Rough Sleepers, Rough Justice

Tue, 04 Nov 2008 18:11:47 +0000

chief

R (RJM) (FC) v Secretary of State for Work and Pensions [2008] UKHL 63

This House of Lords judgment is now just under two weeks old, but I think it is still worthy of comment here. It is a discrimination case dealing with benefits and rough sleepers, but has some important implications in much broader areas, at least in my opinion. It is somewhat tangential to what is usually covered, so we would doubtless welcome comments on whether this is of interest to our astute and loyal band of readers.*

The facts, briefly (some of them from the CA decision):

The claimant, RJM, suffers from mental health problems. During the period before 2004 he received income support, including a disability premium. In August 2004 RJM became homeless, i.e. street homeless. Under the Income Support (General) Regulations 1987 those without accommodation are not entitled to receive the disability premium and that part of his payment was consequently stopped. The difference to RJM was about £23 a week.

Legal Framework

The criteria for entitlement to Income Support are contained in s. 124 of the Social Security Contributions and Benefits Act 1992:

(1) A person in Great Britain is entitled to income support if - … (e) he falls within a prescribed category of person; … (4) Subject to subsection (5) below, where a person is entitled to income support, then – (a) if he has no income the amount shall be the applicable amount; and (b) if he has income the amount shall be the difference between his income and the applicable amount.
The applicable amounts are set out in regulation 17 of the Regulations:
17. Applicable Amounts Subject to regulations 18 to 22A and 70 (applicable amounts in other cases and reductions in applicable amounts and urgent cases), a claimant's weekly applicable amount shall be the aggregate of such of the following amounts as may apply in his case: (a) an amount in respect of himself or, if he is a member of a couple, an amount in respect of both of them, determined in accordance with paragraph 1(1), (2) or (3), as the case may be, of Schedule 2; … (d) the amount of any premiums which may be applicable to him, determined in accordance with Parts III & IV of Schedule 2 (premiums); (e) any amounts determined in accordance with Schedule 3 (housing costs) which may applicable to him in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule...
Under regulation 21(1), paragraph 6 of Schedule 7 provides that for "a claimant who is without accommodation", the amount applicable to him is only that under regulation 17(1)(a). Therefore, a claimant without accommodation has no entitlement to the premiums that they would otherwise be entitled to under regulation 17(1)(d), which as mentioned above was worth about £23 a week to RJM.

RJM claimed that the Regulations are incompatible with article 14 of the ECHR and article 1 of the First Protocol to the ECHR (A1P1), which everyone will know, but for ease of reference they are, as far as is relevant:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law - A1P1
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status - Art 14

The Claim

There were three issues in the case before the House of Lords :

1. Does disability premium come within the scope of A1P1? 2. Is homelessness covered by “other status” in article 14? 3. If the answer to 1 and 2 is “yes”, is any discrimination justified?

Their Lordships (Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Mance and Lord Neuberger of Abbotsbury) unanimously agreed that all three questions could be answered “yes”, thereby dismissing the appeal.

Lord Neuberger gave the leading judgment. Lords Walker and Mance chipped in with some supplementary points.

A1P1

In the CA Ms Lieven QC for the Secretary of State had conceded that RJM’s claim was covered by A1P1, although she criticised the ECtHR’s reasoning. She also stated that this concession would be repeated in the House of Lords. Mr Howell QC, now leading for the Secretary of State in the House of Lords thoroughly withdrew this concession.

Lord Neuberger discussed a series of ECtHR cases. In *Kopecky v Slovakia* (2005) 41 EHRR 944 it was said that A1P1 “does not guarantee the right to acquire property”. Therefore, for a claim to come under A1P1 the claimant needed to own, or at least enjoy a legitimate expectation to, property. There could be no legitimate expectation unless there was a “currently enforceable claim that was sufficiently established”. The logical conclusion, expressed in *von Maltzan v Germany* (2006) 42 EHRR SE92, is that if A1P1 is not engaged then article

14 can not apply.

However, in *Gaygusuz v Austria* (1996) 23 EHRR 364, the ECtHR had held that an Austrian scheme of emergency assistance was covered by A1P1, although this was partly based on the fact that entitlement to the benefit was "linked to the payment of contributions to the unemployment insurance fund".

But in *Stec v UK* (2005) 41 EHRR SE295, the ECtHR decided that it was "artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of [A1P1]." Furthermore:

"… the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law to receive the benefit in question … Although [A1P1] does not include the right to receive a social security payment of any kind, if a state does decide to create a benefits scheme, it must do so in a manner which is compatible with art 14."
Mr Howell invited their Lordships to refrain from following *Stec* and to apply the *Kopecky* and *von Maltzan* line of reasoning. Lord Neuberger rejected this invitation saying (at [31]) that *Stec* was:
"a carefully considered decision, in which the relevant authorities and principles were fully canvassed, and where the Grand Chamber of the ECtHR came to a clear conclusion, which was expressly intended to be generally applied by national courts. Accordingly, it seems to me that it would require the most exceptional circumstances before any national court should refuse to apply the decision.

[32] I do not consider that any exceptional circumstances can fairly be said to arise here."

Mr Howell accepted that it was illogical to distinguish between funded social welfare payments (the *Gaygusuz* scenario) and unfunded social welfare payments (the *Stec* scenario). Accordingly, he sought to argue that both types were outside of the scope of A1P1. Therefore, not only was *Stec* wrongly decided, but so was *Gaugusuz* and the line of cases that followed on from that. Lord Neuberger had little difficulty in agreeing with Mr Drabble QC, on behalf of RJM, that it was "inconceivable that *Gaygusuz* would not be treated as good law by the ECtHR."

Homelessness and Art 14

The Secretary of State argued that in order to succeed under article 14 a claimant must show that they are being discriminated against on the grounds of a "personal characteristic" and homelessness does not count as such a characteristic. On behalf of RJM it was argued that the ECtHR's jurisprudence establishes that there is no requirement for an applicant to show that they are being discriminated against on the grounds of a "personal characteristic". Alternatively, homelessness is such a characteristic, so any such requirement is satisfied. It may be remembered that the phrase "personal characteristics" comes from *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711.

In Lord Neuberger's opinion the first part of the claimant's argument failed. There was no case to support this proposition. Mr Drabble sought to rely on a number of ECtHR decisions where article 14 claims had been dismissed without deciding whether the alleged discrimination was on the grounds of a personal characteristic. However, this was dismissed by Lord Neuberger at [38]:

"The absence of any reference in those judgments to the need for the alleged discrimination to be on grounds of a personal characteristic is just as easily explained on the grounds that it was unnecessary to consider the point, as the claim failed on other grounds, or that the point was irrelevant as there was no dispute on that issue in the particular case."
However, on the issue of whether homelessness was a personal characteristic so as to qualify as "other status" under article 14, Lord Neuberger sided with RJM.

It should be noted that the 'homelessness' in this case is the much narrower definition that most members of the public probably associate with the word, rather than the Housing Acts definition. Lord Walker at [4] refers to the ODPM's figures of 459 rough sleepers in England and Wales in 2005 (this is probably a mistake and should refer to England only - according to the Department of Communities and Local Government there were 483 people sleeping rough in England in June 2008. In Wales there was between 128 and 165 people sleeping rough in March 2008. Of course, I'm sure that we all know that these figures are to be taken with a pinch of salt).

Lord Neuberger noted that a wide and generous interpretation should be applied to the words "or other status" in article 14. He cited the examples of military rank, as against civilian; residence or domicile; and previous employment within the KGB. Furthermore, the concept of "personal" in the phrase suggested that one should be concentrating on what somebody is rather than what is being done to them.

Lord Walker said that the phrase "personal characteristics" from *Kjeldsen* is not a precise expression and to his mind "a binary approach to its meaning is unhelpful." Anyone interested in article 14 should take a couple of minutes to read [5] in its entirety, but in essence "personal characteristics" are like a series of concentric circles. Those closest to the centre are those characteristics that are innate, largely immutable and closely connected with an individual's personality. Other acquired characteristics are further out in the circles. This is important as the "more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify".

In Lord Neuberger's opinion the CA's reasoning on this point was flawed as they had been influenced by the fact that being homeless was a voluntary choice. As Lord Neuberger acknowledged that in itself is quite clearly not true in every case, but his Lordship preferred to concentrate on whether voluntariness was determinative:

"I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purpose of Article 14." [47]
The CA was also influenced by the fact that homelessness had not been recognised as a status by the ECtHR, but Lord Neuberger viewed that as a neutral point as the issue did not appear to have been raised.

Justification

This left the question of whether in the discrimination could be justified. The Secretary of State advanced two arguments to justify the practice. Firstly, the Secretary of State should encourage the disabled homeless to seek shelter, rather than making it easier, in financial terms, for them to remain without accommodation. Secondly, those without accommodation are less likely to require a supplement than those who do have accommodation. In the words of the Secretary of State's witness:

"Claimants in accommodation have a range of expenses and financial pressures related to that accommodation that claimants without accommodation do not have."
While much can be said against these attempts at justification, in Lord Neuberger's opinion neither of them are unreasonable. He referred to the fact that "policy concerned with social welfare payments must inevitably be something of a blunt instrument, and social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the state" [54] and that this "is an area where the court should be very slow to substitute its view for that of the executive" [56].

Lord Mance stated that he found the issue of justification difficult, but that, with some residual doubt, he had come to the conclusion that the discrimination in the Regulations had legitimate aims and was sufficiently proportionate to be justified.

The ECtHR and domestic doctrine of precedent

Lord Neuberger then dealt with the situation where the Court of Appeal is faced with an otherwise binding decision of the House of Lords or an earlier Court of Appeal, but there is a subsequent conflicting ECtHR judgment. In the process he laid down a slight adjustment to the famous principles in Young *v Bristol Aeroplane Co Ltd* [1944] KB 718.

Where the otherwise binding decision is from the House of Lords then, unless there are wholly exceptional circumstances, the CA should follow the HL decision. Effectively then there is no change to the position in *Kay v LB of Lambeth* [2006] UKHL 10. For exceptional circumstances Lord Neuberger referred back to Lord Bingham at [45] in *Kay*.

Where the otherwise binding decision is one of its own then the CA is "free (but not obliged) to depart from that decision." [66]

Interestingly s. 2(1)(a) of the Human Rights Act 1998 is referred to by Lord Neuberger at [34] as part of the discussion on Stec, but does not get mentioned at all in this discussion on precedent.

Lords Hope, Rodger and Mance all agreed with Lord Neuberger and Lord Walker.

Counsel was Richard Drabble QC and Zoë Leventhal for RJM; John Howell QC and Natalie Lieven QC for the Secretary of State; and Rabinder Singh QC made written submissions on behalf of the Equality and Human Rights Commission.

*As this is the first report I have written up for Nearly Legal I am hoping that flattery will get me everywhere.

Homelessness fact finding and Article 6

Fri, 07 Nov 2008 16:09:36 +0000

chief

What more could you wish for on a Friday afternoon that a bit of homelessness law in the Court of Appeal? Don't answer that. Anyway, on to *Ali & Ibrahim v Birmingham City Council* [2008] EWCA 1228.

Two joined appeals, one on behalf of Ms Ali and one on behalf of Ms Ibrahim, came before the Court of Appeal on whether findings of fact made by a review officer under s. 202 of the Housing Act 1996 and the subsequent right of appeal to the County Court under s. 204 were compatible with Article 6 of the ECHR and particularly the ECtHR decision in *Tsfayo v UK* [2006] ECHR 981. Central to the case was whether the House of Lords decision in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5 covered the issue and whether *Runa Begum* should be viewed differently in the light of *Tsfayo*.

Facts - Ali

Ms Ali, a single parent with two young children, made a homelessness application to Birmingham in October 2006. A full s. 193 duty was duly accepted. An offer was made in November 2006 of a flat in Sutton Coldfield, which Ms Ali refused. Birmingham then wrote to her saying that their duty had been discharged and notifying her of her right to a s. 202 review. Ms Ali requested a review. This review was carried out in February 2007 and recommended that a further offer be made due to an administrative error in the original offer letter.

In March 2007 Birmingham made an oral offer of a maisonette in Erdington. They then wrote to her on 14th March 2007. The letter was headed "Final Offer of Accommodation" and dealt with the consequences of a refusal (s. 193). Ms Ali denied that she ever received this letter. She viewed the property on 19th March and refused it. Birmingham subsequently sent another 'duty discharged' letter. Ms Ali again sought a review.

While this review was going on Ms Ali was made another offer of accommodation, this time in Teviot Tower. This offer was not made in connection with her homelessness, but because of her position on the waiting list. Ms Ali also refused this offer.

The reviewing officer sent a decision letter on 2nd May 2007, stating that it was not accepted that Ms Ali had not received the letter of 14th March. In part this decision relied upon the fact that the reviewing officer had spoken to Ms Ali, who had confirmed that she had received the offer letter. (Ms Ali claimed that in her telephone conversation with the reviewing officer she was referring to the offer letter for Teviot Tower). The reviewing officer went on to conclude that the property was suitable and the duty was therefore discharged.

Ms Ali pursued a s. 204 review to the County Court where HHJ McDuff QC held that he did not have to determine as an issue of fact whether the letter of 14th March had been received by Ms Ali.

Facts – Ibrahim

Ms Ibrahim has six children. She is of Somali origin and has a poor understanding of English. In May 2005 Birmingham accepted a full duty towards her and made her an offer in October 2005. Unfortunately, they seem to have made a bit of a hash of it. Birmingham claim that the authority sent Ms Ibrahim two letters at the same time. One appears to have been an ordinary housing waiting list letter, which clearly did not comply with s. 193. It was Birmingham's case that this letter was included by mistake. The second letter, according to Birmingham, did comply with s. 193(5).

Ms Ibrahim contended that she only ever received the 'waiting list' letter, not the 's. 193' letter. She refused the property, without viewing. Two subsequent reviews held that the duty had been discharged, so an appeal to the County Court was launched. Before HHJ McKenna it was argued that Ms Ibrahim had not received the second letter and that the accommodation was not suitable. HHJ McKenna found that the property was suitable and that the issue as to the receipt of the letter had been determined by the reviewing officer. Permission to the Court of Appeal was only allowed on the issue of the letter.

A third case was originally to be heard at the appeal. This related to a finding that an applicant was intentionally homeless, but as Birmingham had since accepted that they owed a full duty to her they argued that her appeal did not need to be heard. The CA agreed that that her appeal was academic and the point of principle as to the scope of the right to appeal in Part VII of the 1996 Act could be determined by reference to the appeals of Ms Ali and Ms Ibrahim. In the meantime the Secretary of State for the Communities and Local Government was joined as an interested party.

In a nutshell, the issue on appeal was therefore whether a decision on an issue of primary fact (in these cases whether a letter had been received by an applicant) could be made by a local housing authority's review officer.

Arguments

On behalf of Ms Ali and Ms Ibrahim it was argued that:

The decision taken by an authority in cases under Part VII of the 1996 Act was a determination of their civil rights and obligations, thereby engaging Art 6(1); The review by the authority was not by an "independent and impartial tribunal" – in order to comply with Art 6(1) an appeal to the County Court under s. 204 must extend to issues of fact where the decision on the facts did not involve consideration of issues of policy; *Runa Begum* could be distinguished as only covering those decisions where issues of specialist knowledge and policy were required. It did not extend to cases, such as the instant case, where simple issues of fact were involved; The ECtHR had distinguished *Runa Begum* on this basis when giving its decision in *Tsfayo*; Consequently Ms Ali and Ms Ibrahim were entitled to a full merits appeal and should be able to challenge findings of fact through a full re-hearing, including the hearing of witnesses; Therefore the County Court should have carried out a full merits appeal to prevent a breach of Article 6.1; in the alternative, the appellants sought a declaration of incompatibility in respect of s.204(1).

The arguments of Birmingham and the Secretary of State are expressed by Thomas LJ in just two sentences at [19]: The decision in *Runa Begum* covered the issue; the decision in *Tsfayo* did not cast any doubt upon the principle. Even if it did, then this court was nonetheless bound to follow the decision in *Runa Begum*; it was for the House of Lords to decide that issue.

Consequently, four questions arose:

1. Were the decisions on appeal a determination of the civil rights of the appellants? 2. Had the issue on appeal been determined by the decision in *Runa Begum*? 3. Should this court in any event leave the determination of the issue to the House of Lords? 4. Does the decision of the Strasbourg Court in *Tsfay*o alter the conclusion that the issue is determined by *Runa Begum*?

Thomas LJ gave the only reasoned judgment, which Rimer and Hughes LJJ agreed with. I will quote fairly large parts of it, but I think that it is a clear and well structured judgment, which does not really need much summarising.

Determination of civil rights

The Secretary of State's main submission was that Part VII was consistent with Art 6(1), an alternative additional submission was put forward that the decision as to whether a duty is owed under Part VII is not a determination of civil rights within Article 6. Thomas LJ was able to decide the case in the Secretary of State's (and Birmingham's) favour without needing to decide whether that alternative submission was correct and therefore assumed that Art 6(1) was engaged, much as had been done in *Runa Begum*.

Did *Runa Begum* cover this issue?

Thomas LJ then turned to consider whether *Runa Begum* covered the issue on appeal. At [25] he sets out the considerations to which he has had regard. He felt that in practice it was "far from easy to draw the distinction advanced" between the finding of suitability in *Runa Begum*

and the findings of primary fact in the instant cases, as a "finding of suitability is itself a finding based on conclusions of primary fact" (point i of [25]). It followed that ([25.ii]):

There would be considerable complexity in administering a scheme with these distinctions. A scheme which enabled certain factual issues to be subject to a full right of appeal and others which would not be so subject would be too uncertain and too complex.

Furthermore ([25.iii]):

That complexity would be compounded in cases where there are multiple issues before the reviewing officer (as in the case of Ibrahim in the instant appeal). There would then be the danger, as Lord Bingham pointed out at paragraph 10 of *Runa Begum*, that "there would be a temptation to avoid making such explicit factual findings as [the reviewing officer] very properly did". Moreover, if the extent of the review by the court was determined by the answer to the question whether a finding of fact was a primary finding, or whether that finding required expertise or whether that finding was determinative, the room for argument and uncertainty would be considerable. The importance of drawing these distinctions would be the more significant if the suggested right of appeal involved the court hearing witnesses in the one type of appeal but not in the other.

The issue before this court does not ultimately depend on drawing such distinctions between types of finding of fact… the issue is determined by an examination of the scheme as a whole. ([25.iv])

In Thomas LJ's view it was also relevant that ([25.v]):

The additional review which would be provided by the suggested full right of appeal on fact would not in practice be very wide. On an appeal applying conventional judicial review principles, the court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-maker and not for the court… The context in which an appellate court in accordance with these principles reviews a finding of fact by a lower court is that the finding was that of the judicial branch of the state and therefore an independent and impartial tribunal.

The full right of appeal sought from a review officer on fact might have to be significantly different from an appeal from a court. The housing review officer is part of the executive branch of the state and not the judicial branch. The question must arise as to whether the conventional scope of a full appeal would be sufficient, if the decision made is not made by an independent and impartial tribunal? ... In many cases where there is a simple issue of credibility, it is difficult to see how there could be a full right of appeal unless the judge was asked to come to a fresh decision by hearing the evidence; the procedure adopted by the reviewing officer in reaching findings of fact is informal and there are no transcripts of evidence. ([25.vi])

There would then be the danger, as Lord Bingham pointed out at paragraph 10 of *Runa Begum*, that "there would be a temptation to avoid making such explicit factual findings as [the reviewing officer] very properly did". Moreover, if the extent of the review by the court was determined by the answer to the question whether a finding of fact was a primary finding, or whether that finding required expertise or whether that finding was determinative, the room for argument and uncertainty would be considerable. The importance of drawing these distinctions would be the more significant if the suggested right of appeal involved the court hearing witnesses in the one type of appeal but not in the other. ([25.vii])

It is quite obvious from what Thomas LJ has said above that ([25.viii]):

There would therefore clearly be significant implications for not only the statutory scheme but for the court and tribunal system, if this court were to hold that a full right of appeal was required on findings of primary fact or on issues of primary fact where the finding was determinative, particularly if the appeal encompassed the re-hearing of evidence.

In any event, the "present scope of the appeal provides a real measure of protection for homeless appellants" ([25.ix]).

Given all of this it is not surprising that Thomas LJ concluded that the issue in this appeal was covered by *Runa Begum*.

Should the CA leave the matter up to the HL?

Short answer: yes. Slightly longer answer:

[28] In my view, even if the decision in *Runa Begum* did not cover the precise point in issue, it would not be right for this court to draw a distinction between different types of fact finding in a scheme so recently considered by the House of Lords. If distinctions are to be drawn, particularly where it is argued that it is akin to counting angels on the tip of pin, then it should be drawn by the House of Lords in a reconsideration of the approach to be taken to the scheme as a whole. This is an even more powerful consideration given the observations of Lord Hope in *Doherty v Birmingham City Council* [2008] UKHL 57 [2008] 3 WLR 636 at paragraphs 19-21. Furthermore for this Court to draw those distinctions would make administration of the statutory scheme dealing with homelessness very difficult in the period which elapsed while the inevitable appeal was made to the House of Lords. That would do no service to anyone.

[29] In any event therefore, I would have concluded that in my view this court should not seek to distinguish *Runa Begum*, but leave the question to be considered by the House of Lords on any application for leave to appeal. But that is not the primary reason for my view that the appeal should be dismissed. It is that the issues on this appeal are within the scope of that decision and that there are independent considerations that support that conclusion.

Tsfayo* and *Runa Begum

Thomas LJ then turned to question of whether the decision in *Tsfayo* altered the conclusion that the issue is determined by *Runa Begum*. *Tsfayo* related to a system for backdating housing benefit that had not been claimed at the appropriate time. In his view the ECtHR had not decided the issue in the instant case in a manner that would require a different answer than simply applying *Runa Begum*. At [34] he cited four key reasons:

1. The ECtHR relied on *Runa Begum* and said nothing to cast doubt on its correctness; 2. Both decisions turned on a very careful examination of the particular statutory scheme that applied; 3. Due to the different rates that local authorities could recoup housing benefit and backdated housing benefit from central government there was a powerful contention that the Housing Benefits Review Board was not independent of the parties; 4. Looking at the schemes as a whole it was readily apparent that a conclusion could be reached that the housing benefits scheme was

not compliant with Art 6(1). This was not the case with Part VII of the 1996 Act.

The appeals were therefore dismissed and the Court refused to grant leave to appeal.

A Curious Footnote

Thu, 13 Nov 2008 10:40:53 +0000

Dave

Mich-Onyibe v Wandsworth LBC (04/11/08, CA, judgment currently unavailable otherwise than by way of e-flash from Arden Chambers) is a kind of a curious footnote to homelessness law. Wandsworth accepted that they owed the full Part VII housing duty to Ms Mich-Onyibe. they offered her a bedsit on the first floor. She refused it. She suffered from a variety of health problems including Type 1 diabetes (involving regular seizures), chronic renal failure and claustrophobia. She said that she couldn't use the lift to get to the property because of her claustrophobia and she couldn't use the stairs because of her medical conditions. Her daughter, who cared for her, could not stay overnight, and her son could not stay at weekends. The property was also too far from her daughter's home and the hospital where Ms Mich-Onyibe received treatment. Wandsworth rejected her refusal and upheld its decision on the s 202 review.

Ms Mich-Onyibe then took a s 204 appeal to the county court and the hearing was heard over three days. The parties subsequently made repeated requests to the judge for the outcome of the hearing. Over three months later, the judge dismissed the appeal stating that he would give his reasons later. He didn't and it subsequently transpired that the judge had retired.

The Court of Appeal refused to rehear the matter as a second appeal because of the amount of medical evidence and documentation. They allowed Ms Mich-Onyibe's appeal, though, on the basis of the failure of the judge to give a reasoned judgment and remitted the matter to the County Court for a further re-hearing.

It's fair to say that NL has dealt with its fair share of bizarre cases and this one fits within that pantheon. It's also fair to say that some judges look as if they're a fish out of water on s 204 appeals and this can show up in their judgments. Whether or not that was the case here is difficult to say - it would, however, be interesting to know generically what level and type of training judges have before they sit on homelessness appeals.

And then there is poor Ms Mich-Onyibe who is still waiting for a proper judicial determination of her claim...

Vulnerability and incapacity benefit

Fri, 19 Dec 2008 13:01:47 +0000

Dave

Mangion v Lewisham LBC only appears on lawtel as an ex tempore judgment on 11.12.08 so if somebody out there has a transcript/better note of the Court of Appeal's judgment, that would be helpful to understand this decision. What appears to have happened is that Ms Mongian had alcohol and back problems. Lewisham found her not to have a priority need because the back problems were not severe enough to affect her mobility, and her alcohol problems were a result of "behaviour of choice". On review, she submitted medical evidence from an assessment for incapacity benefit to the effect that she had moderate depression and that her "mental health problems were caused by alcohol dependency, which caused severe disability". The review officer upheld the decision. Ms Mangion argued that the fact that she had been assessed as having a severe disability was a relevant factor which should have been taken into account on review.

The CA held that the medical assessment was conducted for incapacity benefit and was not a finding that she had a severe mental disability (presumably for other purposes, ie an assessment of vulnerability). As the diagnosis was moderate depression, the review officer was entitled to find that this did not prevent her from getting accommodation herself. Her condition was "not debilitating and not a state that prevented her from doing day to day things". The review officer had correctly address the criteria in s 189(1)(c) and was entitled to reach that conclusion. The message to advisors, then, seems to be take care as to the purpose of the medical assessment submitted to the authority in support of a Part VII/Part VI application/review.

Scotland's homelessness advance warning system

Tue, 06 Jan 2009 12:44:44 +0000

chief

News of a change from over the border. From 1st April landlords will have to notify the local authority in a standard form when they raise proceedings for possession. This will give effect to s. 11 of the Homelessness etc (Scotland) Act 2003. Notice can be posted or sent

electronically to the local authority.

The Notice to Local Authorities (Scotland) Regulations 2008 SSI 2008/324 details the information that a landlord is required to give:

- Details of landlord and their legal representative
- Landlord's registration reference
- Tenant's name
- Address of property
- Date tenancy started
- Details of which court and when proceedings were raised
- What statutory provision proceedings are being raised under

There are no direct sanctions for landlords who don't comply, but discussions are ongoing. The requirement to give notice is a small change, but it *may* make quite a difference to the abilities of local authorities to plan ahead and for succesful interventions to be made through e.g. rent deposit schemes so that homelessness can be prevented.

Allocations/Homelessness

Fri, 23 Jan 2009 22:44:29 +0000

Dave

Alam v LB Tower Hamlets[2009] EWHC 44 (Admin) is one of those interesting cases that you get in allocations - well, interesting because a council like LB Tower Hamlets should probably know better than to have an obscure clause in its allocations scheme which surely will be challenged sooner rather than later (that it took three years is mildly surprising). It's also interesting because most allocations cases, like Ahmad, usually turn on the meaning of reasonable preference. This case turned on the meaning to be ascribed to one of the allocations groups in LBTH's scheme and may be of interest to those in Aweys. Group 2, termed community priority, included "Those assessed by the Council as Homeless under the Housing Act Part 7 and other Homeless households who have an assessed priority need". Now for entirely separate reasons, I have a passing interest in LBTH's scheme and that also puzzled me, so good for Robert Latham, who acted for Mr Alam. The problem lies in the extent and meaning of the reasonable preference categories in s. 167(2)(a)-(b).

Anyway, the facts: Mr Alam was found by LBTH to be homeless, but not in priority need. There was no question of intentionality. He took the non-priority need finding to the County Court on appeal but was unsuccessful. He remained in the s.188 accommodation, a guest house. Prior to receiving the s 184 decision letter, he made a Part VI application. LBTH placed him in Group 3 ("Community Mobility"), not Group 2. The problem for Mr Alam was that, in bidding for one bed properties, he would always be outbid by somebody within Group 2 (or Group 1), however much priority he had in Group 3.

LBTH's argument before Timothy Brennan QC, sitting as a Deputy High Court Judge, was that (a) although Mr Alam was homeless prior to the s 184, he was not homeless thereafter and thus not entitled to reasonable preference; (b) if that was wrong, Mr Alam had a reasonable preference by being placed in Group 3 (and with a high priority within that group). Robert Latham argued that the split definition of Group 2 meant that the first category (ie "Those assessed by the Council as Homeless under the Housing Act Part 7") referred to the s 167(2)(a) reasonable preference category (People who are homeless within the meaning of Part 7); and the second bit of Group 2 (ie "other Homeless households who have an assessed priority need") related to some of the s 167(2)(b) categories. The problem with that construction, as the Judge rightly pointed out, was that "substantially the whole of the second category is already contained within the first category" (para 44). An alternative, and if I may say, somewhat wild construction was that the first category reflected s 167(2)(a)-(b), and the second category referred to those with findings under the Housing Act 1985, ss 65(2)/68(2). The Judge preferred the second construction, in my view wrongly, but frankly LBTH really made their own bed here and their subsequent complaint that this meant that all homeless people would be in Group 2 was met with a judicial "yeah, so what; that's what you've said" ([55]). Equally, and more salubriously, he noted that Group 2 applicants would be prioritised on different bases.

