Housing: recent developments

Nic Madge and Jan Luba QC highlight important political and legislative developments, as well as cases on human rights, possession, prosecutions, houses in multiple occupation, allocation, homelessness, and housing and children.

Nic Madge

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Politics and legislation

Homelessness

The Local Government Association (LGA) has produced a new report responding to rising concern among local authorities about the increasing homelessness pressures being faced across the country: *Housing our homeless households* (LGA, July 2017). The report is accompanied by additional resources, available online, to help councils replicate good practice in their own areas. They include guides, policies, templates and model agreements used by the councils featured in the report, which demonstrate how to:

- establish leasing schemes with private and housing association landlords;
- develop strategies for working with private landlords and letting agents;
- focus on prevention when working well with homeless households;
- use allocation policies and supported housing;
- acquire, convert and build new property for use as temporary accommodation (including modular construction); and
- collaborate with other councils.

The first part of a two-part study, commissioned by Crisis and conducted by Heriot-Watt University, examining the current and projected levels of homelessness across different categories, has been published: *Homelessness projections: core homelessness in Great Britain* (Professor Glen Bramley, August 2017). The research examines the numbers of households experiencing homelessness in its most acute forms, many of which fall outside of officially recorded statistics. The analysis shows that at any one time across Britain in 2016, 160,000 households were experiencing the worst forms of homelessness: rough sleeping, sofa surfing, squatting, living in hostels and unsuitable forms of temporary accommodation, as well as sleeping in cars, tents and night shelters.

In Scotland, from 2 October 2017, the Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2017 SSI No 273 has reduced the period of time during which accommodation can be provided to a homeless household, which would otherwise be unsuitable, from 14 to seven days.

Housing allocation

The Parliamentary Office of Science and Technology has published a new report on the impact of migration on housing: *Migrants and housing* (POSTnote No 560, August 2017). It outlines the possible impact of migrants on housing, including variation by tenure type, migrant characteristics and region. It also considers the impact of housing on migrants and local communities.

The UK government has announced grants from the Controlling Migration Fund totalling £15m to local councils: 'Local councils to receive £15 million in extra funding', Department for Communities and Local Government (DCLG) press release, 19 July 2017. The grants are designed to ease pressures on local services such as housing resulting from recent migration. Local authorities in England have been invited to bid for funding totalling £100m over four years from 2016/17 to 2019/20.

Landlord possession claims

The latest statistics show that landlord possession claims, orders for possession, warrants of possession and repossessions by county court bailiffs have decreased, continuing the long-term downward trend seen since April to June 2014: *Mortgage and landlord possession statistics in England and Wales, April to June 2017 (provisional)* (Ministry of Justice (MoJ), 10 August 2017). Landlord possession claims (32,077), orders for possession (25,195), warrants of possession (16,018) and repossessions by county court bailiffs (8,819) decreased by six, 10, 12 and 16 per cent respectively compared with the same quarter last year. However, seasonally adjusted figures for possession claims have shown an increase for the past two quarters.

However, a new report for the Joseph Rowntree Foundation finds that there has been a rapid increase in evictions over the past 12 years, and especially of 'no fault' evictions from the private rented sector: *Poverty, evictions and forced moves* (Cambridge Centre for Housing and Planning Research, July 2017; updated August 2017). The research explores why this has occurred, and the impact these evictions have had on the lives of tenants who lose their homes.

On 30 August 2017, the Civil Justice Council published its response to the Civil Procedure Rule Committee consultation on *Enforcement of suspended orders – alignment of procedures in the county court and High Court*, which has now closed. In its response, published on 29 August 2017, the Law Society's Housing Committee stated that a permission stage in enforcement provides a useful safeguard to often vulnerable defendants and must therefore apply to all suspended orders. The response recommends simplifying the process to issue a warrant and suggests that permission could be decided on the papers, rather than requiring a full hearing.

The UK government has published the conclusions arising from a consultation on the future of possession-day representation schemes: *Housing possession court duty scheme (HPCDS): commissioning sustainable services – summary of responses* (MoJ, 16 August 2017). It has decided that moving to larger service delivery areas is the appropriate course of action but the proposed procurement area groupings have been revisited and there are several schemes where the Legal Aid Agency (LAA) will seek further input from local providers through the market engagement process before finalising scheme boundaries. On 17 August 2017, the LAA announced that the tender process for HPCDS contracts would follow on from a number of market engagement events which it then ran in August and September. During August, the LAA consulted on the proposed 2018 HPCDS contract. The tender for HPCDS contracts opens in October and will run for six weeks before closing in November. The LAA expects to notify bidders of the outcome of their tenders in June 2018.

