, but the judge found that it contained no proper consideration of how the changes might affect the protected groups. He found that a further EIA undertaken in October 2013 was 'not impressive' (para 107). These findings were unchallenged but Ealing relied on more recent evidence as to the operation of the schemes.
7. Based on that evidence, the court determined that there was no proper basis for finding breach of the PSED in respect of the MTPS. But on the WHPS, the new evidence was insufficient to correct the earlier omissions to provide a proper EIA.
8. However, as Ealing had shown that it was now alive to the discrimination issues and that there were complex analyses to be undertaken in relation to the WHPS in order to assess the impact on the protected groups, it was not necessary or appropriate to quash the WHPS. The declaration of a breach of the PSED would stand.
9. As to CA 2004 s11, the judge's approach had been too exacting. The evidence did not show disadvantage to children in women-led households. To the contrary, annual statistics showed that in both 2011/12 and 2013/14 over 50 per cent of overall lettings were made to women-led households, and in 2014/15 58 per cent of lettings to people with working household status went to female-led households whereas they represented 54 per cent of total applications. The appeal in relation to the CA 2004 was allowed.

- **R (Hussain) v Sandwell MBC** [2017] EWHC 1641 (Admin), 29 June 2017

The claimant was a councillor and a member of the council's controlling Labour group. In January 2017, the council's interim director (resources) submitted a report to the audit committee summarising concerns about the claimant's actions. They included issues relating to housing allocations from 1997 to date. An investigation into the allocation of

10 council-owned properties was undertaken. The investigators found patterns of behaviour exhibiting features of a conspiracy to defraud and/or misconduct in public office. The outcome of a number of housing allocation decisions appeared to benefit members of the claimant's family.

The evidence suggested a 'repeat pattern of use of a number of factors that allowed members of Councillor Hussain's family to be allocated council properties' (see para 98). That matter, and another, were referred to West Midlands Police Regional Organised Crime Unit for consideration.

The audit committee accepted the recommendations in the report to refer allegations relating to the claimant to the monitoring officer. The claimant sought judicial review, on numerous grounds, to prevent the council continuing its investigations into his conduct.

Green J dismissed the claim and stated that:

*On the evidence before the court there is a serious prima facie case against the claimant. The allegations should now be investigated properly in accordance with the formal arrangement instituted by the council under the [Localism Act 2011], which seeks to govern the behaviour of those exercising public office in accordance with the 'Nolan Principles'* (para 23).

- **R (Esposito) v Camden LBC**
  Administrative Court,
  31 July 2017

The claimant was a council tenant in a high-rise tower block. Samples of cladding from the block failed fire safety tests and showed that it had no flame retardant properties. The tenants were decanted to temporary accommodation while fire safety issues were addressed. On receiving further fire safety advice from the fire brigade and the Department for Communities and Local Government, the council decided that it was safe for the claimant to return and the temporary accommodation was withdrawn.

May J dismissed a claim for judicial review. The claimant had not established a case that the council had acted irrationally. It was justified in asking the tenants to return, acting on the professional advice it had received. There was no basis for a claim that, by virtue of the risk of fire or due to the nature of the cladding, the claimant's convention rights in HRA 1998 Sch 1 article 8 had been, or would be, infringed.

## Homelessness

### Priority need

- **Hemley v Croydon LBC**
  Court of Appeal (Civil Division),
  Appeal No B5/2015/0520,
  July 2017

Ms Hemley was a single young woman with mental health and mobility problems. She suffered from chronic pain and walked with a stick. In July 2013, she applied to Croydon for homelessness assistance. In July 2014, on a review, the council decided that she was eligible for assistance and was homeless but did not have a priority need. The review decision stated: 'I see no reason to conclude that you will necessarily suffer injury or detriment greater than that an ordinary street homeless person [would suffer].' In January 2015, HHJ Faber allowed an appeal on the narrow ground that the reviewing officer had made two material findings which were unsupported by the evidence and that it could not be said that, had the reviewing officer approached the matter correctly, he would not have come to a different conclusion.

The council lodged an appeal to the Court of Appeal. In May 2015, the Supreme Court handed down its judgment in *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811; July/August 2015 *Legal Action* 50, identifying the correct comparator as an ordinary person who may become homeless, not an 'ordinary street homeless person'. The council contended that the decision on review could nevertheless still be upheld as lawful on the particular facts of the case as the same result would have been reached applying the correct comparator.