The Judge made one important obiter comment at this point ([47]), which is worth bearing in mind:

Neither of the Claimant's constructions gives any obvious weight to the priority required to be given to those falling within s 195(2) (those who are not homeless, but who are threatened with homelessness which is likely to occur within 28 days). Given the purpose of the scheme in allocating priorities among those who need accommodation, and recognising that decisions about the allocation of housing are unlikely to be made and fully brought into effect within as short a period as 28 days, I would be inclined, if the point arose, to construe 'homeless' in this part of the scheme purposively, so as to include those who are 'threatened with homelessness' in the statutory sense. However I have not received detailed argument on the position of those who are threatened with homelessness and I do not need to decide the point.
The Judge rejected LBTH's arguments, although (and with respect) his judgment is not necessarily the model of good structure. But he rejected LBTH's first submission on the basis, which surely must be correct, that one's status as "homeless" does not depend on whether one is actually entitled to assistance under Part 7 ([51]). At [15]-[18], he gave short shrift to the argument that Mr Alam was no longer homeless after the s 184 decision, making clear that Mr Alam had no enforceable right to stay in the guest house; temporary accommodation was not accommodation in which it was reasonable to remain; and, if he was wrong on those points (and he probably was), at [17], he said: "I hold that it is indeed necessary to imply into the statutory scheme the qualification that the provision to the Claimant of merely temporary interim accommodation did not involve loss of his status of homelessness within the meaning of Part 7. There may be cases of fact and degree which would dictate different results. I am satisfied that in the present case the accommodation which was made available to the Claimant at Mile

End Guest House did not have a sufficient degree of permanence and security to justify a conclusion that the Claimant has lost his status of homelessness by reason of s 175(1)(a) or (b)." At [27], he also made the point, back on the correct path, that
[T]he concept of homelessness does not involve any consideration of whether the individual is intentionally homeless (which the Claimant was not) or in priority need (which the Claimant was not), nor of whether a local housing authority owes him any particular duty to house him consequent on him being homeless (which, as a result of the Claimant not being in priority need, it did not). Those factors are relevant to the existence and extent of the duty which may be owed to him, but not to the question whether he is homeless within the meaning of Part 7.
He went further (and further than he needed to), again in my humble opinion correctly, by saying that the status as "homeless" does not necessarily depend on a formal s 184 decision, but might be raised in other matters such as a Part 6 application - he doesn't refer to s 183 but that would support his construction. As to LBTH's second argument, he rightly made the point that if Mr Alam was entitled to be in Group 2 under the council's scheme, then he should have been placed in it.

Quite a lot was going on here and a lot is at stake for LBTH - it will be interesting to see if they appeal.

Nelsonian ignorance

Wed, 11 Feb 2009 15:22:22 +0000

Dave

Iyekekpolor Ugiagbe is a dream appellant - or, rather, an appellant whose homelessness story is a dream for a neo-liberal Court of Appeal who allowed her appeal against Southwark's finding that she was intentionally homeless (Ugiagbe v Southwark LBC, [2009] EWCA Civ 31).

Ms Ugiagbe and her two small children rented privately. Her landlord sought to terminate the tenancy. She went to the Peckham one stop shop where she was advised to go to the Southwark HPU. She was also told that they would provide temporary accommodation for her but that she should arrange for her belongings to be stored with friends. "She said she was shocked and did not want to be treated as homeless. She did not take the advice to visit the HPU". Her landlord allowed her to stay in the property whilst she bid for accommodation under Part VI. Eventually, he asked her to go and she did.

Southwark found her intentionally homeless because, had she gone to the HPU, they would have told her that her landlord needed a court order to obtain possession. She claimed that she was unaware of a relevant fact (viz. that her landlord needed a court order to evict her) and that she had acted in good faith - thus, under s. 191(2), her act should not be treated as deliberate. The Court of Appeal agreed with her.

The question boiled down to the meaning and extent of good faith. After reviewing the case law, and referring to s. 191(3), Lloyd LJ said that the requirement of good faith "... carries a connotation of some kind of impropriety, or some element of misuse of abuse of the legislation" (at [27]). This would catch dishonesty and "wilful blindness in the Nelsonian sense comes close to that". But Ms Ugiagbe was not turning a blind eye: "On the contrary, she had been led to think that she would be treated as within the scope of the homeless duty, and wanted to avoid that if she possibly could. Foolish or not, her subjective motivation seems to me to be the opposite of bad faith" (at [28]).

One little, but important, postscript was given by Lloyd LJ in relation to the remedy. Ms Ugiagbe had found alternative privately rented accommodation subsequent to the decision on the county court appeal, which she had lost. In breach of the "elementary rule", her solicitors told the court but not Southwark, who only found out shortly before the appeal at which point it argued that the appeal was academic (a point dismissed, on the basis that should she become homeless again the Council might be entitled to rely on its original decision, but did affect the order to be made on appeal).

Who wants to know?

Fri, 20 Feb 2009 10:13:42 +0000

J

A very odd case was noted on Lawtel this morning - *AB v Leicester City Council*, Court of Appeal, 19.2.09. ([2009] EWCA Civ 192)

AB had applied under Part 7, Housing Act 1996, to Leicester City Council ("Leicester") for assistance as a homeless person. It appears that, at both the s.184 and s.202 stages, the City Council had rejected the application on the basis that AB refused to provide any personal information so as to enable Leicester to properly assess her application. AB had also refused to allow Leicester to make any enquiries from relevant third parties in order that they might gleam information about her history. I presume that there was also a s.204 hearing at some stage, because I don't see how else this case could have got to the Court of Appeal.

The Court of Appeal adjourned the appeal. It was concerned that AB was acting in a manner which was contrary to her best interests, particularly in refusing to give any information about herself to Leicester. It may be necessary to appoint a litigation friend to assist AB in these proceedings. However, the Court questioned the value of the appeal proceeding. If AB lost, she could always make a further application under Part 7, whereas, if she won, it did not mean that she would necessarily be provided with permanent housing.

Does anyone have any more information about this - frankly bizzare - case?

An inconvenient problem

Wed, 01 Apr 2009 23:16:26 +0000

Dave

There were lots of good intentions behind the SI making clear that 16/17 year olds are in priority need (The Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002 /2051)). But as a few have pointed out in recent years, there might be consequences because of the capacity requirements of property law. Well, in *Alexander-David v LB Hammersmith & Fulham*, those good intentions (and property law) have bitten back.

Ms Alexander-David, a 16 year old who was also pregnant, was provided with accommodation by Hammersmith and Fulham LBC under s 193(2). They granted and she took a standard form non-secure tenancy agreement terminable by four weeks notice to quit on either side. The agreement contained her name and age, and the usual covenants and provisions for rent payment. She breached the covenants (she has a dog, there are complaints about nuisance and rubbish, and there are arrears). H&F served a notice to quit on Ms Alexander-David.

So what's wrong with that? Well, it may be inconvenient, but, Sullivan LJ rightly held that, as she's under 18, she cannot take the grant of a tenancy at law (s 1(5) Law of Property Act 1925); and as it's an attempt to grant a tenancy to a minor para 1(1), Sch 1, Trusts of Law and Appointment of Trustees Act 1996 kicks in which means that the purported grant operated as a declaration of trust by H&F for Ms Alexander-David. Any second year law student (who's going to pass their property law exam) knows that. Kelvin Rutledge for H&F argued valiantly that four factors made it clear that, although this was a standard form agreement, Ms Alexander-David had taken an "equitable tenancy". None of these factors, however, was sufficient "... to displace the obvious inference to be drawn from the fact that the agreement is in the Respondent's standard form for creating legal tenancies with its adult tenants" ([26]).

In any event, the proposition that Ms Alexander-David had taken an equitable tenancy was, in itself, novel and pretty clever. As Sullivan LJ put it at [31]:

I am not persuaded that a landlord who has full capacity to grant a legal tenancy, and who grants a tenancy without any express qualification to the effect that something less than a legal tenancy is being granted can subsequently say that what he granted was not a legal tenancy, but an "equitable tenancy". As Miss Bretherton put it in her submissions: a landlord does not elect to grant an equitable tenancy; such a tenancy arises in certain specified circumstances, recognised by equity.
There was a moment in the judgment (at [17]-[22]) when it looked like Sullivan LJ might have been persuaded to follow his own path to find that the council had no power to enter into an agreement under which they were to act as a trustee (on the basis of s 21 and 32(3), Housing Act 1985), but he pulled himself out of such a finding slightly unconvincingly (by saying that there had been no public law challenge in any event and making brief reference to s 44, 1985 Act). Neither counsel wished to proceed with that line in any event.

Slightly more inconveniently for H&F, however, this finding of a trust of land with themselves as trustee created a difficulty as regards the notice to quit. There were two issues with the notice to quit: (a) its service by the trustee (ie H&F) was a breach of trust; and (b) it was, in any event, served on the wrong person (it should have been served on the trustee, ie themselves, not Ms Alexander-David). H&F was "... in the absence of any other trustee, in the uncomfortable position of being both lessor and trustee, and in the former capacity of being not merely a party to the breach of trust, but the instigator of the breach" ([35]). Kelvin Rutledge, again rather valiantly, submitted an argument drawing on certain sentences from the judgments in *Hammersmith & Fulham v Monk* and *Crawley BC v Ure* but these cases involved joint tenants and were not relevant to this issue.

By way of conclusion, Sullivan LJ rather generously offered two possible alternative transaction types which the council could use for under 18s: (a) a non-exclusive possession licence which included the provision of services; or (b) an agreement to grant a tenancy until the occupier is 18, such agreement taking effect in equity only. But "Whatever course is adopted, it is important that the inability of a minor to hold a legal estate is expressly recognised, and that any agreement with a 16 or 17 year old expressly states that because the applicant is a minor the Respondent is not granting a legal estate but is instead securing that accommodation is available by granting something other than such an estate" ([38]).

Duty to provide rent-free accommodation?

Thu, 02 Apr 2009 15:08:40 +0000

chief

R (Best) v Oxford City Council [2009] EWHC 608 (Admin), [2009] All ER (D) 252, noted on this week's Garden Court Housing Law Bulletin, but not yet on BAILII.

This is a judicial review that essentially turned on whether a local housing authority has a duty to provide a homeless applicant with rent-free accommodation where that applicant is on income support, but cannot access housing benefit.

A potted history – A, B, C, 1, 2, 3...

Ms Best, who has two young children, has a fairly eventful history with Oxford City Council. Prior to that she lived in Property 1, which, along with her three siblings she inherited a share in. She also bought Property 2, which on the Council's evidence was purchased a year before Property 1 was sold. She first made a homelessness application in 2004 following the break up of her relationship with the children's father Mr C, whom she shared Property 2 with. There is evidence of domestic violence and threats to kill made by Mr C, who was later made the subject of several non-molestation orders. The Council accommodated her in Property 3 from March 2004 through to October 2005 when she was evicted over rent arrears, although Property 2 was sold for £168,000 in December 2004. She then went to live with her mother (Property 4, but don't worry, this one doesn't come up again), although the Council accepted that arrangement was unsuitable due to overcrowding.

A fresh homelessness application in 2007 was met with a finding of intentional homelessness due to Ms Best's failure to pay rent for Property 3, although the Council continued to accommodate Ms Best and her children (in Property 5). That decision was upheld on a s. 202 review, but Ms Best's further appeal to the County Court was withdrawn in September 2007 when Oxford agreed to carry out a fresh review. The new s. 202 review as completed in December 2007 and again found that Ms Best had made herself intentionally homeless, although this time because of the sale of Property 1. Ms Best launched another County Court appeal which led to the Council accepting in February 2008 that they owed her the full s. 193 duty (for reasons that are not entirely clear to me). However, just ten days after this the Council informed Ms Best that unless she paid the rent arrears on Property 5, which were over £10,000, within 14 days they would apply for a warrant of eviction. Her solicitor replied that the s. 193 duty had not been fulfilled as the accommodation was unaffordable and therefore unsuitable.

On 8th April 2008 Ms Best was evicted from property 5, with total rent arrears of over £11,000. Oxford issued a decision letter on 17th April (referred to as 'Decision A') stating that Ms Best had made herself intentionally homeless through non payment of rent for Property 5 and her failure to provide information requested to assess her Housing Benefit claim. A requested s. 202 review was completed on 25th July 2008, which confirmed a finding of intentionality (referred to as 'Decision B'), on the grounds that her ability to pay rent was not wholly dependent on the receipt of HB.

A County Court appeal was launched against Decision B, but that was adjourned pending the outcome of the judicial review case.

Since her eviction Oxford has accommodated Ms Best at yet another property, Property 6. The Council's evidence was that no rent had been paid for Property 6 and there were arrears of over £6,000 by 31st December 2008. Still with me? Good.

The Judicial Review Claim

Ms Best initially sought judicial review of Oxford in two ways:

- There was an ongoing failure by the Council to provide suitable accommodation, i.e. either rent free or at a peppercorn rent;
- Decision A was either Wednesbury unreasonable or based on an error in law.

Oxford, not unreasonably, complained that Decision A had been superseded by Decision B. Although Decision B came after Ms Best was granted permission to bring the claim against Decision A, the Council had invited her to amend her claim to reflect the fact that Decision A had now been superseded. This was not done until the second day of the hearing when counsel for Ms Best amended the claim to include a challenge to Decision B on the same grounds as Decision A and with the added bonus that the later decision did not address the risk of violence from Mr C. Some might say that this was as a surprising approach to take.

Affordability

Counsel for Ms Best submitted that Oxford had erred in taking into account her conduct prior to 19th February 2008 (the date when they accepted a full housing duty towards her) as evidence that she had made herself intentionally homeless after that date. The reasoning behind this was that Oxford knew that Ms Best had previously been refused Housing Benefit. In accepting a full duty towards her the Council were accepting that she had not become homeless intentionally despite her historic failure to obtain HB. Therefore, Oxford could not use a failure to get HB as a justification for a finding of intentional homelessness where she had not paid rent on accommodation that she could only afford with HB.

The judge, Geraldine Andrews QC, said:

64. It seems to me as a matter of logic and common sense that if the local authority are not satisfied that someone has made themselves intentionally homeless in the light of behaviour of which they are aware at the date of the s.193 decision, they cannot use the same historic behaviour to justify a subsequent finding that the person has become intentionally homeless and brought their duty under s.193 to an end. So, for example, if the Council accepted that they were under a s.193 duty to house Ms Best in February 2008, despite the fact that she had already amassed substantial arrears of rent on the property in which she was being accommodated on a temporary basis pursuant to s.188(3), they could not lawfully treat her failure to pay the rent before 19th February 2008 as a "deliberate act" for the purposes of s.193(6) if they then decided to house her in the same property pursuant to their duty under s.193.

65. However, that would not preclude them from relying on her failure to pay the rent after 19th February 2008, provided, of course, that the accommodation provided to her was "suitable", which would involve a decision that she could afford to pay the rent on or after 19th February. In making that decision (on affordability) the Council would be entitled and indeed obliged to look at all relevant information about the resources then available to her, as [the Homelessness (Suitability of Accommodation) Order 1996 SI 1996/3204] makes clear. That inquiry might involve consideration of assets that she was already known to possess, including savings and insurance policies.

While Geraldine Andrews QC did accept that there would be circumstances where a local housing authority would need to provide a homeless applicant with property for no rent or a greatly reduced rent, she went on to say that the finding of Decision B in the present case

was that Housing Benefit was not the only way in which Ms Best could afford to pay the rent for Property 5. The real issue in the case then became whether the Council were entitled to reach the view that Ms Best was able to afford this rent from 19th February 2008 onwards, despite the fact that she was in receipt of Income Support, but not HB.

In the judge's conclusion this was a view that the Council was reasonably entitled to reach. There was considerable doubt about what had happened to the proceeds of sale of both Properties 1 and 2. Ms Best had been caught out lying on one of her Housing Benefit claim forms when she had incorrectly stated that she was not doing any work. She had not supplied much of the financial information asked for, but that which she did supply showed a pattern of expenditure that the decision maker responsible for Decision B concluded was not consistent with the behaviour of an impecunious person worried about money. He came to the further conclusion that Ms Best had been dishonest, was not acting in good faith, that the reason for her failure to provide information was to conceal evidence of assets available to her, and that in all probability her capital assets were over £16,000.

At [104] Geraldine Andrews QC said that the decision maker "came up with an explanation for Ms Best's behaviour that is not just within the range of those that would be open to a reasonable review officer to find, but which is probably the most likely explanation." The conclusion that she was concealing the existence of resources that would be sufficient to pay her rent was neither Wednesbury unreasonable or based on any error of law.

Domestic violence

The second part of the challenge to Decision B was that it did not deal with the risk of violence from Mr C, although the request for a s. 202 review of Decision A had not raised this issue. It was accepted, eventually, that Ms Best and her children required a property in Oxford to meet the children's schooling needs. Geraldine Andrews QC said:

114. It is relevant that Ms Best did not suggest at any point prior to the making of Decision A or Decision B that [Property 5] was unsuitable because of its location, or that any other feature about it made her more vulnerable to the risk of violence from [Mr C] than any other accommodation in Oxford. Her sole complaint about [Property 5] was that she could not afford to pay the rent there.

115. Looking at the evidence in the round, there was no reason to suppose, on the balance of probabilities, that [Property 5] was unsuitable because it exposed the family to any greater risk of violence than any other property in Oxford.

Decision A and the 'ongoing failure'

Decision A was flawed, but it had been superseded by Decision B, which was not. There was therefore no need to quash Decision A, even if the judge was able to. It also followed from the analysis of Decision B that providing Ms Best with rent-free or low rent accommodation was not the only way in which Oxford could discharge its s. 193 duty and so the alleged continuing breach of statutory duty also failed.

Result

Claim dismissed. Although there was still an outstanding s. 204 challenge to Decision B in the County Court Geraldine Andrews QC observed that a successful technical challenge on the basis of a failure to follow Regulation 8(2) would be likely to turn into, at best, a Pyhrric victory for Ms Best.

Addendum to Homelessness CoG...

Wed, 05 Aug 2009 15:59:05 +0000

Dave

DCLoG have put out supplementary guidance to local authorities on intentional homelessness in the context of applicants who face homelessness following difficulties with mortgage commitments. I suspect if you look hard enough, you'll find it, but it's not obvious on the DCLoG website (it wasn't on the "what's new" section, even though it came out today). It's short and the key paras are 3-4 and 10-12. These are generally concerned with establishing that owner-occupiers deal with mortgage difficulties in different ways, and local authorities need to be sensitive to those without just a knee-jerk IH finding. There's also the *Birmingham v Ali* decision to tie into/digest.

At para 10, the addendum draws attention to the following:

some former homeowners may seek housing assistance from a local housing authority having lost their home in one of the following circumstances: i) having voluntarily surrendered the property (handed the keys back); ii) having sold the property; iii) where the property was repossessed after the applicant refused an offer under the MRS; iv) where the property was repossessed after the applicant refused an offer of HMS; v) where the property was repossessed and the applicant had not sought help. There should be no general presumption that a homeowner will have brought homelessness on him or herself in any of the above scenarios.
The addendum then goes on to deal with homelessness, and makes the important point that: *Consequently, where someone was already homeless before surrendering or selling their home or refusing an offer under MRS or HMS, the 'acts' of surrender or sale, and the 'omission' of refusing an offer of MRS or HMS cannot be treated as the cause of homelessness.*

As regards IH, the addendum makes clear that local authorities, in those circumstances, "... will need to look at the substantive causes of that homelessness prior to surrender or sale of the property or refusal of an offer of assistance under the MRS or HMS" (para 12).

This has left me with a warm feeling - DCLoG are clearly trying to do the right thing - but also slightly uneasy - they must have felt it necessary to clarify the CoG with this addendum on the basis that there's dodgy decision-making going on (or, possibly, might be going on).

Contracting out homelessness reviews like the town hall catering contract

Thu, 20 Aug 2009 16:36:50 +0000

Dave

The Court of Appeal's judgment in *Heald and others v LB Brent* [2009] EWCA Civ 930 is just out concerning the outsourcing of s 202 Housing Act 1996 reviews by Brent to Minos Perdios' company Housing Reviews Ltd. There have been a number of County Court judgments on this issue which have not necessarily been ad idem (see eg our post on Augustin v Barnet). The argument against contracting out has been twofold: first, councils have no power to contract out their reviews function under Part VII (and, by extension although not relevant in this case, Part VI) because it is not a "function" of the local authority within s 70, Deregulation and Contracting Out Act and the Contracting Out Regs made under it (Local Authorities (Contracting out of Allocation of Housing and Homelessness Functions) Order 1996, SI 1996/3205); second, there is the appearance of bias on the part of Minos Perdios which gives rise to an Article 6 infringement.

The Court of Appeal dismissed both arguments. The main judgment by Stanley Burnton LJ was given in robust terms and without regret (at [61]). Sir Simon Tuckey simply agreed. Sedley LJ agreed but gave a wonderful lament for the impoverishment of administrative justice (and which I make no apologies for quoting in full below).

On the first argument, though, Stanley Burnton LJ seems to have treated the matter as pretty obvious (at [44]). He is able to do so through citing the well-known definition of functions given by Lord Templeman in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1, 29: a function "... embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions." This definition is always trotted out as if it's generic, but Lord Templeman was dealing with its use in a specific context, viz the legality of swap transactions in relation to (if I remember rightly) s 110, LGA 1972. It's now taken as gospel, but really must be sorted out. Anyway, once you accept that definition applies, the argument pretty much folds. It must follow that a review is a function for the purposes of s 70 capable of being contracted out, and it is significant that the review function is not expressly excluded by the SI (as other functions are).

How to deal with *Runa Begum* though? In *Runa Begum v Tower Hamlets* [2003] 2 AC 430, Lords Bingham and Millett had made pretty scathing comments on the lawfulness of contracting out the review function - Lord Bingham (at [10]) had "very considerable doubts" whether it was a function; and Lord Millett agreeing pointed out that the SI was "concerned in very general terms with deregulation and the subcontracting of ordinary local authority functions" and was not apt to confer that power. Lord Hoffmann doubted its efficacy and practicality, as opposed to the lawfulness. Although not pointed out in Heald, it is notable that Hazell was not cited in Runa Begum. Stanley Burnton LJ brushed the Runa Begum comments aside (at [50]) on the basis that the SI "... is indeed clear and permits contracting out of reviews".

On the second argument, Stanley Burnton LJ started from the Runa Begum position that the a local authority employee does not infringe Article 6 when conducting a review and

"I do not see that a third party should necessarily be any less impartial than an employee. Whether he can be regarded as less independent may depend on the particular facts, and in particular the terms of the contract between the authority and the third party. It is possible to build into a contract a high degree of independence on the part of the third party, for example by prescribing a long contractual term that is terminable only for serious breach. To do so would, however, bring into play another of the Appellants' objections to contracting out, namely that the third party is not democratically accountable." (at 52])
Given that the decision on review, although made by Minos Perdios, was accepted by the council as its own (as indeed it would have to - see s 72, 1994 Act), the democratic accountability argument wasn't a runner. That conclusion about contracting out was fortified (at [54]) by reg 2 of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, SI 1999/71, which appears to accept that an external person may make a review decision.

There then follows an examination of the Minos Perdios contract with Brent together with his website. As opposed to the "high degree of independence" considered in [52], it was noted that the contract has no real security of tenure. But that didn't matter because (a) the fact that he acts for a significant number of local authorities "confers a certain independence in relation to each of them"; and (b) local authorities do not necessarily have security of tenure if their "work is not to the liking of [their] superiors or political masters" (at [56]).

Drawing on the test of apparent bias in *Porter v Magill* [2002] 2 AC 357 (one of my all-time favourites, I've got to admit), he found that the Minos Perdios website did not convey that real danger of bias to an objective and well-informed observer (at [57]). Equally, the sheer number of reviews done by Minos Perdios does not suggest that he doesn't consider each one. It was misleading that he signed his review letters on Brent notepaper as "Minos Perdios Reviews Manager" but that false impression was immaterial.

Ms Heald was successful on one point about which we have commented before on this site - the HHJ who heard her appeal simply said that

he preferred the arguments for Brent without reasons. That was clearly insufficient (but does seem to happen nevertheless) but immaterial as the CA had reviewed all the evidence before him (at [60]).

Whilst Stanley Burnton LJ dismissed the appeal without regret, Sedley LJ, in a short reflective judgment, offered the following analysis on the first issue:

64 Local government has long since been divested of most of its adjudicative powers. The modern forum for the exercise of such powers is an independent tribunal. But by virtue of primary legislation important decisions which can make the difference between a home and the street for thousands of people every year have been consciously placed and kept within the administrative framework of local government, with recourse to the courts on process only and not on merits.
65 It is into this framework that the power to contract out has been introduced. Certain functions are exempted from the power, but the review of homelessness decisions is not one of them. One understands very well why members of the Appellate Committee [in Runa Begum] were dubious, even so, about the contracting out of an adjudicative function as if it were the town hall catering contract. But the fact is that it is difficult to envisage a process less compatible with Article 6 than the in-house review by one official of another official's decision on an issue on which the local authority, through both of them, sits as judge in its own cause. Starting from such a low base, delegation of the review function to a competent outsider on the kind of terms we have seen in this case, whatever its weaknesses, probably offers more in the way of independence and impartiality than the in-house system.
This lament for local authority adjudications as if they are the town hall catering contract will live with me for a good while.

Changing Horses Midstream

Sun, 30 Aug 2009 17:26:40 +0000

chief

Konodyba v Royal Borough of Kensington and Chelsea [2009] EWCA Civ 890 was an appeal against a decision that Dr Konodyba was not entitled to housing assistance as she was subject to immigration control. It turned out to be a cautionary tale about getting rid of your legal advisers at the last minute in order to argue the case a different way.

Dr Konodyba is from Poland, an A8 country. She seems to have worked briefly in a hotel. During this time her child started school. Dr Konodyba made a homelessness claim to Kensington and Chelsea, but this was turned down due to her immigration status. Dr Konodyba argued that she was entitled to reside in the UK as the primary carer of her child on the basis of *Bambaust* and Article 12 of Regulation 1612/68. Although HHJ Behar in the Wandsworth County Court decided against her, she was given permission to appeal by the Court of Appeal. In his leading judgment in this case Rix LJ quotes what he said when granting permission. In the context of what happened later this is worth repeating:

Although this is treated as a second appeal, it raises an important point on the interrelationship of Community and domestic legislation, and depends on the question of an implied derogation from a Community directive. HH Judge Behar, in his excellent judgment, described it as a "difficult area of the law", and in another case HH Judge Knight QC came to a different view. I would give permission to appeal on the basis that it raises an important point of law and because there is a reasonable prospect of success for the reasons addressed in the applicant's skeleton. Because this question must be likely to arise repeatedly, I consider that an element of expedition is suggested.
Clearly this does not suggest that the success of the appeal was a done deal, but it seems that there was not enough encouragement for Dr Konodyba there. At some point in the fortnight before the hearing she disinstructed her solicitors and counsel on the grounds that the submissions on *Bambaust* were made without her permission, were against her will and were entirely irrelevant. She wanted to argue a different case based on Article 7 of Directive 2004/38/EC. Not only was this not the case that permission to appeal was granted for, but it appeared to be based on a different factual basis. Rix LJ interpreted this as meaning that the present appeal was abandoned and should therefore be dismissed.

Wall and Aikens LLJ agreed.

A quick update from the ECJ

Fri, 23 Oct 2009 17:08:27 +0000

J

Readers might remember the case of *LB Harrow v Ibrahim and another* [2008] EWCA Civ 386 (noted by us here) where the Court of Appeal referred three questions to the ECJ concerning the rights of residents of family members of former Community workers.

The Advocate General (Mr Mazak) has now delivered his opinion in the case, which is available here. The Advocate General is not a Judge of the ECJ nor is his view binding on the Judges although, in practice, the ECJ usually follows the advice given. We will, therefore, have to wait for the final decision, but, for what it is worth, he has concluded:

(a) children of EU citizens who have installed themselves in a member state during the exercise by their parents of rights as residence as workers in that state are entitled to reside in the state in order to attend general educational courses;

(b) a parent who is the primary carer of those children - irrespective of his or her nationality - is entitled to reside with the children in order to allow the children to exercise that right. The fact that the parent who is a citizen of the EU is no longer working in that state and has left the state is irrelevant;

(c) it is similarly irrelevant that the children and their primary carer are not self-sufficient and are dependent on social assistance;

(d) the length of time that the children have been enrolled in their educational courses is also irrelevant.

Incidentally, counsel's advice to Harrow on the then prospective Court of Appeal proceedings in this case is available online as part of memo here [link to .doc] and google web version here. It really is amazing what Google can find!

A curious footnote (with benefit of transcript)

Wed, 18 Nov 2009 10:41:19 +0000

Dave

We previously wrote up *Mich-Onyibe v Wandsworth LBC* [2008] EWCA Civ 1649 as "a curious footnote" to homelessness jurisprudence, basing our note on an Arden Chambers e-flash. Thanks to the Chief we now have the benefit of the transcript. The facts were as stated in our previous note. Broadly, the problem was that the Recorder sitting at the Wandsworth County Court on a s 204 appeal - on suitability of accommodation offered in discharge of duty by Wandsworth - gave a judgement in which he did not give reasons at the time but said "I will send further written reasons within the next few days". The parties pressed the Recorder for those further written reasons. He did not provide them. He then retired. The Court of Appeal directed that there be a re-hearing by the County Court.

Both Counsel agreed before the CA that the reasons given by the Recorder were inadequate. The question for the CA, on which the transcript gives further elucidation, was whether it should re-hear the appeal itself (which had been conducted over three days in the county court), as was argued by Counsel for Wandsworth. This may well be a rather more significant issue than I had originally thought (and more than a curious footnote at any rate). In essence, the argument in favour of a re-hearing by the CA was that they were not greatly inconvenienced by the lack of a county court judgment as the focus would be on the review decision and whether it met the Wednesbury grounds.

