Don't answer the phone...

Sun, 10 Jan 2010 22:36:58 +0000

NL

[Update 03/04/2011 - the Court of Appeal decision on the further appeal in this case is here.]

Makisi v Birmingham City Council (Birmingham County Court Appeal Ref: BM9 0166A, 6 Jan 2010)

This was the County Court hearing of a s.204 Housing Act 1996 appeal following s.202 review of a decision that an offer of accommodation was suitable and reasonable to accept, and subsequent discharge of duty under s.193. It is only a County Court appeal decision, but there are some interesting points on the review process worth noting.

Ms Makisi had applied as homeless, with her three young children. Birmingham had accepted the full Housing Act 1996 duty. The property, a three bed property, was agreed to be suitable in itself, but Ms Makisi requested a review of the decision on the basis of the distance from her 6 yo son's school, about 2 miles, which would mean a bus trip and a walk at either end. It was important that her son remain at that school as he has autistic spectrum disorder which affects his comprehension, ability to communicate and to relate to others, attention and cognition. There were extensive special needs statements and reports, which were before the reviewing officer. Ms Makasi's objection to the property was that she wold have to take her son (and with her the two infant children) to the school on the bus and the walk each morning and back each afternoon. Her son's behavioural difficulties made that journey potentially dangerous, both for her son and others on the bus, in various ways, making the location of the property unsuitable and not reasonable as permanent accommodation for her.

Ms Makasi accepted the property, but then requested a review. The submission set out the problems faced in relation to her son and the dangers to her son and others. After a few weeks and a further letter of submissions, the reviewing officer called Ms Makisi and the same day sent a 'minded to' letter, giving an 'opportunity to respond to issues which I am minded to hold against you'. This stated that:

Your case has been rebooked to be heard on 23 July 2009. If any further information in response to this decision which you would like to be taken into account, you or someone acting on your behalf may make oral representations, further written representations or both oral and written representations.
Ms Makisi's solicitors wrote stating that Ms Makisi wished to make oral representations in addition to those in writing, 'in line with the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999' and asking for a time and date for a meeting.

On 27 July, the Reviewing Officer telephoned Ms Makisi. In what the Reviewing Officer later referred to as 'a conversation', it appears that Ms Makisi made statements about the dangers presented by travelling with her son and the Reviewing Officer put questions to her. There was no further evidence about this call. There was no evidence from the Reviewing Officer and Ms Makisi's statement said simply 'Through my solicitors I requested a meeting with Birmingham City Council by letter on 21 July 2009. I was advised by telephone by the Council that they do not need to see me in person.'

Ms Makisi's solicitors sent a further letter requesting an appointment and enclosing some further reports on the son. The Council did not respond but on 14 August sent the review decision, which upheld the suitability of the offer.

On appeal, Ms Makisi argued that: 1. The respondent erred in law in that it failed to take into account the particular difficulties the appellant faced in travelling with her son. 2. The respondent erred in law by taking into an account an irrelevant consideration that the appellant might otherwise use public transport for other purposes, when those journeys might well not be when her son was with her. 3. The respondent erred in law in failing to engage with or address the practical difficulties that the appellant has in alighting from a bus with two other small children as well as her son who is at risk of running off and taking into account irrelevant considerations namely how parents of children without autistic spectrum disorder alight from a bus. 4. The respondent erred in law in failing to apply the test set out in Slater v Lewisham as to the distinct approach to be adopted in considering whether or not the accommodation is reasonable to accept and in substance decided the accommodation was suitable and ergo it was accordingly reasonable to accept. 5. The respondent erred in law in refusing to give the appellant an opportunity to be heard at an oral hearing and in treating her request for the right to make representations orally as discharged by having a telephone call with her.

Grounds 1 to 4 were dealt with fairly quickly. Taking a 'realistic and practical' approach to the review decision letter which was to be read as a whole, the reviewer had addressed herself to 'the challenging nature of the journey, to the fact that the son's behaviour would be difficult wherever and whenever the appellant attempted to travel with him - which she was entitled to take into account. While Ms Makisi's difficulties were no doubt very real, it could not be said that the reviewing officer had failed to engage with them in any meaningful way. Matters of fact were for the Council and the margin of appreciation was wide. The letter may have contained stock phrases, but, taken as a whole, had grappled with the issue of whether it would be reasonable for Ms Makisi to accept the accommodation without wholly running together suitability and reasonableness.

Ground 5 underwent rather greater consideration.

The issue was whether the reference to 'representations [...] orally or in writing or both orally and in writing' in Regulation 8(2) Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 was a) engaged, and if so b) meant in person.

Birmingham argued that the 'minded to' letter of 15 July 2009 did not raise a 'deficiency or irregularity in the original decision or the manner in which it was made', or mention Regulation 8. The obligation only arises if the reviewing officer considers that there are irregularities or deficiencies in the original decision. This was simply volunteering an opportunity for further submission.

Ms Makisi argued that the decision letter of 7 April 2009 was a bare statement of the statutory test and not a statement of reasons, as required, it was thereby defective and Reg 8 was engaged. The Court agreed with this submission. Further, the Reg 8(2) obligations were mandatory. The letter sent mirrored the Reg 8 requirements, even if it wasn't mentioned. The clear inference on the available evidence was that it was written to satisfy the duty.

The choice as to how to make representations was tentatively found to be the Applicant's. Why should the Council have the power to limit the way in which the representation is made?

On what constitutes an oral representation, Ms Makisi argued that 'orally' meant face to face or at a hearing. Birmingham argued it could be a telephone call.

Lambeth LBC v Johnston [2008] EWCA Civ 690 (our report here) was concerned with the right to make representations rather than the manner in which they were made, but Rimer LJ in that case expressly compared oral representation to oral advocacy and argument in Court. Ms Makisi argued that a telephone call did not give this opportunity. The telephone call was without notice and may have caught Ms Makisi unprepared (although this point was not made in her witness statement) and apparently consisted of the Reviewing Officer asking questions.

As to the sufficiency of the telephone call for Ms Makisi to make her case, this was a matter of fact and there was insufficient evidence to decide it, but the interpretation of the regulations was a significant issue.

Ms Makisi argued that the heading of paragraph 19.12 of the Homelessness Code of Guidance for Local Authorities of July 2006 was 'Oral hearings' - the Court observed that the text was the same as Reg 8 and only mentioned 'representations'.

S.203(2)(b) Housing Act 1996 enabled the Secretary of State to make provision by regulation 'as to the circumstances in which the applicant is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing'. However, Reg 8 provides for written and oral representations, neither of which are provided for in these terms by s.203(2).

The Court held that the Regulation must be construed by considering the ordinary and natural meaning of the terms in the context of their purpose and the enabling powers. There was no express provision made for a hearing, despite s.203(2). There is a real distinction between oral representations and oral hearings, as oral representations may be made in other ways.

The other review provisions under the 1996 Act - in relation to introductory and demoted tenancies - both have similar enabling provisions to s.203(2), referring to oral hearings. In the subsequent regulations (Introductory Tenants (Review) Regulations 1997) the regulations provide for an oral hearing, unlike Reg 8. Similarly, the Demoted Tenancies (Review of Decisions)(England) Regulations 2004, Regulation 4 sets out the 'right to an oral hearing'. So, while the Secretary of State had the power under s.203(2) to make regulations providing expressly for an oral hearing, and had done so in these other regulations, there was no such express provision in Reg 8.

Although troubled by this, as a telephone call does not afford the same opportunities for advocacy as a hearing, the Court found that a telephone call could be sufficient for oral representations under Reg. 8.

Appeal dismissed.

A difficult point and the finding perhaps goes against the tenor, if not the letter, of the judgment in Lambeth LBC v Johnston. Is there a second appeal in the offing?

From Ms Makisi, CLP and James Stark, for Birmingham CC, Emily Orme

Transfers and rent arrears

Fri, 29 Jan 2010 13:38:50 +0000

Dave

The question of the interaction between housing debt and prioritisation for an allocation under Part VI, Housing Act 1996, appears to have been in issue in *R(Osei) v Newham LBC Lettings Agency*, decided on 27.01.10. I say "appears to" because, as of yet, no transcript is available - summaries appear on Lawtel and Lexis - and I for one would be grateful of sight of the full transcript (hint hint to Alison Meacher/Hereward & Foster [who acted for Ms Osei] and Lindsay Johnson/Newham [for Newham]). Essentially, the question was whether it was appropriate for Newham's choice-based lettings agency to decide that Ms Osei's rent arrears were sufficient to reduce her priority when bidding for properties. Ms Osei appears to have had a terrible time of it. She was a victim of domestic violence and applied for an out-of-borough transfer with her two children (she was also pregnant). Her application was supported by a variety of agencies (the LA's domestic violence team, their ASB team, and a child protection plan also supported her application for an urgent need for re-housing). Newham's lettings agency initially accepted her application but only subject to her clearing her former tenancy rent arrears (which would, on any view, have been unlawful unless Newham found her to be ineligible). They subsequently issued a decision-letter which said that Ms Osei was entitled to emergency re-housing; but, given the number of households entitled to such priority, Ms Osei's rent arrears were such that she would rank with a lower priority so that it was unlikely she would be made an offer of accommodation; the lettings agency was not minded to exercise its discretion to rehouse her.

Ms Osei argued (a) that the local authority had fettered its discretion by making the issue of the rent arrears the absolute priority consideration without regard to her personal circumstances and the danger she was in; and (b) the lettingss agency failed to give adequate reasons. It

should be said that Newham also put in a supporting witness statement.

Lord Carlile QC, sitting as a Deputy Judge, held that Ms Osei's circumstances had been taken into account and the agency had been satisfied that Ms Osei's case was not such an exceptional one as to enable her debt to be disregarded. Certain of the correspondence had not been "felicitously phrased, and suggested a restrictive approach by the agency to debt" but, applying *Holmes-Moorhouse* (presumably Lord Neuberger's judgment in relation to section 202/204 decision letters, discussed in NL's post on that case), such letters were not to be read as statutory provisions and the decision-letter clearly set out Ms Osei's domestic situation as well as the regard had to that situation. On the inadequate reasons point, it was held that there is no particular form for the giving of reasons "... and having regard to the knowledge that [Ms Osei] and her solicitors could be taken to have had it was clear that sufficient reasons had been given for the agency's decisions" (applying R(M) v Hackney LBC [2009] EWHC 2255 - links to our note, see [35] of the judgment).

There's a lot going on here that requires some background information - hence the need for a transcript!

Gatekeeping and an absence of records

Sat, 30 Jan 2010 20:56:12 +0000

NL

Local Government Ombudsman's decision: London Borough of Hammersmith & Fulham (09 001 262)

'Ms Kenza' (not her real name) approached LB Hammersmith and Fulham as homeless when she had to leave her private rented home following an incident of domestic violence. She was 8 months pregnant.

Hammersmith did not place her in temporary accommodation pending enquiries. Instead officers encouraged her to find accommodation in the private sector. A homeless application was not mentioned by the officers. She was later given a night's accommodation by the out of hours service and, she asserted, she then spent 4 days sleeping rough in a park.

She complained to the Ombudsman that Hammersmith had failed to give her adequate advice and assistance and also complained of sexual and racial discrimination.

The Ombudsman found that Ms Kenza "suffered some injustice because she was not provided with the level of support and assistance she could reasonably expect as a person who was homeless and in priority need".

Further, the Ombudsman found maladministration causing injustice.

The standard of record keeping by housing officers in this case was so poor that it hindered the Ombudsman’s investigation of the complaint and fell so far below acceptable standards that it amounted to maladministration.

He said: “It has not been possible to resolve some conflicts of evidence because of the absence of detailed contemporaneous notes recording housing officers’ contact with Ms Kenza, [voluntary agency] caseworkers and other professionals.”

Officers did not consider taking a homelessness application from Ms Kenza after she left her accommodation even though she had told a housing officer she was homeless. The Council applied too strict a test when deciding whether it should provide Ms Kenza with temporary accommodation by insisting she provide proof of homelessness first. The Council also failed to follow its own procedures for referring victims of domestic violence to a specialist domestic violence housing advocate for support and advice. The liaison and exchange of information between officers in the Children’s Service and Housing Service about a vulnerable service user was also ineffective.

However, in the absence of any specific incident or comment made by an officer, the Ombudsman did not uphold Ms Kenza’s complaint that she was subjected to racial and sexual discrimination.

The Ombudsman recommended that the Council apologise to Ms Kenza and pay her £750. In addition the Council should:

- remind all housing officers of the need to maintain accurate and detailed records of their contacts with service users and their advisers and advocates;
- review its systems for sharing information between Children’s Services (and Adult Services in relevant cases) and the Housing Service about vulnerable service users;
- ensure that the established procedure for referring service users to the domestic violence housing advocate are followed; and
- ensure that all forms used by the Housing Service are dated and ensure that records of service users placed in emergency accommodation by the Out-of-Hours Service are copied to the housing officer responsible for the case.

Impressive work there by LB Hammersmith and Fulham, compounding gatekeeping with incompetence. In case anyone from the Council is reading, let me remind you of the wording of s.188 Housing Act 1996, with a little emphasis.

188. Interim duty to accommodate in case of apparent priority need. — (1) If the local housing authority have reason to believe that an applicant **may** be homeless, eligible for assistance and have a priority need, they **shall** secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part.

Advice and assistance

Wed, 03 Feb 2010 23:32:57 +0000

NL

R(Savage) v LB Hillingdon [2009] EWHC Admin 88 [not on Bailii yet, available on Lawtel].

Ms S applied to Hillingdon Council as homeless following a possession order on her private rented accommodation on grounds of rent areas. Hillingdon provided temporary accommodation then found she was homeless, eligible and in priority need, but intentionally homeless (it didn't help that Hillingdon housing advice had previously told her to set up a direct debit for her rent). Ms S did not ask for a review and it was accepted that she was intentionally homeless.

Hillingdon's s.184 letter quite rightly stated that Hillingdon had a duty to offer her 'advice and assistance' to find her own accommodation. Ms S contacted their housing options team. She was then told that she was not eligible for the finders fee scheme (in which the council provides the deposit/rent in advance on a private tenancy up to £1500) because she was intentionally homeless.

Ms S, via solicitors, first sought a late review - which was refused - then, once evicted from temporary accommodation and once social services had said that they would take her son but not accommodate her, and on a further refusal to provide fee finders assistance, she applied for JR of the refusal to consider her for the fee finders scheme. Interim relief included accommodation, continued on permission.

The Claimant argued that i) the Council did not carry out any proper assessment of C's housing needs in accordance with s.190(4) Housing Act 1996 ii) The Council failed to provide any or proper advice and assistance to C pursuant to s.190)2)(b) HA 1996 iii) The Council adopted a rigid approach or fettered its discretion with regard to the advice and assistance provided, including in regard to the fee finders scheme. iv) the Council had failed to secure accommodation 'for a reasonable period', pursuant to s.190(2)(a) HA 1996.

Hillingdon's argument was i) the issues raised could have been raised on s.202 HA 1996 review, so JR was not appropriate ii) excessive delay iii) none of the Claimant's argument were the case.

Held: although there was no formal written assessment of housing needs, there didn't have to be. Hillingdon has carried out the required assessment, even though it mostly pre-dated the s.184 decision. It was 'wholly unrealistic' to expect a wholly fresh assessment.

Advice and assistance did not have tone such as will ensure that suitable accommodation is available, s.192(2) HA 1996. S.206(1)(c) deals with the provision of accommodation under s.193 and does not qualify s.192. Advice and assistance may indeed not lead to accommodation. There may be litle advice and assistance that can be offered, but that little was offered here.

The Art. 8 argument advanced did not assist the claimant. Even when social services offered to take her son but not accommodate her, the claimant retained a choice - to remain homeless and keep the family together (!).

The Council, as shown by the s.184 letter, was well aware of the Claimant's personal circumstances. It could not be said that they had not been taken into account.

On fettering of discretion, however, the fee finders scheme option was not considered flexibly. There was evidence that the Council had simply refused to consider her for the scheme due to the finding of intentional homelessness and advised her so. The initial decision was not reconsidered and the case was not discussed with a team leader, as set out in the Council's policy, in the light of the Claimant's circumstances. While the policy was not rigid in stating that the intentionally homeless would not usually be eligible for the scheme, the policy was applied as if it were rigid. In this respect the provision of advice and assistance under s.190(2)(b) was unlawful.

On the reasonable length of time to be provided for the claimant to find alternative accommodation, *Conville v Richmond Upon Thames* [2006] 1 WLR 2808 provides that it is for the Council to decide what is a reasonable opportunity. It is not a duty to provide long term accommodation and the efforts of the applicant to find accommodation are relevant. There was no evidence that the Council had applied a fixed period here, in view of the information it had about the Claimant. In fact the stated 28 days given had been far exceeded. The Claimant had had something like 8 months by the time she was evicted.

On the s.202 review issue, s.202(1)(b), raised by the Council, appears to relate to the existence or not of duties under s.184 and not with the discharge of those duties - in that case s.202(1)(f) would be otiose.