The Court of Appeal held that the judge's decision had been contrary to the well-established principle that a benevolent approach was required to review decision letters, and that nit-picking was not appropriate: *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7; [2009] 1 WLR 413. But for the error in relation to the comparator, the appeal would have been allowed. However, the court was not sufficiently confident that the reviewing officer would have reached the same decision on the basis of the correct test, to allow the decision to stand. The appeal was therefore dismissed.

### Intentional homelessness

- **Trindade v Hackney LBC**
  [2017] EWCA Civ 942,
  6 July 2017

The appellant lived on the island of Sao Tomé (off the west coast of central Africa). With her partner and children, she occupied an apartment in a building called Uba Flor under a tenancy agreement. Her daughter suffered from a disability. Her sister lived in the UK. The sister suggested that the appellant come to the UK with her daughter because the medical treatment for her daughter would be better here. The appellant and her daughter left Uba Flor and came to the UK in February 2013. They stayed with the appellant's sister in her privately rented accommodation. The appellant's partner gave up the tenancy of Uba Flor and moved in with his mother. The appellant and her daughter stayed at the sister's home until September 2013, when the sister's tenancy was terminated by notice. The landlord wished to refurbish the property. The appellant applied to the council for homelessness assistance.

On review, the council decided that her last settled accommodation had been at Uba Flor and that she had ceased to occupy that accommodation by her own deliberate act. Accordingly, she had become homeless intentionally: HA 1996 s191(1). She had not been unaware of any relevant fact but, in any event, had not acted 'in good faith': s191(2).

HHJ Wulwik dismissed an appeal. On a second appeal, the appellant contended that the reviewing officer had been wrong in finding that she was not unaware of a relevant fact and that she had not acted in good faith. The 'relevant facts' were said to be that either: (1) at the time of leaving Uba Flor she did not know that her sister would be evicted from her accommodation when she later was; or (2) when she left Uba Flor, she was unaware of a relevant fact then in existence, in that she did not know that there was any prospect of her sister being evicted from her accommodation (ie, that her sister could be evicted at some future date).

The Court of Appeal dismissed the appeal. As to the relevant principles, it held:

1. '[A]n applicant who seeks to bring herself within section 191(2) where the future has not worked out as expected by her, has to show that at the time of her action or omission to act referred to in section 191(1), she had an active belief that a specific state of affairs would arise or continue in the future based on a genuine investigation about those prospects, and not on mere aspiration. Her belief about her current prospects regarding the future can then properly be regarded as belief about a current relevant fact (the apparent good prospects that the future will work out as she expects), such that if that belief can be seen to be unjustified by what a fully informed appreciation of her prospects at the time would have revealed, her mistake will qualify as unawareness of a relevant fact for the purposes of section 191(2)' (para 26).
2. '[S]ection 191(2) … is clearly directed to a point in time when the act or omission referred to in section 191(1) occurs, and it is at that time that the "relevant fact" has to exist and that the applicant has to be unaware of it. It is only by treating as a "relevant fact" the current prospects of an expectation as to the future materialising, based on current objective facts, that the analysis in the authorities can be fitted within the scheme of section 191' (para 28).

Applying those principles to the appellant's case, her first alleged 'relevant fact' did not exist at all at the time she left Uba Flor. The reviewing officer had been entitled to reject her case on her second 'relevant fact' because '[t]he assessment of the facts was for the reviewing officer, based on the evidence available to him … he was clearly entitled to decide that the appellant had not made a proper investigation of her prospects of accommodation in the United Kingdom at the time she left Uba Flor. Therefore, her case did not fall within the scope of section 191(2)' (para 29).

In light of those findings, no question of good faith strictly arose but the court stated:

*It is clearly relevant to the question of good faith that the appellant did not cynically leave Uba Flor with knowledge that she would be homeless in the United Kingdom and intending to make a call on the limited social housing resources here. However … if she left with reckless disregard of what her housing prospects would be in the United Kingdom, or shutting her eyes to how she would in practice meet the obvious need for accommodation when she came here … that would not have been an act in good faith for the purposes of section 191(2) … [I]t is tolerably clear that this was the point being made by the reviewing officer … [T]his was a lawful conclusion for him to arrive at* (para 35).