Arden LJ (with whom Jackson LJ and Sir Mark Potter agreed) said that "what we are really concerned with is the proper use of judicial resources" (at [23]). It was significant that the 1996 Act placed located the county court as the proper court to hear appeals and was an indication of how judicial resources should be allocated. That was not an absolute reason why the CA should refuse a re-hearing, leaving open the possibility that in an "appropriate case", they may conduct such a re-hearing. But there were two particular issues on which Arden LJ relied in refusing a re-hearing. First, although neither party was to blame, "it seems to me that Wandsworth must take the blame for some of that delay because it would have been open to it as soon as it became apparent that further reasons would not be given to consider whether the appeal should be conceded, as it has now been conceded, and if that had happened allowing the appeal by consent so that it could be remitted back to the county court" (at [25]). Secondly, the issues in the case went beyond technical points of law - based on the minded to letter, which was argued to be inadequate (as to which see esp *Lambeth LBC v Johnston* [2009] HLR 10 and *Banks v Kingston-upon-Thames RLBc* [2009] HLR 29) - and went into substantial grounds of appeal (based on unfairness, failure to take account of personal circs; perversity etc). If there were to be a rehearing by the CA, it would be by three judges as opposed to one; although the CA bench might have time left available in the day "... it should be borne in mind that these days members of this court have substantial administrative burdens and a volume of paper applications to deal with and any court time will be used for good purpose" (at [26]; poor them, it's not all judging, you know).

One other matter was considered (at [27]). Counsel for Ms Mich-Onyibe, who supported a county court re-hearing, did so on the basis that she had aso refused temporary accommodation and was currently living with her daughter. There was no prejudice to Wandsworth in the matter going back to the county court and she would rather it did so "so that she is not contending that she is prejudiced by having to live with her daughter" (it being her case that she needed constant attention from her daughter).

Child in Need, Indeed

Thu, 26 Nov 2009 12:01:19 +0000

chief

The Supreme Court has handed down judgment in the case of *R (A) v Croydon and R (M) v Lambeth* [2009] UKSC 8. This is an important decision about the duty of LAs under s.20(1) of the Children Act 1989 to "provide accommodation for any child in need within their area". We will look at this judgment in more detail soon [edit: see here], but for now what you need to know is:

1. The courts can review whether a person is a "child" for the purposes of the Children Act 1989, this is a separate question to whether they are "in need";
2. Ordinary domestic judicial review can be adapted to deal with this where necessary;
3. If s.20(1) does give rise to a "civil right" for Art 6 purposes it is close to the boundary of that concept (*per* Baroness Hale); or
4. The duty of a LA under s.20(1) does not give rise to a "civil right" (*per* Lord Hope);
5. If it is a civil right conventional judicial review is enough to comply with Art 6.

The appeal was therefore allowed. Points 3, 4 and 5 are *obiter*.

Our report on the Court of Appeal decision is here.

Birmingham v Aweys

Thu, 07 Feb 2008 19:31:47 +0000

NL

Hot off the press - judgment released today.

Birmingham, apparently intent on suicide, appealed the judicial review decision in Aweys. Birmingham City Council v Abdishakur Aweys & Ors [2008] EWCA Civ 48. They lost, badly, on all counts.

Birmingham argued that accommodation that was not suitable under section 175(3) could still be suitable for a limited time for the purposes of section 210 after a duty under section 193 has been accepted. The court held otherwise, the definition of 'suitable' has to be the same before and after the housing duty arose. Awua (R (ex p Awua) v Brent LBC [1996] 1 A.C. 55) did not help Birmingham because the accommodation in that case was acceptable albeit short life housing.

Birmingham also argued that Collins J had erred in his ruling that the allocation scheme was unlawful because he held that Birmingham a) could not take financial considerations into account in making policy, and b) he purported to determine priorities between the homeless himself. The court said a) no he didn't, and b) no he didn't. One other technical point turned out to be based on a typo. And that was pretty much that.

This does leave a rather difficult practical situation, as a council will be in breach of duty unless it finds suitable accommodation immediately someone is accepted as homeless. While this can be waived by consent, this is not something that the council can rely on. Collins J had recognised this by giving a guideline of 6 weeks as a reasonable period in which to secure alternative accommodation. LJ Arden's judgment worries about the impact of immediate effect, but declines to construe the statute as including 'a reasonable time' for the accommodation to be secured. On the other hand, she doubts whether a mandatory order would be made by the court where a council genuinely cannot secure suitable accommodation immediately.

I'm guessing that Mike McIlvaney, the Community Law Partnership and Jan Luba QC are happy bunnies tonight.

By the way, the Court limits its discussion of 'suitability' to the issue of the homeless at home, because there are two pending cases Richards v Ipswich BC and Manchester CC v Moran, both concerning women's refuges, that may address the issue of suitability. Something to watch out for there.

Considering Equality of Opportunity

Thu, 28 Feb 2008 20:44:10 +0000

NL

Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government& Ors [2008] EWCA Civ 141. A Court of Appeal judgment on appeals of refusal for planning permission for the retention of mobile homes on green belt land by Irish traveller families. The appeal failed, but what is particularly interesting is the examination of section 71(1)(b) of the Race Relations Act 1976. The EHRC intervened in this appeal, so the issue of 'due regard' to s71 "the need to promote equality of opportunity between persons of different racial groups", in public authority decision-making got a good hearing.

In the only judgment, Lord Justice Dyson rejects the need for an explicit reference to s.71(1), or required form of words, instead following *R (on the application of Lisa Smith) v South Norfolk Council* [2006] EWHC 2772 (Admin). At 37:

The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed.
That said, a reference to the requirements of s.71(1) and associated codes and guidance would be good practice.

In this case, the decision-maker had clearly had regard to and balanced the relevant issues.

Making Good and homeless figures

Mon, 10 Mar 2008 21:22:33 +0000

NL

Via Garden Court's 10 March 2008 bulletin.

Birmingham (yes them again) have had their tenancy agreement found to be misleading by the Ombudsman in terms of their liability for making good damage resulting from repairs.

Homeless figures are out for the last quarter of 2007. Decreases in both decisions (6%) and acceptances (1%) on the previous quarter.

There are a couple of interesting case reports in there too, not yet reported elsewhere:

Hassan Omar v City of Westminster [2008] EWCA Civ, [2008] All ER (D) 38 (Mar)

and

R(Niypo) v Croydon LBC [2008] EWHC Admin, [2008] All ER (D) 24 (Mar)

both on aspects of homelessness, so read the bulletin...

Shala revisited?

Tue, 15 Apr 2008 20:58:21 +0000

NL

London Borough of Wandsworth v Allison [2008] EWCA Civ 354 is a Court of Appeal judgment on an appeal from a s.204 Housing Act 1996 appeal. It was made in downright odd circumstances, as the respondent had won the s.204 appeal but then had public funding withdrawn, for being out of the country, not long before the Court of Appeal heard Wandsworth's appeal. The appeal went ahead, with the respondent not present or represented. Instead the Court had Counsel for the respondent's early skeleton and asked Counsel for the applicant to give it the arguments the respondent might have made (!!).

I'm not going into detail on the facts of the case - suffice to say it turned on the interpretation by the s.202 reviewer and the Recorder in the first instance court of medical evidence in relation to Deep Vein Thrombosis and Raynaud's phenomenon/disease. The recorder at first instance had found that the reviewer had failed to adequately address the medical evidence.

However, as I have made clear, I hope, I am satisfied that the authority went completely wrong in their assessment of the evidence in relation to DVT and Raynaud's. It was not simply a question of the authority making findings of fact on competing evidence, which is something they would be perfectly entitled to do. It was a question of fundamentally misunderstanding and misstating the medical evidence in important respects.
The Court of Appeal found that there was sufficient unclarity and range of views in the medical evidence that the question the recorder should have addressed himself to was whether the review officer's decision was Wednesbury unreasonable:
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223, per Lord Greene MR in particular at 233- 4. In other words, was Ms Anglin's decision one which no housing officer, properly directing her mind to the material before her could properly reach? If the decision was one which was properly open to her, then the overwhelming weight of authority is to the effect that the decision was one for her, and that there is no basis upon which the court could properly interfere with it, however, much the court may or may not agree with it. (65)
In the Court of Appeal's view of the available medical evidence, this was simply not open to the Recorder.

Secondly, the Recorder had not properly considered the Pereia test:

Mr. Lintott's second point was that the Recorder himself had failed properly to apply the *Pereira* test (as set out in paragraph 13 above) to determine whether Ms Anglin had been wrong in her conclusion that the Respondent was not vulnerable. The Recorder had held that the Ms Anglin "went completely wrong" in her assessment of the evidence on DVT and Raynaud's disease, but he had not gone on to consider, as he should have, whether Ms Anglin was wrong in law to conclude that Mr. Allison was, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment would result where a less vulnerable person would be able to cope without harmful effects. Nowhere, Mr. Lintott submitted, did the Recorder address Ms Anglin's conclusion that Mr Allison could take his pills effectively when homeless, and that with continued compliance there was no particular risk of further thrombosis, with the consequence that Mr. Allison would not, when homeless, be less able to fend for himself than the ordinary homeless person so that injury would result when a less vulnerable person would cope without harmful effects. As Auld LJ had pointed out in *Osmani*, vulnerability under s.189(1)(c) was "not exclusively or even necessarily a medical question." -see paragraphs 14 to 17 above. (50)
The Court was at pains to stress that a s.204 appeal is on a point of law and that the court cannot overturn the local authority's findings of fact unless on strong Judicial Review style grounds (with the addition of irrationality and inadequacy of reasons). The Recorder had failed to

properly consider whether the reviewer's conclusion was one that she could properly come to on the evidence available to her.

Of broader significance is the address to Shala. Wandsworth's medicial advisor was the ubiquitous Dr Keen of Now Medical - a GP. The skeleton of erstwhile Counsel for the Respondent had argued that

The proper role for Dr Keen [...] was – as stated in paragraph 22 in *Shala* - to enable Wandsworth "to understand the medical issues and to evaluate the medical issues before it". As a consequence, counsel submitted, the Recorder was entitled to conclude that Wandsworth had misunderstood the medical evidence before it. (61)
The Court of Appeal sought to distinguish Shala.

Firstly, the Recorder had made no reference at all to Dr Keen's reports in his judgment.

Secondly, in this instance, it appeared that Dr Keen had simply commented on the medical evidence (despite the 'I make no housing recommendation' repeated epilogue) in order to allow the Local Authority to understand the medical evidence.

It would plainly not have been appropriate for Dr. Keen to examine Mr. Allison. In the instant case, Dr. Keen's advice seems to me to be well founded in his medical expertise, and he was thus fully entitled to advise Wandsworth on the manner in which Mr. Allison's medical difficulties would be likely to affect him. Ms Anglin was, similarly, entitled to give weight to Dr. Keen's conclusions. (71)
Does this represent a significant change to Shala?

I don't think so. I think it was clear in that judgment that Shala represented a conditional limit on the use of Now Medical (or any commissioned medical) reports by local authorities, but it did not mean that a Now Medical (or council commissioned medical) report could not be taken as credible medical evidence without Dr Keen examining a patient or that *any* specialist medical evidence trumped a Now Medical report. In this case, comments on DVT and anti-coagulation medicine were considered to be within a GP's expertise.

The Court distinguished Shala, and on entirely predictable grounds. Allison may represent a limit case on the application of Shala, but does not change it at all. A Now Medical report still cannot stand as expert medical evidence absent an examination of the patient, and local authorities must still consider carefully whether they are comparing like with like in considering Now Medical's report against expert reports.

Women's refuges and homelessness

Thu, 17 Apr 2008 19:22:56 +0000

NL

Manchester City Council v Moran & Richards v Ipswich Borough Council [2008] EWCA Civ 378

This is a very important Court of Appeal judgment, which will have significant impact on Women's Refuges and women fleeing domestic violence.

These were two appeals, conjoined, both featuring women whose stay at refuges had been ended following incidents and who faced findings of intentional homelessness on homeless applications as a result. The difference was that Moran had the decision as s.184 decision on application as homeless after leaving the refuge and the other, Richards, had been in the refuge after an application and acceptance of duty, with the refuge as temporary accommodation under s193 HA 1996, so duty was discharged on her making herself intentionally homeless.

In Manchester v Moran, Manchester were appealing a finding on s.204 appeal that the refuge was not accommodation (or accommodation in which it was reasonable to remain) for the purposes of s.193 HA 1996. In Ipswich v Richards, Richards was appealing a .s204 appeal finding that the refuge was accommodation in which it was reasonable for her to remain.

In both cases, if the refuge was not accommodation (or accommodation in which it was reasonable to remain), the findings of intentional homelessness would fall.

In general, local authorities have followed R v LB Ealing Ex p Sidhu (1982) 2 HLR 48 (Sidhu), in which the High Court found that a refuge could not be considered as accommodation for the purposes of the Housing (Homeless Persons) Act 1977, then in force. In addition, guidance from the Secretary of State issued in July 2006 suggests at Chap 8, para 8.34 that it should not be regarded as reasonable to continue to occupy such accommodation as women's refuges in the medium and longer term; and at Chap 16, para 16.27, in a discussion of suitability (not reasonableness) that placement in a refuge should be a temporary expedient only for the minimum period necessary.

Broadly, the argument advanced by Moran and Richards updated Sidhu, so that a refuge could not be considered to be 'accommodation' for the purposes of s.175 and s.193 HA 1996; or if it was accommodation, it could not be accommodation that it was reasonable to continue to occupy. In addition, there were sound policy reasons for such a view. If a woman could not make a homeless application while accommodated in a refuge, the refuges would quickly silt up completely with women waiting on Part VI applications.

The Court of Appeal, in the sole judgment of Lord Justice Wilson, found that Sidhu could not be accommodated with the later judgments in Puhlhofer v Hillingdon LBC [1986] AC 484 and R v Brent LBC ex p Awua [1996] 1 AC 55. Following the House of Lords in Puhlhofer, it was impossible not to consider a refuge to be accommodation for the purposes of s.175 HA 1996. Puhlhofer took a very broad definition of

accommodation, refusing a purposive view. (In fact Puhlhofer precipitated the introduction what is now s.175(3) HA 1996 - reasonable to continue to occupy).

Following Awua, the Court held that reasonable to occupy was not equivalent to 'settled' accommodation. In addition refuges did not fall under any of the statutory exclusions from reasonable to occupy, and there was no order made by the Secretary of State excluding refuges pursuant to s.177(3)(a).

In any case, the nature of refuges had changed since 1982, and they could no longer be equate to short stay or emergency shelters.

The accommodation in the present cases was such that it was reasonable for the women to remain. There was no immediate threat of the termination of their licence. It was expected, as set out in the evidence of the WRA, that women would stay for months, even up to two years, while alternative permanent accommodation was being pursued. It was therefore accommodation that was reasonable for them to occupy.

Manchester's appeal granted. Richards' appeal dismisssed.

The Secretary of State's guidance was wrong and should be reconsidered. If the government wished this situation to change, it would be a matter for statute - an order by the Secretary of State.

The Court was clear that a refuge would not always be considered as reasonable to continue to occupy. The Court set out a list of matters for homeless officers to address in assessing refuge accommodation for homeless applicants. I have added the full list at the end of this post. Clearly they will be of considerable importance for both housing officers and advisors.

(For complete geeks like me, there is an interesting discussion of the distinction between 'reasonable' (s.175) and 'suitable' (s.206) at paras 30 & 31, but nothing turns on it here.)

This judgment places women's refuges in a very difficult position indeed. It means that they will not be certain whether a woman that they take in will be able to make a homeless application will at the refuge. They will have to consider the list of factors set out in the judgment in each and every case, as what might be reasonable for one woman's circumstances will not be for another woman. They will have to consider limiting the support that they offer. It effectively leaves them in an impossible position

As far as I can see, there are three options from here:

i) Appeal to the House of Lords. The prospects of success are not great, I would have thought. I suspect that the circumstances of Moran might be a better candidate for an appeal than that of Richards, but the key issues are identical, at least as long as one takes 'accommodation' in s.175 to mean the same as 'accommodation' in s.193, and I think we have to take that to be so.

ii) Secretary of State makes an order excluding refuges as 'accommodation reasonable to occupy'. The simplest solution, and, given the SoS was an intervener in the appeal, maybe the most likely.

iii) Refuges and Councils struggle on with the 'Moran guidelines' as I shall christen them, as to whether a refuge is reasonable to occupy or not. A whole new swathe of s.204 appeals are born as the application of the guidelines is thrashed out.

The Guidelines - matters to be considered in enquiry under s.175(3) or s.191(1) Housing Act 1996 - are at paras 49 and 50:

49. The general matters which fall to be considered include:

(a) the size, type and quality of the accommodation made available to the woman, including the extent of her need to share its facilities;

(b) the terms of the agreement by which it is made available to her;

(c) her ability to afford it;

(d) the appropriateness of its location for her and her child (if any);

(e) the extent of its facilities for her child;

(f) its appropriateness for her and her child in the light of any particular characteristics (including as to health) which each may have;

(g) the length of time for which they have already occupied it;

(h) the state of their physical and emotional health while in occupation of it; and

(i) the length of time for which, unless accepted as homeless, they might expect to continue to occupy it.

50. The particular matters which additionally fall to be considered by virtue of the fact that the accommodation is a refuge include:

(a) the nature of the refuge;

(b) the scale of support which the refuge aspires to provide to the woman;

(c) in particular, whether reflected in the terms of the licence agreement, in its published material or otherwise, the length of the period for which the refuge expects her to remain in occupation of it;

(d) the length of the period for which women generally occupy it;

(e) the extent to which, during her occupation, the refuge has been full;

(f) any evidence that her occupation may have prevented, and in particular the extent of the risk that any continued occupation on her part may in the future prevent, the refuge from offering accommodation to another victim of domestic violence in an emergency;

(g) the extent to which any conditions of the licence agreement, by way, for example, of the prohibition of visitors or of dissemination of the address of the refuge, make it reasonable or otherwise for her, in the light of the length of her occupation to date, to continue to occupy it; and

(h) the extent of her need, and of her ability to accept, such physical and emotional support as the refuge may offer to her.

Jan Luba QC and Adam Fullwood, instructed by Shelter, Manchester, for Moran.

Martin Hodgson, instructed by Anthony Gold, for Richards.

Martin Chamberlain for the SoS.

Clive Freedman QC and Zoe Thompson for Manchester

James Findlay and Wayne Beglan for Ipswich

EU homeless and education

Mon, 21 Apr 2008 20:15:04 +0000

NL

A Court of Appeal case, concerning eligiblity for housing assistance via EU status

London Borough of Harrow v Ibrahim & Anor [2008] EWCA Civ 386 (21 April 2008)

The facts are, briefly, Mrs Ibrahim is a Somali national, married to a Danish national. He came to the UK in 2002 and worked until 2003, when he claimed incapacity benefit to 2004. He was then declared fit. He didn't take up work and left the UK shortly afterwards. he returned in December 2006 and remained without work.

Mrs Ibrahim and their four children joined Mr Ibrahim in the UK in Feb 2003. The children started school in Harrow and have remained in school ever since. Mrs I is separated from her husband, has not worked and relies on benefits. In January 2007 she applied as homeless. Neither Mr nor Mrs I qualify as having a right to reside as worker, work-seeker or self-sufficient. So, unless the children had a right to reside, they would be subject to immigration control and not eligible for housing assistance. Mrs I as carer relied upon her children's right to reside.

After a negative s.184 decision and s.202 review, the Recorder in a s.204 appeal found for Mrs I, that the children had a right to reside under art 12, Regulation (EEC) No 1612/68 (the 68 reg). Harrow appealed.

The issue is deceptively simple. It has long been held that children of an EU citizen (or the spouse of an EU citizen) who at one point had the right to reside, as a worker or otherwise, and who entered education in the host country when that right was being exercised, had the right to reside in order to continue that education, via Art 12 of the 1968 regs. This was regardless of whether the initial person had ceased to have the right to reside or had left the country. *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091

However:

- Baumbast concerned people who were self-sufficient, without specifically referring to or addressing the fact.
- More importantly, the 68 reg had been, at least largely, supplanted by the Directive 2004/38/EC of 29 April 2004 (the "2004 Directive") and the corresponding provisions of English law in the (European Economic Area) Regulations 2006 (the "2006 Regulations").

The 2004 Directive was intended as a unifying of the previous piecemeal right to reside provisions. But it did not expressly repeal art 12 of the 68 regs, when it did expressly repeal other articles (10 and 11) in the same Regulation.

The 2004 Directive (and the 2006 Regulations) hold;

- that the right to reside to continue education is available when the parent who initially had the right to reside has died or left the country.
- that "Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State." (Art 14 2004 Directive). But residence as worker does not have such a condition, see Art 7(1)(a) 2004 directive.

Mrs I contended that, as art 12 of the 68 reg was not repealed, the broad principle of art 12 and Baumbast remained. Mrs I's situation was a lacuane in the 2004 Directive as Mr I had not died and had lost the right to reside as worker/workseeker by the time he left the UK. There was no requirement of self-sufficiency to reside as a worker and was none in the 2004 Directive. Baumbast had held no such requirement.

Harrow and the Secretary of State as intervener contended that the 2004 Directive is the sole source of rights of residence and was clearly intended to incorporate Baumbast. That Art 12 wasn't repealed didn't matter when Art 10 of the 68 reg was repealed, as Art 10 was the source of rights of residence. In any case, the 2004 Directive made self-sufficiency an over-arching requirement for any other right to residence other than the specific exception of a worker and his family. So Mrs I didn't meet the conditions as i) she wasn't self-sufficient and ii) Mr I fell outside the Directive as he was neither dead, nor a worker/work-seeker when he left the UK.

The Court of Appeal leaned towards Harrow's view, but found that the issues are not *acte clair*, in particular on the concept of 'departure' in the 2004 Directive and how far Baumbast could give an independent right to reside based on Art 12 of the 68 reg alone. So they referred questions to the European Court. Specifically:

In circumstances where (i) a non -EU national spouse and her EU national children accompanied an EU national who came to the United Kingdom (ii) the EU national was in the United Kingdom as a worker (iii) the EU national then ceased to be a worker and subsequently left the United Kingdom (iv) the EU national, the non-EU national spouse and children are not self-sufficient and are dependent upon social assistance in the United Kingdom (v) the children commenced primary education in the United Kingdom shortly after their arrival there while the EU national was a worker:

(1) do the spouse and children only enjoy a right of residence in the United Kingdom if they satisfy the conditions set out in Directive 2004/38 of the European Parliament and of the Council of 29 April 2004?;
OR
(2) (i) do they enjoy a right to reside derived from Article 12 of Regulation (EEC) No 1612/68 of 15 October 1968, as interpreted by the Court of Justice, without being required to satisfy the conditions set out in Directive 2004/38 of the European Parliament and of the Council of 29 April 2004; and
(ii) if so, must they have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence and have comprehensive sickness insurance cover in the host Member State?;
(3) if the answer to question 1 is yes, is the position different in circumstances such as the present case where the children commenced primary education and the EU-national worker ceased working prior to the date by which Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 was to be implemented by the Member States?
Hmm. Interesting. This could affect a fair few people.

Nicola Rogers was instructed by Shelter for Mrs Ibrahim. Kelvin Rutledge and Sian Davies were instructed by Harrow, and a brace of QCs, Clive Lewis QC and Elisabeth Laing QC for the Secretary of State for the Home Department.

Fair and commonsense reviews

Thu, 01 May 2008 19:14:35 +0000

NL

So, then

Omar v City of Westminster [2008] EWCA Civ 421

Briefly, the facts were that Mr Omar made a homeless application to Westminster. His household consisted of his wife and his infant son who had just been born and was, at the time of the application was under special care at Kensington & Chelsea hospital. The son was discharged on 28 December 2006. Westminster accepted a duty on 15 January. The family were given temporary accommodation in a hotel. On 19 February Westminster offered a two bed property in Walthamstow E17 for temporary accommodation under s.193 HA 1996. Mr Omar refused the offer, stating that his infant son had a further hospital appointment at Kensington & Chelsea. Mr Omar provided a letter from January 2007 confirming post discharge weekly appointments and another letter confirming an appointment on 21 February.

Westminster wrote on 23 Feb 2007 discharging duty to accommodate under s.193(3) and 193(5). A review was requested of both suitability of the offer and decision to discharge on the basis that Mr Omar relied on the medical support in the Westminster area and family support in the area. Further medicial information was received from the hospital on 4 May 2007 with a current prognosis. Westminster's review was negative. The decision letter mixed past and present tenses in addressing the situation, but takes as a main basis the report of 4 May 2007 from Kensington and Chelsea Hospital on the then current care and prognosis for the baby.

At s.204 Appeal, the Judge found that:

1. As to the suitability of the property, the reviewer was entitled to consider the position at the review date - subsequent to the first decision.
2. As to the decision to discharge duty, the review had to be limited to the facts at the date of the decision, but that in this review, the reviewer had so limited themselves.
3. There was, in any case, no point in sending the matter back for further review as the same decision was bound to be reached.

The Court of Appeal, in LJ Waller's sole judgment, reversed this and directed the matter back for further review.

The Court take an avowedly commonsense appproach:

It seems to me that the question of what facts may be taken into account on the review will depend on what is being reviewed and must, unless there is some compelling legislative provision which dictates to the contrary, be dictated by what fairness requires.(25)
Thus where the decision-making process effectively continues up to the end of the review, it is fair to consider the facts as they are at the date of the review. But when, as here, the decision is final at a certain date, and, as per *Osseily v Westminster City Council* [2007] EWCA 1108, duty is discharged at that time, not somehow postponed until the end of the review; then it is the facts at the date of the initial decision which are at issue (even if what those facts are comes to light later on - it is fine for the reviewer to find things out later about that point).

Having set out its commonsense goal, the judgment performs some remarkable acrobatics to show that this view is either compatible with, or distinguishable from previous cases: Mohamed v Hammersmith and Fulham LBC [2002] 1 AC 547; Sahardid v Camden LBC [2005] HLR page 11; and in finding support in Robinson v Hammersmith and Fulham LBC [2006] 1 WLR 3295.

These paras, 27-31 are well worth reading as a masterpiece of teleological analysis.

In this case, the County Court Judge was:

- wrong to separate suitability of accommodation and the discharge of duty decision
- wrong to hold that on suitability facts up to the date of review should be considered, because duty had already been discharged
- wrong on the review decision letter, which was clearly fundamentally based on the later information of 4 May, so the argument that no other decision was possible on the facts fell.

The general principle for any review under Housing Act 1996 (suitability of accommodation, housing duty, suitability of offer of permanent accommodation, presumably) is, as far as I can see, as follows:

The 'cut off date' for what facts should be properly considered by the reviewer depends on what is being reviewed.

Where the review is effectively a continuation of the decision-making process, the facts continue to be relevant up to the date of the review. An example would be a review of suitability requested by someone who had at the same time accepted the property and is in occupation.

Where the decision is a final one, no facts relating to a point after that date are relevant to the review. So a discharge of duty or, as far as I can see, where an offered property is no longer available after refusal (but there has been no discharge of duty), that date of first decision is the cut off point for relevant facts on review. But remember, this is the date to which the facts relate, not the facts known to the decision-maker on that date. Any facts that subsequently come to light that concern that date are relevant to the review.

Cardiff homeless - tactical lessons?

Tue, 06 May 2008 21:31:21 +0000

NL

Thanks to Housed and Garden Court's bulletin for the pointer to this Ombudsman's report [pdf] on Cardiff's failure to provide temporary accommodation pending enquiries on what was a prima facie case of 'not reasonable to remain' homelessness.

Cardiff were operating a 'housing options' filtering scheme and refused to accept Mr F as homeless until he had notice of eviction.

I don't want to go through the details - which will surely sound very familiar to most housing advisors. Instead, I wanted to look at the case in terms of tactics for advisors and the utility of various routes.

In this case, the Ombudsman awarded compensation of £1500. It is not clear when the complaint to the Ombudsman was made. However, Mr F's first approach to the Homeless unit was in March 2006. He was not put into temporary accommodation until about August 2006, after a possession order was made, and this was apparently after the Ombudsman had begun investigations. The Ombudsman's report is dated 16 April 2008. So, although the report is completely devastating in regards to Cardiff's then practices, it was of little avail to Mr F at the time to complain to the Ombudsman, as he was still not taken into temporary accommodation until after a possession order, despite the investigation. The report then took at least 18 months to appear.

Mr F did have the help of a solicitor during the period March - August 2006. The solicitor apparently repeatedly called and wrote to the HPU during this period, pointing out the conditions Mr F and his family were living under, the intentions of the landlord and also supplying evidence of medical concern about the impact on the health of the infant son.

In that sense, the solicitor provided all the information that Cardiff could reasonably have required to actually make a decision, let alone find that a s.183 HA 1996 duty was triggered. But Cardiff didn't respond. A passage from a solicitor's letter from May 2006 (two months in) is quoted in the report:

Mr [F] is living in accommodation which is currently being extensively renovated by his landlord. We have spoken with the landlord and in the landlord's opinion the premises are not fit for habitation, and as you will appreciate Mr [F] is extremely limited in the accommodation which he can obtain bearing in mind his limited resources.

Whilst we appreciate that the landlord has given him Notice to Quit, it does appear that the premises may be unreasonable for him to occupy at the present time and we would be grateful if you would kindly look into considering his homelessness application on that basis.

Cardiff simply ignored this and the other letters and calls. Although they had no justification for ignoring them, (and tried to blame an individual officer), I'm not surprised at the lack of response.

I have no idea if the solicitor was a housing specialist - they are said to be the 'family solicitor' - and I don't want to be particularly harsh, not knowing the circumstances of their instruction. But I do think there is a general tactical lesson to found here.

In my view, when your client's circumstances are such that there is a clear prima facie housing duty under s.183, pending enquiries, one needs to give the recalcitrant local authority all the reasons why the duty has been triggered, and the history of the client's presenting to the LA.

