Housing: recent developments

Nic Madge, Jan Luba QC and Sam Madge-Wyld highlight important cases on human rights, the Rent Act 1977, harassment, long leases, housing allocation, homelessness, and housing for children.

Nic Madge

Jan Luba QC

Sam Madge-Wyld

Housing law news and legislation update

Such has been the volume of recent, important, case law that the material for this section has been held-over to September's article.

Human rights

Article 1 of Protocol No 1

- **Bikić v Croatia**
  App No 50101/12,
  29 May 2018

Ms Bikić was employed by S, a socially owned company. All S's employees paid three per cent of their monthly salaries as contributions to a housing fund. In 1988, S agreed to grant Ms Bikić a specially protected tenancy of a flat and the right to occupy it with her husband and two daughters. She moved into the flat and continued to live there. The decision to grant her the specially protected tenancy was challenged by three other employees and quashed by the Zagreb Basic Court of Associated Labour. In 1990, S's housing committee drew up a priority list for the distribution of flats. Ms Bikić was the first on the list. The company's workers' council approved the priority list and on that basis she was entitled to have a decision allocating a flat to her.

In 1992, S's flats were transferred for management to the Zagreb Municipality. In 1991, parliament enacted the Protected Tenancies (Sale to Occupier) Act, which abolished specially protected tenancies and regulated the sale of socially owned flats. In 1995, Ms Bikić applied to buy the flat. The Zagreb Municipality did not take any decision within the prescribed time limit of 60 days. In 2005, Ms Bikić resubmitted her request. That request was refused because she had not been granted a specially protected tenancy in respect of the flat.

Her subsequent civil claim against the City of Zagreb was dismissed because the priority list did not constitute a decision to grant a protected tenancy. Ms Bikić's subsequent appeals were dismissed. She complained to the European Court of Human Rights (ECtHR) that the refusal of her request to purchase the flat amounted to a violation of her right to peaceful enjoyment of her possessions under article 1 of Protocol No 1.

By a majority of five to two, the ECtHR dismissed her complaint. It noted that the case did not concern the issue of whether Ms Bikić had the right to dwell in the flat, but only whether she had the right to purchase it under the Protected Tenancies (Sale to Occupier) Act. Under article 1 of Protocol No 1, 'possessions' can be 'existing possessions' or claims that are sufficiently established to be regarded as 'assets'. Where a proprietary interest is in the nature of a claim, it may be regarded as an 'asset' only when the claim is sufficiently established as to be enforceable (para 45). Since Ms Bikić did not fulfil the crucial condition for purchase of having a specially protected tenancy, it could not be said that she had a 'possession'. There had been no violation of article 1 of Protocol No 1.

- **Titova and others v Russia**
  App No 4919/16,
  15 May 2018

In 2008–09, a group of people forged documents to show that they owned a number of flats owned by the City of Moscow. The flats were then subsequently sold to private individuals. Each sale was reviewed and approved by the City Registration Department. In 2013, after the fraud had been discovered, nine people were found guilty of fraud. In 2014, the City of Moscow housing department brought civil proceedings against the purchasers of the flats for their return. A District Court in Moscow found the claim proved, and invalidated the purchasers' title to the flats and ordered their eviction. The purchasers' appeals to the Moscow City Court were refused. The purchasers complained to the ECtHR, contending that the invalidation of their title had breached article 1 of Protocol No 1.

The claim was upheld. This was a case in which the City of Moscow ought to have realised, when it reviewed and approved the sales, that the transactions were based on fraudulent documents. No explanation had been given for why the City of Moscow had approved sales by third parties of flats owned by the City of Moscow. 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. Accordingly, the cancellation of the applicants' title to the flats without any compensation imposed an excessive burden on the applicants, 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. It followed that the forfeiture of the flats had breached article 1 of Protocol No 1.

Article 8

- **Darsigova v Russia**
  App No 54382/09,
  15 May 2018

In 1999, Ms Darsigova was allocated a flat by the Leninskiy District of Grozny. In 2009, the Leninskiy District Court declared the allocation null and void on the grounds that it had been obtained fraudulently. Her appeal to the Supreme Court of the Republic of Chechnya failed and she was evicted. She complained to the ECtHR and contended that her eviction had breached her rights under article 8.

The claim was upheld. The flat was Ms Darsigova's home. It was common ground that her eviction amounted to an interference with her right to respect for her home, was in accordance with the law and pursued the legitimate aim of protecting the rights of individuals in need of housing. The eviction was not, however, necessary in a democratic society because neither domestic court had weighed the rights of other individuals and their need for housing against Ms Darsigova's right to respect for her home. The courts had therefore failed to determine the proportionality of the applicant's eviction.

- **Sadovyak v Ukraine**
  App No 17365/14,
  17 May 2018

In 2001, Mr Sadovyak, a military officer, was provided with a flat owned by the Lviv Military Academy. In 2003, he was dismissed from the military and as a result given priority allocation for social housing from the Ministry of Defence. In 2005, Mr Sadovyak and his wife divorced. His wife and children were placed on a waiting list for social housing by the local authority. None of them, however, were rehoused. In 2012, the Frankivskyy District Court refused an application for the family's eviction from the flat by the Military Academy on the grounds that Mr Sadovyak and his family could not be evicted until they had all been provided with alternative accommodation. This decision was overturned on appeal, on the grounds that his occupation of the flat had never been formally authorised. A further appeal by Mr Sadovyak was dismissed. He and his family complained to the ECtHR, contending that their eviction breached their rights under article 8.