Private rented sector

According to the latest available data, private rents paid by tenants in Great Britain rose by 1.6 per cent in the 12 months to August 2017: *Index of private housing rental prices (IPHRP) in Great Britain: August 2017* (ONS statistical bulletin, 12 September 2017). In England, private rental prices grew by 1.7 per cent, in Wales by 1.3 per cent, and in Scotland 0.3 per cent, in the 12 months to August 2017. London private rental prices grew by 1.2 per cent in the same period.

In Wales, a consultation has just closed on measures to control fees demanded from private tenants by landlords and their agents: *Fees charged to tenants in the private rented sector* (Welsh government, 19 July 2017). The consultation invited feedback on the

nature and level of fees being charged in practice in order to determine: which fees are justifiably being charged to tenants; what fees are paid by landlords to agents; and the possible consequences of banning fees. Data on the fees currently charged in Wales was published on 17 August 2017: *Research into letting agent fees to tenants* (Welsh government, social research paper 48/2017).

Housing standards

The Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill 2017 would amend the Landlord and Tenant Act 1985 to require that residential rented accommodation is provided and maintained in a state of fitness for human habitation. It would also amend the Building Act 1984 to make provision about liability for works on residential accommodation that do not comply with Building Regulations. The bill, a private members' bill introduced by Karen Buck MP, has its second reading on 19 January 2018.

Leasehold

From July to September 2017, the UK government consulted on a range of measures to tackle unfair and unreasonable abuses of leasehold; in particular, the sale of new leasehold houses and onerous ground rents: *Tackling unfair practices in the leasehold market: a consultation paper* (DCLG, July 2017). The consultation also sought views on excluding leaseholders from becoming subject to possession orders because of arrears of ground rent, and views on freeholders being able to challenge service charges for mixed tenure estates with shared facilities. The outcome of the consultation exercise will be published later this year.

A new House of Commons Library briefing paper considers recent trends in leasehold ownership and ongoing problems associated with the sector: *Leasehold and commonhold reform* (Briefing Paper No 8047, 10 August 2017). Areas identified for possible reform are summarised, including the UK government proposals that have been subject to consultation.

Human rights

Article 1 of Protocol No 1

- **Rastorguyev v Russia**
  App No 11808/15,
  25 July 2017

In 2010, the Ministry of Defence assigned a number of flats to private individuals and entered into social housing agreements with them. Subsequently, those people successfully applied to a district court in Moscow for privatisation of the flats. The court's judgments became final and their ownership was registered. They then sold the flats to other persons, including Mr Rastorguyev. He moved into his flat and lived there. Later, the City of Moscow asked the district court to reopen the cases, claiming that the flats were its property. The court established that the Ministry of Defence had never owned the flats and had no right to assign them to private individuals. It quashed the earlier judgments allowing the privatisation. A judgment ordering Mr Rastorguyev's eviction was made, and upheld on appeal, but not enforced. He, and others in a similar position, complained to the European Court of Human Rights alleging a violation of article 1 of Protocol No 1.

The court referred to a number of previous decisions, including *Gladysheva v Russia* App No 7097/10, 6 December 2011. The procedures under which the state had alienated its assets to private individuals were within the state's exclusive competence. Defects in those procedures resulting in the loss by the state of its real property should not have been remedied at the expense of bona fide owners. Restitution of property to the state or municipality, in the absence of any compensation paid to the bona fide 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 the applicants' right to the peaceful enjoyment of their possessions on the other. There was no reason in this case to hold otherwise. 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. It found a violation of article 1 of Protocol No 1 and awarded non-pecuniary damage of €5,000.