But one doesn't ask the LA to look into it, one insists that they respond, via a Judicial Review pre-action protocol letter before claim. And one insists that the LA respond pretty much immediately, with a deadline beyond which an application for Judicial Review with interim injunction application will be made with no further notice. Copy the letter to the LA Legal Services. Then, if there is no reaction in time, make the JR application. (Assuming there is time, I'd usually want to get Counsel's advice and drafted grounds pre-issue, of course).

Sadly, asking the LA to kindly look into it will often at best get a delaying response, at worst achieve nothing at all.

I have no doubt that I might be regarded as unduly aggressive in advocating these tactics. But, as the Cardiff Ombudsman's report makes clear, one is properly insisting that the LA comply with their legal duty, not asking a favour or trying to persuade them to do the right thing. It is worth looking at the response of the then operational manager of Cardiff's homeless services to see why the 'giving the LA the information and asking nicely' approach might well be of little utility. In interview with the Ombudsman, the manager:

was unable to give my investigator the current definition of homelessness saying that it had been a long time since he had looked at the legislation. When asked to expand on the statements in the formal response as to the overriding priority being given to homelessness prevention, the Operational Manager moved away from this position saying that he had not wished to convey an impression that considerations about homelessness prevention would over-ride the assessment process as a matter of course but went on to say that local authorities in Wales have a performance indicator to reduce homelessness applications, this being a consideration in future grant awards and it is appropriate that the options of advice and prevention should be a first response.(33)

So he didn't know the law and was pre-occupied entirely with reducing homeless applications. Given Councils' policies (and Government pressure), it is not surprising that these should be the concerns of homeless units. (That this is about policy driven practice, rather than any individuals working in HPUs, should be clear).

The merit of the aggressive (but still polite, of course) approach is that it bumps matters up to Legal Services immediately, who are, at the least, going to have to deal with the more obvious legal deficiencies in their client's dealings. If this doesn't get results straightaway, carrying through the threat with an application for JR with injunction application focuses minds wonderfully.

The benefit of the approach is the likelihood is that the client's application will be accepted and they will receive temporary accommodation quickly. It is therefore hugely in the client's best interests.

However, there is a caveat. Should the LA choose to fight the JR, rather than act to remove the grounds (effectively settling the case), it will take months to years to get a substantive hearing at the Administrative Court. There is no one simple answer to what happens to the client in the meantime - it entirely depends on the ongoing situation.

There will also be people, I have no doubt, who will object that making applications like this is why the Admin Court is bunged up and that this is a needless waste of the Admin Court's time. I entirely agree. It shouldn't be necessary to have to threaten and make applications in this way, only for the LA to back down in the light of its indefensible position.

I should also be clear that I am no fan of making an application as a threat, regardless of the details of the client's case. But where the client has a viable case, their interest is paramount, and if the LA's inaction means an application, so be it.

As a post-script, I'd like to mention that I will put up a related post shortly about issues of independence and the ability to take an aggressive approach to local authority decisions (or lack of them) in this way, provoked by some posts on Housed's blog.

Caravan sites and Tomlin orders

Wed, 21 May 2008 20:04:15 +0000

NL

A couple of interesting permission to appeal hearings have appeared on Bailii. Permission granted in both cases for Court of Appeal hearing.

Lee v Rhondda Cynon Taff County Borough Council [2008] EWCA Civ 523 concerns whether a Local Authority should have considered the acquisition of a plot for a caravan in the context of a review of an offer of 'suitable' accommodation following assumption of housing duty to a homeless Romany Gypsy.

City of Westminster v Man [2008] EWCA Civ 532 arose out of a claim for unpaid service charges. It concerns whether a Tomlin Order, staying the proceedings, means that an earlier order for costs in the proceedings, not mentioned in the Tomlin Schedule, is unenforceable due to the stay. Not necessarily of interest to many housing people, but we use Tomlins a lot in disrepair and nuisance claims, so this is worth keeping an eye on.

Interim Accommodation and Judicial Review

Wed, 28 May 2008 19:35:37 +0000

NL

Lusamba, R (on the application of) v London Borough of Islington [2008] EWHC 1149 (Admin) concerned a judicial review application on failure to decide on provision of interim accommodation pending review of a negative s.184 HA 1996 decision. It raises interesting procedural issues and a few issues on dependency of family members for priority need.

The application for judicial review on grounds of failure to make a timely decision on interim accommodation was made on 10 April 2008, after a review request on 4 April 2008. On 15 April 2008 at oral hearing, which islington missed as they had not been notified by the court, permission was granted and temporary accommodation ordered. On 28 April, Islington made a decision and refused interim accommodation. Islington applied on 1 May to discharge the interim injunction. The interim relief sought had been temporary accommodation pending not just decision but until the s.205 review decision, which this Court notes extends considerably beyond the final relief sought.

This hearing was of Islington's application, which was also made on the basis that permission had been granted before the time for an acknowledgment of service had expired, with no abriding order, and that Islington had not had notice of the hearing.

The Court found that as the decision on interim accommodation had now been made, the proceedings as issued must fail. The application for interim accommodation pending review could not now be based on the allegation that the required decision had not been made. In fact interim accommodation could only have been ordered on the basis that it was until the decision on interim accommodation was made.

The Court's options were either to treat the hearing as the full hearing or dismiss the application and discharge the application. But this did not take into account what was effectively a further application, via the Claimant's response to the Defendant's application to discharge. Not a formal application but one in substance, that the decision of 28 April not to provide interim accommodation was unlawful, meriting interim accommodation until review decision as relief. The Court then considered this de facto application on its merits on the basis that both parties had in any case consiered their positions on the decision letter.

The original homeless application was made on the basis that the applicant had a dependent, her 18 year old sister, both French nationals. The sister was a full time student and the applicant was apparently receiving child benefit and child tax credit for her on that basis. The Council's refusal for interim accommodation emphasised that, although an 18 year old in full time education can be a dependent, the guidance suggests that the relationship should be akin to a parent and child relationship. In addition, the sister had been in the UK for a year or so before being in education and before receiving any support from her sister.

The Court found that the applicant had not provided any new material after the s.184 decision and one would expect detailed material on dependency to be provided. There was nothing to include the present case iside what the guidance envisaged as dependency. The Court had real difficulty in seeing how the s.202 review would be succesful, but for its purposes, there wasnothing to suggest that the decision letter refusing interim accommodation was anything other than a proper response or contained an error in law.

On that basis, there was no point in formally amending proceedings. This was to be treated as the full hearing of the judicial review application and it was dismissed and injunction discharged.

There is an illustration here of the importance, but also the difficulty when in a hurry, of getting application, grounds, final relief and interim relief all lined up properly when making an urgent application. But also an illustration of the convolutions that the problems the Admin Court is facing can sometimes result in, when one effectively turns out to be applying for something else altogether, simply through time and events.

Suitability and marital harmony

Tue, 10 Jun 2008 21:53:29 +0000

NL

Ahad v London Borough of Tower Hamlets [2008] EWCA Civ 606 was an application for permission to appeal from a s.204 appeal concerning a refusal of an offer of permanent accommodation. Tower Hamlets had discharged duty on the basis that the appellant had refused

an offer of accommodation that was suitable and reasonable for him to occupy, s.173(7F).

The appellant, his wife and three children made up the household. Tower Hamlets had accepted a duty. The appellant was bidding under a Choice Based Letting scheme, made a bid on the property and was successful. After viewing the property with his wife, he refused the offer.

On s.202 review, Tower Hamlets Law Centre made submissions as follows:

We submit that in the event it would not be reasonable for our client to accept the offer. He himself has not had any objection to the property and was inclined to accept it. However, his wife is adamantly opposed to the property. She feels that it is too small for her family's needs. She does not like the area where it is located as she has no family there and would not feel safe there. Mrs Begum [Mr Ahad's wife] indicated to our client that he could accept the property if he wished, but that she would not move to the property and neither would their three children. Mr Ahad thus believed that if he were to accept the property he and his wife would separate. Our client was therefore faced with the choice of either refusing the offer or his marriage breaking down.
In response, in the negative 202 decision, the council said:
…that Mr Ahad had not advised the council prior to or following the offer that he and his wife had differing opinions on what constituted suitable accommodation for him and, in any event, his having bid for a property, the council could only have accepted in good faith that he and his household wished to reside in the property. As he had applied to the council, it was appropriate for them to draw the inference that he acted on behalf of the whole family on bidding for the property, and the differences of opinion between him and his wife as to the type and location of the property was a domestic matter for them to discuss and reach a conclusion before making any bid.
At s.204 Appeal, the appellant argued that the Council had failed to take into account the fresh information at review concerning the likely effect on the appellant's marriage. if it had considered them, it had failed to give adequate reasons.

Mr Ahad had, at all times, accepted that his wife's objections were misplaced and unreasonable.

At first appeal, the County Court held that it was reasonable for the Council to expect such disputes to be resolved within the household:

The objections fell to be considered as primary objections to suitability and the reviewing officer was entitled to reject them as a reasonable basis for refusing the offer in the light of: (a) the lack of foundation for the wife's objections; (b) the fact that the reviewing officer found that Mr Ahad was given particulars of the property and its location before bidding for it; (c) it was a choice-based bidding system; (d) the Authority was not concerned with matrimonial problems arising between the persons to be housed in a single household and the result of a dispute as to subjective matters of suitability; and (e) the Authority was not in a position to make findings of fact as to the legitimacy of Mr Ahad's fears about the future of his marriage.
At renewed permission to appeal hearing, Lord Justice Lawrence Collins considered whether this case raised a point of principle or practice in relation to the two part test of s.193(7F) set out in *Slater v London Borough of Lewisham* [2006] EWCA Civ 394 and applied in *Ahmed v Leicester City Council* [2007] EWCA Civ 843. That test being both objective suitability for the applicant and a subjective test of whether it was reasonable for the applicant to accept the accommodation.

The Court held there was no point of principle or practice at issue. The Council had taken the 'new' facts into consideration and there was no flaw in the reasoning or process.

It is worth noting that the dual test of reasonable and suitable is upheld here, with no question of the subjective test not being required, as suggested by the Court of Appeal judgment in Omar v Birmingham.

Deficiency in a decision

Thu, 19 Jun 2008 20:40:27 +0000

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London Borough of Lambeth v Johnston [2008] EWCA Civ 690 is an appeal to the Court of Appeal from a County Court s.204 appeal.

The brief facts - the Claimant applied to Lambeth as homeless in September 2004. He told the officer he had an alcohol problem Lambeth put him into temporary accommodation. In September 2005, with no further interview or enquiries, Lambeth made a s.184 decision that he was not vulnerable.

At s.202, this was upheld, despite new evidence from the Claimant's drug dependency agency that he was Class A dependant and alcoholic. He was now on a treatment programme but in a vulnerable condition. There was also evidence from his GP to the same effect. The s.202 said not vulnerable, , based on a Nowmedical opinion on drug and alcohol abuse.

At the first s.204 appeal, the Court held that the s.202 was inadequate in its response to the material available, over-reliant on the Nowmedical opinion, and Wednesbury unreasonable. However, the Court also said that even if this was not so, the failure to conduct furthe enquiries or a fresh interview during the year before the s.184 decision would mean that there was a serious procedural irregularity in the decision. This should have been obvious to the reviewer, triggering regulation 8(2) of The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999:

(2) If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is

minded nonetheless to make a decision which is against the interests of the applicant on one or more issues, the reviewer shall notify the applicant –

(a) that the reviewer is so minded and the reasons why; and

(b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing.

The reviewer had failed to do this. The matter was remitted for a fresh s.202.

The new s.202 also concluded that the Claimant was not vulnerable. There was no notification that the reviewer was minded to make a decision against the applicant.

The Claimant went to s.204 appeal on, in part, the grounds that Lambeth were in breach of Reg 8(2) in failing to notify of being minded to find adversely despite the clear deficiency in the s.184 process. The Court agreed and upheld the appeal, with costs. Lambeth appealed to the Court of Appeal.

Lambeth argued that

- Given the facts and history of this case, all parties were well aware of the specific issues under consideration in the s.202 and that a Reg 8(2) noification would have served no purpose.
- The review officer had considered the deficiency - which had in any case been raised at the first appeal - and, after talking to Lambeth Legal, decided that in the circumstances, it wasn't necessary to send a notification.

The Court agreed that in the specific circumstances of this case, the notificiation may have made little or no practical difference, but that was beside the point. Accepting the Claimant's arguments, the Court found that Reg 8(2) was not an option, or dependent on the review officer's view on its practical benefit to the applicant. It was a duty imposed by the terms of the regulation if there was an apparent deficiency or irregularity in the s.184 decision - either in the process of making it or in the decision itself.

The Court's statement on the importance of the regulation is worth noting.

53. It is one thing for an applicant to be able to make representations on the matters in issue and then apprehensively await the review officer's decision, whichever way it may go. It is quite another for an applicant, not just to be able to make such representations, but then also to be given (i) advance notice of the review officer's reasons for his provisionally adverse views, and (ii) the opportunity not just to make further *written* representations as to why those views are not justified by his reasons, but also *oral* representations to that effect. Previously the applicant will simply have addressed the issues as best he can. Now he will have the opportunity to respond specifically to the review officer's own reasons as to how he proposes to deal with the issues. That is a most important advantage to the applicant. It may well, in many cases, enable him to engage in no more than an exercise of advocacy. But advocacy can turn a case. There can be few judges who, having formed a provisionally adverse view on a skeleton argument advanced in support of a case, have not then found their view transformed by the subsequent oral argument for which, in the art of advocacy, there is no comparable substitute. The opportunity open to an applicant to try, by written and/or oral argument, to persuade the review officer that his reasoning for his provisional conclusion is mistaken is – at the very least – potentially of great benefit to an applicant. To be deprived of that right is or may be seriously prejudicial.
The Court upheld the s.204 appeal finding that the failure to consider that this was a case where Reg 8(2) was engaged was indefensible and unlawful. *Hall v. Wandsworth London Borough Council* [2005] 2 All ER 192 followed.

Failure by the review officer to adequately consider, in an objective manner, whether a s.184 decision is deficient or irregular in content or process is susceptible to judicial review principles (Wednesbury unreasonableness) and therefore also to s.204 appeal.

[Many thanks to a reader and commentor here for sending his own report, which was useful for me, but alas, for reasons of employment related discretion, it couldn't be posted. But guest posts/case notes isn't a bad idea...]

S.204 Appeal out of time

Fri, 11 Jul 2008 23:16:14 +0000

NL

Barrett v LB Southwark [2008] EWHC 1568 (Comm) was an appeal of a dismissed application for permission to make a s.204 appeal out of time on an intentional homelessness decision upheld at s.202 review. For some reason it was heard in the Commercial Court (?) and it isn't yet on Bailii, but is on Lawtel for those that have access.

First a note of the judgment, and then a spot of finger pointing.

Ms Barrett is profoundly deaf with three children, two under 18. She became homeless after a mortgage repossession, because she couldn't

keep up payments. After application to Southwark as homeless, she was notified on 2 July 2007 that they had decided she was intentionally homeless. Ms Barrett went to Blackfriars Advice Centre, who submitted a 'detailed submission' for the s.202 review. Southwark finally finished the review in February 2008. The review decision was dated 7 Feb. It contained Southwark's standard line that the right to appeal must be exercised "within 21 days from the date of this letter". The review decision was received by Blackfriars on 14 Feb. On 15 Feb, Blackfriars notified Ms B of the decision and advised her she had 21 days to appeal and that she needed to see a solicitor. (Blackfriars don't have funding for representation). She received the Notice to Quit from temporary accommodation on the same day.

According to Ms B's evidence, there was then a lengthy and sorry tale of trying to find representation, receiving wrong advice from various sources, including solicitors, and finally getting a decent solicitor on 2 April. An appeal with application for permission was lodged on 3 April 2008.

The application for permission was refused by HHJ Gibson at Lambeth County Court. That decision was appealed to the High Court.

S.204(2) HA 1996 states that:

An appeal must be brought within 21 days of his [appellant] being notified of the decision, or, as the case may be, of the date on which he should have been notified of the decision on a review.
S.204[2A] adds
The Court may give permission for an appeal to be brought after the end of the period allowed by (2), but only if it is satisfied (a) where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time, or (b) where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission.
Here the issue was primarily S.204[2A](b). However the Court makes time to correct an error in HHJ Gibson's judgment about the date from which the 21 days runs.

The date from which the 21 days runs is the date on which the applicant is notified of the decision. We all knew this, there are sufficient previous judgments on the matter, so I don't know what HHJ Gibson was doing taking the date as the date on the letter.

Southwark's routine line at the end of both s.184 and s.202 decision letters is wrong, and Southwark know it is wrong. In this case, the High Court also decided that one could not take the date the decision letter was received by the applicant's advisors as being the date the applicant was notified. The proper date was 15 Feb. I'm not sure this would hold if it was solicitors advising on the s.202, rather than an advice centre, but it is an interesting point if one really needs to argue the extra day or so.

Much of the rest turns on the specific facts of the case. Ms B's profound deafness and telephone communication via a not wholly functional type talk relay system, combined with the advice that 'she needed a solicitor', and her lengthy and determined efforts to find a solicitor, were considered. The High Court reversed HHJ Gibson, finding that there was good reason for the failure to bring the appeal in time and for the delay in applying for permission. The delay was because Ms B was seeking advice she could undestand and follow, and she had not received it until 2 April. In addition, although this is not a requirement for the exercise of discretion under s.204[2A], the appeal was not hopeless and had merits.

There are some general points to note.

'Good reason' should not be taken as simply a synonym for 'valid reason'. Good reason has its common parlance meaning. The definition of 'good cause' in Social Security Commissioners Decision R(S) 2/63(T) expressly approved. it reads:

In Decision C.S 371/49, the Commissioner said ""good cause" means in my opinion, some fact which, having regard to all the circumstances (including the claimant's state of health and the information he had received and which he might have obtained) would probably have caused a reasonable person of his age and experience to act or fail to act as the claimant did". This description of good cause has been cited in countless cases. it has stood the test of time. In our judgement it is correct. The word 'fact' of course means a combination of events happening either simultaneously or in succession.
Refusing to accept unfavourable advice, by itself, does not rule out good cause. (This is reference to an odd part of HHJ Gibson's judgment, apparently saying that she should have accepted the unfavourable (and actually actively bad) advice, and by pressing on, she lost 'good reason' for delay.).

On costs, it is accepted that on an application for permission to appeal out of time, the costs should usually be borne by the applicant, although in this case, Southwark had sent Counsel to oppose the application rather than left it to the Judge, which would also be a consideration on costs. Ms B got the costs of the appeal of the decision on permission, with no order as to costs on the intial permission hearing.

Now for the finger pointing. Ms B's evidence gave a detailed account of trying to find a solicitor to take on the appeal. She went to the Law Society's find a solicitor site. All of those she initially contacted turned her away, referring her to others. The judgment speculates that solicitors were reluctant to take the case because

It appears that legal aid housing advisors get paid only a limited fixed fee for their work in this field, and dealing with a deaf client adds to the time to be spent on the case.
I don't know where the Court got this from (I suspect a misunderstanding, but then I haven't yet met any Counsel who fully understand how funding actually works), but it is, of course, wrong. A s.204 appeal would spend about 60 minutes on a fixed fee legal help before devolved powers were used to enable the appeal to be drafted, grounds prepared and issued.

What is clear is that Ms B spent a lot of time trawling round firms, both legal aid and non-legal aid. Her statement, as paraphrased in the judgment, makes for deeply discomfortingly reading. Now, I grant that none of the firms mentioned got to put their account of events, but I would also say that some of the 'who and what' did not surprise me. So, I quote:

Ms Barrett's daughter spoke to Andrews Solicitors without revealing Ms Barrett's deafness and they agreed to give her an appointment. When she arrived she says they told her that nothing could be done. They did not tell her why that was so; she never received a client care letter or any letter confirming the advice. She thinks she was asked to pay about £130 for this service. [Interesting, Andrews do or until very recently did legal aid!]
On 12 March Ms Barrett secured an appointment with Messers Gan & Co, and she was told she should 'forget trying to bring an appeal'. The solicitor did not explain why but drafted a letter for her to send to the Council requesting that they extended the deadline for termination of her temporary accommodation. She was handed a summary of what had been said. The note starts: "we have objected to Notice to Quit - this is best.
Ms Barrett found out about a service called Community Legal Advice [presumably the CLS advice line] and she contacted their helpline on 19 march. the following day she received an advice letter in which it was said "the decision can only be appealed within 21 days of the date of the review decision, which will have passed in your case. You can stil make the application, but the court may reject it for being out of time". They further said that bringing an appeal was "outside our remit as we do not deal with civil claims". The organisation sent her a list of solicitors whoe, they suggested, she should contact. [If this is the CLS, well done. Wrong advice and actually fibbing about being able to act in a s.04 appeal - they can and do, via Derbyshire Housing Aid.]
Ms Barrett tried Glazer Delmar, was offered an appointment but was told they weren't able to help when she got to their office having taken the day off work.

Next Ms Barrett

was told by Messers Peter Otto & Co that if she paid a fee of £60 they would try and help her. She paid. The person concerned rang up the Council and suggested she should return to the HPU to make a new application. {The HPU told her she was wasting her tine and the advice was wrong] She went back to the solicitors who "didn't want to know and told me to leave".
Finally, via Southwark Law Centre and the Southwark housing lawyers group email ring, Ms Barrett's case was picked up by Pierce Glynn, who took the case to this appeal. Counsel was Stephen Reeder.

Where to start? Honestly, where to start? Obviously, I know the area. I can certainly believe that many firms referred Ms Barrett on. I can pretty safely say she didn't contact my firm - I would almost certainly have been the one taking the call - but I can't say that we would have been able to take the case. Maybe so, but we were pretty swamped then (as now) and I would probably have given her some other firm's numbers and the CLS line and website. No issue about deafness would have been involved. I suspect the same would have been true for quite a few other firms.

However, if Ms Barrett's statement is even close to a representation of events, the treatment that she received was at worst incompetent and exploitative - what the hell were non-legal aid, non-housing firms doing taking her money? Or in one instance what was a supposed legal aid, supposed housing firm doing taking her money and giving bad advice? - or at best careless of her situation. After all a day off work, unpaid, is a big deal.

Add in the well meaning but utterly out of their depth and plain wrong attempts at assistance by the Royal Association for Deaf People - for pity's sake, advice people should not try to deal with these situations by having a stab at utterly unknown law themselves - and it is clear that, with the honourable exceptions of Blackfriars Advice Centre and Pierce Glynn, Ms B was pretty comprehensively failed by advice and housing law provision in Southwark/Lambeth.

At first glance, this looks like a strong argument for an LSC style CLAN - integrated diagnosis and referral across a network of providers. But then look at what the Community Legal Advice line did for her. And this is the LSC flagship for the new world of advice provision.

Frankly, I find this all very depressing. I know full well that there are lazy, incompetent and exploitative firms out there. I've been against them in a few cases. And there are some very good legal aid housing firms in this area of London, but I suspect that these were the ones at capacity. So where is the additional capacity? Because, on this anecdotal evidence, there isn't much point in relying on the CLA phone advice to pick up the slack.

Each had a wooden horse

Sun, 29 Nov 2009 18:29:43 +0000

chief

R (A) v Croydon & R (M) v Lambeth UKSC [2009] 8

This was an appeal heard by the House of Lords over the course of four days in July, but with judgment delivered by the new Supreme Court. We reported the Court of Appeal's judgment here. At issue was to what extent the courts could review the decision of a local authority that an individual is over the age of 18. On one view this case turns on a narrow point about construction of the Children Act 1989 and does not really need a lengthy examination on a housing law blog. I'm going to suggest that there is plenty of juicy stuff in here, albeit *obiter*, that is worthy of consideration.

The normal order of things is of course for young people to claim to be older than they really are. Scores of cottage industries churning out fake IDs have depended on this pretty much since the dawn of time. Claiming to be younger than one really is has long been the preserve of Hollywood actresses, supermodels and footballers of a certain nationality (allegedly).

However, there are certain benefits to being found to be under 18. It opens the door to accommodation under the 1989 Act. Someone over 18 is not capable of being a "child in need" under s.20(1) and cannot therefore be entitled to accommodation under that section. There are other legal consequences that flow from this, see for instance the discussion in *R (M) v Hammersmith & Fulham* [2008] UKHL 14.

Everyday experience tells us that assessing someone's age accurately is no easy task. It will be clear that the decision in these cases is an important one to get right. Quite apart from the resource implications, which are not insignificant, wrongly classifying a child as an adult, or vice versa, can lead to serious consequences for them. In this regard it is probably better to exercise any element of doubt in favour of assessing someone as younger rather than older. As an ILPA report has stated "the risks of wrongly treating children as adults are considerably higher than the other way round. This is because the children's system has in-built support and supervision to prevent children from being harmed. No such safeguards exist in the adult system." This was endorsed by the Children's Commissioner for England before the Court of Appeal in this case.

Facts

The facts of these cases can be very briefly stated. The appellants arrived as unaccompanied asylum seekers. They claimed to be under 18, but social workers decided that they were over the age of 18, despite there being some medical evidence in both cases to suggest that they were under 18. In A's case there was some documentary evidence too, while in the other an immigration judge had accepted that M was 17 years old.

Issues

There were three issues before the House of Lords, identified by Lady Hale at [13]:

1. is the duty imposed by s.20(1) owed only to a person who *appears* to the local authority to be a child, so that their decision can only be challenged on *Wednesbury* principles, or is the duty owed to any person who in *fact* is a child, so that a court can determine the issue on the balance of probabilities?
2. is the issue of whether someone is a child is one of precedent fact to be decided by a court on the balance of probabilities?
3. does s.20(1) give rise to a civil right so that Art 6 of the ECHR is engaged and, if so, is the process whereby social workers assess age coupled with the availability of JR on *Wednesbury* principles sufficient compliance with Art 6?

Children Act 1989

It may be helpful to set out a few of the relevant provisions of the 1989 Act here.

Section 17(10):

For the purposes of this Part a child shall be taken to be in need if—
(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
(c) he is disabled,
and "family" , in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.
For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family" , in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

Section 20(1):
Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with

suitable accommodation or care.

Section 105(1):
In this Act—

... "child" means, subject to paragraph 16 of Schedule 1, a person under the age of eighteen

Note that paragraph 16 of Schedule 1 does not apply in this case.

'Child' or 'Child in Need'?

So 'child' is defined as "a person under the age of eighteen". This is the definition used throughout the Act. As the appellants argued the definition was not:

[14] ... "a person who appears to the local authority to be under the age of eighteen" or "a person whom the local authority or any other person making the initial decision reasonably believes to be under the age of eighteen". Reaching the conclusion that this is what it means in section 20(1) requires, as the Court of Appeal accepted, words to be read in section 20 which are not there.
The respondent LAs argued (see [20]) that "child in need" was a composite term of art that requires the sorts of professional value judgment that Parliament cannot have intended should be made by the courts.

Lady Hale gave the lead judgment, with which all members of the Court agreed. In her opinion:

[26] ... The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is “in need” requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and “Wednesbury reasonableness” there are no clear cut right or wrong answers.
[27] But the question whether a person is a “child” is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

[28] ...In section 20(1) a clear distinction is drawn between the question whether there is a "child in need within their area" and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In section 17(10) a clear distinction is drawn between whether the person is a "child" and whether that child is to be "taken to be" in need within the meaning of the Act.

Lord Hope agreed at [51]:
The question is whether the person is, or is not, under the age of eighteen. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court.
This leads into whether or not the question is one of jurisdictional or precedent fact. In the Court of Appeal Ward LJ thought this was not a precedent fact case because he viewed the question as whether a person was a "child in need". Lady Hale thought that this was looking at the wrong question:
[32] However, as already explained, the Act does draw a distinction between a “child” and a “child in need” and even does so in terms which suggest that they are two different kinds of question. The word “child” is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it.
Lord Hope again agreed:
[53] ... The question whether the child is “in need” is for the social worker to determine. But the question whether the person is or is not a child depends entirely upon the person’s age, which is an objective fact. The scheme of the Act shows that it was not Parliament’s intention to leave this matter to the judgment of the local authority.
Therefore, where there is a dispute, the courts can determine an applicant's age on the balance of probabilities as part of judicial review proceedings. JR can be adapted to deal with the determination of questions of fact, see *R (Wilkinson) v Broadmoor Special Health Authority* [2001] EWCA Civ 1545 (see in the present case Lady Hale at [33] and Lord Hope's comments on the practical consequences at [54].

Article 6

Although this was enough to deal with the appeal both Lady Hale and Lord Hope went on to consider whether a civil right was being determined and therefore whether Article 6 was engaged. Although this part of the opinions is strictly *obiter*, it is still very important and will presumably have an impact in other situations, so all of [35]-[45] and [55]-[65] are worth looking at. It will become apparent that there was here a slight divergence of opinion on whether Art 6 applied.

Firstly, it will be remembered that in *Runa Begum* the House of Lords had assumed without deciding that a claim to be provided with accommodation under Part VII of the Housing Act 1996 could give rise to a civil right. However, there is no Strasbourg case that has gone that far. The appellants relied on a series of Russian cases (such as *Teteriny v Russia* and *Sypchenko v Russia*), which they claimed did establish this proposition. Both Lady Hale and Lord Hope noted that there did not appear to be any argument on the point in the Russian cases and they did not assist the Court.