The claim was upheld. The flat was Mr Sadovyak and his family's home. Their eviction would amount to an interference with their right to respect for their home, but had some basis in domestic law and pursued a legitimate aim, namely the protection of the interests of military servicemen in need of temporary service-related accommodation. The eviction was not, however, necessary in a democratic society because the judgment of the appellate courts had not been based on adequate reasons as it had failed to assess the proportionality of the applicants' eviction.

Possession claims and article 8

- **Hillingdon LBC v Holley**
  UKSC 2017/0226,
  21 March 2018

The Supreme Court has refused permission to appeal against the Court

of Appeal decision ([2016] EWCA Civ 1052; [2017] HLR 3; February 2017 *Legal Action* 46) because 'the application does not raise an arguable point of law of general public importance which ought to be considered at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal'.

- **Enfield LBC v Turner** [2018] EWHC 1431 (QB), 25 May 2018

Ms Turner's father was the secure tenant of a three-bedroom council house. After his death, her mother succeeded to the tenancy. When her mother died, Ms Turner had no succession rights. Enfield served a notice to quit and initiated a possession claim. Ms Turner and her son, who lived with her, had many medical issues. The next year, Enfield offered them alternative accommodation in a ground-floor flat with level access. She refused the offer of new accommodation. A trial took place and a possession order was made. Ms Turner appealed.

Whipple J dismissed the appeal. The possession order was necessary and proportionate as there were others with greater need for three-bedroom properties. The trial judge knew that Ms Turner did not want to move and that doctors had said that it would be detrimental to her well-being. The judge had not misunderstood *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] HLR 5; December 2012 *Legal Action* 27 and *Hillingdon LBC v Holley* (see above), and there had been no defect in her approach. Medical issues coupled with long residence would not defeat a local authority's claim where there was no succession. The judge was also correct to hold that Enfield's interest prevailed and that it had acted within the framework of Human Rights Act (HRA) 1998 Sch 1 article 8. It was for the local authority to decide, according to policy, how to allocate its housing stock. At the time of Ms Turner's application, there were 1,479 people waiting for three-bedroom properties. Enfield was entitled to say that the house could be allocated to someone with a greater need for it.

Rent Act 1977

Rent registration

- **Harris Re Gloucester Place Mews** [2018] UKUT 166 (LC), 10 May 2018

Mr Harris was a Rent Act 1977 statutory tenant. In January 2017, his landlords applied for the registration of a fair rent. The application form made it clear that they did not have responsibility for repairs and that the tenant did have responsibility for repairs. Mr Harris appealed against the fair rent determined by the Valuation Office Agency. In his representations to the First-tier Tribunal (FTT), he stated: 'The lease that I have is a full repairing and insuring lease and as such I am fully responsible for every aspect of maintaining & repairing everything both inside and outside of the property.' Notwithstanding that, in its decision, the FTT stated: 'The landlord is responsible for all repairs and decorations.' Mr Harris appealed to the Upper Tribunal (UT).

HHJ Huskinson allowed the appeal. The FTT was in error in proceeding on the basis that the landlord was responsible for all repairs and decorations. It was clear that the FTT's decision could not stand. It had erred regarding an important matter of fact, namely as to who was responsible for the repairs to the property. There was also substance in concerns as to whether adequate reasons were given. HHJ Huskinson quashed the decision and remitted the matter to the FTT for reconsideration by a differently constituted tribunal.

Harassment

Protection from harassment

- **Worthington and Parkin v Metropolitan Housing Trust Ltd** [2018] EWCA Civ 1125, 17 May 2018

Mr Worthington and Ms Parkin were assured tenants. They were concerned about anti-social behaviour in their neighbourhood. With the consent of the landlord, Ms Parkin installed CCTV equipment for the purposes of her own security. Mr Worthington set up a website, which collated and stored evidence of unacceptable behaviour with some commentary. This generated a considerable amount of hostility from their neighbours and the landlord received complaints that their recordings were causing a nuisance and invading the privacy of other residents. It was also alleged that they were taking inappropriate photographs of other residents, including children and young people. After the landlord had requested that the cameras be redirected and material on the website removed, it wrote to both Mr Worthington and Ms Parkin stating that it intended to take immediate action to expel them from their homes. Its solicitors also wrote with a threat of proceedings 'either for an injunction or for possession of your home, or both' (para 40). The housing association then wrote a further letter stating that it was seeking an injunction and was 'still waiting for a court date' (para 44), even though, in fact, no proceedings had been issued.

HHJ Owen QC held that the landlord had unlawfully harassed Mr Worthington and Ms Parkin, contrary to Protection from Harassment Act 1997 s1. He awarded them damages, pursuant to s3(2), of £4,750 and £4,160 respectively. The landlord appealed to the Court of Appeal, arguing that its conduct fell significantly short of the standard of gravity required to constitute harassment.

The Court of Appeal dismissed the appeal. After referring to *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 AC 224 and *Sunderland City Council v Conn* [2007] EWCA Civ 1492, Kitchin LJ stated that 'it was not necessary for the judge to find that each particular item of correspondence was oppressive and unreasonable. He was instead required to consider the correspondence as a whole, and that is what he did' (para 60). The judge had expressly directed himself that he had to consider whether or not the conduct complained of crossed the boundary between that which was unattractive and even unreasonable, and that which was oppressive and unacceptable. He had found that the housing officer's 'approach was flawed and hopelessly careless, and that the analysis … was utterly inadequate and uncritical' (para 64).