Possession claims

Homelessness accommodation: notice to quit

- **Dacorum BC v Bucknall**
  [2017] EWHC 2094 (QB),
  10 August 2017

Ms Bucknall applied to Dacorum for homelessness assistance. In February 2014, Dacorum provided her with a non-secure licence of accommodation under Housing Act (HA) 1996 s188(1) pending the outcome of its enquiries. In September 2014, Dacorum subsequently decided that it was obliged to secure that accommodation was available to her under HA 1996 s193(2) because she had a priority need and had not become homeless intentionally. It wrote to Ms Bucknall and advised her that in due course she would be made an offer of suitable accommodation in the private sector, but for the time being it would perform its duty by allowing her to remain in the property she occupied. In February 2015, Ms Bucknall rejected an offer of accommodation on the grounds that it was not suitable. Dacorum decided on a review that the property was suitable and served a notice to quit to determine Ms Bucknall's licence. The notice to quit did not, however, contain the prescribed information required by Protection from Eviction Act 1977 s5. Dacorum subsequently obtained a possession order in the county court after successfully arguing that as the property had not been 'let as a dwelling', the prescribed information did not need to be contained within the notice to quit. Ms Bucknall appealed.

Popplewell J allowed the appeal. The fact that the property had not initially been let as a dwelling (as it was provided pursuant to HA 1996 s188(1)) was irrelevant. Dacorum's letter to Ms Bucknall in September 2014 had changed the purpose of the letting. The focus, therefore, had to be on the purpose of the letting after Dacorum had accepted that it owed the main housing duty. While it did not follow that accommodation being provided pursuant to the main housing duty is automatically to be treated as being occupied as a dwelling,

[i]f the occupant is permitted to stay in the accommodation for an indefinite further period, that is likely to lead to the conclusion that the continued occupation is as a dwelling, notwithstanding any avowed intention by the local authority to offer him or her another property at some uncertain point in the future. If the occupier is told that he or she can stay in the property for the time being pursuant to the local authority's acceptance that it must house them, they are justified in treating it as their home if they stay for more than a short period. It is the indefinite nature of the period of continued occupation offered which matters. It might be very lengthy, because it need not in fact be followed by an offer of other accommodation in order to fulfil the full housing duty, even if there is an avowed intention to do so … That is what entitles the occupant to treat it as having the degree of settled residence as a home which makes it a 'dwelling' (para 41).

Unlawful subletting

- **Poplar Housing & Regeneration Community Association Limited v Begum and Rohim**
  [2017] EWHC 2040 (QB),
  4 August 2017

Ms Begum and Mr Rohim rented a flat from Poplar, a registered provider of social housing on an assured tenancy. They received housing benefit that covered the rent in full. Terms of the lease obliged them to live at the flat as their only or principal home and prohibited them from subletting. In 2015, Poplar received information that they were subletting and discovered that Ms Begum had financial links to another flat, which was her mother's home. On a simultaneous inspection of both flats, Ms Begum and Mr Rohim were found at her mother's flat with their children. They both admitted that they were living there and had allowed others to occupy their own flat. At the other flat, officers found Ms Rehana and Mr Ahmed who, under caution, admitted occupying the flat and paying a monthly rent of £400 to Ms Begum and Mr Rohim. Poplar began a possession claim.

Later, police executed a search warrant at the flat that Ms Begum and Mr Rohim rented and found him in possession of cannabis and drug-dealing paraphernalia, including scales, plastic dealing bags, SIM cards and cash. He was arrested on suspicion of possessing a class B drug with intent to supply. In a criminal court, he pleaded guilty to simple possession and was fined. In the county court, Recorder Wilson QC granted a suspended order for possession under HA 1988 Sch 2, Grounds 10, 12 and/or 14. Although the landlord sought an unlawful profit order under Prevention of Social Housing Fraud Act (PSHFA) 2013 s5 in the net sum of £1,550, received by Ms Begum and Mr Rohim from Ms Rehana and Mr Ahmed, the recorder refused to make such an order. The landlord appealed.