Lady Hale concluded at [40] that:

...[I]f a right such as this is a "civil right" at all, it must lie close to the boundary of the concept and not at the core of what it entails. If so, this may have consequences for the second question, which is what article 6 requires.
Lord Hope was prepared to go further. I won't break the whole thing down, but after considering the authorities at [55]-[64] he concluded that:
[65] ...I think that it can now be asserted with reasonable confidence that the duty of the local authority under section 20(1) of the 1989 Act to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of the factors mentioned in that subsection does not give rise to a "civil right" within the meaning of article 6(1) of the Convention.
Given her conclusion Lady Hale went on to consider what Art 6 required, if it was engaged. She said that:
[44] I would be most reluctant to accept, unless driven by Strasbourg authority to do so, that article 6 requires the judicialisation of claims to welfare services of this kind. Unlike the arguments based upon statutory construction and jurisdictional fact, Mr Howell's [counsel for A] argument cannot sensibly distinguish between the determination of age and the determination of the other criteria of entitlement. Every decision about the provision of welfare services has resource implications for the public authority providing the service. Public authorities exist to serve the public. They do so by raising and spending public money. If the officers making the decisions cannot be regarded as impartial, and the problem cannot be cured by the ordinary processes of judicial review based upon the usual criteria of legality, fairness and reasonableness or rationality, then tribunals will have to be set up to determine the merits of claims to children's services, adult social services, education services and many more. Resources which might be spent on the services themselves will be diverted to the decision-making process. Such a conclusion would be difficult, if not impossible, to reconcile with the decision of this House in *Runa Begum*. The degree of judicialisation required of an administrative decision, in the view of Lord Hoffmann in *Alconbury*, depends upon the "nature of the decision".
[45] If this is a civil right at all, therefore, I would be inclined to hold that it rests at the periphery of such rights and that the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of article 6.
Lord Walker acknowledged the force of Lord Hope's reasoning on Article 6, but preferred to leave the point open. Lords Scott and Neuberger agreed with Lady Hale.

I think that this result must be right, it is the one that gives effect to what must have been the intention behind the Act. Make no mistake though, this is going to leave the Admin Court with some difficult decisions to deal with. If you doubt this then look back at the Guidelines for Paediatricians quoted at [5] in the CA's judgment, or see the difficulties that Collins J identified at [15]-[32] in the connected case (reported by us here).

While at first blush I find the idea that this is not a civil right quite a difficult one to accept, I must admit that the argument is quite compelling. This does seem to be the correct interpretation of the Strasbourg case law. It will be interesting to see whether this will affect the appeal in *Ali v Birmingham* which the Supreme Court finished hearing two days before this judgment was handed down. In the CA Ward LJ had been comforted by the decision in *Ali* that JR did provide compliance with the standard required by Art 6. Apparently both Lord Hope and Lady Hale heard the appeal in that case (it's shown with Tomlinson as the lead case, but Tomlinson dropped out of proceedings at the CA stage). Of course the present case was heard before judgment in *Crompton v UK*, but I'm not sure that that case takes the argument any further.

Homeless maladministration

Thu, 24 Jul 2008 22:58:28 +0000

NL

Garden Court's bulletin for 14 July (I'm catching up after the holiday) mentions a couple of interesting Local Government Ombudsman's reports on the operations of Homeless Units in Lambeth and in Haringey.

Complaints 07/B/01138 & 07/B/05232 against Lambeth [link is to Word Doc] concerned delays by Lambeth in deciding on homeless applications. The Code of Guidance states that decisions should be made within 33 working days of application. In the case of one complainant, the decision had taken 9 months, leaving her in hostel accommodation with her baby. In the case of the other, the decision took 10 months while she and her child lived with family and friends.

The reason, the Ombudsman found was that:

In 2007 Supply and Demand underwent a "root and branch" reorganisation resulting in significant changes to the way in which all services are arranged and delivered, including the creation of an enhanced Prevention and Options Service. New structures came into effect in April 2007 and included the movement of six former Homelessness Assessment Team officers to the new Prevention and Options Service. However, the outstanding cases, approximately 250 in all, remained with the Homelessness Assessment Team, which also experienced a lack of leadership and guidance following the changes.

This resulted in a large backlog. Despite assurances to the Ombudsman that the backlog had been identified as an issue and a start made in December 2007 to clear it, Lambeth were saying in May 2008 that the backlog would take a further 18 weeks to clear.

The Ombudsman found:

That the Council did not take action to prevent these delays, and the fact that it appears to have been unaware of, or unconcerned about, the likely impact of removing half its homelessness assessment officers both amount to maladministration. Moreover, it seems to me that it took the Council almost eight months to realise that a backlog of assessments had developed and required positive action to deal with it. [...] The failure to take prompt corrective action once the backlog started to become apparent amounts to further maladministration.
In Complaint 06/A/12508 against Haringey [Link to Word Doc] something more than a managerial stuff up was at stake. The complainer made a homeless application to Haringey in January 2005. Haringey began making enquires and a month later accepted a duty. However, Haringey did not offer interim accommodation under s.188 on beginning the investigation. When, after a fortnight, the applicant's solicitors wrote requesting s.188 accommodation as she had no other place to stay, Haringey replied that she 'could apply for interim accommodation if 'she genuinely has nowhere else to stay'. The applicant was upset at her treatment and refused to make 'an application' for interim accommodation.

Haringey told the Ombudsman that:

The opening of a new homelessness application on 11 January 2005 does not imply necessarily that the council has *reason to believe* that she was homeless. It only indicates that she said she was homeless and we accepted a need to investigate … We had good reason to doubt [Ms David's] assertion that she had been made homeless from [her address] or had, in fact ever lived there.
Haringey added that it considered:
that to accept an application under Part VII of the Housing Act is not necessarily equivalent to "having reason to believe" that a person is homeless
This, apparently was maintained on the basis of Counsel's advice that it was a tenable view of s.183. Haringey added that the applicant's solicitors had not 'compelled' the Council to offer interim accommodation on application as they could have done [so apparently it was their fault for not making the LA comply with its duty]. Haringey had apparently invented a whole new category of 'enquiries' under s.183, rather than s.184.

The applicant's solicitors comments to the Ombudsman pointed out that *Aweys v Birmingham* had confirmed that the threshold triggering the duty to make enquiries is low, and that what is required is a 'belief' that the applicant may be homeless, not that the Council be reasonably satisfied that the applicant is homeless.

The Ombudsman states that:

The Council has, at various times during its correspondence with Ms David's solicitor and with my office, referred to the need to determine that there was reason to believe that she *was* homeless, and to its duty to provide Section 188 accommodation only where there was reason to believe that a person *was* homeless. Sections 184 and 188 of the Act refer only to the need for authorities to have reason to believe that an applicant *may be* homeless. This is a crucial distinction, and it is of concern that the Council has confused the two tests. Establishing whether a person is actually homeless is part of the purpose of Section 184 enquiries: in line with Paragraph 3.10 of the 2002 Code of Guidance (and Paragraph 6.12 of the 2006 Code) (see Paragraphs 11 and 16), it is only when Section 184 has been engaged that the authority must make inquiries to satisfy itself whether the applicant *is* homeless or threatened with homelessness. It is therefore of concern that the Council believes that it needs "to satisfy itself that it has reason to believe that a person *is genuinely homeless"* [my italics] before considering whether it needs to secure interim accommodation for him or her (see paragraph 31). The test that it should have applied involved a lower threshold for the applicant to meet.
Exactly. That sounds like a clear statement of the law. Authorities can't invent new thresholds of belief required or new 'preliminary' enquiries for themselves.

Children Act - 'requires accommodation'

Tue, 29 Jul 2008 22:42:36 +0000

NL

This is a significant case on whether Social Services or Housing Departments have a duty to accommodate a homeless child and whether a s.20 Children Act duty arises.

G, R (on the application of) v London Borough of Southwark [2008] EWCA Civ 877 was a case in which a 17 year old child, G, who was initially living with his mother following a successful asylum application, could no longer stay at that home. He presented to Southwark Social Services and after assessment, was referred to the HPU for accommodation under Part VII.

The issue in the judicial review and in this subsequent Court of Appeal hearing was the validity and meaning of the distinction between 'requires accommodation' and 'requires help with accommodation' as set out in the Circular LAC (2003) 13 as guidance on s.17 and s.20 of Children Act 1989 as amended.

Briefly, the facts were that Southwark performed a s.17 assessment (under threat of JR by Fisher Meredith) and concluded that G was in need of help with accommodation, not requiring accommodation under s.20. He would therefore be satisfactorily aided by Part VII homelessness procedures by the housing department. G sought Judicial Review of this decision. The JR application was effectively on the basis that a child who fell under s.20(1)(c), a G did, was owed the s.20 accommodation duty. That claim failed on the basis that Southwark had assessed and their evaluation was that G did not 'require accommodation', Simon J citing the 2003 Circular specifically. G also sought at hearing to raise the rationality of the decision, but this was refused permission. G appealed.

At appeal, G argued that

i) the assessment on its face showed that G did "require accommodation"; ii) it was accordingly unlawful for Children's Services to decide that he did not require accommodation but only "help with accommodation"; iii) in any event there was no warrant for drawing any distinction between requiring accommodation and requiring help with accommodation. The only proper distinction was between a child who required accommodation because he did not have accommodation and a child who did not require accommodation because he already had it. [para 15]
In a split decision, the majority of the Court of Appeal decided that the 2003 Circular was lawful. Although s.20 Children Act did not draw an express distinction between 'help' and 'requiring', s.17(6) enabled provision of accommodation for children that was not under s.20, thus presupposing that not every child, not even every child who meets s.20(1) criterea must require accommodation under s.20. *H, Barhanu and B v Wandsworth Hackney and Islington* [2007] 2 FLR 822, 839 approved, with the emphasis that:
a local authority should decide whether the child requires to be provided with accommodation or merely needs 'help with' accommodation without regard to the implication of his being or not being a looked-after child. [para 23]
That there was a referral to the HPU did not equate to accommodation being required. In the decision letter, the HPU was one agency amongst others that would be addressing G's needs and it may not be the HPU providing accommodation [This is not a very satisfactory argument at all, as far as I understand what is meant, which is not easy.]

For these reasons there is no challenge to the rationality of Southwark's decision and the appealed dismissed. This was the majority judgment of LJ Longmore and LJ Pill.

LJ Rix held the opposite view strongly [paras 75-77]. I quote at length, because it strikes me as the more accurate judgment:

I regret that I am therefore unable to see the matter as Longmore LJ and Pill LJ see it. If one addresses the decision letter or the arguments and submissions made by or on behalf of Southwark, it seems to me to be plain that Southwark has attempted to say that it appears to it that G does not "require" accommodation because it can be provided to him by the housing department. It is only in such circumstances that what is said to be needed by G is "help with accommodation" rather than the provision of accommodation itself. It has in truth been recognised that G requires accommodation, but because it is said that that can be provided by the housing department, therefore it is said that all that G needs from the children's services department is "help" in referring him to the HPU. However, that is, for all the reasons discussed in the jurisprudence which in my judgment is clearly helpful to G, either a side-stepping of Southwark's obligations, or perhaps proceeds from a lack of understanding about their obligations. For instance, the argument has been addressed that the Housing Act regime takes precedence over the Children Act regime. That, however, is in my judgment incorrect, as seems plain on the wording and history of the statutes themselves, but has in any event been confirmed by Baroness Hale in *Hammersmith and Fulham*. Moreover, in *Wandsworth, Hackney and Islington* Holman J, applying the analysis in *R v. Barnet*, has demonstrated that, where it applies, the section 20(1) specific duty takes precedence over the general powers or duties in section 17.

It appears to me that Longmore LJ has come to a different conclusion because he regards the local authority as having a broad discretion, for the purposes of section 20(1) and the question whether or not the child "appears to them to require accommodation", of deciding not so much that question but rather the broader one of whether or not the child appears to them to be in need of being "looked after": see paragraphs 27/28 above. This ties in with passages in the LAC 13 guidance and in Mr Brims' assessment to which prominence has understandably been given at paragraphs 4, 19 and 25 above. Therefore, it appears to be suggested that in the case of a resourceful teenager of 17, his need for accommodation, however genuine it appears to be for the purposes of the three situations provided for in section 20(1), can be dealt with merely by providing "help" towards the acquisition of accommodation provided by the housing department under the Housing Act regime. Thus, it is said, Southwark's view of the matter, that "help" is all that is needed, not "accommodation" itself, is a legitimate response.

In my respectful judgment, however, that is not the case. The test under section 20(1) is not the broad test of whether the child in question needs to be "looked after", but the much narrower test of whether the child appears to require accommodation as a result of finding himself alone in any of the three situations set out in that sub-section. The need for accommodation in those settings is the test for taking the child into the looked after system. In this respect section 20(1) can be compared, for instance, with section 20(3), where the local authority has a somewhat wider discretion ("whose welfare the authority consider is likely to be prejudiced"). Similarly, section 20(4) gives to the local authority a discretion (together with a power rather than a duty) to provide accommodation "if they consider that to do so would safeguard or promote the child's welfare". In neither of those sub-sections, however, is it a statutory ingredient of the local authority's powers or duties that the child should have found himself alone (to gloss thus the effect of the three triggering events under sub-section (1)). In *Wandsworth, Hackney and Islington* Holman J rejected the argument: it was essentially the argument addressed in the *Wandsworth* case itself (at para 53), but rejected; it was also an argument sought to be supported by reliance on a passage in the LAC 13 guidance quoted by Holman J at para 63 but commented on by him adversely at para 64 of his judgment (see at para. 68 above).

I would have to say I'm with LJ Rix on this one. Even if one accepts the existence of a 'requires' v 'help with' accommodation distinction, neither LJs Longmore or Pill deal with what the distinction might actually mean in practice, aside from some references to Southwark's report discussing G's 'resourcefulness'. After all, if the decision is to be made 'without regard to the implications of being or not being a looked after child' then having identified housing as a primary need in the assessment pretty much sorts the matter for s.20, but apparently not...

From the account of the pleadings, it seems as if LJs Longmore and Pill had restricted the issue that they were prepared to consider unduly - to an appeal on permission for JR on grounds of irrationality - and having reached the view that Southwark's decision was not unlawful apparently decide that it was not irrational for that same reason [para 28]. LJ Rix sees the appeal as on the issue of whether accommodation should have been provided under s.20 generally.

I hope Fisher Meredith can take this one to the Lords. It is a messy judgment that leaves Local Authorities at liberty to avoid s.20 accommodation duty by referral to the HPU and a Part VII Housing Act 1996 duty.

S.190 homeless duties and JR costs

Wed, 03 Sep 2008 21:49:11 +0000

NL

I'd managed to miss this one somehow, so thanks to the Garden Court bulletin of August for mentioning it.

R (Dumbaya) v Lewisham LBC [2008] EWHC 1852 (Admin) was the end point of a rather messy sounding set of proceedings. The Claimant had been accommodated under s.193 HA 1996, owed the main housing duty. She was then evicted from temporary accommodation for rent arrears. On a fresh homeless application, or alternatively a review of the discharge of duty, the LA claimed that she was intentionally homeless. The LA provided accommodation pending s.202 review, but refused to do so pending s.204 appeal, following a negative review.

The applicant applied for judicial review and received an order for temporary accommodation pending JR. In the meantime, her s.204 appeal was settled, with the s.202 decision withdrawn and a fresh review undertaken.

The JR had effectively been forgotten in the meantime, delays in the Admin Court being what they are. At the eventual JR hearing, the issue was a costs order against the LA in the JR proceedings. The LA argued that a) it was not clear whether it was a fresh application that was being dealt with, or a request for a review of the discharge decision and b) the applicant had a route open to her to apply to the County Court under s.204(a) to ask the court to review the decision not to provide temporary accommodation pending the s.204 appeal. Thus the JR was 'not at the obvious end of the spectrum' in terms of *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258.

The Court held that, as there was no requirement for a formal application, only that the LA have reason to believe that a person was homeless, point a) was disposed of. On the point b) - premature application for JR, the Court found that, as the LA did not point out to the applicant that she could apply to the County Court for interim relief if accommodation pending s.204 appeal was refused by the LA, the JR application was not premature. This was so regardless of whether there was a duty on the LA to point this out or not. The case was at the obvious end of the spectrum, given the LA's refusal to accept a duty under s.190. Costs to the applicant.

Worth noting that the applicant had mostly CAB assistance, not a solicitor on the homeless applications. Although it appears that Morrison Spowart (and Robert Latham) did the JR application, no point was taken by Lewisham (via Mr Broatch) on the applicant having full legal advice on her options at the point of the JR application. In any similar situation, I would expect that to be put up against the 'County Court relief not being brought to the applicant's attention' point.

Worth reading for the transcription of Counsel instructed at very short notice indeed ;-)

Homeless eligibility issue off to the ECJ

Sat, 11 Oct 2008 22:50:41 +0000

NL

Teixeira v London Borough of Lambeth [2008] EWCA Civ 1088 is a Court of Appeal hearing, referring questions about right of residence under Art 12 of Regulation (EEC) 1612/68 to the European Court. (This is very much a continuation of the issues in LB Harrow v Ibrahim [2008] EWCA Civ 386 - see this previous post on Nearly Legal).

The appellant is a citizen of Portugal, living in the UK since 1989. One of her children was living with her and was in full time education in London. Ms Teixeira had at one point been working but was no longer doing so, nor seeking work.

Ms Teixeira applied to Lambeth Council as homeless, claiming a right to reside under article 12 of Regulation (EEC) 1612/68 (Article 12), which states:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."
Ms Teixeira claimed that as her daughter was in full time education, she was not subject to immigration control and so not excluded from entitlement to housing assistance. *Baumbast v Secretary of State for the Home Department*, Case C-413/99, [2002] ECR I-07091 was raised.

Lambeth decided she was not eligible, upheld on s.202 review. At s.204 appeal at Lambeth County Court, HHJ Welchman decided that Art 12 could not assist Ms Teixeira as it was and remained a requirement that she should not be dependent on public funds. Shortly afterwards, the Court of Appeal decided *LB of Harrow v Ibrahim* [2008] EWCA Civ 386, which had referred reliance on Art 12, in a case where the mother was not an EU national, but the children were and were in school in England, to the ECJ. It is worth noting that the Court of Appeal in that case was distinctly doubtful about whether Art 12 gave a right to reside that would in itself escape the self-sufficiency requirements (which were not at issue in Baumbast).

Ms Teixeira was granted permission to appeal, and questions referred to the ECJ. The questions are as follows:

In circumstances where (i) an EU citizen came to the United Kingdom (ii) the EU citizen was for certain periods a worker in the United Kingdom (iii) the EU citizen ceased to be a worker but did not depart from the United Kingdom, (iv) the EU citizen has not retained her status as a worker and has no right to reside under Article 7 and has no right of permanent residence under Article 16 of Directive 2004/38 of the Council and the European Parliament (v) the EU citizen's child entered education at a time when the EU citizen was not a worker but the child remained in education in the United Kingdom during periods when the EU citizen was in work in the United Kingdom, (vi) the EU citizen is the primary carer of her child and (vii) the EU citizen and her child are not self-sufficient:

(1) does the EU citizen only enjoy a right of residence in the United Kingdom if she satisfies the conditions set out in Directive 2004/38 of the European Parliament and the Council of 29 April 2004?;

OR

(2)(i) does the EU citizen enjoy a right to reside derived from Article 12 of Regulation (EEC) No 1612/68 of 15 October 1968, as interpreted by the Court of Justice, without being required to satisfy the conditions set out in Directive 2004/38 of the European Parliament and of the Council of 29 April 2004; and

(ii) if so, must she have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence and have comprehensive sickness insurance cover in the host Member State?;

(iii) if so, must the child have first entered education at a time when the EU citizen was a worker in order to enjoy a right to reside derived from Article 12 of Regulation (EEC) No 1612/68 of 15 October 1968, as interpreted by the Court of Justice, or is it sufficient that the EU citizen has been a worker at some time after the child commenced education?;

(iv) does any right that the EU citizen has to reside, as the primary carer of a child in education, cease when her child attains the age of eighteen?

(3) if the answer to question 1 is yes, is the position different in circumstances such as the present case where the child commenced education prior to the date by which Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 was to be implemented by the Member States but the mother did not become the primary carer and did not claim the right to reside on the basis that she was the primary carer of the child until March 2007, ie after the date by which the Directive was to be implemented?

Hmm. This matter is, in some ways, more straightforward than the Ibrahim situation, as it is not complicated by the departure of the EU national from whom right to reside originally arose. Hopefully, the referral will be considered with Ibrahim, because otherwise we are in for a very lengthy wait indeed.

Counsel for Ms Teixeira was Adrian Berry, instructed by Hansen Palomares. Toby Vanhegan was instructed by Lambeth Legal and Clive Lewis QC and Deok Joo Rhee for the Treasury Solicitor.

Intentional homelessness and badly behaved children

Mon, 13 Oct 2008 19:01:55 +0000

NL

This is somewhat belated - I'd missed these and the court of appeal isn't on Bailii to link to - so thanks to Legal Action for the heads up.

White v Southwark LBC [2008] EWCA Civ 792 was an application for permission for a second appeal from a s.204 appeal. Ms White was excluded from her mother's home when she was 15. her mother said she had behaved unreasonably and broken house rules. Ms White later applied as homeless (apparently when over 18 with no settled interim accommodation - I may be wrong here). She was found intentionally homeless for her actions that resulted in her being excluded from the mother's home.

The second appeal was on the basis that her acts while a dependent child should not have been considered as the statutory regime did not envisage consideration of either homelessness of dependent children or applications by them.

Held - permission refused. Neither statute nor authorities prevented the consideration of the deliberate acts and omissions of children even at 13, 14 or 15. This conduct can be taken into account in applications by those now non-dependent.

N v Allerdale BC Carlisle County Court 4/08/2008, on the other hand, concerned a finding of intentional homelessness based on the

behaviour of the applicant's child. Ms N was given notice to leave her private rented accommodation due to the behaviour of her son, then 14. The landlord was quite clear it was not a problem with her conduct personally.

Allerdale decided she was intentionally homeless, upheld on review. On s.204 appeal HHJ Peter Hughes allowed the appeal and varied the decision to not intentionally homeless.

- The s.184 was silent on the acts or omissions of the applicant that had rendered her homeless.
- The reviewing officer had failed to identify this fundamental flaw, triggering the requirements of reg 8(2) of Allocation of Housing and Homelessness (Review procedures) Regs 1999. SI no 71.
- The correct question was not whether the applicant could show she had not acquiesced in her son's misconduct, but whether, on assessment of the all the available material, was there material that indicated she had not acquiesced.
- The reviewing officer should make clear that the applicant was being held responsible for the acts of another and give clear cogent reasons for this finding.
- Where credibility was at issue, fairness meant that the reviewing officer should have personally interviewed the applicant.

(Counsel, instructed by Shelter, was my new crush, James Stark of GCN)

Belated and in brief

Mon, 13 Oct 2008 20:34:28 +0000

NL

Also with thanks to Legal Action for this one I had missed (my fault because it dates back to before my illustrious co-bloggers joined NL)...

Littlejohn v City of Westminster [2007] EWCA Civ 1562. Court of Appeal permission to appeal on vulnerability.

A person's propensity to lose accommodation that they have managed to obtain does not render them vulnerable. The correct context for the test of vulnerability is a person who is actually homeless. But it may be that an ability to obtain accommodation will not contradict vulnerability if the obtaining accomodation proves illusory because of an inability to maintain it.

Addiction, relapse and priority need

Fri, 17 Oct 2008 13:30:24 +0000

NL

Simms v London Borough of Islington [2008] EWCA Civ 1083 is Court of Appeal case from a s.204 appeal.

The issue was vulnerability, the Pereira test, and the use of medical evidence.

Mr Simms was homeless,sleeping in his car, having lost his home after losing his job. He had an addiction to crack, asthma and suffered from depression and panic attacks. He applied to Islington as homeless, with support from Addaction Hackney, which pointed out the dangers of homelessness for his progress in drug treatment. His doctor first reported moderate depression and drug use.

At s.184 Islington found not vulnerable, following the recommendation of their medical advisor, who had not seen Mr Simms.

A further medicial report from Mr Simms doctor was submitted for the s.202 review. This report and the solicitor's submissions highlighted the risk of relapse into drug use if Mr Simms was street homeless, the solicitors arguing that this was a clear injury or detriment.

Islington's s.202 upheld the s.184, on the basis that his depression was not enough to make him vulnerable and that drug addiction was not a medical problem. The review letter mentioned the doctor's second report. No further advice from the Council's medical advisor was sought.

Mr Simms appealed, on the basis that:

(1) that the reviewing officer had not properly taken into account whether, having regard to the risk of a relapse, the appellant was vulnerable as a recovering drug addict for some "other special reason";

(2) that the reviewing officer had not properly taken into account all the medical evidence bearing in mind that the council's medical assessment adviser had neither seen the appellant nor consulted with his advisers. Moreover she had not been given the opportunity to consider Dr Anantha's second report of 2nd May;

(3) that the reviewing officer had not properly considered how street homelessness would impact on the appellant's psychiatric condition.

The s.204 appeal failed and was taken to the Court of Appeal on those grounds.

Held:

On the s.202 decision letter, the decision-maker had not overlooked the risk of relapse. The Council were well aware that Mr Simms was receiving assistance for his addiction and this had clearly been a factor in finding he was not Pereira vulnerable.

On the medical evidence, the decision-maker stated, correctly, that it was the LA's duty to determine vulnerability. They were entitled to prefer the evidence of their medical adviser and there was no requirement in every case to refer any further medical reports to the advisor (Shala distinguished). The differences between the first and second report from Mr Simms' doctor were not so great as to require a second opinion from the advisor. The review letter as whole did not give any reason to think that the decision-maker was not aware that the medical advisor had not seen Mr Simms or consulting his doctor.

The question of the impact on Mr Simms' psychiatric condition was not arguable if the appeal otherwise failed. In any case, it was clearly considered by the review officer in the s.202 decision letter and she was entitled to decide it did not render Mr Simms vulnerable.

Overall, not a happy case, but evidence, if more were needed, that the Shala conditions on use of medical reports and advice is concerned with specialist advice and reports from those qualified in the field. Where it is clear that an adviser has not seen the homeless applicant, by itself this does not render their advice of no or limited value.

The issue of danger of relapse into addiction as vulnerability is not closed off. What was upheld here was that the decision-maker was entitled, on the evidence before her,to take the view that she did. The view that although a self induced drug alcohol problem was not a reason for vulnerability, the risk of relapse may be, suggested by *Crossley v Westminster CC* [2006] EWCA Civ 535, [2006] H.L.R. 26, remains open.

On ramps and suitability

Wed, 29 Oct 2008 22:29:04 +0000

NL

Boreh v London Borough of Ealing [2008] EWCA Civ 1176 was an appeal from a s.204 appeal of a s.202 review that upheld a finding that a property offered in discharge of s.192(3) duty was suitable.

Mrs Boreh was owed the full housing duty by Ealing. Ealing offered a property in discharge of that duty, which Mrs Boreh rejected as unsuitable. Ealing found on review that it was. Mrs Boreh is significantly disabled, uses a wheelchair and cannot stand unaided for more than 2 minutes.

Her daughter saw the property on her behalf and rejected it, giving a number of reasons. of these, the one that remained significant on appeal to the Court of Appeal was the absence of a ramp to the stepped front door.

Ealing's initial decision made no reference at all to wheelchair access via the front door or any access to the property from the outside. On s.202 review, after an inspection of the property, Ealing said that the property was, or shortly would be, accessible via a side door and rear patio door, using an alley that had a wooden gate that 'could be widened if necessary' (having noted that it was too narrow for a wheelchair on a site visit), but noted that for front door access 'a ramp would have to be installed' and stated that 'it was confirmed with the owner of the property that a ramp would be fitted'.

On S.204 appeal, the issue was whether a property which was currently unsuitable could actually be suitable as an offer under s.210 in view of proposed alterations, adaptations or additions to it?

The Recorder found that it could, while it was question of fact and degree the language of s.206 [sic] permitted this. [The Court of Appeal pointed out he must have meant s.210 on suitability]. The Recorder found that amongst some other adaptations, 'there was to be a ramp to the front door' and that 'the gate would be widened if necessary'. There was no error in law in the s.202 review.

The Court of Appeal took a different view, based on a reading of the s.202 review decision.

There is nothing in principle wrong with the Recorder's view that prospective alterations and adaptations make a property suitable at the time of offer, para 27:

Whilst I record that we had no argument from either side to the contrary effect, I would respectfully agree with the Recorder that the suitability of offered accommodation is not to be judged exclusively by reference to the condition of the accommodation at the time of the offer, but that the assessment of its suitability can and should also take into account any adaptations or alterations that are, at that time, proposed to be made. I would, however, qualify that by saying that I consider that any such proposals would have to be the subject of assurances that the applicant could fairly regard as certain, binding and enforceable. I also agree with the Recorder that, if the accommodation as it currently stands is unsuitable, it will be a matter of fact and degree as to whether any such proposed adaptations and alterations will be such as to make it suitable. At one extreme, the proposed adaptations may be simple, and easily and quickly effected: for example, the installation of a ramp for access purposes. At the other extreme they may involve the carrying out of such major works as to make the accommodation uninhabitable in the meantime: in such a case the property might well be regarded as unsuitable despite the proposal to carry out the works.

However, the Recorder was in error in taking into account adaptations there were being proposed right up to the point of the review decision. The cut of point for considering proposed adaptations must be the initial decision. In this case there was no discussion of access via the front door or the alleyway at the time of the decision, which focused entirely on the suitability of the interior of the property. There was no ongoing discussion between Ealing and Mrs Boreh about adaptations after the decision that would merit later proposals being included in the review decision.

As Mrs Boreh's appeal actually focussed on the absence of the front ramp, the Court noted that it wasn't addressed in the initial decision but was acknowledged as required by the review decision, only to be met with the inconclusive statement that a ramp would be fitted. By whom and when, and when any agreement to do so was reached, was not clear at all.