The Court of Appeal rejected the submission that the letters 'were unexceptional and of a kind regularly sent by owners of social housing as part of their efforts to protect their wider body of tenants'. The landlord made threats and accusations 'without taking the most basic steps to ensure that they had a proper foundation. They were in fact totally unjustified. [In those circumstances,] the judge had ample material before him upon which to find that the conduct complained of crossed the boundary and was oppressive and unacceptable, and that it amounted to harassment' (para 80).

Implied surrender and damages

- **Smith v Khan** [2018] EWCA Civ 1137, 17 May 2018

In June 2014, Mr Khan granted Mr Smith an assured shorthold tenancy of a flat for a term of 12 months. He lived there with his wife, a Nigerian national who had no entitlement to state benefits. The rent was £300 per month and was funded out of Mr Smith's housing benefit. In March 2015, Mr Smith left the property and disappeared. Initially, neither his wife nor anyone else knew where he had gone. When they finally made contact, he told Mrs Smith that he was in Scotland; his benefits had been stopped; and the rent had not been paid. Mr Khan handed Mrs Smith a letter that purported to give Mr Smith notice to terminate the tenancy. An advice centre wrote to Mr Khan pointing out that the notice was invalid and unenforceable, and that although Mrs Smith was not the tenant of the property, she had a legal right to occupy it under Family Law Act 1996 s30. While she was out, Mr Khan entered the property and changed the lock. On returning, she was unable to get in. She ended up sleeping on the floor of a friend's house for many months.

Although a district judge made an order reinstating Mrs Smith and preventing Mr Khan from seeking to exclude her from the property, it emerged that Mr Khan had relet the property to another tenant and was unable or at least unwilling to comply with the order for reinstatement. She did not enforce the order for reinstatement and the claim against Mr Khan proceeded for damages.

Although Mrs Smith sought a rate of £220 per night by way of general damages for trespass, District Judge Nicolle awarded her £40 per night 'by reference to the amount of rent payable (£9.86 per day) with an uplift to take account of what she described as Mr Khan's flagrant disregard of the law' (see para 13). The damages for trespass covered the period from the unlawful eviction until the date of judgment on the basis that the tenancy either was continuing or would have continued until then had Mr Khan not acted unlawfully. The judge also made awards of aggravated damages (£1,500) for injury to feelings; exemplary damages (£1,200); and damages for harassment (£500). Special damages for the loss of property were assessed at £1,000. The total award was £14,773.37.

Mrs Smith appealed against the quantum of the award in respect of general and exemplary damages. HHJ Owen QC found that the district judge had erred in assessing the daily rate of damages for trespass. He held that the correct rate was £130 per day. However, he also found that there had been an implied surrender when Mr Smith disappeared to Scotland and Mr Khan had served his notice to quit. Mrs Smith's only protection was under Protection from Eviction Act (PEA) 1977 s3 and the correct period for the purpose of calculating damages was 28 days. The overall award was reduced to £7,853.37. Mrs Smith appealed to the Court of Appeal, claiming that there had been no implied surrender of the

tenancy and that the judge had been wrong to limit damages to the 28 days' notice required under the PEA 1977. Mr Khan cross-appealed against the judge's substitution of £130 per day.

In the Court of Appeal, Patten LJ stated that HHJ Owen QC was wrong to assess damages on the basis that the contractual term had come to an end by surrender. In this case, there was no unequivocal indication by Mr Smith that he wished to give up his tenancy. Further, the issue of surrender had not been raised on the appeal. Mere absence was not enough in itself to indicate an intention to abandon the tenancy or to amount to a cesser of occupation for the purposes of Housing Act (HA) 1988 s1. 'The fact that someone chooses or is forced to work away from home does not mean that his former place of residence has ceased to be his only or principal home' (para 31).

With regards to quantum, damages for trespass are not restitutionary. They are payable to compensate the displaced tenant for the unlawful occupation of property by the trespasser. They continue to be payable throughout the period during which the claimant's right to possession subsists and they are not therefore inconsistent with the pursuit in the same proceedings of a claim for an injunction to reinstate the tenant or rightful owner to possession of their property. If such an order is made, damages will be payable up to the date when possession is restored. If there was no implied surrender, the assured tenancy continued for the remainder of its contractual term until 30 June 2015, giving Mr Smith and therefore Mrs Smith a continuing right to occupy during that period.

However, it was unrealistic to regard Mr Smith's assured tenancy as having continued after Mrs Smith elected not to pursue her claim for reinstatement by enforcing the order which she obtained, and both Mr and Mrs Smith had accepted that they would not regain possession. The occupation of the flat as their principal home therefore ceased. Since there was no contractual right under the tenancy agreement to a further lease and neither of them remained in possession paying rent, the tenancy came to an end at the expiry of the fixed term on 30 June 2015. There was no basis for awarding damages for a further period after 30 June. After that date, Mrs Smith had no right to occupy. The district judge was therefore wrong in awarding damages for the entire period up to December 2015.

With regard to the daily rate, damages for trespass must compensate the tenant not merely for the letting value of the property of which they have been deprived, but also for the anxiety, inconvenience and mental stress involved in the loss of what was the tenant's home. The Court of Appeal referred to a 'summary of recent county court decisions [indicating] awards ranging between £100 and £300 per night' (para 45). Although awards made in other cases cannot be treated as strict precedents and judges must feel free to base their awards on their own assessment of the damage that has been caused, they do indicate the value that has been placed by the courts in those cases on the additional factors. HHJ Owen QC was entitled to take the view that the district judge's award was simply too low. The Court of Appeal was not persuaded that it should interfere with his assessment of the daily rate.

The Court of Appeal dismissed Mr Khan's cross-appeal and, on Mrs Smith's appeal, ordered Mr Khan to pay damages for trespass from 15 April to 30 June 2015 inclusive at a rate of £130 per day, amounting to £9,880. To this was added a further £4,200 made up of the awards of aggravated and exemplary damages, damages for harassment and special damages.