Turner J allowed the appeal. Ms Begum, Mr Rohim and their children had moved out of the flat to live with her mother. They had stopped occupying the flat as their only or principal home and had thereby breached their tenancy agreement. Ms Rehana and Mr Ahmed had paid £400 per month to live at the flat. Ms Begum and Mr Rohim had not offered the court any explanation for their conduct nor had they expressed any remorse for it. Mr Rohim had also used the flat as a base from which to further his interest in illegal drugs. After referring to *Cumming v Danson* [1942] 2 All ER 653, *Enfield LBC v McKeon* [1986] 1 WLR 1007, *Raeuchle v Laimond Properties Ltd* (2001) 33 HLR 10, *Leeds & Yorkshire Housing*

Association v Vertigan [2010] EWCA Civ 1583, *Sandwell MBC v Hensley* [2007] EWCA Civ 1425; [2008] HLR 22 and *Manchester City Council v Higgins* [2005] EWCA Civ 1423, Turner J stated that 'the decision of the Recorder was fatally and demonstrably flawed' (para 34). He made a serious error in stating that this was 'not a case where tenants were unscrupulously making a profit by subletting' (para 35). He 'had plainly overlooked the fact that' Ms Begum and Mr Rohim were 'pocketing' housing benefit and, 'at the same time, fraudulently harvesting an additional £400 per month from Ms Rehana and Mr Ahmed' (para 36). He was 'entirely satisfied that the Recorder was taken in' (para 39). The fact that the recorder exercised his discretion on a demonstrably flawed basis meant that Turner J had to exercise that discretion afresh. He concluded:

[N]otwithstanding the passage of time since the hearing before the Recorder, I am entirely satisfied that it would be wrong to exercise my discretion to suspend the possession order in this case. In particular, the sheer scale and persistence of the … initial fraudulent deceit aggravated by further and subsequent drug related offending wholly justifies the condign consequences of an outright order. I would stress that it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families … [T]here was a complete dearth of material which could amount to cogent evidence that the [tenants] would mend their ways in future (para 40).

He made an outright order to take effect in 21 days.

With regards to the application for an unlawful profit order, 'each and every condition' under PSHFA 2013 s1(4) had been fulfilled (para 42). There was, however, an issue as to the calculation of the maximum amount payable. The recorder had concluded that the rent which Ms Begum and Mr Rohim were collecting was less than the rent they were paying the landlord and so assumed that the maximum payment was zero. In so doing, he left out of account the fact that the rent for the flat was covered entirely by housing benefit and so the monies received from Ms Rehana and Mr Ahmed were pure profit. Turner J was satisfied that the 'total amount' did not exclude the element of housing benefit (para 43). The inclusion of the word 'total' in step 1 in s5, which requires the court to '[d]etermine the total amount the tenant received as a result of the conduct described in subsection … (4)(c)', indicated that the gross receipts secured and consequent upon the dishonest relinquishment of possession should be considered. 'To hold otherwise would be to render all but nugatory the clear purpose of the section' (para 43). Turner J made an unlawful profit order in the sum of £1,550.

Enforcement in the High Court

- **Partridge v Gupta**
  [2017] EWHC 2110 (QB),
  15 August 2017

Mr Partridge was an assured shorthold tenant. His landlord, Mr Gupta, served a HA 1988 s21 notice. After a contested hearing, District Judge Sethi made a possession order requiring Mr Partridge to give up possession on or before 11 March 2016. Permission to appeal was refused. In March 2016, Mr Gupta's representatives issued an application in the County Court at Watford seeking permission to transfer the case to the High Court for enforcement purposes pursuant to County Courts Act 1984 s42(2). HHJ Harris ordered the transfer of the proceedings to the High Court. Before that hearing, Mr Gupta's representatives sent Mr Partridge a letter stating, among other things:

We … provide you with notice of … [o]ur application in accordance with Civil Procedure Rules 83.13(8) to the Queen's Bench Division of the High Court for permission to issue a writ of possession following permission from the county court under section 42 of the County Court Act 1984 as stated above. We strongly recommended that you obtain independent legal advice but please do contact this office if you have any questions regarding the impending eviction.

It was not, however, correct that an application to the Queen's Bench Division for permission to issue a writ of possession had been made because no such application was in fact made until after the hearing before HHJ Harris. On 8 July 2016, Master McCloud granted a without notice application for an order under CPR 83.13(8) permitting the issue of a writ of possession to enforce the possession order. Mr Partridge applied to set aside that order, arguing that there had been a failure to comply with CPR 83.13(8), which provides that permission to issue a writ of possession in the High Court 'will not be granted unless it is shown – (a) that every person in actual possession of the whole or any part of the land … has received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled'. Master Yoxall refused that application. Mr Partridge appealed.