The lead judgment is by LJ Rimer, but LJ Walls' additional comments bear quoting in full (paras 55-58):

I have to confess to some impatience that this case should not only have required an appeal to the Recorder but also a full hearing as a second appeal in this court. In my judgment, perhaps the most important issue in the case (the need for a ramp to enable the appellant to gain access to the property through the front door) could and should have been capable of resolution on the ground. That viewpoint is reinforced by paragraph 41 of the skeleton argument for the appellant in this court which states in terms that the appellant would most probably have accepted the accommodation had the offer contained any condition or undertaking to render it suitable.

As it is, however, I respectfully agree with Rimer LJ that it is the decision letter of 12 March 2007 which is the critical document, and as he has demonstrated, that letter makes no reference to the property being unsuitable because there is no ramp allowing the appellant to gain access to the property by the front door.

In my judgment, this matter could have been corrected by Ealing in a number of ways. For example Ealing could have acknowledged on the review that the property was indeed unsuitable without a ramp to the front door, and made a fresh offer, this time giving an undertaking or some other enforceable assurance (I respectfully endorse Rimer LJ's phrase "certain, binding and enforceable") that a ramp would be provided. By contrast, however, Ealing's review letter of 13 July 2007 repeats in terms its view that the property "was and continues to be a suitable offer of accommodation", and only addresses the question of the ramp with the assertion: "It was confirmed with the owner that a ramp would be fitted". For the reasons Rimer LJ has given this is simply not enough.

In my judgment, therefore, the message of this case is that however pressed local authority housing officers may be, they must address their minds to the real issues in any given case, and where simple alterations are required to render a property suitable, those issues must be addressed with clarity and certainty in the decision letters they write.

Catch-up miscellany

Tue, 02 Dec 2008 21:49:58 +0000

NL

Thanks, as ever, to Jan Luba and Nic Madge in Legal Action for putting out notes on cases, including those that don't make the reports. There were a few of those in December's Legal Action that are worth a mention - of course, all I have to go on is the LA note. (Hint - anyone sending a report to Legal Action could also think about sending one here, or you could send a report here even if you don't intend to send it to Legal Action. Full credit given - in a larger type size than LA, at that. Not that there is any rivalry intended, heaven forfend, we just like having new case info and things to speculate about up on the blog).

First up is *Birmingham City Council v Qasim* (Birmingham County Court 8 October 2008). An admin officer in Brum's housing department had arranged for 14 tenancies, completely outside the allocation process and with no authority. These had been disguised as mutual exchanges, where there were no exchanges. An audit report found no evidence to show complicity by the tenants in the fraudulent behaviour of the officer.

Birmingham sought possession on three alternative grounds:

1. The grant of tenancy was an unlawful allocation and so a nullity

2. HA 1985 Sch 2 Ground 1 and tenancy agreement - repossess the property where false information given to get the tenancy, or someone has given false information on the 'tenant's' behalf.

3. Ground 6 - mutual exchange for a premium.

One of the Defendants, supported by the others, applied to strike out the claim on the basis that there were no reasonable grounds to bring it.

On the evidence, the Circuit Judge found:

Ground 6 was not available as there were no exchanges

Ground 1 was not available on lack of evidence of false information being given

The CJ then turned to the unlawful allocation. He found that *Islington LBC v Uckac* [2006] EWCA Civ 340 was the relevant binding

precedent and that therefore Birmingham could only obtain possession on one of the Schedule 2 HA 1985 grounds. Accordingly, the possession claim was dismissed.

With all respect, this strikes me as questionable. Uckac simply doesn't address the unlawful allocation point, and if that point is right, there is no secure tenancy. This is a different point to the rescission argument in Uckac - see paras 25 and 26. I understand that Birmingham are appealing, and for once I would have to say I am not surprised.

Notting Hill Housing Trust v Deol (Brentford County Court 10 October 2008) - confirms that a s.21(4) notice must either expire on the end of the term of the tenancy (periodic) or have a functioning saving clause, 'after expiry of two months from the service upon you' won't do unless the days add up right. Oh and a month is a calendar month, not a lunar month (how desperate was counsel for the landlord?).

R(Hyslop) v Legal Services Commission [2008] EWHC 2294 (Admin) - retention of property (including a long lease) incurs a statutory charge, even where the loss of the property is only 'theoretical' due to the claim being hopeless and doomed to fail. As an aside, how does one rack up £6,371 of costs at legal aid rates on defending a 'doomed to failure' possession?

Kelly v Westminster City Council (Central London County Court 14 August 2008). A s.204 appeal. On review, Westminster upheld a decision that a 49 year old man who had asthma, back pain, depression and a history of crack cocaine use and of imprisonment was not vulnerable. This was despite the fact that he had at best stayed with friends, or crashed at crack dens while out of prison for intermittent periods since 2005. His homeless application was supported by a letter from a prison officer stating that he was institutionalised and would relapse on release. Westminster, in its wisdom, decided that he was not institutionalised and that he had managed to secure accommodation in the past.

On appeal, the Court found that the findings that Mr Kelly was not institutionalised and could find accommodation were so unreasonable, no reasonable review officer could have made them. The prison officer could not decide on vulnerability, but was capable of assessing whether someone was institutionalised. Staying with friends or in crack dens could hardly be taken as 'securing accomodation'. In any case Mr Kelly had been recalled to prison because he couldn't secure accommodation. Decision quashed. What can one say? I mean really...

Melka v Tower Hamlets LBC (Bow County Court 7 July 2008) - Interim accommodation in an area could amount to a local connection/normal residence. There was no rule that interim accommodation could not amount to residence of choice s.199(1)(a) HA 1996. A witness statment from a review officer that stated that an issue had been considered did not rewrite a decision letter that had failed to address a relevant issue.

A post on *R(M) v Barnet LBC* [2008] EWHC 2354 (Admin), which we had unaccountably missed, will be up in a day or so (make it two) - Children Act 1989 s.17 and s.20 duties.

Homeless review, Reg 8(2) and changed facts

Wed, 17 Dec 2008 20:52:46 +0000

NL

Reg 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 provides that if a reviewing officer on s.202 review considers:

that there is deficiency or irregularity in the original [s.184] decision, or the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of the applicant on one or more issues [the reviewing officer shall] notify the applicant (a) that the reviewer is so minded and the reasons why; and (b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing.
So what happens when a situation has changed between s.184 and s.202? Is Reg 8(2) triggered if the s.202 review is to find against the applicant on different grounds to the s.184?

Banks v Royal Borough of Kingston upon Thames [2008] EWCA Civ 1443 was an appeal from a s.204 County Court appeal. Not including the issues of vulnerability and medical evidence, which are by the by to the appeal decision, the facts were, briefly, that Mr Banks had made a homeless application, which was turned down as not being in priority need. Mr Banks then moved in to a room in an HMO. He made a further homeless application, as the room with shared facilities was not suitable for either his health condition or for seeing his son during his residence periods, as his son was not permitted to stay. Kingston issued a s.184 that Mr Banks ws not homeless. Mr Banks requested a review. In the meantime, his landlord served an NTQ with one month's notice.

Kingston's review officer decided that Mr Banks was now homeless, but not in priority need. No notice was provided to Mr Banks of the review officer's intention or the change of reasons. Mr Banks appealed on grounds that 1) reg 8(2) was engaged and the LA had failed to follow it, 2) if not, then natural justice meant that Mr Banks should have had the opportunity to make representations on the 'new' ground of decision, and 3) the Council had failed to make adequate medical enquiries. At County Court, Mr banks failed on all grounds. The Circuit Judge found that Reg 8(2) was not engaged. The s.184 decision was not irregular or deficient at the time it was made.

Mr Banks, with the aid of the Kingston and Richmond Law Centre, appealed to the Court of Appeal, on the same grounds.

The Court of Appeal held unanimously that the procedural safeguards in the 1999 regs were of the highest importance and any departure from them would be a ground of appeal. The purpose of the 'minded-to' notice is to give the applicant an opportunity to try to persuade the

reviewer that his reasoning is mistaken. It is potentially of great benefit to the applicant.

While a literal interpretation would suggest that the relevant date for considering a putative deficiency was the date of the s.184 decision, the function of the regulation is to give the opportunity to make representations on a specific point. A purposive interpretation should be adopted. So, although the original decision cannot be faulted, it came to have a deficiency of sufficient importance to trigger Reg 8(2), in the sense that further representations made in response could have made a difference to the reviewing officer's decision. Appeal allowed on the first ground. The second ground falls away and the medical issues would be the subject of further factual enquiry by the LA.

The Court also expressed disappointment that the appeals had had to be made. Mr Banks should, of course, have been able to make a fresh homeless application once he had received the NTQ, thus avoiding the s.202 review and reg 8(2) issue, but this had not happened.

In my view, this is a point worth having clarified in any case. In the unstable and shifting situations of many homeless applicants, changes in the facts between s.184 and s.202 are not uncommon.

The judgment also offers, for those newish to homeless statute and case law, a remarkably clear overview of the application process, with key cases. Worth a read, for those looking for a primer

(My thanks to Jo.)

Refusing Temporary Accommodation

Sun, 21 Dec 2008 21:31:34 +0000

NL

Once someone is in temporary accommodation, following an acceptance of the full housing duty to a homeless person by the local authority, what happens when that temporary accommodation becomes unreasonable for the household to continue to occupy, but alternative temporary accommodation is refused by the tenant?

Muse v London Borough of Brent [2008] EWCA Civ 1447 was an appeal arising from LB Brent's decision to discharge duty under s.193 HA 1996 when Mrs Muse refused alternative accommodation offered when her current temporary accommodation (at Press House!) became overcrowded.

Mrs Muse was successful at s.204 appeal, arguing that s.193(5) did not apply. S.193(5) provides:

The local housing authority shall cease to be subject to the duty under this section if the applicant, having been informed by the authority of the possible consequence of refusal and of his right to request a review of the suitability of the accommodation, refuses an offer of accommodation which the authority are satisfied is suitable for him and the authority notify him that they regard themselves as having discharged their duty under this section.

Mrs Muse argued that this did not apply where the person was not homeless and she had an assured shorthold of the Press House flat. This was accepted by the Court. Brent had also announced, in their offer and discharge letters, that they would 'instruct the housing association [the direct landlord] to seek possession'. This turned out to be an error. However, Mrs Muse's housing benefit was paid at higher rate as a person in temporary accommodation than as 'just' a tenant, so rent arrears would accrue quickly, as the rent was at a 'temporary accomodation' level. (This shows how ludicrous the charges made for temporary accommodation are - particularly when, as here, it is actually an assured shorthold tenancy! Stadium Housing again...)

Brent appealed to the Court of Appeal. Brent argued that 1) Once a duty arises, it continues until it ceases. It does not go into abeyance or become dormant. If the applicant is in temporary accommodation she can at any time be asked by the housing authority, in this case, Brent, to move to other accommodation. If the person to whom the duty is owed is occupying accommodation belonging to a private landlord, it follows that the housing authority can ask the private landlord to give her notice seeking possession if it wishes her to vacate the premises. This is important for policy reasons. Unless Wednesbury unreasonable, Brent can move those in temporary accommodation. 2) when it became aware that Mrs Muse was in unsuitable accommodation, it became obliged to offer her suitable accommodation and thus its duty would cease if it made her an offer complying with s 193(5), which she refused.

Mrs Muse made similar submissions as before.

Held: *R (Awua) v Brent London Borough Council* [1996] AC 55 suggests that where temporary accommodation is unreasonable for the person to remain in, they again become homeless. (No submissions were made on Auwa). So here a fresh duty arose when Mrs Muse's household became overcrowded. As there is no requirement for an application as homeless to be made in particular form, the fresh duty arose when it was clear to Brent that Mrs Muse was overcrowded. Alternatively, the duty was never fully discharged in law, and arose again once the temporary accommodation became unreasonable to remain in.

40 On either basis, Brent was obliged to, and did, offer alternative suitable accommodation. Brent complied with s 193(5). Accordingly, the

offer was on terms that Brent's housing duty would be discharged if Mrs Muse declined to accept the alternative accommodation. If Miss Roberts' submission on s 193(5) were correct, there would be an extraordinary internal inconsistency in the position in law of somebody like Mrs Muse. That person would be in a position to say that she was homeless and that Brent owed her a full housing duty, but that she was not homeless at the point in time when she made an application for transfer. An interpretation of s 193 that does not produce this basic inconsistency is clearly preferable.

41 The result of this conclusion on s 193(5) for Mrs Muse is severe because it means that Brent no longer owes her a full housing duty. It is, therefore, essential to consider whether the judge was correct on his alternative reasoning (unfairness). Mr Carter in opening his appeal submits that Mrs Muse was always aware that she was accommodated on a temporary basis. He further submits Brent followed the statutory safeguards which were required by Parliament and which Parliament clearly considered to be adequate. Mrs Muse was an assured shorthold tenant and therefore had no long-term security. She and those representing her had in any event consistently maintained that 42 Press House was unsuitable for her. Accordingly, Brent would have been acting unlawfully if it had not found accommodation which was suitable.

The subsiduary argument on unfairness was considered. Mrs Muse submitted she should have been given a full explanation of what Brent were doing once they had received the transfer request.

Held:

The type of notice for which [Mrs Muse] contends is not one required by section 184. Mrs Muse suffered no prejudice from any non-compliance with s 184. (Moreover, any non-compliance with s 184 could not affect Brent's obligation to provide her with suitable accommodation, or the validity of the later offer of accommodation in fulfillment of that duty). It is a reasonable inference from the correspondence and from the attempt at rehousing which did not go ahead that Mrs Muse knew that Brent accepted that her existing accommodation was unsuitable for her, and that that was why it was trying to rehouse her. Mrs Muse was also, to the knowledge of Brent, advised by solicitors, and they could reasonably be expected to advise her fully on the legal situation. Accordingly, in my judgment, Brent was not in fairness obliged to offer her the choice of moving to alternative accommodation or staying at her existing accommodation.

On waiver: This had not formed part of the case below, and while Mrs Muse could possibly have waived the performance by Brent of its duty, her household were also affected. the Court was not prepared to find a waiver had been made.

Appeal allowed, but on Brent's letters to Mrs Muse stating that the Housing Association would be instructed to pursue possession:

I wish to make some observations about the passage in the letter of 5 October 2006 which I set out in paragraph 17 above. Mr Carter accepts that this statement was misleading. He accepted that Brent had no legal right to instruct the landlord to obtain a court order for possession. He informs us that all Brent did in practice was to inform the landlord that the housing duty had been discharged and that the housing benefit would therefore be paid a lower rate. The fact however, is that this statement was made. I am surprised to see a public authority make this sort of incorrect statement. Of its nature, it was bound to cause distress since it would have led the tenant to believe that he or she would shortly be homeless and on the street. It was therefore a very serious statement to make. It is properly accepted that it was incorrect. A person in Mrs Muse's position is a private law tenant of a housing association and it would be for the housing association to consider its position. It is not correct for Brent to suggest that it has any right to instruct the association to attain a court order for possession. I hope that housing authorities will take note of these observations, and that these statements will not be repeated in future.

Well, quite.

Homelessness - when unitary authorities aren't.

Thu, 15 Jan 2009 20:10:55 +0000

NL

R (Hassan) v Croydon LBC (Admin Court 13 January 2009. Only reported so far in Arden Chambers eflash 336) was a judicial review on the discretion to secure accommodation pending s.202 review under s.188(3) HA 1996 and whether a potential duty under s.20 Children Act 1989 by the authority should be considered.

The applicant, together with her children aged 10 and 3, had fled Doncaster in 2005. In an initial application to Croydon, she stated she had fled through violence by a gang of youths. She was found not homeless. In a subsequent application,in 2006, she stated that the real reason was domestic violence, of which she had been ashamed. Croydon found her intentionally homeless on s.202 review. After living in various temporary addresses, the applicant applied again as homelessand was given temporary accommodation. Croydon found her intentionally homeless from Doncaster. The applicant requested a s.202 review and continued temporary accommodation under s.188(3). Croydon declined to exercise the discretion.

The next day, the applicant's solicitor provided new information - that the son said he had also been beaten by the father in Doncaster and that the applicant had told the solicitor she wanted to kill herself and her children. The solicitor asked for a reconsideration. Croydon again declined to exercise the discretion.

The applicant issued Judicial Review proceedings, arguing that

i) the s.184 decision was based on the decision in the second application, which was manifestly flawed in that it found that the applicant had suffered domestic violence but had left Doncaster intentionally.

ii) As the authority said it accepted that the applicant has stated an intention to kill herself, it was irrational not to take the case as exceptional.

iii) As the applicant's children would be children in need for the purposes of s.20 Children Act 1989 if the applicant was not accommodated, the Authority, as a unitary authority, would owe them the s.20 duty. In the light of this, it was irrational not to leave the applicant in her present accommodation, and also a breach of Art. 8.

Held:

The decision in respect of the second application was not manifestly flawed.

The Authority had appropriately assessed the new information provided by the solicitor and, in view of the history and context of the case, it was not an irrational decision to find her case was not exceptional.

To require a unitary authority to consider the existence of a s.20 CA duty when deciding on the exercise of the s.188(3) HA discretion would make such decisions unnecessarily complicated. The authority could not be require to take into account such a future duty.

The Art 8 argument was rejected. The JR claim failed.

While turf wars between social services and housing in unitary authorities are hardly news, the run of recent cases, particularly on accommodation for children, has been highly disapproving of attempts to dump duty on one department by another, with recommendations for interaction within unitary authorities.

While the Court's attention to the administrative burden of the HPU is fair enough, I'm slightly surprised to see an endorsement of the idea that no consideration of the LA's broader potential duties needs to be involved. That said, it would be hard to imply a duty to consider this into HA 1996.

[We should note that Emily Orme of Arden, who acted for the Claimant, presumably wrote the useful report.]

The Basildon Endgame

Mon, 26 Jan 2009 00:12:15 +0000

NL

As people may well have noticed from the news on TV and in the press, the last Court of Appeal hearing in the drawn out saga of the (unlawful) Essex traveller sites resulted in a defeat for the travellers. *Basildon District Council v McCarthy & Ors* [2009] EWCA Civ 13 was the Court of Appeal hearing of Basildon DC's appeal against a High Court decision that, in effect, evictions could not proceed against individual households until individual consideration of their circumstances had been carried out. Some 63 caravan pitches were at issue.

Previous litigation over planning permission had been exhausted and, for the occupants, it was admitted that they occupied the land unlawfully.

What was at issue in this case was the lawfulness of the Local Authority pursuing evictions under s.178(1) of the Town & Country Planning Act 1990, which were proposed to be en-mass for the unlawful pitches.

For the occupants, Jan Luba QC submitted that:

the duty on the council to look for alternative sites, to meet need, continues. Particularly in the absence of such a search, it was incumbent upon the council to consider the claim of each occupant not to be evicted, one by one and plot by plot. The personal circumstances of each of them should be considered. The council's aim was for site clearance, which, it is submitted, did not have regard to individual cases and was unlawful. [para 11.]
The occupants relied on Circular 18/94, Gypsy Sites Policy and Unauthorised Camping, in which it was stated at paragraph 10:
The Secretaries of State expect authorities to take careful account of these obligations [Children Act 1989 and Housing Act 1985] when taking decisions about the future maintenance of authorised Gypsy caravan sites and eviction of persons from unauthorised sites.
and on Circular 01/2006, Paragraph 40 of which requires local authorities to have regard to their statutory duties, including those under Part VII of the Housing Act 1996 and the Race Relations Act 1976; and Paragraph 43 provides:
Where there is clear and immediate need, for instance evidenced through the presence of significant numbers of unauthorised encampments or developments, local planning authorities should bring forward DPDs containing site allocations in advance of regional consideration of pitch numbers, and completion of the new GTA [...] Where there is an urgent need to make provision, local planning authorities should

consider preparing site allocation DPDs in parallel with, or in advance of the core strategy.
Basildon's argument was that it would perform its duties under Part VII, which had been stayed pending the outcome of these proceedings. 'Need' was not the same as demand, and 'need' had to be shown to be in the district rather than the east of england as a whole. The Council's detailed examination in its report of December 2007 had considered individual circumstance and demand. In LJ Pill's lead judgment at para 43
I have set out the contents of the officers' report and minutes in some detail. Having considered these as a whole, it does not appear to me that the Committee failed to address the correct issues when deciding whether to take action under section 178. Need and the absence of alternative sites in the District was recognised, as it had been in the Secretary of State's planning decisions. On the other hand, it does not follow from a claimant's wish to live on a site in Basildon District that he is entitled to have one there. The council was entitled to regard the situation of the sites in the Green Belt as a factor of substantial weight when doing the exercise they acknowledge was required. However, both when considering whether planning permission should be granted and when making an assessment under article 8 of the Convention, such personal circumstances as the proximity of family members may also be a factor. I accept the formulation of Ouseley J in O'Brien v Basildon District Council [2007] 1 P&CR 16. Ouseley J stated, at paragraph 171, that "the question of local connection could be a live issue in the assessment of needs." He also stated that the Green Belt factor is also "a matter for legitimate debate.
The Council argued that demand for the east of england was clear, but not the allocation to Basildon. As the Sec of State had refused temporary planning permissions and upheld enforcement on consideration of individual cases, there was no reason to uphold a failure under Para 43 of the guidance.

Held - at paras 70-71:

The procedure which has been followed, the refusal of planning permission, consistently supported by the Secretary of State, the taking of enforcement action under section 172 of the 1990 Act, and the flagrant disregard of enforcement orders upheld by the Secretary of State, can legitimately form the basis for a decision to take action under section 178 of the 1990 Act. In taking that decision, the persistent breaches both of planning control and the criminal law are factors which may be taken into account. The council was not required to act as if the decisions on the enforcement notices had not been taken.

Given the planning context, I do not consider that the council has erred in law in failing to give further consideration to alternative sites at the time the decision to take action under section 178 was taken. As appears from Circular 01/2006, sites are to be provided through the development plan process. I have referred to that process and to the Secretary of State's comment on its current stage. In his planning decisions, the Secretary of State has plainly been mindful of factors in favour of the claimants and has declined to grant planning permission. Temporary permissions, contemplated in paragraphs 45 and 46 of the Circular have been refused by the Secretary of State, mindful of all the factors involved. I agree with the approach to this issue of Keene LJ in O'Brien, including his reference to the planning system being development plan-led and the likely exacerbation of controversy by by-passing the system. Whether an attempt should be made to bring forward DPD allocations (paragraph 43 of Circular 01/2006) may be the subject to debate but failure to do so does not, in my judgment, and in this particular context, render a decision to act under section 178 unlawful.

And, LJ Lloyd on the Part VII HA 1996 issue:
[A]lthough the question of homelessness was embarked upon at an earlier stage, it has, properly, been in abeyance until now, and that if the council's decision stands, as a result of the appeal, the housing department will engage with those affected, to see which of them wish to apply under section 183 of the 1996 Act, and the council will comply with its duties under the Act in relation to those who do so apply. None of that had to be addressed as a pre-condition of proceeding to enforcement under the 1990 Act. Officers will take the necessary steps to comply with Part VII of the 1996 Act as part of the process of deciding how and when to carry out their delegated functions under the council's decision.
Appeal allowed. The evictions under s.178 can proceed.

Applying under Part VII via Part VI

Mon, 02 Feb 2009 16:05:59 +0000

NL

This is another decision of the Welsh Ombudsman, again concerning Conwy Council. Case 200702044 - Conwy County Borough Council. I don't propose to go into detail on the specifics of this matter - which principally concerned delay and muddle in dealing with an imminent homeless situation, mostly due to having to pass through Housing Options (homeless prevention) before any referral to Housing Advice (the HPU) could be made.

However, the Ombudsman made some points concerning the complainants' Part VI application that are worth repeating:

63. As a function of its housing allocation arrangements the Council, through its housing lettings officers, must consider whether an applicant is “homeless” as the Act (see above) makes it clear that reasonable preference must be awarded to those who are homeless. The relevant meaning of “homeless” in the context of the housing application form to be assessed by a lettings officer is the same as that which applies if Council homelessness officers were considering whether any Part 7 duties were owed. The Council"s Policy indeed sets out an award of points for a number of variables under the “Homelessness” points section (set out above) stating that such points could only be awarded following a formal interview and investigation by a homelessness officer. In other words, before such points can be awarded by a lettings

officer there must have been consideration of the position by a homelessness officer which makes identification of circumstances set out in the application form critical, as an award of preference homelessness points can make a real impact on an applicant's prospects of an allocation.

64. In addition, circumstances set out in a housing application form might itself mean it is necessary that an assessment of whether any of the Council"s Part 7 duties are owed (including the provision in some circumstances of emergency temporary accommodation) is carried out by a homelessness officer to whom the matter should then be referred.

In short, a Part VI application that gives reason to believe that homelessness is or may be involved should trigger Part VII duties and assessment. The Ombudsman further criticised the lack of awareness of officers in this authority dealing with Part VI applications of the factors that may engage Part VII, and hence their failure to refer to homeless officers on, for example, poor housing conditions or affordability issues. I'd consider that this is far from an uncommon situation, so theses points have general relevance.

We're not in Sparta any more.

Wed, 04 Feb 2009 16:16:18 +0000

NL

The House of Lords Opinions in *Holmes-Moorhouse v LB Richmond upon Thames* [2009] UKHL 7 were handed down today. This concerned whether a shared residence order under s.8 Children Act 1989 meant that a child was 'reasonably expected' to be resident with both parents following a divorce, for the purposes of s.189(1)(b) Housing Act 1996, so as to confer priority need in a homeless application.

The Court of Appeal said that, in certain circumstances, it might well mean just that, and that the Local Authority should intervene in the Children Act proceedings if it wished to argue the point. The House of Lords disagrees, and adds some 'helpful' observations... **Lord Hoffmann** considers that when a residence order is made, the Court's decision is based upon the welfare of the child in circumstances as they are or may reasonably be expected to be. However, a decision under Part VII on whether the child can reasonably be expected to reside with the parent is not made on the assumption that the parent will have accommodation available, but instead involves deciding whether such accommodation should be secured, which brings in wider considerations than the welfare of the child.

'Reasonably expected to reside' is an objective criteria - a social norm. Unlike 5th Century BC Sparta, a boy of 7 might now reasonably be expected to live with his mother. The HA 1996 (dating from the 1977 Housing Act) provisions are aimed to enable the nuclear family to live together. But the social norm must be applied in the context of a scheme for allocating scarce resources. Although the statute did not expressly state this:

14. The question which the housing authority therefore had to ask itself was whether it was reasonably to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves. It would also have to have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children. But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation.

The Court of Appeal was wrong to suggest that considerations of resources should have no part to play in the decision on whether it was reasonable to expect the child to reside with the applicant. The Court of Appeal was also wrong to suggest that the LA should intervene in the family proceedings. The Housing Act and Children Act proceedings should not become entangled.

The Homeless Code of Guidance at 8.10 (now deleted) was muddled in its reasoning and said little about 'reasonably expected', hence the necessity of this judgment. But the suggestion in the code that it would be an exceptional case where both parent could be said to have the children residing with them is right [para 21]:

I think it will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII with another so that he can reside with the other parent as well. It seems to me likely that the needs of the children will have to be exceptional before a housing authority will decide that it is reasonable to expect an applicant to be provided with accommodation for them which will stand empty for at least half of the time. I do not say that there may not be such a case; for example, if there is a child suffering from a disability which makes it imperative for care to be shared between separated parents. But such cases, in which that child (but not necessarily any sibling) might reasonably be expected to reside with both parents, will be unusual.

The Review Officer in this case had clearly misunderstood what was intended to be the effect of the shared residence order, referring instead to residing with one parent and staying with the other. But this was irrelevant. It didn't matter what the current situation was or what it would be if the order was implemented, all that mattered was the decision as to whether the children might be reasonably expected to live with the

father as well as the mother. The review officer had ample grounds for answering this in the negative.

Baroness Hale concurs and adds that the Family Courts are to deal with the situation as it is, not with creating options where none exist. In practice, the distinction between consent and contested orders drawn by the Court of Appeal doesn't hold. In this case, it appears that the Family Court had not considered any evidence of the children's wishes and had not adjudicated between competing accounts of the care of the children and breakdown of the relationship. The wishes of the children ought to have been paramount. The residence order should not have been made, particularly when it should have been clear that the father would have no accommodation available to him on leaving the home pursuant to the order. The Family Court should not use a residence order as a means of putting pressure on the LA to provide resources. A fully reasoned order may have more weight with the LA in a Part VII application than an order by consent, but it is not determinative.

Baroness Hale adds another example of what might be an exceptional case, where "a shared residence order was made some time ago and has been working extremely well, but one of the parents has unexpectedly and unintentionally become homeless (perhaps because of domestic violence from a new partner)", but upholds the appeal.

Lord Neuberger agrees with both, then adds some views on the treatment of s.202 review decisions. In this case the review decision contained a 'technical error of law' which did not invalidate its conclusion. While challenges to review decisions should be carefully considered in view of their humanitarian importance:

47. However, a Judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Although they may often be checked by people with legal experience or qualifications before they are sent out, review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court’s judgment.

Attention must be paid to the question of whether the error does or does not 'on a fair analysis' undermine the basis of the decision.

Lord Neuberger adds, in a passage which will doubtless be raised by virtually every s.204 appeal respondent from now on:

50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.

So there we have it. I think the point that order in the Family Court under Children Act s.8 cannot be taken to create an option when it does not otherwise exist is a good one and that, where as in this case, the order is made prior to one parent leaving the family home, it cannot be determinative on the Part VII decision.