Long leases

Qualifying long-term agreements

- **Corvan (Properties) Ltd v Abdel-Mahmoud**
  [2018] EWCA Civ 1102,
  15 May 2018

Corvan, the freehold owner of a block of flats, entered into a management agreement with its agents. The agreement provided that it would 'be for a period of one year from the date of signature hereof and will continue thereafter until terminated upon three months' notice by either party'. Ms Abdel-Mahmoud, a lessee, successfully argued in the FTT (Property Chamber) and the UT (Lands Chamber) that the agreement was of indefinite duration and was accordingly a qualifying long-term agreement (within the meaning of Landlord and Tenant Act (LTA) 1985 s20ZA(2)) as it was for a period of more than 12 months. Corvan appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. The use of the words 'will continue' introduced a mandatory requirement for the agreement to continue beyond the initial 12 months. This meant the term was for a period of 12 months plus an indefinite period, which was subject to termination on three months' notice being given. This in turn meant the term of the agreement was for a period of more than 12 months and it was therefore a qualifying long-term agreement. Had the agreement been for a term of 12 months, but terminable within the first year, it would not have been a qualifying long-term agreement.

Service charges

- **Saunderson v Cambridge Park Court Residents Association Ltd**
  [2018] UKUT 182 (LC),
  29 May 2018

Mr Saunderson was the leasehold owner of a flat within a block of flats. Cambridge Park Court Residents Association Ltd (Cambridge Park) was his landlord. Under Mr Saunderson's lease, Cambridge Park was obliged to provide him with certain services and Mr Saunderson was obliged to contribute towards the cost of providing those services by payment of a service charge. Most of the flats within the block received their heating and hot water from a communal heating system. The lease did not make provision for Mr Saunderson or any of the other lessees to be provided with or pay for the communal heating system. Initially, Mr Saunderson did not object to making a contribution towards its cost. However, he subsequently disconnected his flat from the communal heating system after it ceased to provide him with adequate heating and hot water, and installed his own heating system.

A few years later, he argued that he should not be obliged to contribute towards the cost of the communal heating system as his lease did not require him to do so and he no longer received the service. The FTT (Property Chamber) decided that Mr Saunderson was obliged to continue paying for the communal heating system because he had previously paid the cost without objection since 1994 and this had given rise to an estoppel by convention. Mr Saunderson appealed to the UT.

HHJ Hodge QC allowed the appeal. Any estoppel that may have existed between Mr Saunderson and Cambridge Park ended when Mr Saunderson stopped receiving the benefit of the communal heating system. The FTT (Property Chamber) had further erred by failing to consider whether the payment for a service that Mr Saunderson did not receive was reasonable within the meaning of LTA 1985 s19. Had it done so, it could only have concluded that the sum was not reasonable.

- **Charles v Tower Hamlets LBC**
  [2018] UKUT 140 (LC),
  15 May 2018

Ms Charles was the leasehold owner of a flat. Tower Hamlets was her landlord. Ms Charles was obliged, under her lease, to pay Tower Hamlets a service charge. Tower Hamlets brought a money claim against Ms Charles after she refused to pay the service charge for the years 2013/14 and 2014/15. Ms Charles sought to defend the claim on the basis that she had not been provided with access to the supporting accounts for each of the relevant service charge years. The case was then transferred to the FTT (Property Chamber).

On 22 September 2016, directions were made and a final hearing listed for 12 December 2016. The directions provided for Tower Hamlets to provide Ms Charles with 'evidence to substantiate all costs incurred for the years in dispute' (para 16) and then for Ms Charles to prepare a statement of case explaining the basis of her challenge to the service charge. Tower Hamlets provided Ms Charles with the service charge certificates (which set out the items of expenditure for each year) and a number of invoices for each year. Ms Charles contended that this was insufficient evidence to enable her to prepare her statement of case and applied to the tribunal for the case to be stayed.

The FTT (Property Chamber) refused the application for a stay and Ms Charles applied for permission to appeal from that order. Both the FTT (Property Chamber) and UT refused permission to appeal. On 12 December 2016, the FTT made an order debarring Ms Charles from participating in the hearing as she had failed to comply with any of the directions and had, in particular, failed to particularise the basis of her challenge to the service charge. Ms Charles appealed against that decision to the UT.

HHJ Behrens dismissed the appeal. The FTT (Property Chamber) had been entitled to debar Ms Charles from taking part in the proceedings. Tower Hamlets had complied with the tribunal's directions and there was no good reason why Ms Charles could not have completed her own statement of case. Moreover, Ms Charles had never identified a single area of challenge to the service charge.

Access and costs

- **Notting Hill Housing Trust v Esan**
  Court of Appeal (Civil Division),
  16 May 2018

Ms Esan was a long lessee. Her lease obliged her to allow access by the landlord for repairs. In 2014, Notting Hill was concerned about water leakage from her flat into another flat. It applied for an injunction requiring access. Despite service of the application, Ms

Esan did not attend the hearing and an injunction was granted. Ms Esan accepted that she became aware of the injunction but continued to refuse access. Notting Hill applied to commit her for contempt. Ms Esan eventually agreed to provide access but the judge ordered her to pay Notting Hill's costs, summarily assessed at £3,052. Ms Esan appealed, arguing that she had not been to blame for the leaking water and that she had not been served with any of the documentation before the committal hearing.