Foskett J dismissed the appeal. He noted that CPR 83.13(8)(a) 'was lifted directly from' RSC O45, r3 (para 31). He stated that the issue that needs to be addressed by a master considering a 'without notice' application for permission to issue a writ of possession is 'simply whether he/she is satisfied that "every person in actual possession of the whole or any part of the land … has received *such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled*" … what may constitute sufficient "notice of the proceedings" for the purposes of the rule may vary from case to case and … the court simply needs to be satisfied that any "occupant" knows sufficient about the "proceedings" to be able to apply for appropriate relief' (paras 47–48; emphasis in original).

That reading of the rule would suggest that some degree of flexibility is permitted in the court's approach. From the moment that the appeal failed, Mr Partridge would have known that he and his family were required to vacate the property. The fact that the letter stated that an application for permission to issue a writ of possession had been made should have galvanised Mr Partridge into making an application for relief if he truly thought such relief might be granted. 'The "notice of the proceedings" referred to does not necessarily require either the service of the formal notice of application for permission or even a more informal intimation by letter or other communication that the application will be heard on a particular day or at a particular time. Either would be sufficient, but neither is required by the rule provided that the notice is sufficient to enable the occupant(s) to apply for relief' (para 64). In so far as what was said by Rose J in *Secretary of State for Defence v Nicholas* [2015] EWHC 4064 (Ch) was inconsistent with that approach, Foskett J declined to follow it.

Prosecutions

Sham licence agreements

- **Islington LBC v Green Live Ltd, t/a Green Live Estate Agents**
  Highbury Corner Magistrates' Court,
  10 August 2017

A letting agent gave occupiers renting residential accommodation 'sham' licence agreements which suggested, wrongly, that they had no right to challenge eviction and that there was no statutory protection for deposits. The agents pleaded guilty to two offences under the Consumer Protection from Unfair Trading Regulations 2008 SI No 1277 relating to the issuing of the licences and one offence of using a letting agency association logo when it was not a member.

Green Live Ltd was fined £11,000 for the two sham licences and £5,000 for the misuse of a logo. Two residential occupiers were awarded compensation totalling £3,000. The defendant was ordered to pay costs of £1,500.

Houses in multiple occupation

Rent repayment orders

- **AB v Newham LBC**
  [2017] UKUT 299 (LC),
  27 July 2017

AB owned a semi-detached house on three floors including an attic room on the top floor. It was a house in multiple occupation (HMO). From March to December 2014, she lived on the ground floor and the upper floors were occupied by two separate households under agreements with her. As the person in control of the property, she was required to obtain a licence from Newham under HA 2004 Part 2. AB did not do so until December 2014. As a result of warning letters, she was or should have been aware of the need to apply for a licence in 2012. She was convicted of an offence under HA 2004 s72(1) but the conviction was quashed on appeal.

Newham applied to the First-tier Tribunal (FTT) for a rent repayment order (RRO) (HA 2004 ss73 and 74). Medical records and witness statements referred to AB's poor mental health, but she did not attend the hearing in the FTT to explain in greater detail the difficulties to which she had alluded in her witness statement.

The FTT made a RRO. In its decision, it recorded the evidence of both parties in summary form including AB's assertion that she 'suffers from poor health exacerbated by the criminal proceedings and the application for a RRO'. However, it made no finding of fact concerning her mental health or the extent, if at all, to which it had contributed to her failure to obtain a licence. It stated: '[I]t is reasonable to make a RRO. The tribunal finds that no exceptional circumstances exist sufficient for it to decline to make a RRO.' AB appealed to the Upper Tribunal.

Martin Rodger QC, deputy chamber president, allowed the appeal. The

phrase 'exceptional circumstances' appears only in s74(4) and is not relevant to the question whether or not a RRO should be made. Whether there are 'exceptional circumstances' is relevant only to the amount it is reasonable to require a recipient of housing benefit to repay and then only in a case where that recipient has been convicted of an offence under s72(1). Where there has been no conviction, the jurisdiction to make a RRO under s73(5) is not subject to the requirements imposed by s74(2) and (2A). In a case not falling within s74(2) (ie, where there has been no conviction), the question for the FTT to determine under s74(5) is what sum it considers 'reasonable in the circumstances' should be repaid. In such a case, the FTT was required 'in particular' to take into account the matters listed in s74(6). In this case, the FTT did not refer specifically to the matters that it was required by s74(6) to take into account 'in particular'. Those matters included the conduct and financial circumstances of AB. By omitting to make any assessment of those circumstances, the FTT was in error and its decision could not stand.