Further *Conville* had proceeded by Judicial review without any suggestion that s.202/s.204 was the appropriate route. However *R (Ahmed) v Waltham Forest LBC* [2001] EWHC Admin 540 appeared to find the opposite.

It was not necessary to decide in this case as the Council had accepted it would be helpful to have guidance on these statutory provisions and grant of permission had not been opposed for that reason. Further it was not clear that s.202(1)(b) would permit the determination of such issue on review and county court appeal.

Delay in bringing the claim did not pertain to the issue of advice and assistance - it was an on-going duty.

Overall, the Council's failure to comply with its own policy on the fee finder scheme was unlawful and capable of remedy.

Hillingdon have amended the fee finders scheme policy in the interim. How is not stated.

Missing letters, Reviews and Determinations of Civil Rights

Thu, 18 Feb 2010 00:07:31 +0000

NL

Tomlinson & Ors v Birmingham City Council [2010] UKSC 8

This is the Supreme Court judgment on the appeal from the Court of Appeal of what was then called *Ali & Ibrahim v Birmingham City Council* [2008] EWCA 1228 [our report here]. At issue was whether the Housing Act 1996 s.202 review and s.204 appeal to the County Court procedure was compatible with Article 6 of the European Convention on Human Rights. Or pace Lord Hope:

i) Does an appeal under section 204 of the 1996 Act involve the determination of a "civil right" for the purposes of article 6(1) either generally or in cases such as the present ones where the issue is simply one of fact? ii) If so, does article 6(1) require that the court hearing such an appeal must have a full fact-finding jurisdiction so that it can determine for itself a dispute of fact either generally or in a case such as these? iii) If so, can section 204 of the 1996 Act be read compatibly with article 6(1) so as to entitle the county court to exercise that jurisdiction? If not, then a declaration of incompatibility will have to be made.

The short answer by the Supreme Court is:

i) no it doesn't; and ii) possibly obiter in view of i) but, no it doesn't; and iii) doesn't arise

With the surprise ending out of the way, let's look at how the Court got there, as this was a case where, as Lord Hope announced in the main judgment, the Court took 'the opportunity to introduce a greater degree of certainty into this area of public law'.

A little history The appellants had both made homeless applications to Birmingham CC and Birmingham had accepted the full housing duty. Both had been made offers of permanent accommodation which they had refused as unsuitable. Birmingham decided they were suitable and discharged duty under s.193 Housing Act 1996. Both applied for review and raised the issue that they had not received offer letters setting out the consequences of refusal as required under s.193(5). Birmigham said that the letters had been sent. Both s.202 reviews upheld Birmingham's view that the letters were sent and had been received and that the offers were suitable. The s.202 reviews were carried out by more senior officers of Birmingham CC as per the standard review process. Both appellants appealed to the County Court under s.204 and sought to raise non-receipt of the letter as a factual issue to be determined. In both cases, the court refused to consider this on the basis that appeal was on points of law only and that factual issues were for the Council to determine.

The appeal to the Court of Appeal was on the basis that discharge of duty under s.193 was a determination of a civil right, that Art 6 was thereby engaged and that restricting determination of fact to the local authority was not compatible with the Art 6 requirement for determination by an independent tribunal. The Court of Appeal held that the matter fell under *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5 and that the finding in *Tsfayo v UK* [2006] ECHR 981 did not change it.

The Supreme Court The Appellants argued on the main Art 6 point that:

the right to accommodation under section 193 of the 1996 Act is a civil right within the meaning of article 6(1) of the Convention. [...] The effect of the statutory scheme was to confer on the appellants an entitlement to accommodation. This was a right, the correlative of which was a duty on the local housing authority which subsisted until it ceased to be subject to the duty in one or other of the ways provided for by the statute. The right to accommodation was an individual economic right which flowed from specific rules laid down in a statute, according to the Strasbourg court's reasoning in Salesi v Italy 26 EHRR 187 and Mennitto v Italy 34 EHRR 48. From this it followed that the reviewing officer's decision, which brought that right to an end, was a determination of the appellants' civil rights within the meaning of the article.
and
Although a right to accommodation was a right to a benefit in kind rather than a right to a financial payment or a subsidy. But he said this did not in itself disqualify it from being a civil right. A series of Russian cases beginning with Teteriny v Russia, application no 11931/03, 1 July 2005, BAILII: [2005] ECHR 449, and ending with Nagovitsyn v Russia, application no 6859/02, 24 January 2008, BAILII: [2008] ECHR 73, indicated the contrary. It was held in those cases, which arose out of failures to comply with judgments by which the applicants were to be provided with accommodation of a certain size in a specified location, that there had been a violation of article 6(1).
Birmingham did not mount a challenge to this argument, preferring to take the view that if this was a civil right, it was at the border of such cases. Birmingham preferred to deal with the specific cases before them.

However, the Secretary of State for Communities and Local Government, intervening, mounted a full scale opposition to the 'right to accommodation' being a civil right for Art 6(1) purposes, on the basis that this would have wide ramifications for administrative practice in many area, not just homeless decisions. The SoS argued that:

Strasbourg case law had limited civil rights to those which were related to individual economic rights which were enforceable through the

courts. Any right under section 193 was subject to a large number of decisions that were left to the judgment of the local housing authority. There was also a judgmental decision as to how any such right was to be delivered, as the duty under section 193 was merely to secure that accommodation was available. The inclusion of benefits in kind such as these in the determination of rights protected by article 6(1) was a step further than the Strasbourg court had gone, and this Court should decline to take it.
Lord Hope's main judgment, with which Lady Hale and Lord Brown agreed, traced the history of cases before and after *Runa Begum*. His view is that the European cases before *Begum*, in as much as they applied to public benefits had initially been concerned with benefits analogous to private insurance and then extended in a limited manner to social benefits not analogous to private insurance but where what was at issue was a specific sum of money not at the discretion of the authority concerned and where the decision at issue was directly decisive for the benefit at issue (*Salesi v Italy* 26 EHRR 187, *Mennitto v Italy* 34 EHRR 1122).

In *Runa Begum (2003)*, the House of Lords declined to take a step further than the existing Strasbourg case law and, while declining to decide whether a right to accommodation under Part VII Housing Act 1996 was a civil right, there were clear indications in the opinions of Lords Millett, Hoffmann and Bingham that they would, if pressed, decide against, principally on the basis that there was too large a degree of discretion in the provision of accommodation for it to be equated to a right to a specific sum.

Since *Begum*, there has been *Tsfayo v United Kingdom* 48 EHRR 18. However, in *Tsfayo* it was not disputed that the case concerned the determination of a civil right and the case fell within the mainstream of those mentioned above. *Tsfayo* takes the court no further on the issue of a benefit in kind as a civil right.

Stec v United Kingdom (2005) 41 EHRR SE295 and *Loiseau v France* application no 46809/99, 18 November 2003 appear to contain suggestions that a civil right is an 'assetable right' akin to a 'private right arguably recognised under domestic law' or 'an individual right of which the applicant may consider himself the holder'. These suggestions do not support the view of a benefit in kind as a civil right. Lord Hope quotes himself in *R (A) v Croydon London Borough Council* [2009] UKSC 8, where the issue was argued, as saying 'it could be asserted with reasonable confidence that the local authority's duty, which is 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, did not give rise to a civil right'.

The Russian cases, while they did concern accommodation, were all about judiical orders that accommodation be provided. There was a clear argument for taking entitlement by judicial order as a civil right, but this was distinct from the right asserted here.

On this basis, Lord Hope finds:

I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to "civil rights" within the autonomous meaning that is given to that expression for the purposes of that article. The appellants' right to accommodation under section 193 of the 1996 Act falls into that category. I would hold that article 6 was not engaged by the decisions that were taken in the appellants' cases by the reviewing officer. [para 49]

On the issue of whether the review/appeal process was Art 6 compliant, although there was no need to find on it, Lord Hope adds that while the argument that the issues in these cases were perhaps closer to *Tsfayo* than *Begum* in that the questions at stake were purely ones of fact, whether the letters were received or not was only:

one among a number of questions that had to be addressed to determine whether the respondents' duty under section 193 had been discharged. They are dealt with together in section 193(5) in a way that shows that they are all interlinked. The scheme of the Act is that they are to be dealt with together both at the initial stage and, in the event of a review, by the reviewing officer. To separate out questions as to whether the formalities laid down by the subsection were complied with from those as to whether the accommodation was suitable would complicate a scheme which, in the interests of speed and economy, was designed to be simple to administer. [para 53]

The decision about whether the letter was received or not was only a staging post along the way. In any event the ECtHR had not given any indication that it disapproved of *Runa Begum*. The ratio of the decision in *Begum* should be applied and on that basis "the absence of a full fact-finding jurisdiction in the court to which an appeal lies under section 204 does not deprive it of what it needs to satisfy the requirements of article 6(1)." [para 54].

Lord Collins agrees with Lord Hope, with some further discussion of the Strasbourg cases.

Lord Kerr also agrees, but with more misgivings. He had difficulty in finding a principled distinction between social security payments and social welfare provision, but the lack of analogy with private insurance and the extent of discretion in both establishing entitlement and discharging the duty in the 'right to accommodation' indicate the difference.

Lord Kerr is also uneasy about judicial review (principles) being sufficient review by an independent tribunal of an administrative review decision. Where the purpose if to remedy a lack of independence at first instance (*Tsfayo*) and the issue at stake is a purely factual one, judicial review seems inapt, although suited to consideration of evaluative decisions.[para 78]

Nevetheless, *Runa Begum* continues to 'occupy this field', and it is true that Part VII decisions partake of both factual inquiry and

discretionary judgment. 'The nature of the scheme as a whole dictates the answer'.

Brief comment (pending further thought) I doubt that this judgment comes as a surprise to many. The Court of Appeal more or less sent the case on its way to the Supreme Court with a request that the Art 6/Civil right issue be clearly determined and so it has been. The perceived danger of the spread of the judicialisation of dispute procedures into the administrative realm is set out clearly.

I confess to finding the arguments based on the extent of the discretion involved in the evaluation of whether a duty is owed under Part VII to be perhaps exaggerated, and maybe likewise the views on the extent of the discretion over the means by which the duty to accommodate may be discharged. However, it is clear that the view that 'the content of the statutory duty lacks precision' (Lord Collins) is what enabled the Court to separate a right to accommodation from a right to benefits.

Strong rumour has it that this case may now be taken to Europe. Given the analysis of the Strasbourg cases on the issue set out in this judgment, that certainly would settle the question of whether the ECtHR has reached the limit of its expansion of the concept of a Civil Right under Art 6 or not.

In the meantime - business as usual.

Right of residence and children in education

Fri, 26 Feb 2010 01:21:56 +0000

NL

LB Harrow v Ibrahim C−310/08 on reference from the Court of Appeal (*LB Harrow v Ibrahim and another* [2008] EWCA Civ 386. Our note here).

The question was whether:

(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;

Mrs Ibrahim is the wife of a Danish man, who worked for a period in the UK. Following an illness and a period on benefits, Mr I's right to reside ended and he returned to Denmark. However, Mrs I and their four children, who had joined Mr I, remained in the UK and the children had been in school throughout. Mrs I applied as homeless and Harrow refused her as ineligible.

The Court of Appeal referred the following questions to the European Court:

(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?

On (1) and (2) the European Court found that, following Case C−413/99 *Baumbast and R* [2002] ECR I−7091 and Case C−7/94 *Gaal* [1995] ECR I−1031, it was clear that a child's right to reside under Art 12 was independent of Articles 10 and 11, regardless whether the parent who is a citizen of the union has ceased to be a migrant worker in the host state. A refusal to allow the parent with care to reside during the children's education would deprive the children of their right under Art 12. In paragraph 23 of *Gaal,* the Court expressly stated that Article 12 of Regulation No 1612/68 contains no reference to Articles 10 and 11 of the regulation.

Further

as is apparent from the very wording of Article 12 of Regulation No 1612/68, the right to equal treatment in respect of access to education is not limited to children of migrant workers. It applies also to children of former migrant workers.

The right derived by children from Article 12 of Regulation No 1612/68 is also not dependent on the right of residence of their parents in the host Member State. It is settled case-law that Article 12 requires only that the child has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and Gaal, paragraph 27).

To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.

Directive 2004/38 did not alter Art 12, as contended by Harrow and the UK. Where that directive amended Art 10 and 11, it did so specifically, and the absence of specific address to Art 12 showed the intention of the European legislature. Indeed, the directive was intended to be consistent with *Baumbas*t. There was no intention to limit Art 12 to a mere right to access to education. Directive 2004/38 has the stated purpose of strengthening the right of free movement, but if it replaced Art 12 in the same way as it did Art 10 and 11, then the Art 12 right would be more restricted that before.

On sufficient resources, there is no requirement in Article 12 for self sufficency and, following *Baumbas*t, the Article must not be rendered ineffective.

The Court, in a case where it had to rule on whether children who were resident in the Member State in which their father, a national of another Member State, had been employed before returning to his State of origin were entitled under Article 12 of Regulation No 1612/68 to State assistance intended to cover the costs of their education, the maintenance of them and their dependants and sickness insurance, held, without ruling on the economic situation of the students in question, that the status of children of a worker who is a national of a Member State within the meaning of Regulation No 1612/68 implies, in particular, that it is recognised in European Union law that such children must be eligible for study assistance from the State in order to make it possible for them to achieve integration in the society of the host Member State, that requirement applying afortiori where the persons covered by the provisions of that regulation are students who arrived in that State even before the age at which they had to attend school (Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 35).
Therefore
the answer to the first two questions is that, in circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.
There was accordingly no need to answer the third question.

In short, where the children of a EU worker have entered education in the UK, then there is a continued right to reside for the children and the parent who is their carer (whether an EU citizen themselves or not) for the duration of the course of education, regardless whether the marriage to the EU worker subsists or if the EU worker remains in the UK. This is an independent right belonging to the children. There is no requirement for self-sufficiency on the part of the family or parent with care. The family therefore has a right to reside and eligibility for support, including housing.

Case C−480/08 *Texeira v LB Lambeth* (on reference from *Teixeira v London Borough of Lambeth* [2008] EWCA Civ 1088 (our report here)) has also been decided. The basic issues on reliance on Art 12 were the same, with the additional questions being:

i) 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, or is it sufficient that the EU citizen has been a worker at some time after the child commenced education?;

and

ii) 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?

On i) the European Court found that it is sufficient that the child became installed in the host country at a time when a parent was a worker and there was no requirement that the child must have started education at a time when the parent was a worker.

On ii)

the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.
Overall, *Ibrahim* was a big case for Shelter and Nicola Rogers to bring and a significant decision. Naturally the Daily Mail didn't like the result, apparently on the basis that Mrs Ibrahim has a 36 inch TV and a Playstation, this apparently being sufficient to make the law an ass. I wonder if the practical benefit of the decision for the Mail's ex pat readership on the fringes of the Med had occurred to them?

Tiexiera was brought by Hanse Palomares, Adrian Berry and R. Gordon QC acting.

Probably wrong but wholly academic

Mon, 15 Mar 2010 13:51:59 +0000

NL

Raw, R (on the application of) v London Borough of Lambeth [2010] EWHC 507 (Admin)

This case is a vivid illustration of the difficulties of challenging a Local Authority's apparent homelessness gatekeeping practices, or alternatively, if you are a Local Authority, a clear example of tactical defences to such a challenge.

The problem is that a claim for judicial review seeking to address, in part, the lawfulness of a policy, rests pretty much entirely on the impact of the policy on the individual claimant. Thus the astute Council settles the effect on the Claimant, leaving the broader policy issue as academic and pretty much impossible to pursue.

In this case, Mr Raw (incidentally a veteran of the Kay v Lambeth short-life housing battles and still in the same property despite an order for possession being made) had applied as homeless to Lambeth. Lambeth had referred him to Lettings First - a deposit scheme for private accommodation run by Lambeth, and it became clear that they were not going to proceed with making s.184 inquiries once the referral had been made. Once judicial review proceedings were underway, Lambeth restarted inquiries under s.184, eventually accepting the full duty, but removed Mr Raw from the Lettings First scheme until the decision that the full duty was owed was made. it then re-instated Mr Raw on the Lettings First scheme as well as allowing him to bid under Lambeth's CBL scheme.

Mr Raw's JR claim included a claim for a declaration that failing to make inquiries under s.184 was unlawful, and that a referral to Lettings First was not a basis to stop the s.184 process. By the time the matter came to hearing, then, this part of the claim was wholly academic (as was the rest).

Mr Raw sought to persuade the court that this was an iossue of broader public interest, given that at least 100 and probably more homeless applicants each year were referred to Lettings First and, as the conditions appeared to be standard, would have their homeless applications abandoned, or at least frozen. This looked like gatekeeping.