The Court of Appeal dismissed the appeal. For the purposes of the hearing before the judge, it did not matter whether Ms Esan was to blame for the leaks. All that mattered was that she had not complied with the order allowing access. She had not attended the injunction hearing and had taken no steps to have the order set aside or to appeal against it. Further, the judge had been entitled to proceed on the basis that, as the evidence indicated, documentation had been left at the property. The Court of Appeal should be slow to entertain appeals from costs orders. The judge had had a discretion in making the order and, where there was no error of law, the Court of Appeal would only interfere where the exercise of discretion had exceeded the generous ambit within which reasonable disagreement was possible. This was not such a case.

Enforcement of housing conditions/smoke alarms

- **Badwall v Kingston upon Hull City Council**
  First-tier Tribunal (General Regulatory Chamber),
  [2017] UKFTT PR_2017_0028 (GRC),
  21 December 2017

Mr Badwall was the landlord of a flat. On 7 May 2017, a council officer inspected the flat and found the smoke and carbon monoxide alarm to be defective. On 10 May 2017, Hull served Mr Badwall with a remedial action notice under Smoke and Carbon Monoxide Alarm (England) Regulations 2015 SI No 1693 reg 5 requiring him to fit a functioning smoke and carbon monoxide alarm within 28 days. Mr Badwall failed to do so. On 28 June 2017, Hull fitted the alarm itself and, on 11 July 2017, served Mr Badwall with a penalty notice in the sum of £2,000 in accordance with its own policy for first contraventions of the 2015 regulations. Mr Badwall appealed against the penalty notice on the grounds that he had been busy at work and on holiday.

The appeal was dismissed. Hull's policy was fair and Mr Badwall's excuses did not warrant a departure from it. The tribunal further noted that:

As a landlord who went on holiday whilst leaving his property in a dangerous condition it is unfortunate that the appellant chose to refer to his sympathy for the Grenfell Tower victims in seeking the tribunal's indulgence (para 16).

Planning enforcement/proceeds of crime

- **Islington LBC v Etek Developments (Tufnell Park) Limited**[1]
  Blackfriars Crown Court,
  23 April 2018

On 7 September 2017, Etek Developments (Tufnell Park) Limited pleaded guilty to breaching a planning enforcement notice served on it by Islington in 2009. That notice had required Etek to stop renting out substandard and inadequate residential accommodation, ie, a single dwelling house that had, in breach of planning control, been converted into five flats.

In April 2018, Blackfriars Crown Court ordered Etek, in addition to a fine of £8,000, to pay £304,458 under the Proceeds of Crime Act 2002.

Housing allocation

- **Complaint against Croydon LBC**
  Local Government and Social Care Ombudsman Complaint No 16 017 593,
  26 April 2018

The complainant (Mr X) lived in a one-bedroom council flat. He applied for a housing allocation, by way of transfer, to a two-bedroom flat. He said that he needed to move due to noise and anti-social behaviour, which was having a significant impact on his epilepsy, and that he needed a two-bedroom property so he could have a carer stay overnight. His initial application was refused.

He applied for a review and supplied letters from his consultant neurologist and his GP. At the council's request, he provided a further consultant's letter, which stated that he 'has frequent severe seizures and therefore needs supervision and quiet housing, to ensure he gets sufficient undisturbed sleep as sleep deprivation can provoke seizures' (para 21). The council sent the information to its independent housing medical adviser (IHMA), who simply wrote 'epilepsy but no evidence health related housing needs' (para 22). The council declined to award any medical priority and refused to authorise a two-bedroom transfer.

The ombudsman found that the council had been at fault in two respects. First, it had taken 33 weeks to complete the review whereas its internal polices provided for completion within eight weeks. Second, it was at fault in the way it reached its decision not to award Mr X medical priority based on advice from its IHMA. The ombudsman said:

It is for the council to make a decision on medical priority and not the [IHMA]. The council is entitled to take account of the [IHMA's] opinion but must also take account of other medical evidence it receives. In reaching its decision the council should consider the fact that its [IHMA] has not examined or spoken to Mr X. Furthermore, the [IHMA's] advice does not address the issues raised by Mr X's consultant neurologist or his GP regarding the impact of his medical conditions on his housing (paras 28–29).

The council agreed to: (1) carry out a fresh review of its decision regarding Mr X's medical priority and his request for two-bedroom accommodation and issue a reasoned decision; and (2) pay Mr X £250 for the distress caused by the delay and his time and trouble pursuing his complaint.

On publishing his report, the ombudsman said:

Councils can take into account advice from independent medical advisers when reviewing people's housing applications, but the final decision must be down to the council itself. It is difficult to see how Croydon council could base its review decision on paperwork provided by someone who had neither examined nor even spoken to the man, without considering evidence provided by the man's medical specialists ('Council ignores medical evidence when deciding man's housing application', LGSCO news release, 20 June 2018).

- **R (Buckley on behalf of Foxhill Residents' Association) v Bath and North East Somerset Council**
  [2018] EWHC 1551 (Admin),
  20 June 2018

A housing association applied to the council for outline planning permission to redevelop a housing estate by the demolition of up to 542 dwellings and the provision of up to 700 new homes. The council granted permission on the basis that existing tenants and residents would be transferred directly from their existing homes to new homes on the estate, rather than being decanted temporarily.

The claimant sought a judicial review on the grounds that the council had failed to have due regard to the public sector equality duty in Equality Act 2010 s149. The council accepted that it had not carried out an equality impact assessment but contended that the decision had been taken in full knowledge of the demographic of residents on the estate and that they would only make a single move to another permanent home.