- **Newham LBC v Harris** [2017] UKUT 264 (LC), 4 July 2017

Mr Harris was a landlord of a HMO in Newham, but failed to obtain a licence in accordance with the HA 2004. After Newham sent him a notice of intended prosecution, Mr Harris made an application for a licence and accepted a caution. Newham applied to the FTT for orders requiring rent and housing benefit to be repaid. The FTT declined to make such orders. It decided that even where the mandatory conditions for a RRO had been made out, it retained a residual discretion. Newham appealed.

Siobhan McGrath, sitting as a judge of the Upper Tribunal (Lands Chamber), dismissed the appeal. The tribunal has a discretion whether or not to make a RRO even when the conditions in s96(6) or (8) are met. Section 96(5) was 'very clear' in stating if 'a tribunal is satisfied as to the matters mentioned in subsection (6) or (8) it *may* make an order' (para 27, judge's emphasis). Had the draftsperson intended that there should be no discretion for the tribunal to make an order or not, s/he would have used the word 'must' or 'shall'. The word 'may' was permissive. It both conferred jurisdiction and gave a discretion. She stated:

The task for the tribunal therefore is as follows: firstly to decide whether the conditions in section 96(6) or (8) have been fulfilled; secondly to decide in the circumstances whether or not to make an order and finally if an order is made, then to determine the amount of the order having regard to the requirements of section 97. I should add that it will be a very rare case where a tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of so doing are prescribed by legislation to include an obligation to repay rent or housing benefit then the tribunal should be reluctant to refuse an application for a rent repayment order (para 30).

Housing allocation

- **R (XC) v Southwark LBC** C1/2017/1215

The claimant in this unsuccessful judicial review is applying for permission to appeal to the Court of Appeal. The Administrative Court held that the council had not treated the claimant unfavourably as a consequence of her disability and that although the priority star element of its housing allocation scheme was indirectly discriminatory against those with disabilities and women, the council had shown that it had adopted a scheme which was the least intrusive possible and which struck the right balance: [2017] EWHC 736 (Admin); June 2017 *Legal Action* 33.

- **R (Osman) v Harrow LBC** C1/2017/0674

The claimant in this unsuccessful judicial review is applying for permission to appeal to the Court of Appeal. The Administrative Court upheld the council's decision, reducing her priority in accordance with an amended housing allocation scheme, because the difference in treatment between public and private sector tenants under the scheme had been justified as an appropriate means to meet the objective of reducing overcrowding and making the best use of scarce resources: [2017] EWHC 274 (Admin); April 2017 *Legal Action* 41.

Homelessness

Applications and decisions

- **R (Sambotin) v Brent LBC** C1/2017/1605

The council is applying for permission to appeal to the Court of Appeal from an Administrative Court order allowing the claimant's application for judicial review and quashing the council's decision (that he was not eligible for housing assistance despite an earlier decision of the council to the contrary): [2017] EWHC 1190 (Admin); [2017] HLR 31; July/August 2017 *Legal Action* 42.

Out-of-district placement

- **Scarville v Lewisham LBC**[1] County Court at Central London, 21 August 2017

Mr Scarville and his son were accommodated by the council in temporary accommodation within Lewisham's district, provided under HA 1996 s193(2). Later, a friend of Mr Scarville's son was stabbed outside the property and the police said Mr Scarville and his son would need to be moved to alternative accommodation for their safety. Lewisham offered alternative accommodation in Bedford. Mr Scarville agreed that he would accept the offer. However, before the proposed move, Mr Scarville was told by the officer investigating the stabbing that, in fact, he and his son were not at risk at the Lewisham property. He told the council that he would not be moving to Bedford as there was, in fact, no risk to him and his son at the Lewisham property and the police would confirm this.

The council decided that its duty had been discharged by the refusal of the Bedford property: s193(5). Mr Scarville sought a review. The council made enquiries and the investigating officer confirmed that the police had no intelligence to suggest that Mr Scarville or his son were at risk at the Lewisham property. On review, the council decided that, given the urgency with which alternative accommodation had needed to be secured, the Bedford property had been suitable, as there had been no other accommodation available, and its duty had been discharged.