Mr Watkinson who appeared on behalf of the claimant invited me to exercise my discretion to entertain the application for a general declaration and to adjudicate upon it. In doing so he relied on two points. The first to which I refer in more detail below was that it is to be inferred that there are many other people in a similar position to that in which the claimant found himself before the Council agreed both to continue its inquiries and to allow him to participate in the rent deposit scheme, so that the court would have to determine the issue raised in this case sooner or later in another case if I declined to do so in this case.

Mr Watkinson's second ground was that the operation of the Council's policy, as he submitted, has the effect that claims for judicial review brought by people in the position of the claimant are always likely to result in offers being made by the Council similar to those made in this case before the claim gets to court with the result that unless the court is prepared to adjudicate on the legality of the Council's policy in a case which no longer has any practical effect on the particular person who has brought a claim there will never be a mechanism for subjecting the alleged illegality of the Council's policy to judicial scrutiny.

The Court considered *R (on the application of Zoolife International Limited) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) on the issue of hearing academic cases. Silber J stated
In my view these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the courts. The first condition is in the words of Lord Slynn in Salem (supra) that "a large number of similar cases exist or anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequences would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs.
Here, although the claimant had sought evidence on the existence of other claims on this topic, there was not sufficient evidence that a large number of claims would be brought in the future, or had been settled in the past. And, while
In principle in a hypothetical case in which a claimant was able to identify an unlawful policy implemented by a local authority which could never be challenged by a person adversely affected by it because the nature of the illegality was so transient or short lived that it would always cease before it could be brought to court or where the local authority deliberately disapplied the policy so as to render all claims academic before the court could decide on them, I could imagine that there might be a good reason in the public interest for the court to entertain an academic claim for a declaration that the policy was unlawful. this did not appear to be such a case.
Further
There was no evidence before the court of other cases in which the Council's allegedly unlawful policy was initially applied but subsequently disapplied, let alone disapplied by the Council after proceedings for judicial review had been issued with the motive of preventing the court from adjudicating upon the legality or illegality of the alleged policy.
And, although Lambeth's account of its Letting First scheme and referral policy left questions unanswered, there was some force in Lambeth's argument that any individual challenge to it would be fact sensitive, depending on how the scheme affected that person.

The Court declined to adjudicate on the 'academic' declaration.

However, as a coda, Mr Justice Stadlen provided Lambeth with a homily on the immediate nature of the duty to make inquiries under s.184 (and provide interim accommodation under s.188) and offered his view that the apparent operation of the Letting First scheme gave rise to serious concern:

Thus if for example while waiting for a property to become available under the rent deposit scheme a person to whom the 7 January 2009

document or its equivalent was addressed was in a position where had the council continued its inquiries it would have had reason to believe that he might be homeless, eligible for assistance and have a priority need there is nothing in the document to tell him either that he may be forfeiting a right to interim accommodation which he might otherwise have had or alternatively that the council would consider itself bound to secure interim accommodation whether under section 188 or voluntarily.
and
it might well be that a blanket policy of ceasing inquiries in all cases where a Part VII applicant has been referred to the rent deposit scheme could be construed as such an avoidance of statutory obligation. In short the benefits of the rent deposit scheme, great though they may be, are not equivalent to and may not be an adequate substitute for at any rate the benefits to a Part VII applicant of the duty to provide interim accommodation under section 188, which benefits may in practice be diminished or undermined in the event of the Council not completing its section 184 inquiries.
But. of course, these are merely observations on what might have been the finding had the Court decided to hear the case on the facts and Lambeth's Letting First scheme was not found to be unlawful.

Permission 2 - given: EU child and Homeless duty

Mon, 22 Mar 2010 21:29:32 +0000

NL

Lekpo-Bozua v Hackney LBC [2010] EWCA Civ 222 [Not on Bailii]

Ms L-B had applied to Hackney as homeless. Hackney accepted that she was eligible, homeless, not intentionally homeless and in priority need, because her niece, a child, lived with her. However, while Ms L-B was a UK citizen, her niece was an EU national. Hackney contended that this meant the niece was a restricted person within the meaning of section 184(7) Housing Act 1996:

so that its duty to re-house her was the more limited duty imposed by section 193(2) and (7)(AA) of the Act. That meant that its duty to the applicant continued only until she accepted or refused an offer of private accommodation as defined in section 193(7AC).

The Court of Appeal was told that the only issue to be decided on appeal was whether the niece has the right to reside freely in the United Kingdom under Article 18 of the EU Treaty. If she does then the full housing duty would be owed by Hackney.

Art 18 applies to a 'qualified person'. The niece did not fall under any of the definitions of 'qualified person' in Regulation 6(1) of the Immigration (European Economic Area) Regulations 2006. Ms L-B argued that *Baumbast v SSHD* (Case C-413009) [2002] ECR-701 meant that proportionality applied to limitations and conditions under a directive (here Directive 2004/38/EC) such that:

If it can be seen that there is an accidental lacuna in the Directive, Article 18(1) must be applied to fill it where it is plainly appropriate for a person to have a right of residence by virtue of being a citizen of the union. Where, however, it is possible to discern in the Directive a deliberate intention to exclude a particular class of persons, it is not legitimate to resort to Article 18(1), since to do so would undermine the Directive.

The niece had lived in the UK with her aunt for 9 years, receiving an education and benefits here. At s.204 appeal, Ms L-B contended that this meant there was a clear lacuna in the directive and regulations, which should be interpreted in her favour. Hackney argued that the regulations were carefully worded. Students were a qualified person only if they had comprehensive sickness cover, which the niece didn't, and had no recourse to public funds The definitions of family members did not extend to the niece. The Circuit Judge held against Ms L-B.

On application for permission, Ms L-B argued:

i) Article 8 applied as the homeless duty in Local Authorities was intended to preserve family life and the legislation discriminated between foreign (EU) nationals and UK children, which was not justifiable. ii) The niece had access to the NHS as a resident in the UK, so Reg. 6 was besides the point. iii) If the regulations and directive gave rise to a breach of human rights, that was a lacuna falling under Article 18. iv) that in light of recent developments in the case law of the European Court it is no longer necessary to find a lacuna before considering the question of proportionality.

Hackney argued that a scheme which enabled discharge of housing duty by means of an AST could not fall foul of the convention on human rights.

The Court of Appeal took the view that the relevant European law was complex and of wider importance. In addition, there was not time to consider *Teixeira v Lambeth* and *Ibrahim v Harrow* properly, but it may be that further clarification was required in this area. Permission to appeal allowed.

Comment It will be interesting to see how this goes. It doesn't seem to quite fall under Ibrahim, but it may be that the decisions on Art 12

rights are relevant. That said, I can see Hackney's argument on ASTs and a lack of breach of Art 8. There was no proposal to divide the family. Thanks to Garden Court bulletin for the heads up on this case.

'Minded to' letters and oral representations

Mon, 29 Mar 2010 12:56:57 +0000

NL

Bury Metropolitan Borough Council v Gibbons [2010] EWCA Civ 327

This was the Court of Appeal judgment on a second appeal from a s.204 Housing Act 1996 appeal in the County Court. At issue were the Circuit Judge's findings that Bury had: a) failed to give advice to Mr Gibbon on first application as homeless as required by para 2.12 of the Homeless Code of Guidance for Local Authorities b) should have addressed this failure in their s.202 review, but failed to do so c) failed to address an error in the s.184 decision as to the level of savings held by Mr Gibbon in the s.202 review d) failed to hold an oral hearing which Mr Gibbon's legal representatives could attend, as required by Regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedure) Regulations 1999

Bury appealed.

Brief facts... Following some personal difficulties, Mr G sold his house in November 2007, receiving some £23,000 over the mortgage, and he and his daughter moved to private rented accommodation. His personal difficulties continued. He was largely unemployed but not claiming housing benefit or any benefit, and was drinking heavily. By June 2008, he was in rent arrears and was given 2 months notice. A further letter told him to leave by 27 September 2008. Mr G did not know he was entitled to remain until a possession order was made. He approached Bury on 9 September 2008 and made a housing application for himself and his daughter, stating on the form and in person that he was to be imminently homeless. Bury did nothing at all at this point.

Mr G and daughter moved into a caravan on 17 September 2008. he went back to Bury on 26 September and told them he was homeless. Bury didn't believe his daughter was living with him, and sent him away as not being in priority need (apparently without s.184 decision being made).

In December 2008, Mr G again approached Bury as homeless and told them he was being kicked out of the caravan. This time Bury accommodated him and his daughter while making enquiries. The s.184 decision in December 2008 was that he was intentionally homeless because he had left due to rent arrears while having £7,048.72 in savings (This was not the case.)

On review, with Bury Law Centre representing him, Mr G had a meeting with the review officer on 20 march 2009. On 31 March, the review officer wrote a 'minded to' letter stating that she was minded to find Mr G intentionally homeless due to non-payment of rent, frivolously spending his capital from the sale of his house and voluntarily leaving the rented accommodation. On 2 April, Bury Law Centre asked for an extension of time to 9 April for a response to this letter. On 8 April, Bury Law Centre sent a further letter asking for a meeting between the review officer, themselves and Mr G to make representations. By co-incidence, Mr G was in the Council offices that day, talking to a different officer. Mr G said in that conversation that 'he had nothing to add' to the minded to letter.

Bury granted an extension of time to 15 April, but no meeting took place or was arranged by the review officer. On 16 April, Bury confirmed the decision of intentional homelessness as in the minded to letter.

On s.204 appeal to the County Court, the judge ordered a fresh decision, as set out above. Bury appealed.

Bury argued that: i) the application of 9 September 2008 did not trigger their Part 7 Housing Act 1996 obligations ii) It was not important that the reviewing officer had failed to address whether Mr G was or could have claimed housing benefit and di not address whether his failure to do so was an act or omission in good faith or ignorance under section 191(2) and anyway Mr G had not acted in good faith. iii) There was no requirement for an oral hearing as regulation 8(2) was not engaged and even if it was, there was no requirement for a full oral hearing as opposed to by telephone. iv) There was no legitimate expectation of a full oral hearing arising.

The Court of Appeal held:

On i) the Council had failed to provide any assistance or guidance to Mr G when he first approached in September 2008. Advice on housing benefit may have been crucial.

If a person informs the local housing department that he is threatened with homelessness because he has received notice to quit for non-payment of rent, and if the Council does not give appropriate advice, it cannot automatically be assumed that this does not matter. In the present case, the Council's omissions at a crucial time, namely when Mr Gibbons was about to move out of 5 Park View Court and become homeless, were relevant to the question whether Mr Gibbons became homeless intentionally. This was a matter of substance which, in accordance with the guidance in Holmes-Moorhouse at paragraphs 49 to 51, the reviewing officer should have taken into account.
On ii) this was not crucial to the outcome below, however, the judge was right to find that the reviewing officer should have taken into account that Mr G was not provided with advice in September 2008 on housing benefit.

on iii) the s.184 finding that Mr G had £7,000 savings was wrong. The reviewing officer had come to the conclusion that it was wrong in the

course of the review and her decision was based on a different factual basis. Following Carnwarth LJ in *Hall v Wandsworth LBC, Carter v Wandsworth LBC* [2004] EWCA Civ 1740 at 29 and 30:

Where the reviewer rejects the factual basis of the original decision and proposes to substitute a different factual basis leading to the same conclusion, it seems to me that the review has identified a "deficiency" within the meaning of regulation 8(2).
While there may be some circumstances in which a telephone call would suffice for Regulation 8(2) oral representations, that would not suffice in this case. "It was clear that without legal assistance Mr Gibbons did not have the ability to make any relevant submissions or comments concerning the "minded to" letter dated 31st March 2009. Mr Gibbons made this plain when he attended the housing department on 8th April 2009". In these circumstances, "the only way the Council could receive any relevant oral representations on behalf of Mr Gibbons was by acceding to Bury Law Centre's request for a meeting."

On iv) this was rendered somewhat academic by the finding on Regulation 8(2) at iii). However, there was nothing in the 'minded to' letter, which simply referred to further written submissions or a telephone call, that would give rise to a legitimate expectation of an oral hearing, if Reg 8(2) had not been engaged. Bury would have succeeded on this ground of appeal if the circumstances were otherwise, but it wasn't so they didn't. In any event, "following the despatch of the "minded to" letter dated 31st March, it became apparent that the only way of receiving the relevant oral submissions from or on behalf of Mr Gibbons was by holding a meeting as requested by Bury Law Centre."

Appeal dismissed.

This is an interesting case on oral submissions under Reg 8(2). We have seen a telephone call being held to suffice previously (*Makisi v Birmingham City Council*) , and it is not ruled out here, but it is also clear that where there is legal representation (and certainly where that representation is key to submissions being made) then a full oral hearing is required.

it is also interesting and potentially useful on whether a Council's inadequate or non-existent advice on a previous occasion is something that should be considered in s.184 inquiries and s.202 review. If it is material - for instance on housing benefit claims as here - then it should be a factor in the Local Authory's considerations.

Five go to Mornington Crescent

Mon, 05 Apr 2010 14:41:12 +0000

Dave

[aka Three out of the Five go ever so slightly bonkers on the way to Mornington Crescent, and one of those three gets lost on the way]

On the Radio 4 show, I'm sorry I haven't a clue, there is a game called Mornington Crescent, in which there are no rules and the outcome is irrelevant as the show is more important than the game. It is a surreal game in which the winner is the first person to say "Mornington Crescent". I was reminded of that game when reading the five cases wrapped up in *Salford City Council v Mullen* [2010] EWCA Civ 336, which J termed "the Famous Five". They each raise the relevance and extent of gateway (b) in two different factual scenarios: (1) termination of a non-secure tenancy/licence occupied by virtue of section 193, Housing Act 1996 (*Powell v Hounslow LBC*; *Manchester CC v Mushin*); and (2) tenancies terminated under the introductory tenancy regime contained in Part V, Housing Act 1996 (*Hall v Leeds CC*; *Frisby v Birmingham CC*; *Mullen v Salford CC*). Gateway (a) was not argued before the CA in these cases because the CA is bound by *Kay* and *Doherty*, and all of the five occupiers reserved the right to argue gateway (a) in the SC. These are cases in which there are no rules - or, at least, counsel for three of the five local authorities (Salford did not appear) argued that *Wandsworth LBC v Winder* [1985] AC 461, which forms the basis of gateway (b), didn't decide, erm, what it did decide - and the outcome is entirely irrelevant - as the main show is the nine person SC in *Pinnock*, with which the famous five were seeking to join (perhaps to make a suspicious six). However, the outcome was that four out of the five local authorities won; Manchester lost and one will need to look into the mind of Jon Holbrook to find out why. Permission to appeal was granted in *Powell* and *Hall* as the best specimens, so to speak; permission was refused, subject to submissions, in the others.

The first thing to answer, then, is why did the CA bother at all and not just wave the cases through. Their line was that the SC should have a broad range of cases and county courts need urgent guidance (an understatement, I'd say) about how to deal with gateway (b) defences to possession proceedings. Whether those courts find that guidance here or not is open to doubt.

There are five questions of law considered: (1) does section 38, County Courts Act 1984 exclude a gateway (b) defence in all cases? (2) do the particular statutory schemes exclude the taking of a public law defence in the county court? (3) does gateway (b) involve a full proportionality review? (4) How wide is gateway (b) in the context of the specific statutory schemes? and (5) what "decision" or "decisions" can be challenged through gateway (b) (that is, just the decision to serve the notice to quit [ntq] or all decisions leading to possession - this is the ongoing battle between two lines of CA judgment, respectively *Doran v Liverpool CC* [2009] EWCA Civ 146and *Central Bedfordshire DC v Taylor* [2009] EWCA Civ 613, discussed also in our note of *Barber v Croydon LBC* [2010] EWCA 51). Waller LJ gives the judgment of the CA, but Patten LJ gives a supporting judgment which specifically considers the position in *Manchester CC v Mushin*. This was the only case lost by the local authorities and was, if I might say, surreally argued - more of that at the end because it's just weird and not exactly on point as it turns out. Waller LJ takes each point in turn as follows:

Section 38 ([47]-[49])

Section 38 is the curious provision which disentitles a county court from giving the remedies of certiorari and mandamus. From that small

seed, it was argued by Hounslow, Leeds and Manchester that a gateway (b) defence is not open to a Defendant at all in the county court and, in the alternative, *Wandsworth LBC v Winder* [1985] AC 461, properly analysed, only gives rights to defend private rights using public law. These amount to possibly the most bizarre submissions I've ever come across from mostly ordinarily sensible people. They could not possibly succeed without unwinding twenty five years of case law, the whole of gateway (b) (because one would have to make an application for permission to bring a JR if they were right), not to say *Doherty* etc. Clearly the CA were bound and this was a hopeless argument. The only local authority counsel who comes out of this well is Jonathan Manning who did not take this point at all and rightly so. Yes, gateway (b) can be procedurally messy because of the remedy problem caused by section 38, but that does not mean it cannot exist.