### Suitable accommodation

- **Begum v Birmingham City Council**
  County Court at Birmingham,
  [2017] EW Misc 10 (CC),
  14 June 2017

Ms Begum was homeless and was owed the main housing duty: HA 1996 s193. Birmingham offered her council accommodation secured through the housing allocation scheme. She

rejected the offer on the basis that the accommodation was unsuitable because of its location. The council decided that the accommodation was suitable and the refusal had discharged its duty: s193(7). Ms Begum asked for a review.

The reviewing officer decided that the original decision was deficient for failure to have regard to the PSED and that, accordingly, the requirements of Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) had been triggered. She sent a 'minded to' letter indicating that despite the points made about location, she was minded to find the accommodation 'suitable' and that Ms Begum had an opportunity to make further representations.

In response, Ms Begum contended that the accommodation had been unsuitable by reason of her inability to manage its stairs with her three young children and the absence of a lift. The reviewing officer addressed that matter in her final decision but found the accommodation had nevertheless been suitable.

HHJ David Grant allowed an appeal. The requirements of reg 8(2) had been triggered by the deficiency in the original decision. That decision had not dealt at all with the stairs/lift point because it had not been raised at that stage. When it was raised, unless the new point was manifestly insupportable or implausible (which it was not), the reviewing officer had been obliged to send a further 'minded to' letter dealing with it before reaching a final decision adverse to the applicant. She had not done so. The decision was quashed.

### Out-of-district accommodation

- **R (E) v Islington LBC** [2017] EWHC 1440 (Admin), 30 June 2017

The claimant was a child. She lived with her mother (who was profoundly deaf) and two siblings (aged four and two). In May 2015, they fled the family home in Southwark (in south London) as a result of alleged domestic violence. The mother applied to Islington (in north London) for homelessness assistance. As a result of the move, the claimant's education was interrupted. In October 2015, Islington accepted that it owed the main housing duty: HA 1996 s193. It arranged temporary accommodation for the family in Hammersmith and Fulham, and sent that council the statutorily required notice of that move: HA 1996 s208. Although the notice indicated that the claimant was of school age, it did not mention education at all. The family remained in the temporary accommodation in Hammersmith and Fulham for six months before being accommodated in Islington. During that six-month period, there was no school place for the claimant for seven weeks of term time and two weeks of school holidays.

In her claim for judicial review, the claimant contended that Islington had failed to respect her right to education during that period (and two other periods): HRA 1998 Sch 1 Pt 2 article 2. Islington contended that the effect of the placement in Hammersmith and Fulham had been to cast the education duty on that council.

Ben Emmerson QC, sitting as a deputy High Court judge, allowed the claim. Giving guidance on the responsibilities of the two local authorities involved in an out-of-borough placement he said:

1. '[The HA 1996 s208 notice] provided the names and dates of birth of each member of the family and the address at which they were to be accommodated in Hammersmith and Fulham. From a casual reading of this data, it could be deduced that E was a school-age child. This fact carried the necessary implication that there must be a statutory duty on one or other local authority to satisfy itself that E was receiving suitable education. This was therefore a situation that cried out for effective liaison between the two authorities' (para 15).
2. 'The notice gave no indication of E's current educational arrangements, or of any plans or proposals that Islington may have had for her future education during the period of the temporary placement out of borough. It did not suggest which of the two authorities should assume primary responsibility for the discharge of the statutory obligation to educate her, or suggest any arrangements (formal or otherwise) whereby the two authorities could co-ordinate over E's educational needs to ensure they were met promptly and that she could maintain a reasonable measure of educational continuity' (para 16).
3. 'In fact, the notice made no mention of education at all. Of particular significance, it gave no explicit or implied indication of the need for fresh educational provision to be made by Hammersmith and Fulham, and failed to spell out the critical piece of information that any existing arrangements for her education would necessarily be disrupted by the temporary transfer' (para 17).
4. 'In the event, no adequate steps were taken by either borough to ensure that educational facilities were promptly made available. There is no evidence before me that any significant liaison took place between the two education departments concerning E's continuing educational needs. E thus had no school education for [nine weeks]' (para 18).
5. '[T]he home authority, which has, up until the moment of transfer, borne the primary duty for the discharge of a child's convention right to education, must retain at least some continuing responsibilities for the child's education, even after the temporary transfer has been effected' (para 107).
6. Paragraph 4.16 of the *Homelessness code of guidance for local authorities* (DCLG, July 2006) 'amounts to an unambiguous and strongly worded recommendation to the housing department of a sending authority which is contemplating the temporary out-of-borough transfer of a school-age homeless child, to liaise directly and work collaboratively with the education department of the receiving borough, in order to ensure that appropriate educational arrangements are put in place and monitored' (para 108).
7. In the light of CA 2004 s11(2)(b) and the decision of the Supreme Court in *Nzolameso v Westminster City Council* [2015] UKSC 22; June 2015 *Legal Action* 45, the position was that 'any local authority contemplating the transfer of a school-age homeless child into temporary accommodation out of borough is under a *Nzolameso* duty to make contemporary records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the child, in accordance with its primary obligation under section 11(2)(a). In addition, however, by virtue of section 11(2)(b), it must be able to demonstrate, by reference to written contemporaneous records, the specific process of reasoning by which it reached the decision (if it did) that the authority to which it was delegating its housing obligations would secure the child's educational welfare, either through making appropriate arrangements for school admission, or by making available alternative educational provision under section 19 of the Education Act 1996' (para 120).
8. '[T]he section 208 notice could not be sufficient to displace Islington's obligations as the primary public authority with responsibility for guaranteeing the delivery of E's convention right to education' (para 130).
9. 'Parliament must be taken to have contemplated that, in its application to a cross-borough temporary housing transfer of a homeless school-age child, it [had] imposed a duty on the sending authority to ensure the continued provision of educational services by the receiving authority' (para 135).