Lewis J quashed the decision. He said that:

... the real issue of substance was whether the defendant could demonstrate that it had had due regard to the impact on the elderly or disabled of the loss of their existing home. Elderly persons may well have lived for many years in a home and wished to spend the rest of their years in that same home. Disabled persons may well have had an existing home adapted and can be certain that they can live, and function, in that environment. To lose that environment may give rise to particular considerations as to the impact of such a loss which are different from, and greater than, the impact on other persons (para 38).

On that issue the council's case failed. The judge said:

The defendant did not specifically address or have regard to the impact on groups with protected characteristics, in particular the elderly and the disabled, of the loss of their existing home. It may well be that not a great deal would have needed to be said on this matter. It may have been sufficient to draw that matter to the decision-maker's attention and then the decision-maker could have decided whether the contemplated benefits of the proposed development did outweigh any negative impacts. Ultimately, however, I am persuaded there were matters relevant to the discharge of the public sector equality duty which the relevant decision-maker needed to have due regard to but which were not drawn to the decision-maker's attention. In the circumstances, there was a failure to discharge the duty imposed by section 149 of the 2010 Act (para 40).

Homelessness

Interim accommodation

- **XPQ v Hammersmith and Fulham LBC**
  [2018] EWHC 1391 (QB),
  7 June 2018

The claimant was a victim of trafficking. When she applied to the council for homelessness assistance, she was provided with interim accommodation

pending a decision. She was given a place in a mixed-sex unit with access to a shared bathroom and communal kitchen. She said that while there, she had been a victim of sexual assault and harassment. After several weeks, she was moved to a self-contained unit but said that while living there she was accosted by a person who was one of, or was related to, those who had trafficked her. She requested and was granted an urgent move to a different area.

She brought a claim against the council for damages for the sexual assault and harassment she had suffered, victimisation and a risk of re-trafficking, psychiatric injury, re-traumatisation, anxiety, stress, depression, fear and humiliation, and injury to feelings. She asserted a violation of her 'rights as a victim and a gross interference with her personal dignity' (para 18), significant psychiatric damage, the feelings of re-traumatisation, anxiety, distress, depression, fear and humiliation she had suffered as a consequence of the two placements in unsuitable temporary accommodation, and damages against the council in respect of breaches of the EU Trafficking Directive (Directive 2011/36/EU). In addition, she claimed aggravated damages and exemplary damages. She also claimed declarations that the council was in breach of its duties under the Trafficking Directive, HRA 1998 Sch 1 articles 4 and 8, HA 1996 s188 and common law duties of care.

Langstaff J dismissed the claim. Applying *O'Rourke v Camden LBC* [1998] AC 188, he held that a breach of HA 1996 s188 did not give rise to a cause of action sounding in damages, whether for breach of statutory duty or common law negligence. The Trafficking Directive did not have the direct or indirect effect of imposing a liability on the council. The council could not be liable at common law for the acts of the third parties complained of. The claims based on articles 4 and 8 took the matter no further and failed on their facts.

- **R (McDonagh) v Enfield LBC** [2018] EWHC 1287 (Admin), 24 May 2018

The claimant lived with her three children in private rented accommodation. It was unsuitable for her disabled son, a wheelchair user, as it was a two-storey house and the bathroom and toilet were on the first floor. In March 2015, following reports from a social worker and an occupational therapist, the council treated the claimant as having applied for a social housing allocation under HA 1996 Part 6. In January 2017, the claimant's solicitors made it clear to the council that the claimant was seeking assistance under HA 1996 Part 7 (homelessness). No response having been received, the solicitors sent a letter before claim in July 2017.

The council then responded, acknowledging the application and the fact that the HA 1996 s188 (interim accommodation) duty had arisen. No interim accommodation was offered. The council explained that it had nothing that was 'any better than the current accommodation' (para 28). On 8 February 2018, a claim for judicial review was issued. The council then accepted, on 19 February 2018, that it owed the main housing duty under HA 1996 s193. It offered a private rented sector tenancy of single-level wheelchair-suitable accommodation, which the claimant accepted and moved into in March 2018.

The claimant continued the judicial review claim seeking damages for the period 2015–18 on the basis that the council had failed to recognise its s188 duty through that period resulting in an infringement of her rights under HRA 1998 Sch 1 article 8.

Nigel Poole QC, sitting as a deputy High Court judge, held that:

Just because an application is ostensibly by a 'not homeless' applicant, and therefore might be regarded as being made under Part VI of the Act, it does not follow that it cannot constitute an application for the purposes of Part VII – R v Islington London Borough Council Ex p B *(1997) 30 HLR 706 at page 710. The words 'reason to believe that an applicant may be homeless' [in s188] suggest a low threshold for the duties under Part VII to arise* (para 41; see *R (Aweys and others) v Birmingham City Council* [2007] EWHC 52 (Admin); [2007] HLR 27; March 2007 *Legal Action* 18).

On the facts, the judge found that:

... in March 2015 the claimant had applied to the defendant for accommodation, and that on receipt of the March 2015 application, given that the authority already had the OT assessment from October 2014, the authority had reason to believe that she may be homeless as defined by s175(3). Accordingly, s183(1) of the Act was made out and so the later provisions of Part VII applied.

It follows that under s184(1), the defendant should have made such inquiries as were necessary to satisfy themselves whether the claimant was eligible for assistance and if so, whether any duty, and if so what duty, was owed to her under Part VII. The defendant does not dispute that at all relevant times the claimant was eligible for assistance [s185 of the Act] and was a priority applicant [s189]. Mr Lane for the defendant did not suggest that the claimant was intentionally homeless at any time after March 2015. Accordingly, if the authority had continued to have reason to believe that the claimant may be homeless, the interim duty to accommodate under s188(1) arose (paras 43–44).