Statutory Schemes ([50]-[55])

This submission was stronger for the local authorities with a muted "Mornington Crescent" being raised in the introductory tenancy cases. The submission here was that the statutory schemes precluded the raising of a gateway (b) defence to the possession claim. The homelessness cases were never going to succeed because there was CA authority in the way (*Barber* and *McGlynn v Welwyn Hatfield DC* [2009] EWCA Civ 285). Hounslow nevertheless foreshadowed their SC argument with the claim that gateway (b) only arises in exceptional circumstances where domestic law contains an insufficient safeguard against an Article 8 violation, a proposition roundly rejected on authority.

The introductory tenancy cases are successful on this point in the sense that the statutory provisions make clear that the county court judge has no discretion but to grant a possession order once the procedural elements around the s 128 notice have been complied with (s 127(2)). *Manchester CC v Cochrane* [1999] 1 WLR 809 and *R(McLellan) v Bracknell Forest BC* [2001] EWCA Civ 1510 stand in the way of the alternative construction argued for the occupiers (ie that they could bring their gateway (b) defence in the county court, rather than by commencing a fresh JR application). Although it was argued that Doherty had "swept away" Cochrane and McLellan, the CA decision in Pinnock stood in their way, particularly as the introductory tenancy and demoted tenancy regime are essentially identical (at [54]). This point, then, was won by the local authorities and leaves us with a rather awkward scenario (what if the County Court refuses an adjournment, but there is a successful permission application for a JR?).

Proportionality ([56]-[61])

The next two questions concern the scope of a gateway (b) review. What degree of scrutiny/intensity does it entail? It will be remembered that Lord Hope in *Doherty* at [55] said that "... it would be unduly formalistic to confine the review strictly to traiditional *Wednesbury* grounds" but that just begs the question. The CA hold that it does not extend to a full proportionality review, citing *Doherty* as their authority. That really foreshadows the real issue which is that it's beyond Wednesbury but less than proportionality, and we know that some judges have said that you can't really pass a sliver of paper between *Wednesbury* and proportionality, which leads to ...

Width of Gateway (b) ([62]-[67])

This section begins with a citation from Dyson LJ's judgment in *Smith v Evans* [aka Buckland] [2007] EWCA Civ 1318, at [44], that "It will only be in a truly exceptional case that it will even be seriously arguable that [a gateway [b)] defence will succeed". They go on to quote extensively from Lord Bingham in *Kay* because there's not much difference between him and the majority in *Kay*, the need for highly exceptional circumstances even on his braoder formulation, and his judgment was approved by the ECHR in *McCann*. The question this gives rise to is the extent to which personal circumstances are and can be relevant in a gateway (b) defence. The answers are different depending on the statutory scheme, according to the CA. As regards the introductory tenancy regime:

... the question will be whether there is some highly exceptional circumstance which should lead to the County Court adjourning the matter so that Judicial Review can be applied for in the Administrative Court. Circumstances personal or otherwise which Parliament must have contemplated would be likely to be present in the context of such a scheme could not be considered as ‘exceptional’ never mind ‘highly exceptional’. Thus for example it would be contemplated that difficult questions of fact as to whether anti-social behaviour had occurred or not would be something that Parliament would contemplate as likely. A Local Authority would not have to conduct a full inquiry to establish the truth or otherwise of such allegations knowing that those are just the situations in which getting witnesses to attend and give evidence would be difficult. With allegation and counter-allegation the Local Authority has to take a decision and unless it could be shown that it was arguable that no reasonable authority with the duties it had to perform in relation to managing its social housing could have taken the decision, there should be no question of adjourning the case until a tenant had brought judicial review proceedings.

With the homelessness cases, a different approach was required because of the different statutory scheme which enables a defence to be run in the county court, andthe ntq cannot be challenged directly through the review procedure. But: the gateway (b) defence would need to be highly exceptional if the local authority were going to continue to provide accommodation, perhaps in a smaller place; there is an internal review of certain decisions under section 193 available through which the occupier can make full representations; and it should be remembered that the purpose of the homeless legislation is limited. In summary, then, *Barber* was an example of the kind of case which is highly exceptional (although see below) because the local authority were unaware of Barber's mental illness when they served the ntq but: "Anything less than that kind of risk would be unlikely to qualify as so exceptional as to provide an arguable gateway (b) defence in the context of the homeless legislation" (at [67]).

Decision or decisions? ([68]-75])

This is the most interesting aspect of the decision, to me at any rate. The question is whether one can only challenge the ntq through a gateway (b) defence, as suggested in Doran, or whether each separate decision taken by the local authority (or RP) on the way to possession is defendable through gateway (b), as in *Taylor* and *Barber*. I have never seen how it can be as limited as *Doran* suggests, but it is particularly interesting to see the SoS arguing that Doran is correct. They do so for three reasons: *Doran* allows the facts as they appeared or should have appeared to be considered, and therefore is not as limited as we thought; the Taylor approach causes practical problems of its own in enabling occupiers to lengthen possession proceedings, making them more expensive and costly and here, they use the example of ASB stopping after the ntq or at a later stage before possession; finally, the whole point of gatewway (b) was that the ntq or a rent demand

was ultra vires and void as in *Winder* (which rather repeats the modified section 38 argument). The CA reject these submissions (at [73]) and felt bound by *Taylor* as it had been accepted in *Barber* (at [74]). They reject the first submission because it does not deal with a wholly new event occurring after the ntq, such as the occupier becomes seriously ill. They reject the second submission because:

... we do not accept there is a practical difficulty in a situation in which an introductory tenant brings forth facts which show he has now improved his behaviour; a local authority will be bound to consider whether it should continue with the proceedings but it will not be arguable that it is unreasonable for the Local Authority to continue with them having given the tenant his or her chance and with others waiting for accommodation.

And finally ...

there's *Manchester CC v Mushin*. In summary, Mr Mushin's wife and family left the home provided by Manchester under Part VII due to Mr Mushin's domestic violence. Manchester served an ntq and Mr Mushin relied on a gateway (b) defence on the basis that he did not commit domestic violence and he wanted to stay at the property in case his wife and children reutrned. At the trial Manchester relied on Mr Mushin's over-occupation but conceded that, if it was proved that domestic violence had been the reason for the service of the ntq, then a gateway (b) defence was open to him and should succeed if he had not had the opportunity to rebut the charge of domestic violence. Manchester sought to withdraw those concessions intheir amended notice of appeal and skeleton. But Jon Holbrook, for Manchester, decided not to seek to withdraw them preferring apparently to attack the judge's findings of fact on this point. As Waller LJ put it, "... the argument should have been that because Mr Mushin was in fact in accommodation for a family whereas he was now single, the court should have granted a possession order and any challenge to unsuitability should have been brought by Mr Mushin under the relevant sections applying to the homeless" (at [43]). Indeed, "there was nothing highly exceptional about Mr Mushin's position - it possibly would have been if his wife and family wanted to come back and live with him, but the local authority continued its claim.

Was there in reality any evidence on which the county court judge could base his finding that the ntq had been served because of the domestic violence? Well, yes, actually, quite a lot. Granted there had been two ntqs, only the first of which was relied on; although the housing officer at the time said that he thought it had been served on the basis of underoccupation, against that was the case history and the fact that the housing officer was one cog in the wheel, so to speak.

Conclusions

Forgive me some brief concluding thoughts, perhaps taking account of some of the observations made at last week's conference as well (not really a law practitioner's event, but lots worthwhile going on). What it boils down to is whether there is a highly or seriously arguable gateway 9b) defence in which personal circumstances seem to play some role at least. Barber is regarded as exceptional, but this is, of course, an empirical question and I wonder whether that notion of "exceptional" is actually brought out in the everyday lives and practices of local authorities and RPs, as well as occupiers. We are still left with the real bottom-shifting question: what is exceptional?

Homeless children - new guidance

Thu, 08 Apr 2010 20:45:02 +0000

J

The Secretary of State for Communities and Local Government and the Secretary of State for Children, Schools and Families have issued new guidance to local housing authorities and local social services authorities on housing obligations owed to 16 and 17 year olds.

The guidance is, mostly, explaining and endorsing the effect of *R (G) v LB Southwark* [2009] UKHL 26 (see our note here). Amongst other points, it stresses that, if a child qualifies under s.20, Children Act 1989, they should be accommodated under that section and not under s.17, 1989 Act or Part 7, Housing Act 1996.

It also sets out the correct approaches to be taken, depending on whether the application for assistance is made to a unitary authority (*i.e.* a London borough council or, say, Birmingham / Manchester etc); most of this (protocols for joint working, etc) shouldn't come as a surprise to either authorities or lawyers for applicants, but it's always helpful to have the position re-stated. The guidance also makes clear that B&B should never be used as temporary accommodation for 16 and 17 year olds.

The guidance is available here and, by virtue of s.182, Housing Act 1996 and s.7, Local Authority Social Services Act 1970, has statutory force.

Suitability: Norris v MK

Tue, 13 Apr 2010 17:39:04 +0000

Dave

In *Norris v Milton Keynes Council* [2010] EWCA Civ 77 (not on Baili, Lawtel or Westlaw yet, but, thanks to the Chief's special powers, we have a copy), Rimer LJ considered that a second appeal was merited on two points - LAG, which brought this case to our attention, notes that

the appeal was compromised following the grant of permission.

In brief, the facts are that MK offered Ms Norris a property on 30.10.2008 in discharge of their Part VII duties under s 193(7). MK knew that Ms Norris suffered from epilepsy and needed a shower, rather than a bath, because of the risk of drowning. The property only had a bath. At the viewing on 05.11.2008, Ms Norris was told that any subsequent OT assessment would be followed, including if necessary the fitting of a shower cubicle. Ms Norris sought a review of the suitability of the offer. The reviewer found it suitable on the basis of the assurances at the viewing.

There were two grounds of appeal, and both of them are really quite interesting generally.

The first issue concerned whether the Regulation 8(2), Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, was engaged because of a deficiency in "the" decision. Adrian Marshall-Williams for Ms Norris argued that "the" decision to be reviewed was the offer letter of 30.10.2008, a decision which was clearly deficient. MK and the HHJ had said it was not engaged because it had been supplemented with the subsequent assurances at the view; Rimer LJ was also initially of the view that it was not engaged but changed his mind and considered that it was a point of some general importance on which there is only limited authority, if any. Now, this is a really important point, I think (and not one that I'd given much thought to before reading the decision) because it does raise both a technical ground of appeal as well as, much more importantly in my eyes, an important right for the applicant on a review to make written/oral submissions (on which see our notes of *Banks v Kingston-upon-Thames LBC* [2009] HLR 29 & *Lambeth LBC v Johnston* [2009] HLR 10, esp at [53], again per Rimer LJ). There's definitely food for thought there.

The second ground of appeal was whether the assurance at the viewing on 05.11.2008 was sufficiently certain to satisfy the *Boreh* criterion regarding assurances (at [27] in *Boreh*). Rimer LJ regarded this as an arguable point and was satisfied about its importance on the basis that this point had not been the subject of argument in *Boreh* and, as it had been raised directly in this case, could now be the subject of full argument as to its ambit.

Sadly, of course, the case will never be heard; but I should record congrats to Adrian Marshall-Williams for convincing Rimer LJ of the two grounds when it didn't seem as if, on reading the papers, he was that convinced at all.

Failed asylum seeker - accommodation, not support

Wed, 21 Apr 2010 17:09:18 +0000

NL

R (Kiana) v Secretary of State for the Home Department (2010) QBD(Admin) 20/04/2010. [Note of extempore judgment on Lawtel] [Now full judgment on Bailii]

Mr Kiana came to the UK and applied for asylum. He subsequently lived with his partner and they had a child together. Mr K was provided support under s.95 Immigration and Asylum Act 1999. Following the failure of his application and the subsequent appeals, s.95 support was terminated. Mr K applied for support under s.4 I&A Act 1999 on the grounds that he was destitute. The Secretary if State's refusal was overturned on appeal and Mr K was offered accommodation with one of the SoS's 'target landlords', separate and away from his partner and child. Mr K refused the offer and the SoS refused further assistance.

On Judicial Review of that decision, Mr K argued that s.4 did not stop the SoS providing support separately from accommodation or, if it did, there was no reason accommodation could not be provided by entering an agreement with his partner's landlord. Second, in providing accommodation only through target landlords, the SoS forced Mr K to chose between staying with his family and remaining destitute or accepting the offer and leaving his family, as such it was an interference with his Art.8 human rights.

The Secretary of State argued that he could not provide support under s.4 without providing accommodation. He was obliged to ensure that the accommodation was adequate and safe and that this was achieved through the target contracts with landlords, which could be monitored.

Held: Unlike s.95, which conferred a wider power to provide accommodation and/or support, s.4 simply gave a power to provide the failed asylum seeker with somewhere to live. The inferred intention of Parliament was that s.4 was a more limited power, tied to the provision of accommodation.

The s.4 obligations could not have been discharged though an informal arrangement with Mr K's partner's landlord, as the SoS was obliged to ensure the accommodation was adequate. That was ensure through the screening and monitoring of target landlords.

There was no Art 8. breach. Mr K was not being separated from his family in the same way as someone subject to a deportation order. Art 8 did not guarantee the provision of accommodation or welfare support. There was a positive obligation on states to provide support where family life was severely inhibited or welfare of children threatened but this did not apply in this case.

The support under s.4 was deliberately designed to be less advantageous than support under s.95 as a part of the legitimate immigration control policy.

Application refused.

Not their decision to make

Mon, 03 May 2010 22:18:29 +0000

NL

Birmingham City Council v Clue [2010] EWCA Civ 460

Ms Clue was a Jamaican national. She and her oldest daughter were given leave to come to the UK in 2000 as visitors. After 6 months, she applied for leave as a student, which was refused after appeal in 2003. No steps were taken to remove Ms Clue or her daughter. Ms Clue had 3 children while in the UK, whose father was a UK citizen and who where therefore UK citizens. The children's father supported Ms Clue until 2007. In October 2007, Ms Clue applied for indefinite leave to remain on the basis that the oldest child had been living in the UK for more than 7 years. She returned to live with her aunt (in Birmingham).

She then applied to Birmingham City Council for accommodation and assistance under s.17 Children Act 1989. Birmingham declined to do so on the basis that Ms Clue and her family could return to Jamaica, where they could continue to enjoy a family life. For this reason there was no breach of Art 8. Birmingham offered a payment for travel and a resettlement grant.

Ms Clue made a claim for judicial review, which was upheld:

Birmingham had erred in law in failing to take account of the reasons underlying DP 5/96 (in its amended form) and the presumption to which it gave rise that, where a child of a family had been resident in the UK for 7 years, indefinite leave to remain would be granted in all but exceptional cases. DP 5/96 was the policy of the Secretary of State for the Home Department applicable to children who had been in the UK for 7 years.

Birmingham appealed. The Secretary of State for the Home Department and Shelter came in as interested party and intervener respectively.

Ms Clue was granted indefinite leave in October 2009, making the appeal academic, but it proceeded on its relevance for other cases.

The Court noted that the Home Office policy DP 5/96 in force at the time of Birmingham's decision was that, where a child had lived in the UK for more than 7 years:

For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not normally proceed with enforcement action in cases where a child was born here and has lived continuously to the age of 7 or over, or where, having come to the UK at an early age, they have accumulated 7 years or more continuous residence.

It was under this policy that Ms Clue had applied and it was this policy to which Birmingham ought to have had regard.

Held:

a) Unless the application for leave to remain is clearly hopeless or abusive, it is not for the Council to consider the merits of the application for leave to remain, where made explicitly or implicitly on convention grounds (which in relation to the 7 years policy was clearly the case). This is properly the province of the Secretary of State to determine.

b) Where the application would be terminated should the applicant leave the country, as here, the Council's decision would effectively end the application for leave to remain. This was not the Council's decision to make, as above.

c) The financial situation of the Council is irrelevant. Where the applicant (i) is unlawfully present in the UK within the meaning of para 7 of Schedule 3 Nationality, Immigration and Asylum Act 2002; (ii) is destitute and would (apart from Schedule 3) be eligible for services of the kind listed in para 1 of Schedule 3; and (iii) has made an application to the Secretary of State for leave to remain which expressly or implicitly raises grounds under the Convention, the demands on the Council's resources can play no part in its assessment of need:

Were the position to be otherwise, a person's application for leave to remain would, in effect, be rejected on the basis that a local authority applies article 8(2) on one set of criteria (weighing the various calls on its budget), where the same application might be allowed by the Secretary of State (the person whose statutory function it is to determine such applications) on a wholly different set of criteria (weighing the need to maintain a firm and orderly immigration policy). That is obviously incoherent. But it is also unfair and arbitrary. It is unfair and arbitrary because it means that the outcome of a person's application for leave to remain depends on the budgetary priorities of the particular local authority to which the claim for assistance is made. The outcome of the application for leave to remain may be different if the claim for assistance is made to a different local authority whose budgetary priorities are different. The disposal of applications for leave to remain should not depend on the vagaries of the budgetary considerations of local authorities.

d) Birmingham's human rights assessment in the case was unlawful. Firstly, it took no account of the application for leave to remain.