Islington's contention that the moment a child is moved out of borough, the sending borough's educational obligations automatically come to an abrupt and immediate end, was wrong. It had been responsible for the breach of the claimant's ECHR rights during the relevant nine-week period.

### Housing and children

- **R (AC and SH) v Lambeth LBC** [2017] EWHC 1796 (Admin), 14 July 2017

The claimants were homeless children. Their mother was a Jamaican national. Her immigration status did not allow her to have recourse to public funds. She was not eligible for homelessness assistance or social housing. She had twice applied to have the 'public funds' restriction lifted but the Home Office had not been satisfied by the information and material provided in support of the applications. Following an assessment, Lambeth decided that the children were not 'in need' on account of destitution. The council did not believe the mother's account that she was destitute and had no accommodation or support. The claimants applied to quash that assessment on grounds of procedural fairness in that the council had not offered their mother an opportunity to correct an adverse view of her honesty before concluding its assessment.

Cheema-Grubb J rejected that ground of challenge. The assessment had 'proceeded from explicit adverse findings as to credibility against their mother … on the basis that she had deliberately misled Lambeth and attempted to manipulate the council into providing housing for the children, and thereby herself, while there were alternatives available to the family to avoid destitution' (para 24). Accordingly, the question for the court was whether 'it was unfair for Lambeth not to discuss its intention to make adverse findings about her probity and bona fides with the claimants' mother when relying on her for much of the material upon which to make a decision whether the claimants were children in need' (para 59). The claimants' mother knew 'it was vital for her to provide information about her previous addresses and sources of support. Her accounts have varied over time. The places where she and the claimants were living without recourse to the local authority for some years had to be explored by the social workers who were

faced with using public resources to house a family who may well have been able to find other solutions' (para 61(b)).

On the facts, 'given the history of contact between the claimants' mother and the defendant and the Home Office, this is not a case in which the defendant's procedure was flawed by reason of it not presenting its provisional conclusions to the claimants' mother for her response' (para 62).

However, a separate ground of challenge, based on a failure to reassess in the light of information about the autism of one of the claimants, succeeded.

- **R (KA and NBV) v Croydon LBC** [2017] EWHC 1723 (Admin), 7 July 2017

The claimants had been provided with accommodation and support by Croydon on the basis that they were unaccompanied asylum-seeking children: CA 1989 s20. When the council concluded age assessments finding that they were in fact adults, notice was given of those decisions and accommodation and support were immediately withdrawn. The claimants sought judicial review. They contended that the simultaneous delivery of the written decisions and withdrawal of accommodation impeded the right of access to justice because they would be rendered homeless before they could mount any challenge to the correctness of the decisions.

Laing J dismissed the claim. No statutory provision required the council to continue accommodating after an adverse decision. The right of access to the courts was not impeded because applicants for judicial review of adverse decisions could, in appropriate cases, obtain interim relief.

**Comment**: There is no reference in the judgment to the cases (such as *R v Secretary of State for the Environment ex p Shelter* [1997] COD 49, QBD) on the obligations of a public authority to act reasonably when accommodation duties end.