I'm less convinced by Lord Hoffmann's assertion that resource considerations can play a part in a decision about 'reasonable to expect to reside'. He says at para 16

[...]There seems to me no reason in logic why the fact that Parliament has made the question of priority need turn upon whether a dependent child might reasonably be expected to reside with the applicant should require that question to be answered without regard to the purpose for which it is being asked, namely, to determine priority in the allocation of a scarce resource. To ignore that purpose would not be a rational social policy. It does not mean that a housing authority can say that it does not have the resources to comply with its obligations under the Act. Parliament has placed upon it the duty to house the homeless and has specified the priorities it should apply. But so far as the criteria for those priorities involve questions of judgment, it must surely take into account the overall purpose of the scheme.

But resource issues clearly play no part in consideration of any of the other criteria for priority need, making this one unique in Lord Hoffmann's view. The indicative absence of express provision for consideration of scarcity of housing in s.189, as argued in the Court of Appeal, does make sense, because consideration of scarcity in relation to pregnancy, or vulnerability would be logically ridiculous. Unless Lord Hoffmann is taken at face value, in which case it becomes alright to consider resource issues in relation to 'reasonably expected to reside' for the partner of a pregnant woman (189(1)(a)), or a partner or carer of a vulnerable person (189(1)(c)). Resource considerations can clearly play a part in determining if someone is homeless - overcrowding, for instance - but these are logically separate to priority need.

I also wonder whether the 'exceptional' cases are quite so exceptional as their Lordships seem to think. The situation is surely quite different in the example set out by Baroness Hale - where there is existing shared residence and one of the parents subsequently becomes homeless. I doubt that Holmes-Moorhouse will be the end of issues over shared residence for Part VII applications.

I'm not sure that Lord Neuberger's additions are wholly helpful. As far as the Court of Appeal were concerned, the error over living/staying was fatal to the review decision because it held the review out to be based on a misunderstanding of the nature of residence. The Court of Appeal may have been wrong, but it was neither nit-picking nor unfair.

Outsourced temporary accommodation

Tue, 05 May 2009 22:56:57 +0000

NL

Many local authorities use private accommodation for temporary accommodation under Housing Act 1996 Part VII. This may be by an LA ALMO 'managing agency', on which more at another time, or by licence agreements with private agencies.

One of the latter came to grief in Birmingham in 2008 and the decision to abandon the agency agreement was the subject of judicial review proceedings in *First Real Estates (UK) Limited v Birmingham City Council* [2009] EWHC 817 (Admin).

First Real Estates (FRE) supplied temporary accommodation to Brimingham between 2005 and 2008. It was founded by Iftikhar Hussain, who had previously worked for Dyadal Property Link. Dyadal then became one of FRE's major suppliers of licences for properties, which private landlords in turn submitted to Dyadal. FRE wold supply properties to Birmingham at very short notice and ended up being used, a lot, by the HPU. After a little while FRE began representing itself as 'registered agents for Birmingham City Council'. it is worth noting that there was no express register or agency agreement with BCC in place. Instead each property was taken under a licence agreement which stated that "The licence is terminable by either party on receipt of written notice at any time". On FRE's part, the licence stated "we warrant for our part that the Housing Unit complies with all current legislation and is fully licensed as required to be used as residential property."

In late 2007, Birmingham decided to put provision of temporary accomodation to public tender and FRE were informed that its tender had not been successful. While the tender process rolled on, FRE properties continued to be used extensively by BCC.

After a few years of apparently happy licencing, Birmingham were made aware of some issues with the accommodation provided by FRE.

CLP, no strangers to this blog, had threatened to bring JR proceedings over one property as being unsuitable for the discharge of Part VII duty and submitted a complaint about another property's appalling condition and alleging that:

The Agent who showed Mr Nurhussein around the property gave the impression that he was from the local authority. He advised Mr Nurhussein that if he failed to sign for the accommodation, then he would be on the streets.
Mr N was moved to B&B on the day the letter was received.

Another licencee left accomodation after one night because "it was dirty, infested with insects in the kitchen and broken windows. My mother also witnessed seeing mice in the kitchen"

And then came the other complaints:

By letter dated 30 May 2008 one Maxine Goggins of Weir Housing Ltd wrote to the Council a letter stating that she had received a call from someone who identified herself as Nicky from FRE "in a very aggressive manner and a male voice could be heard in the background to prompt the caller". Ms Goggins stated "When I tried to defend myself I was continually spoken over and told it was now a police matter". Ms Goggins understood that the call was prompted by FRE’s discovery of a Weir Housing Ltd business card in the possession of an occupant of one of FRE’s properties.
A Council officer identified rent claimed in respect of an empty property. And:
Another Council officer, Gary Nicholls, reported that he had received an e-mail from a British Gas contract manager alleging that one of his engineers was offered extra work by Mr Hussain in exchange for omitting various findings from his report. The e-mail caused the Council particular concern. 11. The Council also became concerned about the safety of gas appliances and gas supplied in properties supplied by FRE. By a letter dated 21 May 2008 Lisa Barker, the Council’s interim head of housing, referred to "discrepancies" in the gas safety certificates supplied by FRE in respect of fifteen properties. The letter stated that the Council’s private sector housing services team would undertake inspections of all the properties managed by FRE, following which FRE would be advised, in writing, of the inspection carried out, the contraventions (if any) and the necessary remedial works to ensure that the properties comply with the Council’s enforcement standards. The Council received no response to that letter.
All in all, not a pretty picture. Still, when FRE came to a meeting arranged by the Council to discuss standards of properties, they apparently arrived confident that failing to meet basic standards for habitable property was a minor glitch that could be sorted out. To that end:
Mr Iftikhar Hussain attended that meeting along with his solicitor (Ms Virk), Mr Naeem and Councillor Tariq Ayoub Khan. Mr Khan is deputy leader of the Liberal Democratic Party in Birmingham. He had known Mr Iftikhar Hussain for over twelve years and spoke well of him. He had in the past made representations to the Council on behalf of FRE, particularly about a delay in making payments. He attended the meeting on 16 June because he understood "the aim of the meeting was to resolve issues and the way forward for both parties was to work together ... At the commencement of the meeting I spoke and told everyone that I was hoping a constructive way forward would be worked on to avoid a potentially embarrassing situation".
We will say no more about Mr Khan's presence over the volumes already spoken by the invitation by FRE to attend and his mention of a 'potentially embarrassing situation' which is oh so redolent of Yes Minister.

Unfortunately for FRE, at the meeting of 16 June 2008, BCC first raised the complaints and then said that FRE's services were being ended on 7 days notice.

What this actually meant is that the Council would be seeking alternative accommodation for those in FRE temporary accommodation after 7 days. A continuing process. And also that there would be no new licences taken.

FRE sought judicial review of the decision, on grounds that the decision was unfair and unreasonable because: (i) The Council did not notify FRE in advance of the particular issues and properties to be discussed at the meeting that day. (ii) At the commencement of the meeting Mr Iftikhar Hussain was presented with a letter setting out various allegations of regulatory defects but was not given time to investigate these and to respond as he would wish. (iii) The allegations as to non-compliance with the Gas Safety (Installation and Use) Regulations related to more than 150 certificates so that it would take considerable time to check them but Mr Hussain was not allowed the time to do so. (iv) The allegations as to non-compliance with the Health and Safety Rating System introduced under Part I of the Housing Act related to 23 properties so that it would take considerable time to check them but Mr Hussain was not allowed the time to do so. (v) No period of time was offered to FRE at the meeting on 16 June to remedy the various defects in the properties of which complaint was made. (vi) The Claimant had not been forewarned of "the vital fact" that the meeting was to be followed by a discussion as to whether the Council would continue to use FRE's services.

Now, quite apart from the written warning of investigation of Gas Safety inspections that FRE had already received, quite how it can be unfair to 'not give time to remedy' evidenced breaches of fundamental statutory duty is beyond me, particularly as the Council wasn't actually issuing enforcement notices. But this is by the by as the prime issue was whether the decision was properly subject to judicial review.

On this FRE submitted that there was an 'overarching agreement' between it and the Council pursuant to which:

"The Claimant has a legitimate and reasonable expectation that the arrangements between it and the [Council] would not be abrogated in a summary and arbitrary fashion and with no adequate notice". FRE admitted that there was no written agreement, but maintained that "an estalished arrangement was undoubtedly in place whereby reliance was placed on the Claimant by the Defendant to provide services to house the homeless on a temporary basis to discharge their responsibilities and the Claimant placed reliance on the Defendant to use its service and to discharge its invoices as they fell due."
The Council maintained that FRE was simply one of a number of providers that they contracted with on a case by case basis to provide accommodation. References to an 'arrangement' in letters from the Council simply referred to the specific private contractual nature of the licences.

The Court took the Council's view, despite the clear fact that FRE had been used extensively by the Council in discharge of Part VII duties. This was a series of private contracts, not an overarching agreement.

This did not prevent the contracts being subject to judicial review, but the question was whether the contested power was defined by statute. Here the contracts were private contractual agreements and there was no register of approved suppliers involved. S19(9) of the Local Government Act 1989, argued by FRE, was simply not relevant as it did not create a right to judicial review where that would not otherwise be the case:

In principle it cannot be right to permit a claimant suing a public body for breach of contract to invoke public law, for as Neuberger LJ (as he then was) stated in *Supportways v Hampshire CC*, [2006] LGR 837: "If he could do so, it would place a party who contracts with a public body in an unjustifiably more privileged position than a party who contracts with anyone else, and a public body in an unjustifiably less favourable position than any other contracting party".
And that, apart from a swift disposal of any hopes of a private/contractual claim FRE might possibly thought they might have, was that. The claim failed, costs to Birmingham.

But there is one point I'd take issue with. FRE didn't plead legitimate expectation, but the Court pointed to the Council's letter to FRE dated 21 May 2008 in which the Council stated

that it would inspect the properties managed by FRE in the next 4-5 weeks and "following the inspection your company will be advised, in writing, of the inspection carried out, the contraventions (if any) and the necessary remedial works to ensure that the property complies with the Council's adopted enforcement standards for all private sector housing". It is fairly to be inferred into that letter that if FRE were to conduct any of the remedial works identified as necessary in the course of such inspections, so as to bring the relevant property up to the Council's enforcement standards for public housing, the Council would consider such property as suitable for its use in providing public housing. But the decision of 16 June 2008 intervened before the inspections were completed.
This is surely wrong. Firstly the Council didn't set 'public housing' enforcement standards, but private housing standards. The Council is the enforcement body for those standards generally, via the EHOs and enforcement orders. There can hardly be any legitimate expectation for continued licensing in the Council stating that it would be taking the usual warning and enforcement steps that it should do for any private letting accommodation in breach of statutory requirements. I can only hope the Court didn't pay this point full attention because it was, effectively, obiter.

All of this tempts me to post on Street v Mountford and s.11 L&T 1985 liability in such situations, but that will have to wait for another time.

Not interesting enough

Thu, 28 May 2009 22:13:02 +0000

NL

McKenzie, R (on the application of) v London Borough of Waltham Forest [2009] EWHC 1097 (Admin) was a Judicial Review initially

brought on grounds that the local authority refused to provide the claimant with temporary accommodation following her notification by the hostel she was living in that she would not be able to remain once her baby was born. In fact she was served notice to quit for three months after her due date. The hostel accomodation meant sharing a bathroom with another, male, resident.

The claimant applied to the LA as homeless and was told she was not homeless. She then brought judicial review proceedings on the basis that it was never reasonable, except in exceptional circumstances, for a pregnant woman in her third trimester to continue to occupy accommodation where any of the facilities were shared with a male who was not a member of her family, so she was homeless under s.175(3).

After issue but before hearing, the claimant had been housed by the LA, at about the time of the birth of her baby. The claim was therefore academic for the claimant, but she wished to pursue the claim on principle, for guidance, on the basis that

it is in the public interest to obtain the court's guidance as to how local authorities should approach homeless applications by pregnant women by inviting the court to answer seven questions and to make nine declarations. At the core of the application is the contention that it is never reasonable (except in exceptional circumstances) for a pregnant woman in her third trimester (or even before) to continue to occupy accommodation where any of the facilities (bathroom, lavatory or kitchen) are shared with persons of the male sex who are not members of her family, with the result that she satisfies the requirement for homelessness in section 175(3) and the section 188(1) duty to provide interim accommodation is triggered, even though she as yet has no baby.

The Court found that Claimant must establish that two conditions are satisfied, the first being that a large number of similar cases exist or are anticipated and the second that her claim involves the resolution of a discrete issue which does not require detailed consideration of the facts, *R (ex parte Zoolife International Ltd. v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) applied.

In this case, the Claimant had adduced no evidence on the first condition, merely asserting that a large number of similar cases existed.

On the second condition, the issues would either be fact sensitive or, as put by the claimant, require the Court to substitute its view for the words of s.175.

The Court therefore declined to decide the academic points raised.

There is a stern lesson there for anyone who casually thinks their JR application has merit in itself, regardless of merit to the client. If claiming broader point of public interest, you will need significant evidence on the scope of that interest, and put the questions to be determined very, very carefully.

Article 6, outsourced reviews and bias.

Sun, 31 May 2009 17:24:13 +0000

NL

The outsourcing of s.202 Housing Act 1996 reviews by local authorities to private, commercial bodies came under scrutiny in *Charlotte Augustin v London Borough of Barnet*, Central London County Court, 22 May 2009 (no report available online yet). There are a couple of Court of Appeal cases on the same issue coming up, so we will be revisiting it.

This was a s.204 appeal, heard by Mr Recorder Hollington QC, of a s.202 review decision, purportedly by Barnet, upholding their decision that an offer of temporary accommodation had been suitable. The s.202 decision was actually made by Mr Minos Perdios, the director of Housing Reviews Limited (HRL), a private limited company.

The s.204 appeal was on grounds that: 1. The review was a breach of Art. 6, as it was not a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law 2. Alternatively, the review was vitiated by common law bias, as a fair minded observer would perceive there to be a real possibility of bias towards Barnet. 3. The decisions should be quashed on its merits as failing to take into account the level of support the appellant received from family, making errors of fact on traveling times, unreasonable in its decision that the appellant did not need the help of her family and unfair in not giving the appellant a chance to respond to the finding that the appellant could have found a new local nursery. (The issue of suitability turned on the location of the property).

The Court held that the review was vitiated by the appearance of bias on the part of Mr Perdios, but went to to consider the other grounds of appeal, including finding that there was an Art 6 breach in delegating the review decision to an independent contractor, and that the decision was flawed in that all material factors relating to family support had not been taken into account.

On apparent bias, the Court noted that the website for HRL stated:

We have dealt with over 3,500 reviews with unparallel [sic] success. Out of these cases 158 have been appealed in the County Court with 95% of cases successfully defended.

and under 'course aims':

The course will also provide ideas on writing s.184 decision letters. Too often courses do not provide homeless officers with the tools needed to make adequate enquiries, be able to obtain all the relevant information during the crucial initial interview through effective questioning and use the information obtained to write a 'watertight' s.184. The course also provides practical advice on how to write a 'watertight' s.184.

The Court found that the references to 'success' and to 'watertight' decision-making could only be references to findings adverse to the applicant. It was wrong for a person acting in a quasi-judicial capacity to be focussing on such cases. In a position where the only relationship with Barnet was commercial, there were no professional constraints or procedural safeguards beyond those in the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, and no evidence of Mr Perdios' skills or experience beyond a mention that he used to be a local authority review officer, there was a clear appearance of bias in his choosing to promote himself in these terms.

[A list of Councils for which Mr Pedios/HRL has provided services is on HRL's site, here. The site has been edited a little, removing the reference to success in appeals, but the passage on 'watertight' s.184s is still there.]

On Article 6, Barnet had relied on the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 and the 1999 Regulations, arguing that it was permitted by Parliament to contract out the review functions and no other safeguards had been imposed other than the 1999 Regs. The court should be very reluctant to hold Parliament's intention fell foul of Art 6.

However, the Court found that, while there is a power to contract out the s.202 function, it depends on the terms and circumstances of the sub-contracting as to whether there is an Art 6 breach. The 1996 Order contemplates that the Local Authority will exercise its sub-contracting power in a manner as will avoid a breach, e.g. by not contracting to an organisation whose integrity, competence and experience were clearly deficient, even leaving bias out of the picture. No compliance with the procedural safeguards in the 1999 Regs nor any power of judicial review could cure the manifest defects in such a case. And deciding Art 6 compliance requires a view to the composite decision-making process, including but not limited to the judicial review process (*R (Alconbury Developments Limited) v SS for the Environment, Transport and Regions* [2003] 2 AC 295, *Runa Begum* [2003] 2 AC 430 and *Adan v Newham LBC* [2002] 1 WLR 2120. Ironically, in *Adan*, the applicant's submisison was that the LA was obliged to contract out, to ensure independence. This was rejected by the Court of Appeal).

Hale LJ and Brooke LJ in *Adan* agreed that the constitution and procedures of the body to whom reviews were contracted out would be relevant to judging compliance with Art 6. In *Runa Begum*, the Lords expressed concerns over the Art 6 compliance of the independence of 'a contracted fact finder, whose services could be dispensed with' (Lord Hoffmann) and Lords Bingham and Millett doubted that 'the exercise of quasi-judical powers is a function of the authority within the meaning of the 1996 Order' and doubted that a person 'appointed ad hoc by the authority directly concerned and lacking any kind of security of tenure could constitute an independent tribunal established by law for art 6(1)'. These were all dicta in those cases, though.

The Court found that the review was 'a classic administrative decision, involving a high degree of discretion and subjective judgment'. The decision maker must be expert and also take into account policy considerations,, such as local housing and financial constraints. The 'was a decision that Parliament had delegated to a democratically accountable institution, not the courts.' Article 6 respected that democratic principle (per Lord Hoffmann in *Alconbury*, para 69).

When Barnet contracted out the review function to a person such as Mr Perdios and HRL, the decision-making ceased to be that of a democratically accountable institution. The respondent had relied on that very independence in arguing no breach of Art 6. It follows that all the reasons for the deference to the Local Authority's judgment and discretion that are present in Article 6 fall away.

In order to comply with Art 6, contracted out review functions would either have to mean greater powers of review on merits for the courts than are given in s.204 or greater safeguards in the procedure of the review process than those in the 1999 Regulations. The review process in this case breached Art 6.

[Edit: It should be noted that it was common ground in this case that it did involve a determination of civil rights, but Barnet expressly reserved the position to argue to the contrary in the House of Lords.]

This is, of course, just a County Court s.204 appeal. It is also primarily decided on the appearance of bias rather than the article 6 point, but the argument is interesting and clearly has further to go. Two previous s.204 appeals on the issue are mentioned in relation to Mr Perdios' review decisions and Art 6 - HHJ Dedman at Southend on Sea County Court in April 2008 found no objection, while HHJ Barnett QC at Colchester Couty Court in October 2008 held there was a valid objection. We'd be happy if anyone with any further information on those cases would contact us.

So, we'll see what the Court of Appeal makes of the issue this time round. Again, any information on those forthcoming appeals gratefully received.

Not reasonable but suitable

Thu, 02 Jul 2009 19:26:42 +0000

NL

Not for the first time, I (and I suspect others) have been completely wrong-footed by Baroness Hale. It would be fair to say that the House of Lords judgment in the joined appeals in *Birmingham v Ali and Moran v Manchester* [2009] UKHL 36 has come as something of surprise. Unfortunately, its effects will be felt for a long time and it looks likely to initiate a whole new sub-category of litigation in homeless cases, the 'are we there yet?' claim. On the positive side, though, its effects on Women's Refuges are helpful, largely removing the danger that a refuge place would be classed as accommodation in which it was reasonable to remain for homeless application purposes.

First the background on issues in the joined cases (and should you wish, our reports on Ali/Aweys and Moran in the Court of Appeal).

Birmingham v Ali (formerly *Birmingham v Aweys*) concerned Birmingham's policy of leaving the homeless at home in the same property, once a duty under s.193(2) had been accepted, and placing them on the Part VI allocation scheme in Band B, where homeless in temporary accommodation were placed in Band A. In the High Court and the Court of Appeal, it was found that the duty to provide accommodation under s.193(2) Housing Act 1996, which must be 'suitable' under s.206(1), meant that suitable accommodation had to be provided immediately or a within a reasonably short time. Both High Court and Court of Appeal found that accommodation in which it was not reasonable to expect the applicant to remain (the s.175(3) homelessness test) could not be suitable accommodation for the purposes of s.193. The Court of Appeal held that 'suitable' had to be the same before and after the housing duty arose. Further, being placed on the allocation list was not satisfaction of the 193 duty. Yet further, Birmingham's allocation policy which distinguished between the homeless at home and the homeless in temporary accommodation was unlawful as the distinction was irrational.

Moran v Manchester concerned Manchester's finding that a women's refuge was 'accommodation in which it was reasonable to remain' such that in losing her place at the refuge Ms Moran had made herself intentionally homeless. The Court of Appeal had found that a refuge a) was accommodation and b) was capable of being accommodation in which it was reasonable to remain depending on the facts. This did, of course, mean that women's refuges were in danger of seizing up, as the women in the refuges would not, or not necessarily be classed as homeless.

In the House of Lords, at the Lords request, the cases were placed together, although heard months apart. The reason why becomes apparent. The sole opinion is from Baroness Hale, although in effect a joint opinion with Lord Neuberger.

The main issue in both cases is identified as the meaning of the the phrase 'accommodation which it would be reasonable for him to continue to occupy' (s.175(3)) and its links to s.191(1) on intentional homelessness. There are other issues on Birmingham's appeal, which I'll come to later.

Baroness Hale states that the phrase 'would be reasonable for him to continue to occupy' looks to the future as well as describing a current state. It is looking at occupation over time [para 36], where s.177(1) states simply 'it is not reasonable' to occupy property where there is a risk of violence. This is in accord with the Act's orientation to those who are homeless or 'threatened with homelessness'.

The definition of 'reasonable to continue to occupy' is therefore to be taken as meaning that someone can be homeless if they have accommodation which it is 'not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene' [para 34].

This means that someone can be accepted as homeless 'even though they can actually get by where they are for a little while longer'. [para 38]. 'Not reasonable to continue to occupy' doesn't necessarily mean that the person cannot spend another night in the property - and if they can't then the s.188 temporary accommodation duty would be triggered immediately and so into the s.193 duty.

However, as the authority can satisfy the full duty under s.193(2) by providing temporary accommodation (followed of course by provision of further accommodation) it is clear that accommodation which it may be unreasonable to occupy for a long period can nevertheless be reasonable to occupy for a short period. Accordingly:

there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to occupy on a relatively long term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing section 193 duty. [para 42]

The requirement that the accommodation arranged under s.188 or under s.193 (for temporary accommodation) be suitable means that it must be suitable for the period of occupation envisaged., What is suitable in the short term may not be suitable in the medium or longer term. [para 47]

So the same property in which it would not be reasonable for the homeless applicant to continue to remain under s.175(3) may be suitable for his/her continued occupation in discharge of s.188 or s.193(2) duties!

Moran v Manchester is thus disposed of. A women's refuge will not be accommodation that it would be reasonable for the woman to occupy indefinitely, unless there are clear facts indicating that circumstances are otherwise. It would therefore fall under s.175(3) and she would be homeless as long as she stayed there. There is therefore no need to deal with the issue of whether the refuge was accommodation at all (*Sidhu*) or whether it was caught by the decision in *Puhlhofer,* as was the issue in the Court of Appeal, although the Court of Appeal was right that Sidhu did not survive Puhlhofer [paras 52-56].

On the Birmingham cases, the issue becomes at what point the accommodation could no longer be described as suitable for discharge of the s.193(2) duty and the local authority would therefore have to secure alternative accommodation under that duty. [para 48]

Baroness Hale, while acknowledging that 'it may be' that the Birmingham cases meant the Council was on breach of its duty at some point,

says that this is a question that turns on the particular facts in a case. As the basis on which the Birmingham cases were brought was on the principle, rather than their specific facts, there was no longer any basis for a decision in their favour in the claim.

On the practical implications, a court faced with a claim that the person has been left in the accommodation for too long should be slow to accept that this is so, as it is primarily a question for the authority. Nonetheless, there will be cases where the court ought to step in. While it would be wrong to ignore pressures on stock, budgets and personnel on the part of the authority, one cannot overlook the clear duty to the homeless imposed on the authority. So there will be cases where the present accommodation is so bad, or has gone on for so long that the court will conclude enough is enough [para 51]

And that was main argument done with. On the lawfulness of Birmingham's allocation policy, it is clear that Part VI and Part VII duties are different. Performing a Part VI duty does not mean that the Part VII duty is satisfied and vice versa. Birmingham's view that temporary accommodation was automatically Band A and homeless at home automatically Band B meant that the Council could not address the 'short term' basis of the suitability of the homeless at home accommodation.

As far as the Court of Appeal's judgment on the allocation policy was based on the conclusion that the applicants could not lawfully have been left in their current accommodation, it was wrong. However, that judgment was also based on the view that the Part VII duty to both groups was identical and it was unlawful to prioritise one.

R (Ahmad) v Newham LBC[2009] UKHL 14 (our report) suggested that, as long as a reasonable preference was given to all homeless applicants, there was no reason why an authority should not decide to give further priority to one group over another, as long as it was not irrational.

However, on the sparse information given to the court, there did not appear to be a rational justification for the policy of prioritising those in temporary accommodation over the homeless at home where a duty had been accepted. So, the policy was unlawful on that basis.

Thus the result was:

Moran v Manchester: Appeal upheld. *Birmingham v Ali*: It is lawful for Birmingham to leave the 'homeless at home' where they are in the short term. It is not lawful for Birmingham to leave them there until a property becomes available under the allocation scheme - the present accommodation may well become unsuitable long before then. The allocation policy is unlawful to the extent that it gives priority to people in one type of temporary accommodation which is no less satisfactory than that of the homeless at home.

Comment. It is perhaps difficult to resist the view that, having arrived at a neat and effective solution to the problem posed by Moran v Manchester - where the 'it is not accommodation' argument was in real trouble - the Lords sought to map that onto Birmingham v Ali and achieve a 'practical' result. But, as far as I can see, Baroness Hale and Lord Neuberger have effectively read in the word 'indefinitely' to s.175(3) such that it reads 'A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy [indefinitely]'. Certainly that is the implication of para 52.

I'm deeply uneasy with this idea of a 'forward looking' sense to s.175(3). 'Forward looking' is covered by s.175(4) - likely to become homeless within 28 days. The forward looking aspect of s.175(3) is surely that continued occupation after this point in time would be unreasonable.

It may be worth considering whether the judgment opens up a whole new aspect to homelessness applications - 'not reasonable to remain indefinitely', as that appears to be the clear implication.

And then suitability in respect of s.188, s.190 and s.193 accommodation. Clearly, suitability is, in terms of temporary accommodation, not an issue of suitability for indefinite occupation. But as a not so hypothetical question, given the facts in the Birmingham cases, how can a statutorily overcrowded property where a duty is accepted be suitable for any length of time? (although Harouki v RB Kensington & Chelsea suggests otherwise, but may itself be wrongly decided in the light of this case) - but of course this is question of circumstance and fact that we will be now left to litigate as 'no longer suitable' ('are we there yet') cases. I can say with complete confidence that the legacy of Baroness Hale's opinion will be a couple of years of cases on 'suitability'.

And what will be the venue? If the assumption is that remaining in the property is discharge of s.188 or s.193(2) duty, is the route via s.202 review and s.204 appeal? Or, if it is a freestanding decision, is it subject to judicial review? Para 50 does not make it clear, with passages that might imply both routes. Should we expect a case or two on this issue. Of course, if the authority refuses or fails to consider a submission on (un)suitability, that is a JR.

The upshot is that the 'practical' solution will mean a lot of litigation, leave a lot of people in properties in which it is not reasonable for them to remain, but, on the plus side, solve the disaster facing women's refuges. Birmingham's previous allocation policy is also left unlawful, which, frankly, has to be a good thing as a rational justification was nowhere in sight.

Heaven knows how costs were allocated on the Birmingham cases, but there will be a certain unhappy Birmingham based practice... Plus I will have to swallow all previous 'intent on suicide' comments - intent on self mutilation, perhaps, but not suicide on Brum's part. Whether they are going to like the legacy in practice is another matter entirely.

Support and suitability

Sun, 12 Jul 2009 16:42:18 +0000

NL

Abdullah v City of Westminster [2007] EWCA Civ 1566 is not a new case. In fact it is two years old, but the transcript of the Court of Appeal judgement has only just come out (and it isn't on Bailii). So we'll do a brief note.

The case was a second appeal from a s.204 appeal to a Circuit judge. There has indeed been a previous appeal, in which HHJ Collins had quashed a review decision and required a fresh decision. This appeal was from the second decision.

Mrs Abdullah was a refugee from Yemen. She was accommodated in Barnet but moved to Westminster (with Barnet's encouragement) as there was a Yemenite community in Westminster, including relatives, who could support her with her four children. She applied as homeless to Westminster.

Westminster accepted a duty and offered her accommodation in Barking. The review was of the suitability of the accommodation. Mrs Abdullah made submissions on her reasons for needing to live in Westminster. The first review found that the offered accommodation was suitable. It was overturned on appeal on the basis that

it had missed the real point, which was not that she would very much like to live in Westminster, [...] it was that she had a real need to be in Westminster because only in Westminster could she get support from friends and relatives and, accordingly, only by putting her in Westminster could the council comply with its legal duty to provide her with suitable accommodation.

The second review decision also found that the accommodation in Barking was suitable. The question was whether this time the review officer had properly tackled the reason for Mrs Abdullah's need to live in Westminster.