Secondly, the whole emphasis of the assessment was on the right to family life, "there is no indication that Birmingham recognised that to require the claimant and her family to return to Jamaica would interfere with the family's right to private life (their relationships and social, cultural and family ties in the UK) or that they understood that the private life rights of children who were born in the UK or came here at an early age were of particular weight". Accordingly, the human rights assessment was inadequate.

The Court acknowledged that:

The facts of the present case have exposed the problem that has been created for local authorities by delays on the part of UKBA in dealing with applications for leave to remain by persons in the position of the claimant and her family. In an ideal world, the UKBA would be made aware of all cases which fall into this category and prioritise them so as to reduce the period during which assistance has to be provided by the local authority pending determination of the application for leave to remain.

The Secretary of State had stated that such cases were to be prioritised and that should go some way to meeting the problems.

Appeal dismissed.

It should be noted that, at least for the purposes of this case, the Court accepted a distinction between cases where a person alleges that the consequences of return would be a breach of his article 8 rights in the UK: for example, it would involve an interference with his family life in the UK by breaking up his family, or it would result in an interference with his private life in the UK (Domestic cases); and cases where a person alleges that the consequence of a return would be a breach of Convention rights in the country of origin (Foreign cases). Although hybrid cases are acknowledged to exist, this case fell wholly under the 'Domestic case' type at the decision is on that basis.

M not G

Thu, 06 May 2010 21:21:35 +0000

NL

TG, R (on the application of) v London Borough of Lambeth [2010] EWHC 907 (Admin)

Or when is a child in need not a child in need?

This was the judicial review of Lambeth's decision not to support TG as a 'former relevant child', he being over 18. The question was, quite simply, had TG been a 'looked after child' at any point before he was 18, in particular what functions Lambeth was exercising when it provided TG with accommodation.

TG was living with his mother until March 2006. In 2004 he had come into contact with Lambeth's Youth Offending team, there followed a sentence of a supervision order in 2005. From February 2004 to April 2007, TG had been under the supervision of 8 different social workers attached to the Youth Offending Team.

From mid 2005, TG had been insisting to his Youth Offending Team social workers that he could not live with his mother, that she was throwing him out, and asking for a reference to the Housing Department HPU. His mother, however, reported that although they were having difficulties, she was not throwing him out and that he could stay.

Eventually, in March 2006, his mother told the YOT social worker that she was under a lot of pressure to write a letter for the HPU, she didn't wish TG to leave home, but as he insisted he could leave but there would be no return if he did.

The YOT social worker completed a report and gave it to TG to take to the HPU:

The Report is headed "Homelessness and Social Vulnerability Report. To be completed by the Youth Justice Team". The first section is entitled "Reason for homelessness and accommodation history"; it reads as follows: "I understand that the relationship between [T] and his mother has broken down to the point that it is not advisable that they both live in the same household. [T] has been living with his mother since the age of 9. His mother emigrated from Jamaica when [T] was quite young and was looked cared for [sic] by his father. The relationship between his parents has since broken down. However, his father passed away sometime ago." The next section headed "Details of any periods in Care/Looked After"; this states "No". Details of family contacts are given and a brief summary of the Claimant's contacts with the YOT. Towards the end of the three page document it is said that the Claimant was able to fend for himself, but in the final section before the signature, under the heading "Other information", it is said that, "This young person is in desperate need of housing and would hope that his housing need is met as he fulfils the Child in Need criteria…".
TG was accommodated in a hostel by the HPU and remained in temporary accommodation provided by the HPU until he was given an AST by the South London YMCA in October 2006. This tenancy was terminated by possession order in September 2009 on the basis of anti social behaviour.

On being refused assistance as a 'formerly looked after child' TG brought the JR proceedings.

The YOT social worker filed a witness statement, admitted a hearsay due to illness, which denied ever considering TG to be a 'child in need'

and stating that if she had, she would have referred him to Children and Young Persons Services. It wasn't clear how that sat with the final line of the report she wrote. However, the key issue was whether the YOT social worker was exercising a social services function in this apparent assessment of TG as a 'child in need', thus making the referral to the HPU akin to the position in *R (G) v Southwark LBC* [2009] 1 WLR 1299 (our report here), or not, in which case the situation would be akin to *R (M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 (our report here). I.e. Should the referral to the HPU be properly taken as asking Housing to assist in the discharge of a s.20 Children Act duty by Social Services, or did this fall under the provision of accommodation by Housing under Part VII Housing Act 1996 without Social Services involvement, as a separate department, with no s.20 Children Act referral or duty arising?

Held: Youth Offending Teams were established and operated under s.39 of the Crime and Disorder Act 1998. This was separate and distinct from the Social Services function of a local authority under Local Authority Social Services Act 1970, Children Act 1989 and Children Act 2004, even though there was a requirement that at least one person with experience of social work be included in each team and that in this case those who had dealt with TG were all qualified and experienced social workers. The social worker's description of the activities of the YOT was accepted:

The purpose of the team is to provide community intervention for young persons sentenced by the court. All the work comes directly from the court. We do not receive referrals from any other source. The court may ask for pre-sentence reports or for us to make recommendations. We are not like the CYPS [sc. "Children and Young People's Services"] where others can make referrals to us. The Court Team see any young persons picked up overnight, prepare bail packages for them and can make suggestions to the Bench. I am part of the next stage after the Court has made a community sentence. My team supervise the young person in the community, providing information and reparation, i.e. paid or unpaid work, group work and addressing specific issues about offending behaviour. Depending on the severity of the young person's offence, he might be on an Intensive Supervision Sentencing Programme ("ISSP") which the Claimant was on at one point, when on 6 April 2005, he was made the subject of a Supervision Order for 12 months and placed on such a programme.

It was acknowledged that the YOT was now one of the divisions of Children and Young Persons Services, but it was distinct from the Children and Families division dealing with social services functions in relation to children.

So:

In my judgment, the essence of the decision in M is that the duty arises when the relevant factors come to the attention of those charged within the local authority with children's social services. While the supervising officer of the YOT is the DCS [Director of Children's Services] the functions of the YOT remain those assigned by the CDA 1998 which are described in practical terms in the draft witness statement of Ms Acquah. Those functions are directed to the working with offenders sentenced by the courts and working through the process of those sentences; they would not ordinarily be considered as part of the social services functions of the authority as that term is commonly understood. As in M, the official in the YOT looked to the Housing Department to meet the need and those charged with social services provision were never engaged.

Given that it has been decided in M that a firm line has to be drawn in resolving when a local authority is exercising its social services functions, it seems to me that the line has to be drawn by saying that the duty is not triggered until the child comes to the attention of the division of the local authority responsible for those functions in the ordinary course. The peripheral attention of a duly qualified official of a different team will not do.

Although just as in in M, "with the benefit of hindsight, the Housing Department or the YOT should probably (as a matter of good practice) have referred the Claimant here to the team in charge of children's social services", this had not happened and, as in M, it was not the Court's place to decide that this constituted bringing the claimant to the attention of social services when this had not in fact happened.

Accordingly, the social services function of the local authority were not engaged. TG's accommodation was under Part VII Housing Act 1996, not s.20 Children Act 1989. TG was not a 'child in need' during the period of accommodation and was therefore not a 'formerly looked after child'. M rather than G.

Claim dismissed.

These we have missed/didn't know about

Mon, 17 May 2010 07:58:56 +0000

NL

As ever, the Housing updates in Legal Action for May 2010 contains news of a few homelessness cases that are otherwise unreported and which hadn't reached us - primarily County Court decisions or applications for permission for JR or appeal that didn't make Bailii or elsewhere.

Human Rights *Slough BC v Aden* [2009] EWCA Civ 1541 Application for permission to appeal on the basis that the provision of a non secure periodic tenancy of a hostel room under the homelessness provisions of Part VII Housing Act 1996 was incompatible with Art 8 of the ECHR. Mr Aden had been found not to be in priority need and an NTQ served on the non-secure tenancy. Permission to appeal refused. The issue had been considered in *Sheffield CC v Smart* [2002] EWCA Civ 4 and *Desnousse v Newham LBC* [2006] EWCA Civ 547 and Part VII had been held to be complaint.

Homelessness *O'Callaghan v Southwark LBC*. Lambeth County Court 6/11/2009 The Claimant, aged 17 applied as homeless. She was dealt with under Part VII and not referred to Children's Services. She was provided with temporary accommodation, but no s.184 decision was made or notified to her. The Claimant was evicted from the foyer style accommodation she had been placed in. Southwark decided that she was intentionally homeless as a result, upheld on review. On appeal, Southwark argued that securing the foyer style accommodation was part of its homelessness prevention arrangements, so accepting the placement had brought the Claimant's homeless application to an end. HHJ Welchman allowed the appeal and varied the decision to one that the Claimant had not become homeless intentionally. There had been no decision on her application, so the loss of interim accommodation could not give rise to a finding of intentional homelessness. Prevention of homelessness, while a good thing, was not an alternative to the Part VII framework and provision of accommodation as 'homelessness prevention' could not be used as a way to avoid statutory responsibilities. (Good work by Cambridge House Law Centre(R) there).

R(Halewood) v West Lancashire DC. Admin Court sitting in Manchester 31/07/2009 Ms Halewood made an application under Part VII. The LA decided that she lacked capacity to make such an application, *R v Tower Hamlets LBC ex p Begum* [1993] 1 AC 509. A consultant psychiatrist advised that while she possessed capacity to understand and respond to an offer of accommodation, her mental condition would be likely to impair her ability to comply with conditions of tenancy to some degree.

Ms H sought judicial review on the grounds that it was not open to the Council to refuse her application simply because her lack of capacity may have some, possibly minor, role to play in future breaches of tenancy, and that the ratio of Begum was that only a person lacking in capacity to understand and comprehend an offer of accommodation ought to be excluded from Part VII. At a renewed permission hearing , HHJ Pelling QC accepted that the misapplication of the Begum test was arguable and granted permission. The claim was settled on accepted of the homeless application and subsequently full duty by the Council.

Eryurekler v Hackney LBC. Clerkenwell & Shoreditch County Court 09/02/2010 The applicant had applied as homeless after giving up a private tenancy. In that tenancy, there was a shortfall of £25 per week between housing benefit and rent. The applicant received Income Support and child tax credit. The Council found intentional homelessness, up held on review. Neither decision refereed to the Homeless Code of Guidance para 17.40, which states that accommodation should not be considered affordable if residual income (after costs of accommodation) would be less that the level of income support (or income based jobseekers) applicable or that would be applicable if entitled to claim it.

On s.204 Housing Act 1996 appeal, the applicant argued that 'income support' in the Guidance should be read as including tax credits, as otherwise the applicant would be in a worse position than someone receiving income support with a childcare element, or an adult on income support with no children. The Council argued 'income support' should be given its natural meaning and limited to the amount actually paid to the applicant for herself.

HHJ Mitchell held that the Council's interpretation would lead to 'unprincipled results' which could not have been the intention of the Secretary of State.. The decision maker was obliged to consider paragraph 17.40 and clearly had not as no reasons were given for departing from that recommendation. But the appeal was dismissed as the applicant's unnecessary expenditure was very high, such that the rent was actually affordable.

Connors v Birmingham CC Birmingham County Court 15/01/2010

Ms C was owed the main housing duty by Birmingham. She declined an offer of permanent accommodation. Birmingham sent a letter saying it had discharged duty but gave no reasons why the property was considered suitable. On review, the review officer acknowledged the failure to give reasons, but sent a 'minded to' letter asking for further representations within 7 days. Ms C did not make representations in the 7 days and the decision was upheld. On appeal, the review decision was quashed. Ms C would have had 21 days to consider and respond to reasons if the original decision had contained them as it should. She had been deprived of that opportunity and setting a limit of fewer than 7 days for representations in the 'minded to' letter was unfair on that basis.

Our thanks as always to Jan Luba QC and HHJ Madge for gathering and circulating these cases. The May issue also contains a useful article by Robert Latham on the new TSA regulatory framework. However, there is a suggestion that the TSA might not be long for this world, making it probably the shortest lived housing regulator ever. We shall see.

Ibrahim/Teixeira guidance

Tue, 18 May 2010 16:53:05 +0000

NL

The DWP has issued guidance to decision-makers on benefit entitlement in the wake of Ibrahim and Teixeira (our report here) in the European Court, for when there is a likely Article 12 Regulation (EEC) No 1612/68 derived right for a child or children to remain to complete education. A copy of the guidance can be found here [link to PDF. Thanks to Disability Alliance]. The guidance is interesting not just for benefit entitlement, but it is a fair guess that housing authorities would follow a similar line.

A couple of things strike me about the guidance. One is the insistence that the Claimant must be primary carer AND parent (or step-parent) to be eligible. See para 7 and elsewhere. I'm not sure that this is so. Granted on the facts of Ibrahim and Teixeria, the carers were parents, but the Art 12 right belongs to the child, and, while a parent must have been a worker in the UK at some point, I can't see how the ratio of those cases requires the primary carer to be a parent. The benefit/housing entitlement stems from the child's right to remain and to be supported and cared for while they do. On that basis, the usual primary carer for the children would be the relevant claimant. Will this take another case to resolve?

Secondly, although I'm a lot less sure of my grounds here, the guidance is firm that children of A8/A2 nationals will not gain Art 12 rights unless the migrant worker has completed the necessary 12 months registered work. (Para 10). This would mean that although such a child might have been in school for a year, no Art 12 right to continue that education. Again, on the basis that the Art 12 right is the child's, not the parents, I can't see how this would work. I suppose the counter argument is that the accession migrant is not an EU worker during the 'qualifying' period, and thus the child can't accrue Art 12 rights through their residence. I'm not convinced, but I am happy to have it explained to me. Preferably using short words.

Accommodating an abducted child

Tue, 01 Jun 2010 20:24:55 +0000

NL

EA v GA & Westminster City Council & Salford City Council [2010] EWCA Civ 586 [Not on Bailii, transcript on Lawtel]

This is a little outside our usual grounds, but as it concerns the Court's power to direct Local Authorities to accommodate a child and parent, and has interplay with S.20 Children Act 1989, it is worth a note.

The issue in this appeal was the extent of the Court's powers to order a Local Authority to provide accommodation under Section 5 Child Abduction and Custody Act 1985.

EA, the mother, had removed J and K, the children and fled from Ireland to, first, Salford. She was Nigerian and on a vistors visa, so became an illegal immigrant. The children were born in Ireland and were EU Citizens. They were accommodated by Salford for 4 weeks. Salford then gave her the money to go to London, one way.

The father, GA, is also Nigerian. He applied for a return order under the Hague Abduction Convention 1980. This was listed before HHJ Coates, EA having been located since first order was made. HHJ Coates made an order under s.5 Child Abduction and Custody Act that EA, J and K were to be accommodated by Westminster City Council in the interim while giving case management directions. Westminster were informed that such an order was to be sought just before the hearing, were not represented and presumably in view of the the permission to apply to discharge the order on 1 days notice.

Westminster applied to set aside the accommodation direction on the basis that it should have been Salford ordered to provide accommodation. Jurisdiction to make the order, even with 'no true protective ingredient to the order', was conceded. At hearing, Mostyn J doubted Westminster's concession and took the view that there was no risk of further flight or deceit in this case, that s.5 did not bite where there was no protective purpose to the accommodation, and that it was likely that s.17 and s.20 Children Act 1987 would apply instead, creating a different duty for Westminster. The accommodation direction was discharged, with permission to appeal for everyone concerned and deferred discharge pending appeal.

EA appealed. Before the appeal was heard, an assessment of K made clear that he was a very vulnerable child with very special needs. On the basis of this report, EA argued that K should never be homeless or be without his mother's care. A broad interpretation of s.5 was merited as there could be no doubt of K's need for protection and such an interpretation was required to meet the requirements of Article 7B of the Convention.

S.5 reads as follows:

Interim powers Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

For GA it was argued that an accommodation order may be needed to prevent further abduction, but also to promote preparation of a defence to the return application and to promote the welfare of the abducted child, particularly if the child has special needs. Further, a constricted view of the section as applying only to a further abduction risk would leave obvious lacunae in the Court's powers - if the absconding parent was in custody, for instance.

Westminster argued that on the facts, s.17 and s.20 Children Act would clearly apply, such that it was unnecessary to spell a duty to accommodate out of the wording of s.5 of the Child Abduction Act, which was aimed to prevent further abduction.

Held: The language of s.5 was broad. it needed to be in order to achieve the Convention goals and to safeguard the welfare of children whose vulnerability may well be amplified by the effects of abduction. While the commonest risk may be that of further abduction, that is but part of safeguarding the welfare of the child, were the welfare need may be unrelated to the risk of another upheaval. S.17 and s.20 Children Act

discretionary powers [an error on s.20 powers being discretionary there, surely, NL] are considerably less satisfactory than a court's powers to order accommodation in these circumstances, and there is no requirement to provide accommodation to the mother under those sections save her common law claim on grounds of humanity.