1 Matt Sinden, solicitor, Foster & Foster, London, and Alex Grigg and Tim Baldwin, barristers, London.
2 Laura Coyle, solicitor, Turpin & Miller, Oxford, and John Beckley, barrister, London.
3 Case no RAP/10/2016.

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.

# Youth justice: update

**Jennifer Twite and Kate Aubrey-Johnson round up the latest developments affecting young defendants including cases on age assessment and on criminal records, new sentencing guidelines, a Bar Standards Board consultation, practice direction amendments regarding live link and developments in online guilty pleas and virtual courts, and changes to plea and trial preparation hearing (PTPH) forms.**

**Jennifer Twite**

**Kate Aubrey-Johnson**

## Age assessment

The recent case of *R (M) v Hammersmith Youth Court* (2017) 5 May (Admin) dealt with some of the complexities that arise when children arrive in the UK without documents to prove their age. The difficulty of deciding age by appearance alone has been recognised in numerous civil court cases, especially in the field of immigration and community care law, most notably in the case of *R (B) v Merton LBC* [2003] EWHC 1689 (Admin). There are also criminal cases that deal with the issue (eg, *R v O* [2008] EWCA Crim 2835 and *R v L and others* [2013] EWCA Crim 991). However, there has been a lack of procedural guidance addressing how best to deal with a purported child whose age is disputed.

In the case of *M*, a young man arrived in the UK alone. He was arrested for theft soon after, and told police he was 16 years old. Police treated him as a child and brought him before the youth court. The youth court magistrates, however, doubted his age on the basis that he looked older. They refused an application for an adjournment to allow him to produce his birth certificate. They deemed him to be an adult under Children and Young Persons Act 1933 s99 and sent him to the Crown Court for trial. He was denied bail and sent to Wormwood Scrubs, an adult prison, where he spent over six weeks.

The magistrates' decision was challenged by way of judicial review. The High Court released him from prison that day and remanded him to local authority accommodation. The court sent the case back to the youth court to remake the decision as to his age. The court pointed out the authorities, cited above, that emphasise the importance of proper age assessments to determine age, and that, where there is a genuine dispute, usually the best course is to adjourn to allow proper enquiries to be made (*R v Steed* (1990) 12 Cr App R (S) 230). In *M*'s case, the local authority was due to carry out an age assessment, which could be available to the youth court when it made the fresh decision.

While the case law has been critical of courts making ad hoc decisions as to age, it provides little, if any, guidance on what procedure should be followed at a first appearance. Local authorities and the immigration services have to grapple with the issues arising from age-disputed individuals regularly, and therefore there is a wealth of case law in other jurisdictions that should be considered by criminal practitioners faced with this issue. In *R (A) v Croydon LBC; R (M) v Lambeth LBC* [2009] UKSC 8; [2009] 1 WLR 2557, the Supreme Court held that the fact of a child's age is an objective fact that admits only one right answer: see Lady Hale at paras 32–33 and Lord Hope at para 54. This arguably conflicts with the authority that in the criminal courts, once a decision as to age is taken, any decision, such as sentence, will still stand, even if it later transpires that the defendant was a different age.

A further complication in the criminal courts, as occurred in *M*'s case, is that once a case has been committed to the Crown Court, there is no power to remit back to the youth court, even if the court later forms the view that the defendant is a child (*R (W) (a minor) v Leeds Crown Court* [2011] EWHC 2326 (Admin)), and therefore mistakes as to age are difficult to rectify, the only remedy being a judicial review of the court's decision.

Local authorities are frequently faced with making decisions about the age of individuals in such circumstances and the correct approach to be taken to the determination of the fact of age has been developed in over a decade of case law. The base principles about how age should be fairly assessed were first set out in *R (B) v Merton LBC* (see above) per Stanley Burnton J, as he then was, and are aptly summarised in *MVN v Greenwich LBC* [2015] EWHC 1942 (Admin). These principles are now enshrined in a sophisticated set of detailed guidance published by the Association of Directors of Children's Services (ADCS) (*Age assessment guidance*, October 2015).

The ADCS has also agreed and published a joint protocol with the Home Office on the process by which age disputes are to be determined where they arise in the immigration context (*Age assessment joint working guidance*, June 2015 (published 22 May 2015)). The protocol was agreed and published in recognition of the importance and relevance of age to a breadth of areas of a putative child's life and decision-making by state authorities. The objective of the joint working protocol is to ensure a consistent approach. The only comparable guidance in the