Recorder Bowers QC quashed that decision. Referring to the judgment in *Omar v Westminster City Council* [2008] EWCA Civ 421; [2008] HLR 36, at paras 25 and 32, he held that: (a) the reviewing officer had to assess the facts at the date of the 'discharge of duty' decision, rather than the facts being 'frozen' at the date of the offer of the Bedford property; and (b) the reviewing officer had to take into account facts in existence at the discharge date, even if they were not discovered until after that date. Before that date, the investigating officer had formed the view that there was no longer any risk and the officer had confirmed this directly to the council, albeit after the discharge of duty date. In these circumstances, the reason for the council deciding that the Lewisham property was not suitable fell away. It followed that it was 'reasonably practicable', for the purposes of HA 1996 s193, for the council to secure that accommodation was available for Mr Scarville's occupation within its district, simply by leaving him at the Lewisham property. Its continued offer of the Bedford property had become in breach of that duty. Accordingly, the council's decision that its duty had been discharged was irrational.

Priority need

In two appeals from the County Court at Central London listed for 9 October 2017, the Court of Appeal will consider the meaning of 'significantly more vulnerable' in the context of decision-making about priority need: *Panayiotou v Waltham Forest LBC* and *Smith v Haringey LBC*.

- **James v Waltham Forest LBC**[2] County Court at Central London, 28 June 2017

Ms James had a 19-year-old son and a 21-year-old daughter. She sought homelessness assistance after being evicted from her private rented accommodation. HA 1996 s189(1)(b) confers priority need status on 'a person with whom dependent children reside or might reasonably be expected to reside'. The council decided that Ms James did not have priority need because the children's ages meant that they could not count as 'dependent children'. On appeal, Ms James argued that the council had erred by applying an arbitrary age limit, and that 'dependency' could potentially exist at any age where there was a parent-child relationship.

Recorder McGrath dismissed the appeal. She held that a person aged 19 or over, ie, who has reached his/her 19th birthday, cannot be a dependent child for these purposes. She referred to para 10.7 of the Homelessness Code of Guidance for Local Authorities (DCLG, July 2006, page 84), which states:

The 1996 Act does not define dependent children, but housing authorities may wish to treat as dependent all children under 16, and all children aged 16–18 who are in, or are about to begin, full-time education or training or who for other reasons are unable to support themselves and who live at home.

The judge found that the code sets out a clear structure that:

1. children under the age of 16 will always be treated as dependent;
2. children aged 16 to 18 may be dependent because of being in full-time education or training, or for other reasons; and
3. people aged 19 or over are not envisaged as being 'dependent children' at all.

Reference was also made to the

decision in *Miah v Newham LBC* [2001] EWCA Civ 487, in which the Court of Appeal held that the reference in the code to 'aged 16–18' must be interpreted as including the age of 18, ie, a person who has not yet reached his/her 19th birthday. That decision did not consider or suggest the possibility of a person aged 19 or over being classed as a dependent child.

Housing and children

- **R (CO and KO) v Lewisham LBC** [2017] EWHC 1676 (Admin), 16 June 2017

The claimants were homeless children. Their mother's immigration status prevented her from having recourse to public funds. As a result, the family could not be helped under HA 1996 Parts 6 or 7. The council decided that the claimants were not 'children in need' for the purposes of Children Act (CA) 1989 s17 because the mother had assistance available from her two sisters, the children's father and other sources. On a reconsideration of that decision, the sisters wrote to the council explaining why they could not provide accommodation and the father confirmed that he could not assist. The council maintained its view and did not accept the mother's account that when she could not raise funds for a night in B&B, the family slept in the A&E department of a local hospital.

HHJ Walden-Smith, sitting as a High Court judge, quashed the decision. The council had:

- not reconsidered its earlier decision with an open mind in the light of new material;
- failed to put directly to the mother, for explanation, its doubts as to the credibility of her account that she had slept in A&E;
- failed to comply with its obligations under CA 2004 s11; and
- reached a conclusion that, on the specific facts, was irrational.

1 Daniel Clarke, barrister, London, and Patricia Michael-Forrester, solicitor, Burke Niazi, London.
2 Stefan Liberadzki, barrister, London.