This finding is likely to be of very limited effect. Westminster had complained of the likely effect upon it, given its size and proximity to the Royal Courts of Justice, but had been unable to provide figures on the number of s.5 orders to accommodate it had received. In the circumstances there was no reason to believe that this case would be of far reaching impact.

Priority through dizziness?

Sun, 09 Jan 2011 23:33:56 +0000

NL

Hussain v London Borough of Hounslow [2010] EW Misc 15 (CC) (01 December 2010)

Not sure why this one wasn't written up in November. I thought we'd covered it, but apparently not. It is worth a look not just on the specific issues but as the pre-amble sets out the relevant statute and case law in some detail, including the guidance given in *Holmes-Moorhouse v Richmond-upon-Thames BC* [2009] UKHL 7 ; [2009] 1 WLR 413 on the approach the court should adopt in interpreting review decision letters.

This is a s.204 Housing Act 1996 appeal from Central London County Court. The appeal was from a s.202 review decision by Hounslow that Ms H was homeless, eligible but not in priority need as her medical conditions did not amount to vulnerability.

Ms H had been staying at temporary addresses, then applied to Hounslow as homeless. Initially Hounslow made inquiries into vulnerability but did not accept an application [naughty]. After solicitors got involved, Hounslow did, finally, accept an application. A couple of weeks later, the decision of not in priority need was made. On review, the review officer additionally contacted Ms H's GP. Within a month the s.202 review decision upheld the s.184. The s.202 review letter is appended to the judgment and can be seen here. Ms H's medical issues were: depression; gall bladder stone; high blood pressure; aches; and mobility issues, including dizziness and falling.

On appeal the grounds were:

1. The review officer didn't apply the *Pereira* test in respect of Ms H's depression.
2. A composite test for assessment of vulnerability was not applied.
3. Too strict a test was applied in relation to mobility.
4. The review officer committed a material error of fact in relation to Dr Keen's opinion (Now Medical advice to the Authority) on depression
5. The review officer did not have regard to the risk of injury or detriment stemming from recurrent falls.
6. The review officer failed to give reasons for rejecting the GP's opinion that Ms H was vulnerable.

Held:

On 1. Overall the review did apply the *Pereira* test in respect of Ms H's depression. While it may be arguable that it would not be enough if the review had been limited to the view that depression would not "*hinder you from managing your daily affairs when street homeless*" (although the Court's view was that this would be sufficient – not being hindered would mean not less able to cope than a normal person), the review had already considered the depression in earlier passages. In addition, while it was true that:

There is no reference to depression under the heading "Composite Assessment/Comparative" (paragraphs 44 to 49). Under "Composite Assessment/Composite" at paragraph 52 is the reference of which complaint is made. This relates to one of the headings in 10.16 of the Code – each of which deals expressly with vulnerability i.e. the extent to which there is a comparatively higher risk of injury or detriment. I am satisfied that the RO did not simply ask herself the "wrong" question – whether the condition would or might deteriorate. She was, I think, considering one further aspect of the future, homeless, situation having already addressed others at paragraphs 44 to 49 (which do not address depression but do look forward to prospective homelessness and do deal with risk of injury and detriment) and having already concluded that there was no enhanced risk at paragraph 22. Other references to depression, at paragraphs 55 and 60, show the RO's permissible and unchallenged view of the lack of severity of the depression.
Ground 1 dismissed.

On 2., whether the review applied a composite test, Ms H had argued that the review under 'composite' appeared to be based on para 10.16 of the code of guidance. This was wrong as 10.16 was not the composite test. Ms H was wrong on this point, para 10.16 was a sub set of 10.14, which sets out the composite requirement. While the review letter was far from clear in structure on the composite assessment. There was no clear decision after the composite section as there was after each individual problem. However, the appellant had failed to show that the composite test was not applied, even after disregarding 'possibly self-serving' assertions that it had been from the respondent. Ground 2 dismissed.

On 3., Ms H argued "that the RO applied too high a comparative test; being reasonably satisfied that a person would suffer injury or detriment does not require comparison with serious or complete incapacity". The issues on conclusions on dizziness were a separate ground

of appeal – see below. The reviewing officer was attempting 'in her own way' to describe the degree of effect of the mobility issue. There were discussions of mobility elsewhere in the review decision, mitigating would might otherwise have appeared as too high a bar, when the decision was taken as a whole 'without lawyerly gloss'. "What the RO is saying, taken in context, is that, like normal homeless people, the Appellant was and would be able to move around and use public transport for that purpose in spite of her dizziness and proneness to falls". Ground 3 dismissed.

On 4. Did the review officer make a material error of fact or irrational decision in view of Dr Keen's opinion? Dr Keen had said that he did not think Ms H's "medical issues here are disabling or prevent her from supporting herself if homeless". The review decision stated that Dr Keen "did not feel that your depression hinders your ability to fend for yourself without injury or detriment when street homeless". Ms H argued that this meant that the review officer misrepresented or misunderstood Dr Keen's opinion, effectively adding 'without injury or detriment'. Without ascribing any special status to Dr Keen's language, or assuming he was using a shorthand as a regularly used medical advisor (who, for clarity was also the Judge's personal GP), "it was not unreasonable for the RO to treat as implicit in his answer the absence of risk of injury or detriment". There was in any event enough material elsewhere in the decision letter to show that a proper consideration of the depression in Pereira terms had been made. Ground 4 dismissed.

On 5.- was there attention to Ms H's dizziness and falls, Ms H argued that her GP had "reported that the Appellant's depression caused her to suffer dizziness which had led to recurrent falls [...] and that although the RO referred to this in the [review decision] (paragraphs 32 and 47), she did so in the context of mobility and failed to recognise it as a risk of injury or detriment". This absence of consideration was 'startling' in the sense of *R v Brent LBC ex p Bariise* (1999) 31 HLR 50, 58, CA, suggesting the relevant matter had been ignored.While the Respondent argued that the dizziness had been taken into account in mobility and there was no medical evidence before the officer to suggest injury or detriment as a result of the falls, Ms H argued that the review officer had not pursued the issue of dizziness and reported falls with Ms H's GP, and that relevant inquiries had not been made, particularly given the repeated references to dizziness and recurrent falls in the original s.184 decision.The review letter only mentioned 'proneness' to falls and did not deal with the actual, recurrent falls.

"The Appellant submitted that i) the letter and the original decision show that the fact of recurrent falls was accepted by Ms Luty [the initial decision officer] ii) the RO appears to have misunderstood or unconsciously misrepresented the GP's evidence because her categorisation of the Appellant being "prone to falls" is not as serious as suffering from dizziness which led to recurrent falls. Moreover, there was no material – and therefore no factual basis – which entitled her to, in effect, discount what the GP had said iii) the ground of appeal is that the RO failed to have proper regard to the fact that the Appellant suffered from dizziness and recurrent falls. The fact that she referred to the Appellant's condition as being prone to falls strongly suggests that she did not have regard to the risk of the Appellant having recurrent falls if homeless.

For the Respondent it was said that, while acknowledging that neither officer had *explicitly* considered the risk of injury or detriment as a result of the falls, 'prone to falls' in the [review decision] encapsulates both the Appellant's past history of fall(s) and the risk of future falls. One cannot be prone to falls, if one has never fallen. It was thus submitted that the suggestion for the Appellant that the wording suggests that she did not have regard to the risk of the Appellant having recurrent falls if homeless was wrong."

Held, while the questions of dizziness and falling were addressed in the review decision in another context, there was no reference in the decision to any risk of injury or detriment arising out of dizziness leading to the risk of a fall. It was only addressed in the context of mobility. This was a startling omission in the *Bariise* sense. Nothing in the decision suggested a scepticism as to the dizziness and falling or its mention by the GP. As it was mentioned in relation to mobility, it was not discounted, but there was no discussion – and apparently consideration – of the physical risk from falling – either for or against Ms H.

On Ground 6, the GP's letter stated that she was 'fairly vulnerable', not 'very vulnerable. This was sufficient in itself to distinguish this case from *Hall v Wandsworth LBC, Carter v Wandsworth LBC* [2004] EWCA Civ 1740; [2005] 2 All ER 192; ;[2005] HLR 23 where the requirement to give reasons for rejecting an important aspect of the applicant's case was set out.

In any event, Ms H was treated as 'fairly vulnerable' so the GP's view was not rejected. Then the review letter dealt with vulnerability and the failure to refer explicitly to the GP's opinion was not a failure giving rise to an error of law. Ground 6 dismissed.

Appeal allowed on ground 5, review decision quashed. Costs to the Appellant.

Care and attention v keeping a watch over

Mon, 10 Jan 2011 23:44:41 +0000

NL

SL, R (on the application of) v City of Westminster Council [2010] EWHC 3182 (Admin)

A rolled up permission and substantive judicial review hearing on the issue of whether the local authority owed a duty under s.21 National Assistance Act 1948 (as amended), with the complication that NASS had accepted a duty to accommodate in the meantime.

SL was an Iranian asylum seeker. He sought asylum on the basis that he was gay and faced persecution in Iran. His application was rejected, but he made a fresh application which is not yet determined (and the approach of UKBA may have been changed by *HJ Iran v Secretary of State for the Home Department* [2010] 3 WLR 386.)

In the interim SL had become homeless and a few months later was diagnosed with severe mental health problems. He was admitted to psychiatric hospital. After some time, he was assessed by a social worker from Westminster. Westminster decided no duty to accommodate SL under s.21 arose. Firstly, SL was not in need of 'care and attention' under s.21(1)(a), or that such support as he needed from a social worker was available whatever his accommodation arrangements. Secondly, both s.21(8) which excludes NHS care, and s.21(1A) applied. S.21(1A) provides:

"A person to whom section 115 of the Immigration and Asylum Act 1999 (Exclusion from Benefits) applies, may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely - (a) because he is destitute; or (b) because of the physical effects or anticipated physical effects of his being destitute."
While NASS does not have to accommodate all (or indeed many) of those caught by s.21(1A), it acknowledged a duty to accommodate in this case. (The Secretary of State had been an interested party, but had been discharged earlier in the case. NASS's position had not changed).

The Claimant maintained that the local authority owed a duty under s.21 National Assistance Act and brought a claim for judicial review shortly after the initial decision. Interim relief was granted.

By the time the claim reached hearing, the Claimant's position was:

That the state of the authorities demonstrates that it was wrong to conclude that the claimant does not fall within section 21(1)(a) of the 1948 Act and also wrong to conclude, in consequence, that the obligation to house the claimant fell upon NASS.
The Court adopted the sequential approach set out in [2002] 1 WLR 2956. Firstly, it must be decided whether s.21(1)(a) is engaged and only then whether the exclusions in s. 21(8) and s.21(1A) apply.

However, in this case, SL's care needs were being met by the NHS in terms of medication, therapy and occupational therapy, so care and attention was provided other than by means of accommodation:

[the Claimant] seeks to avoid this conclusion by submissions developed, first, by reference to the facts, and secondly by reference to the law. The factual submission is that, if the claimant is not accommodated by the Council, his care needs will significantly increase because he will be on the streets. Thus, whatever the position when the assessment was made, the necessary care would no longer be capable of being delivered without providing accommodation.
The principal difficulty with that submission is that, on the evidence in this case, there was no question of the claimant being homeless. NASS had accepted its responsibility to accommodate the claimant and, as the evidence suggests, were seeking to do so either within Westminster or close to it so as to avoid discontinuity in the provision of medical care. Whatever might be the legal consequences of imminent street homelessness, they do not arise on the facts of this case.[paras 17 & 18]
Further, assistance in this case was being provided outside the home, rather than care being provided in the home as in the *Westminster v NASS* case.

The Claimant was infirm, but this was not enough to bring him within the exception to s.21(8) in the Westminster case, as that relied on someone first having passed the s.21(1)(a) test, which was not the case here. Care and attention was available otherwise than by accommodation. On this issue, *R (Mani) v the London Borough of Lambeth* [2003] EWCA Civ 836 amounted to a reformulation of the test in *Westminster v NASS*.

As per Lady Hale (as she was) in *R (M) v Slough London Borough Council* [2008] 1 WLR 1808, at para 36:

"Although M is HIV positive, his medical needs are being catered for by the National Health Service so, even if they did amount to a need for care and attention within the meaning of section 21(1)(a), he would not qualify, but, for the reasons given above, I do not think that they amount to such a need ... as he does not fall within section 21(1)(a) it is unnecessary to decide whether he would be excluded by section 21(1A)".
On the evidence in this case:
In my judgment, it would be more accurate to say that the support that the claimant needs amounts to keeping an eye on him. That is a rather different matter [to care and attention]. It imports the notion that whilst keeping an eye on him, if circumstances change, different or further interventions might become necessary. It is not, however, in my view, care and attention. On this basis also, the claimant fails to establish that he came within the criteria found in section 21(1)(a).
Permission for Judicial Review granted but claim dismissed.

Contracting out homelessness reviews: Technical issues

Fri, 18 Jun 2010 10:47:53 +0000

Dave

With thanks to Robert Latham, we have the transcript of an interesting section 204 homelessness appeal brought by Ms Shacklady against Flintshire CC in the Mold County Court before HHJ Gareth Jones (07.05.2010). The substance of the appeal concerned Ms Shacklady's appeal against Flintshire's decision to exercise its discretion to use the local connection provisions of the 1996 Act to refer her back to Conwy CBC and other matters; but HHJ Jones never got to the substance because there was an important procedural point taken by Ms Shacklady

concerning the fact that Flintshire had contracted out the review of their decision to a Mrs Ros Tyrrell, described in correspondence as "Reviewing Officer on behalf of Flintshire County Council". Mrs Tyrrell issued a minded to letter on the basis of additional information and then a s 202 review decision. The case acts as a reminder to applicant's advisors always to check the basis for the contracting out authorisation - congratulations to Shelter Cymru and Robert Latham for pursuing this point, when it perhaps did not appear obvious initially.

HHJ Jones dealt with two of the appeal grounds in his judgment as a preliminary issue. These were (a) the review decision was a nullity, and (b) the reviewing officer, Mrs Tyrrell, had no lawful authority to conduct any review and Flintshire had made no lawful authorisation of its review function to her. Let me indulge in some ground clearing - we know that s 70, Deregulation and Contracting Out Act 1994 enables a minister by order to allow a function to be contracted out "... as may be authorised in that behalf by the local authority"; such an authorisation must be for a period not exceeding 10 years (s 69(5), 1994 Act); the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996, SI 1996/3205, as interpreted in *de Winter Heald* (links to our note), entitles local authorities to contract out their reviews function in principle.

The issue for Flintshire was whether they had followed the correct procedure for contracting out their review function to Mrs Tyrrell. Flintshire were only able to produce a letter from the "interim head of customer and housing services" confirming an interim arrangement enabling Mrs Tyrrell to carry out a backlog of outstanding reviews for a remuneration of £250 pd. As HHJ Jones noted, "No limitation of time appears in the document and this appointment is not for a specified period". Ms Shacklady argued that there had been no proper contracting out as a matter of procedure and time limit.

The first issue here is whether the interim head had sufficient authority to contract out or whether it was required to be done by the council and/or by formal resolution of the council. This is entirely free from authority (although there is an interesting article in the Journal of Housing Law that I've come across on this point - see (2010) 13(2) JHL 24-5, mercifully short) but in this case was probably dealt with by Flintshire's constitution and another document (amazingly only produced on the first day of the appeal hearing) which effectively appeared to give the officer the proper authority, although nothing turned on that point.

The second issue was effectively conceded by Flintshire in accepting that they were unable to locate any written documentation in relation to Mrs Tyrrell's appointment because "... it is possible that there was no such document in the first place" (I would put an exclamation mark after that, but I suspect that this may well have occurred in a lot of cases). The argued for an implied authority, but that didn't wash with HHJ Jones, who said that they could not "remotely comply with" s 69(5) without such a written record and there was no time limit attached to any authorisation anyway.

Flintshire argued, drawing on the judgment of Lord Hailsham in *London & Clydeside States Ltd v Aberdeen DC* [1980] WLR 182, that this was at the lower end of the spectrum of procedural defects so as to enable the court to find that Mrs Tyrrell's review was not a nullity. HHJ Jones disagreed because: the absence of a written record or contract is serious; English ODPM guidance indicated its importance at least as a matter of good practice in Wales - as HHJ Jones remarked: "How, if at all, does this local authroity monitor good performance by Ms Tyrrell if there is no written framework document of authorisation?" (bang-on point, I'd say); without such a document the 10 year time limit could not be met; the integrity of the regime set by Parliament should be protected and it did "expect, in my judgment a Local Authority to obey the law to the minutest detail, ... by giving a limited authority".

Ms Shacklady went for a variation of the s 202 decision but, as there was no sufficient evidence about where she had been living for the past months and she may not have lived exclusively in Flintshire, there was a question still to be addressed.