Although the council conceded that it had been in breach of that duty since 31 July 2017, the judge found that 'the defendant's s188 duty to secure interim accommodation arose much earlier, in the first week of December 2015' (para 48). From that date, the council bore the burden of demonstrating that it had complied with the duty. It failed to do so. Accordingly, there had been a breach from December 2015 to February 2018, even though the court was satisfied that 'from January 2016 there was no suitable housing available from the defendant's own stock and from November 2016 there was no suitable interim accommodation available to be secured by any means' (para 50).

Such a breach of duty could not found a claim in negligence or for the tort of breach of statutory duty but might amount to a breach of article 8. On the facts of this case, there had not been a breach of the claimant's own rights under that article. In any event, a declaration of breach of the right would have been sufficient to mark the breach. If that was wrong, only £2,000 in damages would have been awarded. No claim had been brought by the disabled child.

Priority need

- **Raufi v Islington LBC**[2] County Court at Central London, 4 June 2018

Mr Raufi was a refugee. In Iran, he had been imprisoned and tortured. In 2015, he came to the UK and was granted indefinite leave to remain in 2016. When his National Asylum Support Service (NASS) accommodation ended, he moved in to live with his brother and his brother's family in a one-bedroomed property. In January 2017, his brother asked him to leave and he applied to the council for homelessness assistance. The medical evidence showed that he suffered from: severe depression; anxiety; post-traumatic stress disorder; urinary incontinence; plantar fasciitis, causing pain in his feet, as a result of falanga (beating to his feet); limited ability to walk; cervical pain; low back pain; and non-alcohol-related fatty liver disease. Having taken advice from NowMedical, the council concluded that he did not have a priority need because he was not vulnerable. That decision was upheld on review.

HHJ Roberts, unusually, varied the decision to a finding that Mr Raufi did have a priority need because he was vulnerable. The council had applied the wrong test to the issue of vulnerability, 'namely a quantative [sic] approach rather than a qualitative one'. It had also applied the wrong test to the comparator. 'The comparator is an ordinary person who is homeless, and such a person is healthy and robust' (para 86). The judge added that 'in any event, on a proper assessment of the evidence, the [council] could only conclude that by reason of his mental illness and physical disability [Mr Raufi] was vulnerable' (para 87). He thus upheld the majority of the eight grounds of appeal.

Housing and children

- **R (KI) v Brent LBC**[3] [2018] EWHC 1068 (Admin), 10 May 2018

In October 2016, the claimant (then aged 16) entered the UK. Initially he stayed with an uncle, but that relationship broke down. He sought a judicial review of the council's refusal to recognise him as a 'child in need' requiring accommodation under Children Act (CA) 1989 s20 and, subsequently, on his attaining the age of 18 on 5 January 2018, refusing to recognise his status as a 'former relevant child' for the purposes of CA 1989 s23C.

At trial, the council conceded that it was in breach of its duty under s20 in seeking to accommodate K with his uncle again in October 2017 despite the breakdown in their relationship and the unsuitability of the uncle's accommodation. However, it contended that the breach of duty had occurred before the claimant had been accommodated under s20 for the 13 weeks necessary to trigger the status of 'former relevant child'.

David Elvin QC, sitting as a deputy High Court judge, held that, following the council's belated compliance with its duties of candour and full and frank disclosure, it was plain on the facts that the council 'continued as a matter of fact to treat K as a looked after child beyond the 11 October ... and did so beyond the 13 weeks required to establish eligibility (which occurred at the end of October 2017). Indeed, I consider that he did not cease to be looked after, or that the s20 duty ceased, until he turned 18 on 5 January 2018' (para 103). Accordingly, the claimant was owed the duties contained in s23C.

The judge said:

Whilst I do not underestimate the difficulties faced by local authorities, and their social services department, in these days of austerity and public funding cuts when available accommodation is scarce and they have a duty to promote the welfare of many children in need, it remains the responsibility of the council to comply with the law and the overriding duty to protect the individual child and that child's welfare (para 109).

- **R (FA) v Redbridge LBC**
  Administrative Court,
  27 April 2018

The claimant was a Nigerian national. She entered the UK in 2002 as a visitor but overstayed. She subsequently gave birth to a daughter. Her application for leave to remain was refused. A further application was rejected, as was her application for asylum. An appeal was dismissed. Appeal rights were exhausted in November 2016. The claimant made a further application for leave to remain on the basis that she had been in the UK for over 10 years.

In April 2018, she became homeless. She was not eligible for assistance under HA 1996 Part 6 (housing allocation) or Part 7 (homelessness). She applied to the Home Office for assistance under Immigration and Asylum Act (IAA) 1999 s4 and also to the council under CA 1989 s17. The Home Office decided she was not entitled to support under IAA 1999 s4. On appeal from that decision, a tribunal concluded that she was not destitute and dismissed her appeal. The council said she was entitled to support under IAA 1999 s95 and therefore IA 1999 s122 prevented it from providing services. The claimant sought a judicial review of that decision and applied for interim relief. Although the claimant was a failed asylum-seeker, it was argued that she was to be treated as though her asylum claim was still extant because the home secretary could provide support for an asylum-seeker or their dependants if they were destitute: s94(5).

Warby J held that, in conjunction with other provisions, CA 1989 s17 imposed a duty on a council to assess and provide appropriate services. The issue was the interaction between CA 1989 s17 and IAA 1999 ss4 and 95. Section 4 dealt with failed asylum-seekers, s95 dealt with asylum-seekers. It was impossible to be confident about the home secretary's view of her status. It was a sufficiently debatable issue, as to whether the council had reasonable grounds for the belief that the Home Office would assist under s95, to justify interim relief until after a decision on permission for judicial review. It was hoped that the home secretary would intervene in the claim as an interested party to provide information about who should provide support to the claimant.