Mrs Abdullah argued that: 1. the review officer had failed to pay proper attention to what HHJ Collins had said in the first appeal on the reasons for needing to live in Westminster. 2. the review officer placed undue emphasis on flawed information from Social Services. 3. the review officer did not place the correct emphasis on available medical evidence, which did not support his conclusion.

On 1. Jacob LJ found that HHJ Collins was not making any findings of fact and that was not his function. His comments were not, therefore, binding on the reviewer as a finding of fact.

On 2. Jacob LJ found that the information from Social Services was enough to support the review officer's view, although there was clearly an issue in dispute about the extent of the support network in Westminster, this was not a matter for the Court to decide.

On 3. Jacob LJ found that the issue the review officer was to address was whether this was a matter of need rather than of 'mere strong convenience'. While it could not be said that the review officer's summary was entirely fair:

bearing in mind that this is not a legal document to be construed like a will or a statute, there is enough, and only just, to justify the statement. What is really being said, if one summarises the medical material overall, is that it would be much, much, much better for this lady to be in Westminster, but not quite that she cannot cope without it.

Wilson LJ had concerns with the review, in particular in the ease with which the 10 letters by Mrs Abdullah's family and friends on the support she was receiving were set aside as against 2 short notes from social services, and in the handling of the medical evidence. He further identified two sentences that HHJ Collins had specifically said had missed the point in the first review which had been repeated verbatim. However:

Reviewing officers are not judges and have no legal training. They are decision makers, often overworked. This reviewing officer was at the time the only officer conducting reviews under section 202 of the Act of 1996 for the whole of the City of Westminster. Reviews of reviewing officers, when subject to appeal to the county court under section 204 of the Act, are not to be subject to the degree of analysis apt to an appeal to this court from a judgment of a professional judge; and the appeal to the circuit judge is only on a point of law. That said, as I am sure the reviewing officer would in retrospect accept, this second review was hardly his finest hour.

There was enough in the review to indicate that the review officer had identified the appellants case and it was 'just about' open to him to conclude as he did on the available evidence.

Arden LJ concurred. On the specific issue of the weight to be accorded to the judgment of HHJ Collins on the first review in the second review, she held:

There would still have to be a second review; and it would be inconsistent with that review, being a fresh review [...] for the officer dealing with the second review to do so on the basis of any particular disposition. He had to look at the matter afresh. Of course he would pay respect, and should pay respect, to what the judge had said and take account of his judgment, but there was no question of deference or giving what the judge had said any particular weight which would alter the normal method of review.

Further, in regard to the letters from friends and family, the review officer was entitled to decide what weight to give the letters and the wieght he had given them was not untenable in the circumstances.

Appeal dismissed.

Not just suitable but properly so

Fri, 31 Jul 2009 21:10:25 +0000

NL

Araya, R (on the application of) v Leeds City Council [2009] EWHC 1962 (Admin)

S.188 Housing Act 1996 accommodation, provided pending s.184 decision or s.202 review of a negative s.184 decision, must be 'suitable'. This means that any accommodation to which a homeless applicant is transferred, must also be suitable. *Araya, R (on the application of) v Leeds City Council* [2009] EWHC 1962 (Admin) was a judicial review of just such a decision on to give notice on existing accommodation and offer an alternative place, which raises a couple of interesting points.

Ms Araya is a refugee from Eritrea, with two infant children and indefinite leave to remain. She applied as homeless to Leeds. She was placed in emergency temporary accommodation. She remained in this accommodation after a finding of intentional homelessness, a s.202 review, s.204 appeal and, at the relevant time, was awaiting a further s.202 review as a result of the appeal. As it was accommodation pending s.202, this was still s.188 accommodation.

She was accommodated in the Harehills area of Leeds, where there was an Eritrean community and a church she attended on Saturdays and Sundays. In March 2009, Leeds gave 7 days notice on the accommodation and offered a place in a hostel in Bramley, which was supported accommodation.

Ms Araya sought judicial review of the decision: a) to require the claimant and her family to move from their present accommodation at 56 S Avenue, Harehills, Leeds; b) that the Mount Cross Hostel, Bramley was suitable accommodation for the claimant and her family; c) to require the Claimant to move on 7 days notice. The grounds were that i) the decision did not properly take account of location; ii) in all the circumstances there was insufficient notice given to the claimant to move.

On i) while in itself the hostel property was not in itself unsuitable, Leeds had failed to consider the importance of location to suitability.

On ii) 7 days notice was too short, inhumane and showed that the Council had failed to consider Ms Araya's Art 8 rights.

Overall, even if

the Hostel was not unsuitable, the decision nevertheless has to be taken properly and in accordance with the Act; if flawed, the decision does not do what the Act requires; it is no answer that the end result is the same –'you have accommodation that is suitable'. This is because, he submits, those who apply are entitled to the possibility that there might be property that was even more suitable if the process were carried out correctly. [Para 7]

Ms Araya relied on *R v Newham London Borough Council ex parte Ojuri* (1999) 31 H.L.R. 452 which held that a flawed decision, that did not fully consider the applicant's situation, meant that whether other, better, possibilities were available was not considered.

Held: Such cases turn on their facts. It is true that the process of the assessment of suitability must be properly carried out, regardless of the 'suitability' per se of the property proffered.

Here Leeds had a clear reason for moving the applicant to the hostel. it was 'tier 1' accommodation which meant that she would be supported in her bidding for suitable permanent accommodation, which had been a problem. There was evidence that Ms Araya's support in the Eritrean community in Harehills, and her church, had been considered by the officer, including transport links, such that the Homeless Code of Guidance had been followed. There had been an offer of alternative accommodation, which was refused.

On the notice point, the Claimant was fully aware she might have to move at short notice. It was emergency accommodation that she had been in for 8 months before the decision. There had been previous efforts to move the Claimant into other tier 1 accommodation. Hostel places became available at short notice. In the circumstances the short notice was not an infringement of Art 8 rights.

Application dismissed.

While such cases are always going to be intensely fact sensitive, this is interesting in that the argument by the Defendant that the accommodation offered was in itself suitable was not taken as being the end of the claim. The process of the assessment of suitability has to be properly conducted, or the risk is that other, better, possibilities would be excluded by the decision.

Accommodation pending review: Mohammed in action

Tue, 22 Sep 2009 19:58:50 +0000

NL

R (Gebremarium) v City of Westminster [2009] EWHC 2254 (Admin)

Thanks to the Garden Court housing bulletin for pointing to this one. We had to look around as the judgment is not yet available anywhere except casetrack.

This was the permission hearing of an application for judicial review of a decision by Westminster not to exercise its discretion to accommodate Ms Gebremarium pending a review of its decision to refer Ms G to Cardiff under the local connection provisions.

Ms G is Eritrean. She had been accommodated in Cardiff by NASS following an asylum application. After her asylum application was successful, NASS ended accommodation and she subsequently lived in two private tenancies in Cardiff between October 2007 and May 2009. In May 2009, Ms G's four daughters, aged 4 -16, were granted visas and joined her. Ms G and family came to Westminster within a week and applied as homeless. She had only a one bed flat in Cardiff and said that she wanted her children not to be isolated - they had come for church and community. Westminster accommodated pending decision. On the s.184, Westminster found Ms G homeless, eligible, in priority need and non-intentionally homeless. However she had no local connection with Westminster, but did have a local connection to Cardiff. Westminster referred to Cardiff who accepted a duty. Westinster sent a s.198 letter notifying Ms G.

Ms G requested a review of the decision and requested that Westminster exercise its discretion to accommodate pending review under s.200(5) Housing Act 1996, which is directly comparable with s.188(3) Housing Act 1996, the discretion to accommodate pending s.202 review of a s.184 decision.

Ms G submitted that she did not want to return to Cardiff because she felt lonely and isolated there, had suffered from depression, and all her family and friends lived in London. Moreover, her children were Christian Orthodox and could only attend the Eritrean Orthodox church in Southwark. They would not be able to attend church in Cardiff. The children were registered to start school in Westminster in September.

Westminster responded on 7 August. The letter used the decision in *R (Mohammed) v Camden LBC* [1997] 30 HLR 315 for its structure, Mohammed being the case that set the principles for the exercise of this discretion. Westminster said they were satisfied that Ms G had establshed a residence connection in Cardiff, by choice. There were Pentecostal churches in Cardiff attended by Eritreans. Any disruption to schooling would be brief and Ms G would not be isolated as she had her daughters with her now. Under a heading of 'new information, material and argument', Westminster said they were aware of none. Under 'personal circumstances', Westminster said it had considered personal circumstances. Ms G was not homeless, technically, as Cardiff had accepted duty. Westminster declined to exercise its discretion to provide interim accommodation.

After a pre-action letter on 7 August, Ms G sent a further letter on 10 August, making further representations on receipt of the housing file. Westminster had failed to make enquiries about church or community connections amounting to special circumstances. No enquires had been made about any reason for Ms G's unhappiness in Cardiff. Further, the Council had failed to understand that Orthodox worshippers could not attend Pentecostal churches. Ms G then issued the JR.

At the initial consideration, Dobbs J adjourned for a week, ordering that Westminster serve a decision regarding the children's place of worship in a couple of days. Westminster wrote to Ms G on 13 August, saying that special circumstances had been considered before the referral to Cardiff, but that isolation was not a special circumstance given the period Ms G had lived in Cardiff of her own accord. On the children's church, Westminster has established that the children could attend any Orthodox church and that there was a Greek Orthodox church in Cardiff attended by people from 20 countries. In addition, a church in Southwark did not establish local connection to Westminster.

Ms G responded that a church conducting services in Tigrinya, the childrens' native tongue, was needed.

At the hearing, Ms G argued that: 1. The Council had not addressed its mind to the discretion it had under s.200(5). it had failed to address its mind to the existence of a discretion not to refer to Cardiff. There had been a lack of serious enquiries before the referral, as the letter of 10 August showed. The Council could well have concluded there were far superior support networks in its area. 2. The letter of 10 August raised significant new arguments and the Council's earlier contentions on church attendance were clearly wrong. The services in the Southwark church were in the children's language, while there were no Eritrean Orthodox churches in Cardiff. The Council failed to consider that the children would not pick up sufficient english during the review period. 3. The Council's decision was flawed. it placed an undue emphasis on the presence of a Greek Orthodox church in Cardiff. 4. On personal circumstances, Ms G would be street homeless if not provided with interim accommodation. The Council had misdirected itself in law by saying Cardiff had accepted a duty so that she was technically not homeless. This ignored the s.200(5) discretion, which could be exercised where the notified authority had accepted a duty.

Held by Cranston J: The Council had considered the Mohammed factors and its letter set out the findings in relation to each of the three factors. That was enough to dispose of the application, by binding precedent. The Court will only intervene in an exceptional case, *R v Brighton and Hove Council, ex parte Nacion* [1991] 31 HLR 1095 (Lord Woolf).

The only special circumstances advanced related to the church in Southwark. The Council had uncovered an alternative in Cardiff and considered the language point, which would lessen over time. But in any event the need to attend a church in Southwark could not give a local connection to Westminster.

The issue of what weight to give a factor was for the Council. It could not be said that it had given 'too much' weight to accommodation being available for Ms G in Cardiff.

There were no exceptional circumstances in this case, such as a need to obtain medical treatment only available in the area. This is the type of exceptional factor which would have resulted in finding the Council's decision flawed. This decision was not flawed in public law terms, permission refused.

Now, I have a certain sympathy with the view that in deciding whether to accommodate pending review of a referral decision, the fact that the notified authority will accept a duty should perhaps not play too great a part, for basic reasons of circularity/pre-judging the review - after all if one had to actually be facing street homelessness, no s.200(5) discretion decision would ever be successful. But it is hard to see that this was actually a major factor here, where it looks like the comparison was more generally issues arising from accommodation in Westminster v accommodation in Cardiff.

That aside, this decision does show the high hurdle of challenging the exercise of discretion where the authority has at least considered the Mohammed criterea.

Lost by translation

Wed, 21 Oct 2009 21:20:43 +0000

NL

Ali v Birmingham City Council [2009] EWCA Civ 1279 (Original note from an Arden Chambers eflash pdf).

Mr Ali, who is Somalian, applied as homeless to Birmingham. At interview he was noted as speaking and understanding English. he was given a leaflet in a number of languages, including Somalian, with details of translation services.

Birmingham accepted a duty and their letter to Mr Ali informed him that he would receive only one offer of suitable accommodation. Further telephone conversations were carried out through an interpreter.

Birmingham then offered a property by letter, stating that this would be the sole offer and setting out review rights. On viewing the property, Mr Ali refused it and, via a Somali community centre, submitted a review request in grounds of suitability. The review held the property was suitable.

Mr Ali appealed to the County Court on grounds that he had not been properly informed of his right to accept an offer of accommodation while seeking a review of its suitability, as required by s.193(7), because the letter was in English, which he could not read, and no translation to Somalian had been provided. The requirement under s.193(7) was to inform the applicant, not merely to notify them, which meant an obligation on the Authority to ensure its communication was in a form the applicant could understand.

The County Court appeal was dismissed. The Court held that 'inform' and 'notify' were used interchangeably in Part VII Housing Act 1996. As long as reasonable facilities for translation were provided and available from the Local Authority, there was no greater requirement to translate the notification letter.

The Court of Appeal held: 'Notify' and 'inform' are used somewhat synonymously, with the distinction that 'notify' refers to the giving of notice in a document and 'inform' relates to the contents of that document. As the County Court had found, as long as reasonable facilities for translation were provided, there was no further routine requirement to translate letters for applicants who did not have english as a first language. Mr Ali had been notified of the available facilities and had not requested a translation of the letter.

Appeal dismissed.

These we have missed...

Tue, 03 Nov 2009 20:14:27 +0000

NL

And thanks to the Garden Court bulletin for pointing them out. A couple of cases not yet available on Bailii.

R(Gardiner) v Haringey LBC [2009] EWHC 2699 (Admin), [2009] All ER (D) 301 (Oct). Or 'everything old is new again'

From the full judgment: Ms G. had applied as homeless to Haringey, who found she was not homeless as she had accommodation available to her in Columbia. Ms G requested a review on the basis that that accommodation was not suitable for her child, who had a preliminary diagnosis of autistic spectrum disorder and severe and extensive care and support needs not available in Columbia. The review withdrew the decision. A further review upheld the decision, stating that Ms G's decision to return to the UK, without definite accommodation, to seek care for her child was 'reckless'. The different level of available care for the child was acknowledged but was not, in itself, sufficient reason to leave the Columbia house and come to the UK without definite accommodation.

A subsequent s.204 appeal upheld the decision. Ms G applied again 4 months later, supplying further information about her child's situation and condition, including specialist evidence that the child would be very badly affected by instability and that she had improved considerably under current specialist care to the extent that she was now 'thriving' beyond expectation. The specialist's letter stated that a return to Columbia would have a significant negative impact. Haringey refused the application on the basis that there were no new facts. They had already acknowledged that facilities were better than in Columbia. Ms G applied for Judicial review.

Held: Following *Maloba v Waltham Forest LBC* [2008] All ER 701 (our post here), whether accommodation was suitable was no just a matter of its size and structural quality. The educational and medical needs of the child were material considerations. The Guidance, at para 6.27, states that a renewed application must be treated as a fresh application if there are substantive new facts. The significant issue was not now the difference in the level of available facilities, but the impact on the quality of life for the child. The Council had failed to look beyond the level of facilities available and consider the effect on quality of life. The reports submitted with the renewed application did amount to new facts, specifically on the severity of the likely degree of effect a return to Columbia would have on the child.

And then...

HSE v Helen Jayne Beckett Grimsby and Cleethorpes Magistrates Court

Various commentors on this post suggested that the HSE was less than enthusiastic about prosecuting private landlords over breaches of the gas safety check rules. So it is with pleasure that we can point to this prosecution (HSE press release)

Ms Beckett was a private landlord. Between 25 July 2007 and 5 January 2009 (about 18 months), Ms Beckett failed to ensure that a gas fire in the rented property she owned at Flat 1, 22 Sea View Street, Cleethorpes, had been checked for safety. Despite being served with an improvement notice by HSE in November 2008, she failed to get the necessary checks carried out by the required date.

She pleaded guilty at the Magistrates to breaching Regulation 36(3) of the Gas Safety (Installations and Use) Regulations 1998 - the 12 monthly check - and of contravening a previous improvement notice. She was fined £1,000 with £1,500 costs.

Now, let that not be a one off, *pour encourager les autres*, kind of prosecution and let others follow Yorks and Humberside's lead.

Physical violence only

Thu, 17 Dec 2009 18:28:02 +0000

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Yemshaw v Hounslow LBC (2009) CA (Civ Div) 15/12/2009 [only as Lawtel note so far]

This was an appeal to the Court of Appeal from a s.202 appeal on the issue of what 'violence' in s.177(1) Housing Act 1996 meant. S.177(1) provides that it is not reasonable to remain in accommodation where the person has been subject to violence or the threat of violence.

Ms Y claimed that she had to abandon the family home with her children because of her husband's abusive behaviour. She stated that, although her husband had not physically assaulted her, she had been subjected to emotional, psychological and financial abuse. Housnlow found that this was not sufficient to amount to violence under s.177(1) and that it as therefore reasonable for her to remain. This was upheld on review and appeal, following *Danesh v Kensington and Chelsea RLBC* [2006] EWCA Civ 1404.

At the Court of Appeal, with the Secretary of State for Communities and Local Government intervening, Ms Y argued that *Danesh* had been decided in view of the Homelessness Code of Guidance for Local Authorities 2002, which supported the definition of violence as involving physical contact. However, the 2006 guidance widened the scope of violence to include other non-physical forms of abuse. The Secretary of State supported this view. Ms Y argued that the Court had a statutory duty to consider the Guidance and on that basis, *Danesh* would have been decided differently today. A more flexible approach to the definition of the term by the courts was consistent with a purposive approach to social legislation designed to reflect society's changing values.

Held:

Danesh was not decided *per incuriam*.

Y overstated the importance of the codes. While the court was obliged to have regard to them under s.182 Housing Act 1996, they were no more than persuasive authority. Nothing in s.182 or the Act meant that 'violence' had the meaning that the Secretary of State may ascribe to it from time to time.

If the Secretary of State wished to introduce new circumstances that would mean it was not reasonable to remain, there was a mechanism in s.177(3) for doing so. As this mechanism existed, the court should be hesitant in accepting that the meaning of a word had changed over time.

Continuing to follow *Danesh* to define violence as physical abuse would not stultify social attitudes to domestic violence.

A wider definition would in any event lead to practical difficulties for Local Authorities, who would have to make subjective judgments on applicant's circumstances, which would be inconsistent with the straightforward requirement under s.177(1).

I wonder if we will see the s.177(3) mechanism exercised soon? I'm not going to hold my breath.

Birmingham Council Gatekeeping, with benefit of transcript

Tue, 22 Dec 2009 19:25:07 +0000

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Kelly & Mehari v Birmingham CC [2009] EWHC 3240 (Admin) [Not on Bailii yet, available on Lawtel]

Following our note here (and the very helpful comment to it) we've got the transcript of the judgment. (In fact I've had it for a few days, but it has been hell out there, hell I tell you. And that was just the commute.)

This was a hearing of two joined Judicial Reviews (at the new Birmingham High Court) of Birmingham's treatment of homeless applicants and provision of interim accommodation under s.188(1) Housing Act 1996.

The Claimants argued that Birmingham had a policy or a procedure designed to avoid their duty under s.188 or that their policy gave rise to a risk that in a significant number of cases interim accommodation would not be secured when it should be.

Birmingham argued that in these cases, it was the mistakes of individuals who had failed to properly follow their procedures that was at issue.

So, was it policy or an inadvertent balls up...

On initial application as homeless to Birmingham, a form had to be filled out:

setting out information with regard to immediate accommodation needs (e.g. Question 1: “Are you able to remain at your current accommodation tonight?”). There are notes within the form. After Question 12 (“HB Form completed?” -- of course, a reference to a Housing Benefit Claim Form) there is this: “Note: An emergency request form cannot be submitted until a HB form has been completed”. In Questions 17 and 18 there are seven separate questions relating to risk. After the applicant’s signature there is the following rubric: “Upon completion of the interview, unless the applicant and family are at risk of harm, they should be advised to return to the homeless address whereby a visiting officer will attend the property”: in other words, they are to be sent back “home”. There is a later question for the interviewer, “Balance of probability satisfied: Yes: No” -- which appears to be a reference to whether, on the balance of probabilities, the applicant would be safe or at risk if he returned “home”.

If 'emergency accommodation' was to be offered, then a second form, headed 'Homeless Application Form: Housing Act 1996, Part VII' would be completed and this was the starting point for s.184 enquiries. This second form was headed "This personal data will be held and processed by [the Council] to enable the assessment of need and, in particular, the provision of services for which you may be eligible".

Now I know what you are thinking, that this already looks like gatekeeeping pure and simple, but let us turn to the facts in the cases.

Kelly Mr Kelly applied as homeless after having been ejected from the family home by his mother. It was common ground at the JR hearing that he was homeless and in priority need by virtue of being under 25 and suffering from mental health problems. When he applied Mr Kelly was given an 'emergency accommodation form' to fill in. The interviewer also filed in a 'Homeless Application Form - Progress Sheet'. Birmingham relied on this as showing s.184 inquiries had begun, but what the 'sheet' said was:

App suffers with ADHD, has provided a couple of letters which are from ‘05/’06. States what medication he was on, and how severe they thought his condition was. They felt his behaviour was not a result of having a mental illness, and his behaviour was the result of low intelligence. Contacted Learning Difficulties Team. They advised 2066 was last involvement had with him, and confirmed he was on medication at the time. Contacted Dr Kenyon, who confirmed app has no priority need. Discussed circumstances, nothing to suggest he would be vulnerable. Have contacted app and spoke to his mum, and advised he has no priority need. Advised of direct access hostel. Discussed with Colette. TA refused.

Mr Kelly was sent away. Birmingham argued that this constituted s.184 inquiries but that the officer had been in error in not providing written reasons and 'the substantive decision as to duty owed to the applicant was taken before the enquiry was complete -- and in particular before the homeless interview'. So the decision was wrong, nay unlawful, but this amounted to individual error by 'Mr Clarke', the officer.

But that wasn't the only 'individual error' in this case.

At the bottom of the Progress Sheet of 11 September, to which I have referred, Mr Clarke confirmed the decision he had made, namely “T.a. [i.e. temporary accommodation] refused”. His decision cannot be categorised as a defective Section 184 decision following an inadequate enquiry. It was a decision not to afford Mr Kelly temporary or interim accommodation under Section 188.

Mr Clarke did not take that decision alone. He did so after discussing it with a colleague, “Collette”. But it does not end there. On 15 September, the solicitor for Mr Kelly (Miss Bi) telephoned the Council and spoke to Caroline Darwin. She, too, was in the Council’s Homeless Team. She was an experienced member of that team. Miss Darwin prepared a further Progress Sheet recording the conversation. That makes clear that the decision that had been made on 11 September was that it was interim accommodation that had been refused. Miss Bi said that the Council were under a duty temporarily to house Mr Kelly pending the completion of their Section 184 enquiries: Miss Darwin did not agree that that was the case. [...] Later that day Miss Darwin sent a fax to Miss Bi, sending “all documents pertaining to Mr Neville Kelly’s Temporary Accommodation request”, reiterating the nature of the decision taken by Mr Clarke.

At hearing, Birmingham also accepted there was an error of law in this decision too, but it was also, yet another 'individual error' and nothing to do with a policy.

Unfortunately for Birmingham, this didn't wash.

I cannot accept the premise upon which those submissions were made, namely that Mr Clarke’s decision was a Section 184 decision that was defective -- and unlawful -- in the respects identified by Miss Hodgson [for Birmingham]. It was clearly not such a decision.

There is no doubt that Mr Clarke considered and decided Mr Kelly’s application as one for interim accommodation. Unfortunately, he did so without any apparent appreciation of Section 188 or of the obligations which that statutory provision imposes on the Council. He considered whether Mr Kelly had a priority need for accommodation, not whether there was reason to believe that he did so. The latter is a lower test, as Paragraph 6.5 of the Homelessness Code of Guidance reminds authorities. [...] Had he done so, on the basis of Mr Kelly’s application and documents he produced in support, the only proper conclusion to which he could have come is that there was reason to believe that Mr Kelly may be homeless and in priority need of accommodation. That would have triggered the Section 188 duty to provide interim accommodation, until the Section 184 enquiry had run its course and the Council had informed Mr Kelly of the resultant duty to house, if any, that it considered it owed to him

Oh dear, but so far at least, Birmingham still had an outside chance of arguing it was cock-up and a regrettable mistake.

Mehari There is a long history of refused applications in this matter, but at issue was Mr Mehari's application when he and his family were street homeless after their landlord had taken the keys back. He was initially told that because he had handed the keys back he wold have to come back the next day (!).

The following day Mr Mehari sought legal advice, and, following a letter, an application was made on the evening of 17 September to the duty judge (Sweeney J). He ordered the Council to provide accommodation until determination of the court application. That accommodation was given by the Council for one night, but then withdrawn, until His Honour Judge Purle QC reissued the order with a penal notice attached.* Mr Mehari has subsequently been offered accommodation by the Council following the completion of Section 184 enquiries.

At the JR hearing, Birmingham accepted there was reason to believe Mr H was homeless when he first approached them and that it erred in law by sending him away. The officer was right in saying that at 6.20 pm they had no cover for dealing with applications but Birmingham accepted this was an unlawful failure of its practice.

However, the 'Emergency Accommodation Request Form' completed in this case stated:

Upon completion of the interview, unless the applicant and family are at risk of harm, they should be advised to return to the homeless address whereby a visiting officer will attend the property

This was clearly an instruction and one followed by the interviewing officer.

There is certainly nothing to suggest in the Progress Sheet or Emergency Accommodation Request form that she completed that she had the “reason to believe” criteria of Section 188 in mind, let alone applied them, in coming to her decision

There was other similar evidence in the case of JI, whose case was not pursued, but the evidence was considered because both parties relied on the facts. Odd, because in this case Birmingham purported to discharge the s.188 duty prior to the end of s.184 enquiries and decision.

Held - and I make no apologies for quoting at length:

In regard to Mr Kelly:

Mr Clarke [the initial decision maker] simply did not engage with the Section 188 criteria at all. He was not alone, as two of his colleagues equally failed to do so; and the Council's response to this claim evinced no sensitivity to, or real comprehension of, the criteria that ought to have been applied, at least until Miss Hodgson's [counsel for Brimingham] valiant effort to rationalise the decision-making process embarked upon by Mr Clarke ex post facto. I do not accept the basis of the defence, namely that the Council's procedures in this case operated properly, but Mr Clarke individually failed. There is strong evidence in this case of a system failure.

Overall:

of the many Homelessness and Temporary Accommodation Officers involved with the three cases -- by my calculation, eight -- none refers to Section 188 or gives any indication that they are applying the Section 188 criteria in considering whether an applicant for housing should be afforded interim accommodation pending the outcome of the section 184 enquiries. The Emergency Accommodation Request Forms neither refer to Section 188 nor the criteria of that statutory provision; and indicate that, once the initial interview is over, the applicant is to be "sent home" (i.e. advised to go home) unless he would be at risk of harm there.
Nor does the other material in evidence aid the Council. The instruction note sent to Homeless Officers on 13 February 2007, after the Aweys judgment, makes no reference to the correct approach to the discharge of the Section 188 obligation. The material from and about St Basils refers to housing options, but not to an applicant's rights (and the Council's corresponding obligations) under Section 188. Similarly the Council's own leaflets, "Housing Options: Do you need help in finding a home?" and "Homeless?" make no reference -- unless the reference to "other options" being available refers to interim accommodation being under Section 188.

None of the officers purported to apply the Section 188 criteria. None of the Council's documents explained that they should do so, nor did their external documents explain or suggest to applicants that those criteria would be applied. The Section 188 duty to afford interim accommodation pending the conclusion of enquiries under Section 184 is part of a comprehensive and coherent statutory scheme: but the Council treated what they called the application for "emergency accommodation" as a discrete and separate exercise, divorced from the substantive housing application. There is certainly some evidence that housing applications are not registered until after the initial approach, and even as late as the housing interview: but I do not have to make findings in that specific regard. I am satisfied that, far from the errors in these cases being of individuals who went outside the Council's practice and procedures, the relevant officers were following the practice and procedure they were encouraged to follow by the Council themselves.

the claimants are each entitled to a declaration that the Defendant Council acted unlawfully in failing to apply the statutory criteria of Section 188 to the issue of whether they should secure that accommodation was available for the Claimant's occupation pending a decision as to the duty (if any) owed to him under the provisions of Part 7 of the 1996 Act.

Naughty, naughty, NAUGHTY Birmingham. Not only for gatekeeeping, but for then attempting to blame the individual officers who were, after all, only following the policy and the procedure laid out in Birmingham's own forms.

The message to Birmingham's homeless officers appears to be clear. Far far better that you appear to have individually screwed up than our policy faces a challenge. New jobs are easy to come by, after all.

Hopefully the outcome from this case will be used elsewhere, although it shouldn't need repeating, again - the s.188 duty kicks in on first approach if the 'low threshold' of 'have reason to believe may be homeless' is met. It is no good sending them away if they aren't in 'risk of harm' by insisting that they return whence they came. Oh and yes, an application is made when the person presents to the LA, not when they have been permitted to fill in the relevant form.

Congratulations to CLP and counsel Mr Nabi, but am I alone in being astonished that a) Birmingham had such an unsophisticated gate-keeping policy and b) they thought they had a chance of success on the individual cock up defence, given the documents?

* I think this is suitable rejoinder to Collins J's view here that penal notices are unnecessary against local authorities. With respect, Collins J is quite simply wrong.