Note to self: check that authorisation ...

Oh, and one last thing, praise to HHJ Jones for his sensitivity in giving judgment, with Ms Shacklady and her two kids in attendance (he began by telling her that she had won).

Reviews of Suitability and Discharge of Duty

Mon, 05 Jul 2010 12:54:07 +0000

NL

Ravichandran & Anor v London Borough of Lewisham [2010] EWCA Civ 755

Or *Omar v Birmingham City Council* [2007] EWCA Civ 610 revisted. This was the Court of Appeal hearing of a second appeal from a s.204 Housing Act 1996 appeal at the County Court on Lewisham's discharge of duty under s.193 Housing Act 1996. it is a significant decision on the nature and extent of s.202 reviews of offers of accommodation under s.193 and of discharge of duty. The Court sets out guidelines on this issue.

Briefly, the facts were that Lewisham owed Mr & Mrs R the full housing duty following their homeless application. Eventually, they were offered a 3 bed flat as a 'final offer'. The offer letter stated that:

The Council is satisfied that this accommodation is suitable and it is reasonable for you to accept this offer. If you do not take up this offer of housing the council will no longer have a duty to provide you with any accommodation. We will then discharge our duty (to house you) under s.193(7) Housing Act 1996. We will terminate any temporary accommodation and you will have to make your own arrangements for housing.

You have a right to a review based on the suitability of this offer. This request must be made within 21 days of this offer

Mr & Mrs R viewed the property with one of Lewisham's case workers. They did not consider that the property suitable. A form was filled in giving medical reasons for their refusal, based on asthma and physical issues for their children. Lewisham treated this as a s.202 review request. The review considered the medicial reasons and concluded that the property was both reasonable and suitable. The review letter stated that:

As a result of my decision my Council will shortly be formally writing to you to discharge its duty to you. My Council will also be commencing action to recover your present temporary accommodation and you should therefore begin looking for alternative accommodation.

A couple of months later, a letter purporting to discharge duty under s.193(7) Housing Act 1996 was sent by Lewisham, on the grounds that the offer was suitable. This also stated that there was a right to review of the decision.

R found a solicitor, who sent a pretty hopeless letter, which did however raise that they had been subject to racial abuse and been spat by a neighbour on viewing the property. Lewisham responded, purportedly as a s.202 review, restating the decision of the review of suitability and making no mention of the allegations of racial abuse.

R found another (very competent) solicitor who sent a further letter complaining that s.202 review was defective as it did not address the issue of racial abuse. Following further submissions were made, which pointed out that Mrs R had mentioned the abuse at the meeting at the property with Lewisham's case worker.

Lewisham sent a s.202 review decision which stated that all issues of suitability had been dealt with in the first s.202 review and which did not address the racial abuse beyond mentioning that submissions had been made on that. The covering email stated:

You will see that I have not address (sic) several of your representations in full because in my view it is not necessary. This review is on the discharge of duty address whether the offer, including the procedure leading up it was such to cause the duty to cease. The majority of your representations focus on suitability which is not the issue that we are dealing with in this review. The authority had already conducted a review on suitability it was completed by Mr Gomez and the decision was that the Council were satisfied it was a reasonable and suitable offer for your client.

And the review letter stated that the reviewer was "satisfied that the provisions of sections 193(5) as well as 193(7) were met".

R appealed by way of s.204 to the County Court on the basis that the last s.202 of the decision to discharge duty did not address the issue of suitability and whether it was reasonable for R to refuse the offer.

Judge Faber dismissed the appellants' appeal from Lewisham's May 2009 review decision pursuant to section 204 of the 1996 Act on the following grounds. She held that Mr Georgiou was not obliged in May 2009 to consider the issue of suitability again, that decision having already been taken and reviewed in October 2008, and there having been no appeal under section 204 from that review. She then held that, although the issue of whether or not it was reasonable to accept Lewisham's offer did fall to be considered in the May 2009 review pursuant to section 202(1)(b) as one of the requirements for an offer within section 193(7), Lewisham was entitled by virtue of the decision of the Court of Appeal in Omar v Birmingham City Council [2007] EWCA Civ 610, [2007] JLR 43 to rely instead on section 193(5), which did not involve that requirement for an offer within that subsection.

So, there was no requirement to consider whether it was 'reasonable for [R] to accept', simply whether the Council considered the property suitable. As a reminder, s.193(5) has only a 'suitable' test, while s.193(7F) has a two part test - suitable and 'reasonable to accept'. The latter is a subjective test - reasonable for this person in their position to accept. *Omar*, surprisingly, had apparently held that an offer of temporary Part VII or indeed permanent Part VI accommodation could fall under 193(5) as well as 193(7F) and so the only requirement to be met was that the LA was satisfied as to suitability.

R appealed on the grounds that (1) the May 2009 review was flawed because (a) Lewisham was not entitled to rely on section 193(5), Lewisham's only offer having been made pursuant to section 193(7) and the review being a review of a decision in relation to section 193(7); (b) the review had failed to take into account, in relation to both the suitability and "reasonable to accept" issues under section 193(7), that the appellants had been subjected to racial abuse when they had first viewed Wakefield House; and (c) Mr Georgiou had wrongly concluded that he was not required to have regard to that incident of racial abuse in relation to suitability; and (2) the Judge misapplied the decision in *Omar v Birmingham CC*.

Lewisham responded that: (1) the review decision of 10 October 2008, on a proper reading, included a decision that it would have been reasonable for the appellants to have accepted the offer of 13th August 2008; alternatively, (2) if the reasonableness of accepting the offer had been separately addressed in the decision of 10th October 2008, it could have made no difference to the outcome of the review.

Held: The distinction between s.193(5) and 193(7) was an important one, precisely because s.193(7) required the dual test of suitable and reasonable to accept. *Griffiths v St Helens MBC* [2006] EWCA Civ 160, *Slater v Lewisham LBC* [2006] EWCA Civ 394, [2006] HLR 37, *Tower Hamlets LBC v Rahanara Begum* [2005] EWCA Civ 116 considered.

Omar v Birmingham CC was not a precedent for the "proposition that, where an authority makes an offer of permanent accommodation expressly under section 193(7), but fails to satisfy the reasonableness requirement, it can treat itself as discharged from all duty under section 193 by unilaterally treating the offer and the refusal as made under section 193(5)". *Omar* is to be limited to its own specific facts - where the offer did not specifically state whether it was made under s.193(5) or 193(7). In any event, the satisfaction of the reasonableness requirement was not in issue in *Omar*.

The requirements of s.193(5) apply where the offer is one of temporary accommodation. Where the offer is of permanent accommodation under s.193(7) generally, the reasonableness requirements apply. Lewisham's offer was celarly and expressed to be under s.193(7).

Lewisham's submissions that the amendments to Housing Act 1996 by the 2002 Act meant that the only decision capable of s.202 review was the decision that an offer was reasonable and suitable, not the decision to discharge duty, which was now automatic, were not correct. *Warsame v Hounslow LBC* [2000] 1 WLR 696 is still applicable after the amendments. In this case, there was a clear further decision to discharge duty.

It was submitted by Mr Arden that this produced an absurd result since it would mean that it would never be possible for suitability, reasonableness and discharge to be reviewed at the same time. We do not accept that criticism. If, following the making of the offer by Lewisham or at any event once there had been a refusal of the offer, there had been a review at the same time of both the suitability and "reasonable to accept" requirements as well as the decision prospectively to discharge by the making of the offer (or, if after refusal, that the conditions for discharge had been satisfied), they could have been dealt with at the same time, and by virtue of section 202(2) would not then be open for further review. The problem in the present case is that until January 2009 there never was an invitation for a review of the "reasonable to accept" aspect or of the prospective discharge of duty by the making of the offer or of the satisfaction of the conditions for discharge under section 193(7) and no such review was in fact carried out until then. The only review was of suitability under section 202(1)(f) (as amended) and not, as indicated in Warsame, under section 202(1)(b) both as to the discharge of Lewisham's duty and the "reasonable to accept" issue.

On the facts, there had been no review by Lewisham of whether the property was reasonable for R to accept prior to the raising of the racial abuse. Lewisham's statement that it was 'a reasonable offer' was not the same as a review of the 'reasonable to accept' requirement. After the racial abuse was raised, there had been no further review of whether it was reasonable to accept, but the racial abuse incident should have bee considered as it took place prior to the date of the refusal of the offer, even if only raised later.

Appeal allowed.

The Court sets out principles for reviews of offers under s.193(5) and s.193(7):

(1) Section 193(5) is concerned with offers of temporary accommodation to meet a local housing authority's duty under Part VII of the 1996 Act. Section 193(7) is concerned with offers of permanent accommodation pursuant to the authority's allocation scheme under Part VI of the 1996 Act.

(2) An authority making an offer of accommodation, the refusal of which it intends to rely upon in discharge of its duty under section 193(2), should always make clear to the applicant whether the offer is intended to be within section 193(5) or within section 193(7). Where the authority makes clear that the offer is intended to be within section 193(7), it cannot subsequently treat the offer, and any refusal of it, as made under section 193(5).

(3) In the case of an offer under section 193(7), section 193(7F) requires the authority to be satisfied that, in addition to the accommodation being suitable for the applicant, it would also be reasonable for the applicant to accept the offer. Although there is a significant area of overlap between the suitability of accommodation and the question whether it would be reasonable for the applicant to accept the accommodation, these are distinct and different requirements.

(4) The reasonableness requirement in section 193(7F) is not satisfied merely by the authority making an offer which it considers reasonable. What is required is an offer which it would be reasonable for the applicant to accept.

(5) The applicant is entitled to a review of the suitability requirement in section 193(7F) by virtue of section 202(1)(f) of the 1996 Act and of the reasonableness requirement in section 193(7F) by virtue of section 202(1)b). It is both possible and desirable for both requirements to be reviewed at the same time. The right to a review of both requirements, and the intention to review both at the same time, should be made clear to the applicant.

(6) The applicant is also entitled to a review of the decision of the authority as to the discharge of its duty under section 193(7) by virtue of section 202(1)(b). If the review takes place before refusal of the final offer of accommodation, it will strictly be a review of the intention that the offer will, on refusal, result in cessation of the authority's duty. If the review takes place after the refusal of accommodation, it will be a review of the authority's confirmation that its duty has ceased by virtue of satisfaction of the statutory pre-conditions for such cessation. The applicant should be informed of the right to such review.

(7) It is desirable that such a review of the decision of the authority as to the discharge of its duty under section 193(7) takes place at the same time as the review of the suitability requirement and the reasonableness requirement in section 193(7F). If it is intended that it will take place at the same time, the applicant should be so informed.

(8) If the review of the suitability requirement and the reasonableness requirement and the decision of the authority as to the discharge of its duty under section 193(7) take place at the same time, by virtue of section 202(2) there will be no further right to review of the decisions on

any of those matters. If, however, the decision of the authority as to the discharge of its duty does not take place at the same time as either the review of the suitability requirement or the reasonableness requirement, matters relevant to those requirements which were not taken into account on the earlier review must be taken into account by the authority on the decision review if the matters existed prior to the refusal of the offer, even though they were not raised by the applicant at the earlier review.

Comment

While the restriction of *Omar* to its own facts is very welcome, the manner in which it is done is rather odd. While the offer letter in *Omar* did not state it was an offer under s.193(7), the primnary finding in the case was that it was a valid offer under s.193(7) regardless, so the application of s.193(5) remains odd. There is a discussion of whether the statements on s.193(5) in *Omar* were obiter or not, but that is not decided, which is a pity. Still, from the limitation of Omar and the guidlines given, it is clear that the *Omar* 'loophole' for avoiding a consideration of 'reasonable to accept' is closed for offers of permanent accommodation.

I recently had an email suggesting that a s.202 review of suitability and reasonableness was not available for a 'qualifying offer' of private accommodation under s.193(7B), just that the LA had to be satisfied the offer was reasonable and suitable. The guidelines here appear to state that a review is available for any decision as to suitability and reasonableness under s.193(7F), which would catch a qualifying offer, I think.

The guidelines are useful, but the Court's view that the requirements for the availability of a review both of the decision that an offer is 'reasonable and suitable' and also of the decision to discharge duty does leave some complications. Consider (6) of the guidelines. How can the tenant apply for a s.202 review of a decision by the LA that it intends to discharge duty if the offer is refused, where the offer hasn't yet been refused? But this appears to be the import of the guidelines where the LA does not state that the review of 'reasonable and suitable' and of discharge will happen at the same time, as per (7).

Overall then, a good thing and some needed clarity, but I suspect there are a few problems for the future in there.

Serving no useful purpose

Mon, 19 Jul 2010 10:00:16 +0000

Dave

In *R(C) v Nottingham City Council* [2010] EWCA Civ 790 (available through the Chief's mystical powers and Lawtel [and now also on BAILII]), the Court of Appeal was faced with a substantive issue in relation to the children leaving care provisions of the Children Act 1989, as amended, and the Children (Leaving Care) (England) Regulations 2001. Instead of dealing with that issue (which appears to have been around whether two people between 18 and 21 had been looked after by the council previously under the CA, when accommodation had been provided under Part 7, Housing Act 1996), the Court of Appeal decided the claim on a preliminary issue. Throughout the claim, Nottingham had offered to provide the relevant services to the Claimants (including according them a priority need in future homelessness applications under Part 7), even though saying that they were under no legal obligation to do so. Therefore, the Court said that there was no useful purpose being served by the litigation (applying *Cowl v Plymouth CC* (Practice Note) [2002] 1 WLR 803) when the Court and the Council have a heavy workload: "[The Court] does not exist to decide moot points" and "... the Children's Department of Nottingham City Council has a heavy workload. Its resources are better devoted to promoting the welfare of children in Nottingham, rather than arguing points of law whose only relevance is to other cases in which the Nottingham City Council is not involved" (at [37]).

Permission refused and, one might add, ouch.

Residing legally ...

Thu, 29 Jul 2010 09:40:08 +0000

Dave

An interesting argument emerged before the Court of Appeal in *Lekpo-Bozua v Hackney LBC (SoS for Communities and Local Government joined as interested party)* [2010] EWCA Civ 909. The issue arose around the difference between, on the one hand, an entitlement to the main housing duty under section 193, Housing Act 1996, to successful homelessness applicants, and, on the other hand, the duty owed in "a restricted case" under section 193(7AA). The restricted case material was inserted into the 1996 Act (finally) by section 314, Housing and Regeneration Act 2008, in order to deal with the declaration of incompatibility found in *R(Morris) v Westminster CC* [2006] 1 WLR 505 on the previous provision (disregard of applicant's ineligible child for Part VII). A restricted person is someone who is ineligible, or subject to immigration control, and either doesn't have leave to enter or remain in the UK or whose leave is without recourse to public funds. Where a household includes such a person they are subject to the restricted duty in section 193(7AA)-(7AD). In summary, the duty ceases if the household is made an offer of a private sector tenancy (an AST will do) and the authority is encouraged to bring their duty to an end in this way (see s 193(7AD)).

Ms Lepko-Bozua was seeking to avoid the application of section 193(7AA). She is British but her niece, who has the lovely name Océane (with an acute accent on the first e), has lived with her (and her ex) in the UK for about nine years. Ms Lepko-Bozua became homeless as a result of DV from her ex. Hackney found that Océane was a restricted person because she was not a qualified person under regulations 4 and

6, Immigration (European Economic Area) Regulations 2006. They also found that she had not "resided legally for a continuous period of five years" in the UK (see Article 16, Directive 2004/38/EC). On the s 204 appeal, it was found that she was not a qualified person (even though she was in education, she did not have comprehensive insurance cover in the UK and couldn't give the sufficient resources assurance - see reg 4(1)).

The argument for her was that she had, in fact, "resided legally" in the UK for five years in accordance with Art 16. The legality derived from the fact that she had not been removed from the UK by the SoS. Now, this is an argument that I have also been looking at, quite separately, and found quite attractive (despite a nagging doubt). Consider Recital 17 to the Directive, which requires "compliance with the conditions laid down in this Directive" for the right to permanent residence (conditions such as not being an unreasonable burden on the social assistance system of the host state). The Court of Appeal dismissed the argument for Ms Lepko-Bozua pretty much out of hand:

Asked by the Court for the legal principle on which his submission rested, Mr De Mello struggled to answer. He was not promoting a kind of prescription, but was promoting a variety of waiver. He pointed to Recital 21 of the Directive which provides for host Member States to decide whether to grant social assistance before a person has acquired a right of permanent residence. He struggled to rationalise the selection of a period of 5 years for the operation of his variety of waiver, when Océane does not come within Article 16 of the Directive which is the origin of a period of 5 years. It might just as well on his argument be 2 years or 20. He did not begin to establish a basis in EC law for the variety of waiver for which he contended. ([17])

Residing "legally" means as per Recital 17 in compliance with the Directive's conditions. Océane "remained [in the UK] upon tolerance subject to immigration control with no right to remain" ([18]). The Court cites *McCarthy v SoS for Home Department* and *Abdirahman v SoS for Work and Pensions* in support, and explained (politely) a comment made by Kay LJ in *Kaczmarek v SoS for Work and Pensions* (at [23]) as well as *R(Badar) v Ealing LBC* (irrelevant as right of residence was not contested).