- **Judicial Review by OC (A Minor) and another**
  [2018] NIQB 34,
  10 April 2018

The claimants were teenagers who had lived difficult and troubled lives involving engagement with social services and criminal justice authorities. They sought a declaration that public authorities were to be absolutely prohibited from using bed and breakfast-style accommodation for single young vulnerable teenagers such as themselves.

Keegan J considered *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14; April 2008 *Legal Action* 35 at para 27, in which Lady Hale described the 'wisdom of … guidance' that 'bed and breakfast accommodation is unlikely to be suitable for 16 and 17 year olds who are in need of support'. Counsel in the instant case had 'put forward an impressive argument in support of an absolute prohibition on bed and breakfast accommodation using OC's case by way of example'. The judge said: 'I have considerable sympathy with this case particularly as OC's case highlights the dangers in using this type of accommodation where there are serious inherent problems such as drug addiction. The accommodation cannot simply be used to provide a roof over the head of a problematic young person' (para 38).

Although the court would not 'declare an absolute prohibition on hotel/bed and breakfast accommodation in cases of this nature', the judge stressed that 'the use of this type of accommodation should be rare, restricted and heavily monitored' (para 49). The court would adopt the headline points that in respect of vulnerable teenagers, among other matters (para 50):

- *The accommodation [provided] should be suitable.*
- *What is suitable will depend on the facts of each case.*
- *Bed and breakfast/hotel accommodation must only be used in exceptional circumstances, for the shortest possible period and accompanied by supports and services.*
  […]
- *Social services will be expected to vouch all attempts to find suitable accommodation to a court and to set out the exact nature of temporary accommodation with an emphasis on supports and services.*

- **R (RL) v Croydon LBC**[4]
  [2018] EWCA Civ 726,
  11 April 2018

The claimant was a Ghanaian national and the mother of three children aged between six and 12. The eldest child was a British national. The mother and the two younger children had leave to remain in the UK subject to a condition that they should have no recourse to public funds. The effect was that they were not entitled to homelessness assistance or social housing under HA 1996 Parts 6 and 7.

The claimant told the council in September 2015 that she was facing eviction and the council began an assessment of her children's needs under CA 1989 s17. The eviction took place on 15 October 2015 but the assessment had not been completed. On 28 October 2015, the assessment still not having concluded, she sought judicial review seeking to achieve the provision of accommodation. She obtained an interim order.

The assessment was concluded on 4 November 2015 and the council agreed to meet the children's needs by provision of temporary accommodation. The renewed application for permission to seek judicial review was withdrawn on the basis that the parties would make costs submissions in writing. Judge Gill, sitting as a deputy High Court judge, made no order as to costs. The claimant appealed.

The Court of Appeal dismissed the appeal. The relief sought by the claim (provision of accommodation) had never been obtainable because s17 contains only a general duty to assess, not a specifically enforceable duty to provide accommodation absent an assessment. Underhill LJ said:

More accurately, what the [claimant was] seeking was an assessment under section 17 of the 1989 Act, which might (and indeed eventually did) lead to the provision of accommodation. At the time that the proceedings were issued there was no dispute between the [claimant] and the council that it was under an obligation to carry out such an assessment: it had indeed started, to the [claimant's] knowledge, some time prior to the commencement of proceedings. The object of the proceedings was not to secure an assessment but to secure it sooner than it was feared would otherwise be the case. That being so, the fact that the assessment was in fact completed, and that the [claimant was] accommodated accordingly, does not represent 'success': that would have happened anyway (para 74).

The only other route to a costs order in the claimant's favour was to demonstrate that a court was:

… in a position to decide with sufficient confidence both (a) that Croydon had been legally obliged to produce the assessment prior to 28 October 2015 and (b) that it was reasonable of the [claimant] to issue the proceedings on that date. I say 'with sufficient confidence' because it would not be proportionate to hold the equivalent of a full trial simply in order to determine liability for costs: the court has to do its best to reach a fair conclusion on a summary basis, with the fallback of making no order if that is not possible (para 75).

Applying that approach, the claimant could not succeed on costs:

A section 17 assessment is a serious exercise, requiring information from several sources, and … local authorities have many calls on their resources. A court should be slow to find that an authority had been guilty of unlawful delay simply because it had missed a benchmark target or its performance may be shown to have been sub-optimal in some particular respect. There were indications that Croydon had encountered difficulties in accumulating all the information that it felt it required: given that the delays in question were on any view not gross it would not be proportionate on a costs assessment to attempt to get to the bottom of exactly what had gone wrong or whose fault it was (para 76).

Jackson LJ agreed with the view that, although the no-costs order could not be disturbed in this case, that conclusion was to be reached with some reluctance because 'of the importance to solicitors undertaking publicly-funded work of recovering costs on an inter partes basis not only when they succeed in litigation but when the litigation is resolved on a basis that represents success' (paras 78–79).

1 See 'London borough secures its largest ever confiscation order for planning breaches', *Local Government Lawyer*, 29 May 2018.
2 Kevin Gannon, barrister, London and Osbornes Law, solicitors, London.
3 See also page 20.
4 See also pages 20 and 24.

Nic Madge is a former circuit judge. Jan Luba QC is a circuit judge. Sam Madge-Wyld is a barrister at Tanfield Chambers. They are grateful to the colleagues at note 2 above for providing details of the judgment.