Nic Madge and Jan Luba QC 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.

Police misconduct: update

Malicious prosecution, damages for false imprisonment, *agents provocateurs*, quantum, costs, limitation, decisions to prosecute, criminal records schemes, crime recording procedures, race discrimination and burden of proof, police misconduct panels, and significance of personal mitigation: Stephen Cragg QC, Tony Murphy and Heather Williams QC review the latest cases.

Stephen Cragg QC

Tony Murphy

Heather Williams QC

Malicious prosecution: who is a prosecutor?

- **Rees and others v Commissioner of Police of the Metropolis** [2017] EWHC 273 (QB), 17 February 2017

The claimants brought actions for malicious prosecution and misfeasance in public office. Three of them had been prosecuted for murder (Jonathan Rees (C1), Glenn Vian (C2) and Garry Vian (C4)) and Sidney Fillery (C3) was prosecuted for perverting the course of justice. The alleged offences related to the killing of private investigator Daniel Morgan, who was found with an axe in his head in 1987. C1 was Morgan's then business partner, C2 and C4 were his brothers-in-law and C3 was a detective who knew C1.

The claimants were charged following a reinvestigation. The charging decisions were made by the Crown Prosecution Service (CPS) following submission of a report prepared by two senior police officers, including David Cook. This report described 'new and compelling' evidence that primarily came from two police informers, James William Ward and Gary Eaton. The report failed to mention the extensive contact that Cook had with Eaton during the period when he was debriefed, which had occurred in breach of a 'sterile corridor' put in place to avoid potential contamination of the investigation.

Eaton's evidence was ruled inadmissible in the criminal proceedings and the prosecution of C3 was stayed as there was no other evidence against him. The Crown subsequently offered no evidence against the other three after additional documentation emerged that was damaging to Ward's credibility. The civil claims relied predominantly upon Cook's conduct concerning Eaton.

Mitting J held that Cook was not the prosecutor for the purposes of the malicious prosecution claims as the decision to prosecute was made by the CPS and the situation was not one where Cook alone knew the facts concerning the alleged offences. Despite Cook's deliberate concealment of material relevant to Eaton's credibility, the CPS was able to exercise an independent discretion given the volume of other material available. Accordingly, the malicious prosecution claims failed.

Mitting J went on to consider the other ingredients of the tort, in case he was wrong on that issue. Eaton's evidence should be excluded from an assessment of whether there was reasonable and probable cause for the prosecution, as Cook was aware his conduct was likely to render that evidence inadmissible. The rest of the evidence against C1, C2 and C4 satisfied the objective limb of the test and there was no basis for finding that Cook did not believe it provided reasonable and probable grounds for the prosecutions. There was no reasonable and probable cause for the prosecution of C3 once Eaton's evidence was disregarded.

Further, C1, C2 and C4 had not established malice, as the judge was satisfied that Cook believed the accounts of Eaton, Ward and the other evidence relied on, so that he thought he was bringing those complicit in the murder to justice.

As regards the misfeasance claims, the judge accepted Cook was acting as a public officer at the material time in investigating the crimes. He found that Cook's conduct in relation to Eaton amounted to deliberately perverting the course of justice, so that the 'untargeted malice' form of the tort was made out. In relation to C1, C2 and C4 he found no loss had been suffered as they would have been prosecuted if Eaton's evidence had not been available, given the other evidence against them. However, C3's claim succeeded as he would not have been prosecuted in those circumstances.

Comment: Appeals in relation to all the unsuccessful claims will be heard by the Court of Appeal in April 2018.

The judge's approach to the prosecutor issue is highly questionable. His judgment fails to refer to the fact that in *Copeland v Commissioner of Police of the Metropolis* [2014] EWCA Civ 1014; [2015] 3 All ER 391 the court confirmed that the correct test is whether the alleged prosecutor was 'in substance' responsible for the prosecution having been brought, as this was the test identified by the House of Lords in *Martin v Watson* [1996] 1 AC 74. On the face of it, this test should have been applied by the judge as binding upon him. Instead, he relied on another passage from *Martin v Watson*, where reference was made to all of the facts being within the defendant's knowledge so that the charger could not exercise an independent discretion, although the Court of Appeal in both