Interesting argument, but unsuccessful - s 193(7AA) applied.

"Responding to Human Rights Judgments", or then again, not.

Sun, 08 Aug 2010 22:09:00 +0000

NL

The latest Government response to the Joint Committee on Human Rights report 2009/10 has been released. The PDF of the response is available here. This is the response of the current Government and they make clear that it is to a report prepared under the previous government. But in terms of the actual response, I suspect this makes little difference, save perhaps on *Connors*.

Of interest to housing lawyers are the JCHR findings and the Government response on *McCann* and *Kay v UK*, *Connors* and implementation of s.318 Housing and Regeneration Act 2008, and Schedule 15 Housing and Regeneration Act 2008 in relation to the incompatibility in *Morris v Westminster CC* [2005] EWCA Civ 1184.

Summary Possession (McCann etc.) The JCHR says

…[W]ithout action by the Government, domestic courts remain bound by the decisions of the House of Lords in McCann and Doherty, that express consideration of the proportionality of any interference with the right to respect for home in Article 8 ECHR is not required. We think it is predictable that this position will not find favour with the European Court of Human Rights. We consider that the Minister should be required to explain why the costs of resisting further litigation in the case of Kay v United Kingdom on this repeat issue are justified…

We are concerned that the issue of respect for people's homes in summary possession cases remains unresolved, despite numerous decisions of the House of Lords and the European Court of Human Rights. We welcome the Government's acknowledgment that should the European Court of Human Rights decide again, in the pending case of Kay v United Kingdom, that domestic law is incompatible with Article 8 ECHR, it will have to revisit the question of whether a remedial order or legislation is necessary to remove the breach identified by the Court. Unless the European Court of Human Rights departs entirely from its reasoning in the case of McCann, we consider that the Government will inevitably need to revisit the breach identified in that case. We question whether it would not have been more cost effective to reform the summary possession process rather than to pursue further domestic and European litigation. It would be prudent for the Government in the meantime to consider how the process might be reformed to give effect to the decision in McCann in the event that the decision in Kay goes against it, in order to avoid any further delay following the forthcoming decision in Kay v UK.

This seems entirely plausible. And the Government's response? This is not a straightforward matter. There have been three House of Lords cases so far and the Supreme Court has heard *Pinnock*. It isn't at all clear how much *McCann* turned on its own facts and how far proportionality is a 'necessity' criterion for Art 8.2. Plus *Kay* does not turn on personal circumstances where *McCann* does. So the Government will await the Courts' decisions in *Kay v UK* and *Pinnock* and see.

Equal treatment of those on caravan sites The JCHR says:

In view of this apparent yet further delay in remedying the incompatibility in this case, we have written to the Minister to ask whether the Government intends to introduce the statutory instrument necessary to bring section 318 into force before the end of this Parliament; if not why not; and to ask for full explanation of why a statutory instrument which would bring into force a piece of legislation which prevents future breaches of the Convention is not regarded as a priority claim on parliamentary time by the Government.

The Govt.'s response?

A decision on section 318 will be made shortly, in the context of a wider strategy being developed in relation to Gypsies and Travellers, and an announcement will be made in due course.

So, we are going to do something, but we're not going to tell you what yet.

And finally, on the *Morris* incompatibility issue THis is the issue of ineligible children or pregnant spouses for homeless priority - the JCHR was not wholly satisfied that the implementation of Schedule 15 Housing and Regeneration Act 2008, in force from 1 March 2009, was sufficient. Lest we forget, this provides that housing assistance by the way of a private sector tenancy will be sufficient for those who are only eligible by way of a previously ineligible child or pregnant spouse. The JCHR view on Schedule 15 is:

We have previously reported our view that although this measure may remove the direct cause of the incompatibility identified in these cases, the solution in Schedule 15 of the 2008 Act gives rise to a similar risk of incompatibility. Schedule 15 continues to make a distinction between those entitled to the full range of housing assistance in relation to priority need, and a lesser set of obligations which will be open to those whose priority need is based upon their relationship with a dependant who is subject to certain immigration controls. We note that a similar kind of distinction, albeit based on facts which arose prior to the enactment of Schedule 15, is currently being challenged at the European Court of Human Rights.

The Government disagrees, on the basis that Schedule 15 is wholly sufficient to address the incompatibility established in Morris. So nothing else will be done about it.

Overall then, and respectively: wait and see; we'll do something but we're not saying what; and not a problem.

I suspect that several strands of ongoing higher court litigation are mapped out right there. We will, of course, follow them up.

Homelessness - 'due regard' to disability

Tue, 12 Oct 2010 22:03:27 +0000

NL

Pieretti v London Borough of Enfield [2010] EWCA Civ 1104

This is an odd case, in lots of ways, but what is decided in this appeal to the Court of Appeal is potentially of broader significance and certainly useful as clarification. The issue was whether, and if so to what extent, the duty on local authorities under (1) of s.49A of the Disability Discrimination Act 1995 applies to exercise of powers and discharge of duty under Part VII of Housing Act 1996 - the homelessness provisions.

S.49A is to be replaced, at a date not yet set, by wider and perhaps stronger provisions in s.149 of the Equality Act 2010, but it seems likely that the principle in this case will continue to apply.

I'll save the facts in this case till later. Suffice to say for the present that this was a second appeal from a s.204 appeal that nearly didn't make it, as shortly before the Court of Appeal hearing, it turned out - to everyone's surprise, including their own solicitor's - that the appellant and his wife weren't actually homeless anymore, having had two ASTs since the hearing of the s.204 appeal. (This is perhaps more understandable when one realises that the course of the case so far had been a first s.184 decision, overturned on review, new s.184 decision, upheld on review, but quashed on s.204 appeal, fresh s.202 review upholding the decision and s.204 appeal upholding review decision, then appeal to the Court of Appeal).

However, the Court of Appeal decided that a) the matter was of wider public interest and b) given that the appellant's current AST was shortly to end, there was a [surely slim] possibility that Enfield would find that the chain of causation hadn't been broken and that the appellant and his wife remained intentionally homeless, as per their review decision under appeal.

The question before the Court of Appeal was, principally, simply whether s.49A(1) DDA 1995 applied to the Local Authority's exercise of Part VII Housing Act 1996 powers and duties, and if so, what that meant.

S.49A(1) states:

Every public authority shall in carrying out its functions have due regard to – (a) the need to eliminate discrimination that is unlawful under this Act; (b) the need to eliminate harassment of disabled persons that is related to their disabilities; (c) the need to promote equality of opportunity between disabled persons and other persons; (d) *the need to take steps to take account of disabled persons' disabilities*, even where that involves treating disabled persons more favourably than other persons; (e) the need to promote positive attitudes towards disabled persons; and (f) the need to encourage participation by disabled persons in public life.
[The italics are as inserted by Wilson LJ for his emphasis].

Then there is a code of practice:

entitled "The Duty to Promote Disability Equality" and published in 2006 by the Disability Rights Commission pursuant to s.53(8A) of the Act of 1995, described the duty created by s.49A(1) as the "duty to promote disability equality" (paragraph 1.2) and explained that it "requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities" (paragraph 1.13). The subsection provides that the regard to be paid to the six needs identified in it should be "due"; and the code explains that the word "due" comprises two linked elements, namely proportionality and relevance (paragraph 2.34)

The appellant argued that the s.202 reviewer's decision to uphold a finding of intentional homelessness involved a breach of s.49A, as there had not been due regard to the need to take account of a person's disabilities. This argument had apparently been raised for the first time in amended grounds of s.204 appeal, much to Enfield's continued teeth-gnashing chagrin.

At the Court of Appeal, Enfield argued: i) that the duty under s.49A(1) applies only to the general formulation of policy on the part of a public authority and not to its determination of individual cases. ii) that Part VII of the Act of 1996 addresses the rights and needs of the disabled so comprehensively that there is no room for introduction into the scheme for making provision for the homeless of further protection for the disabled such as is exemplified by s.49A(1) of the Act of 1995 (pointing particularly at priority need (s.189(1)(c)), the intentionality of the homelessness "in good faith" provision in s.191(2), and suitability of accommodation). iii) that, in its determinations under Part VII, a local authority does not carry out "functions" within the meaning of s.49A(1) until, if at all, it reaches the stage of discharging a duty (or exercising a power) to secure that accommodation is available for a person's occupation.

On i) the Court of Appeal, in Wilson LJ's sole judgment, held:

[The] first submission is clearly wrong. "The duty in s.49A applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of those being an aspect of carrying out its functions": per Black J in *R (JL) v. Islington LBC* [2009] EWHC 458 (Admin), [2009] 2 FLR 515, at [114]. There is no scope for depriving the word "functions" of much of its normal meaning.

On ii)

[The] second submission is clearly wrong. For disability to play its rightful part in determinations made by public authorities (including under those areas of Part VII to which Mr Rutledge [for Enfield] refers) there must (so Parliament clearly considered when enacting s.49A(1)) be a culture of greater awareness of the existence and legal consequences of disability, including of the fact that a disabled person may not be adept at proclaiming his disability. The six specified aspects of the duty in s.49A(1) complement the duties of local authorities under Part VII.

on iii)

[The] third submission is clearly wrong. When, if at all, an authority reaches the stage of securing that accommodation is available to a person, it is not unreasonable to describe its function as a "housing" function. But it does not follow that, in the discharge of its prior duties (in particular of inquiry under s.184 and of review under s.202), the authority is not carrying out a function.

Overall, the duty in s.49A(1) certainly applies to Local Authorities carrying out 'all their functions' under Part VII Housing Act 1996. But what does this actually mean?

For what it meant in this case, we need to look briefly at the facts. Mr & Mrs P had an assured shorthold. It was brought to an end via s.21 notice and possession proceedings. They approached Enfield as homeless. The ex-landlord told Enfield that she had ended the tenancy due to non or delayed payment of rent. It was on this basis that Enfield (repeatedly) found them intentionally homeless. The actual history went as follows:

(a) the agreed rent was £850 p.m; (b) at the outset of the tenancy the appellant paid the landlady a deposit equal to two months' rent, viz. £1700; (c) the entitlement of the appellant and his wife to housing benefit was not such as to cover the entire rent; (d) adjustments to the amount of their housing benefit, particularly when made retrospective, caused considerable temporary confusion about the amount of the

balance payable; (e) in July 2007 the appellant, who, with his wife, wished to start looking for an alternative home, asked the landlady (whom they distrusted and who reciprocated their distrust) to repay the deposit but she refused to do so on the basis, clearly correct, that it was repayable only at the end of the tenancy; (f) thereupon the appellant withheld rent equal to the deposit, viz for the months of August and September 2007; (g) in October 2007 the appellant consulted solicitors, who advised him that he had been wrong to withhold the rent and that in doing so he risked eviction from the home; (h) the appellant at once accepted the advice and cleared the arrears; (i) for November 2007 the appellant, wrongly believing that the housing benefit would be paid to him rather than to the landlady, paid her £325; in fact the benefit, namely £697, was paid to her, so for that month there was an overpayment to her which she did not repay to the appellant; (j) there was a dispute between the appellant and the landlady as to whether the rent for January and February 2008 had been paid, as a result of which housing benefit was suspended pending enquiry; (k) knowing that the tenancy was coming to an end and still not trusting the landlady to refund the deposit, the appellant refused to pay the rent (or make the equivalent payment for use and occupation) due on 10 March and 10 April 2008; (l) by letter dated 11 April 2008 a free legal advice service [presumably the CLS - NL], whom the appellant had consulted by telephone, gave him advice in the course of which it recited that he had withheld payments for those two months and it did not suggest that it had been wrong for him to do so; (m) on 18 April 2008 however the judge in the county court who granted the possession order against the appellant and his wife (and who was not invited also to enter a money judgment against them) informed the appellant that he had been wrong to seek to recover his deposit by withholding the payments due on 10 March and 10 April; and (n) accordingly, on 29 April 2008, notwithstanding his knowledge that he and his wife were soon to be evicted, the appellant cleared the arrears. [!!! NL]

This is, on any view, very far from the usual history of rent arrears or non-payment of rent. Further, on the second form of their homeless application, Mr & Mrs P had ticked a box stating that they (or at the least Mrs P) were disabled, and both Mr and Mrs P listed depression amongst other medical problems. Their GP, contacted by Enfield, stated that Mr P:

was suffering a depressive reaction to having to cope with a mentally ill son with a history of drug abuse and with a wife who had been drastically affected by the son's problems and who had become very depressed and unable to do anything for herself; that the depressive reaction in the appellant had first been diagnosed in 1995; that he, the doctor, had last seen the appellant in respect of his condition on 6 May 2008; and that the appellant was not on any regular medication and had mainly been treated with psychological support from the practice. In relation to the appellant's wife, the doctor said that she had severe arthritis in her neck, shoulders and hands, an osteoporotic spine with a prolapsed disc and chronic reactive depression, for all of which she took medication. "This lady", he wrote, "is quite disabled with her chronic depression and her physical problems."

At s.204 appeal, the CJ held that the breach of s.49A had not been raised as an issue before the review officer and, *pace* *Cramp v Hastings BC* [2005] EWCA Civ 1005, that disability was not an obvious matter that the reviewing officer should have considered. The CJ went further and found that Mr P was not disabled, (which, as Enfield conceded in the appeal, he should not have done - as a finding of fact that he had no place to make, on the basis of sketchy information collected by Enfield, and as he focussed on what Mr P could do, not what he couldn't).

The Court of Appeal found that the dictum in *Cramp* relied on by the CJ - that a court should be hesitant to overturn a review decision on grounds 'which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered' - required modification:

32. [...] In circumstances in which a reviewing officer under s.202 (or indeed the initial decision-maker under s.184) is not *invited* to consider an alleged disability, it would be wrong, in the light of s,49A(1), to say that he should consider disability only if it is *obvious*. On the contrary. He needs to have due regard to the need for him to *take steps* to take account of it.

On 'due regard to the need to take steps to take account' of disability, this does not mean that in every case s.184 and s.202 decision makers must take active steps to inquire into whether the person is disabled and if so, in a way relevant to the decision. The duty is better phrased as 'to take due steps to take account of disabled persons' disabilities', where 'due' means appropriate in all the circumstances.

33. [...] In *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) the Divisional Court of the Queen's Bench Division (Scott Baker and Aikens LJJ), at [84], described the phraseology of s.49A(1)(d) as "convoluted". The court helpfully proceeded, at [90] to [96], to identify six general principles referable to the duty to have "due regard" in all six of the aspects specified in the subsection, including, second, that it demanded "a conscious approach" and, third, that it should be performed "in substance, with rigour and with an open mind".

34. For practical purposes, however, I see little difference between a duty to "take due steps to take account" and the duty under s.49(A)(1)(d) to "have due regard to … the need to take steps to take account". If steps are not taken in circumstances in which it would have been appropriate for them to be taken, i.e. in which they would have been due, I cannot see how the decision-maker can successfully claim to have had due regard to the need to take them.

In this case, the reviewing officer was in breach of the s.49A(1) duty as she failed to make inquiry into relation to features of the evidence presented to her that raised a real possibility that Mr P was disabled in a sense relevant to whether he acted 'deliberately' for the purposes of

being intentionally homeless as per s.191(1) HA 1996, or indeed acted in good faith as per s.191(2). The history of the non-payment of rent was, to say the least, curious. There was the GP's report pointing to 13 years of depressive illness and Mr P's own statements on the second of the homeless application forms.

While it was possible that Mr P did indeed have no relevant disability, the law required:

the reviewing officer (and, for that matter, the initial decision-maker) to take steps to take account of the appellant's disability, i.e. to make further inquiries into whether it existed and if so whether it was relevant to the decision under s.191. Those further inquiries she never made. [para 36]

Appeal allowed, review decision quashed, but in the circumstances no order was made for a fresh review. The appellant had sought a declaration that s.49A DDA applied to Part VII HA 1996. There was a question whether the Court had the power to make such a declaration on an appeal from a County Court decision under s.204, but as this was a binding court of appeal decision, no declaration was necessary for the judgment to have effect.

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Sun, 17 Oct 2010 18:40:11 +0000

NL

Khazai & Ors, R (on the application of) v Birmingham City Council [2010] EWHC 2576 (Admin)

We've been waiting for this one. Mutterings about the 'Birmingham email case' have been around for a bit. This is a judicial review which is something of a sequel to *Kelly & Mehari v Birmingham CC* (our report, bailii transcript), and as with that case, deals with apparent gatekeeping by Birmingham City Council.

Back in December 2009, in Kelly & Mehari, the Court had found that there was an apparent unlawful policy by Brum to not deal with s.188 interim accommodation on homeless applications. Birmingham had stated that it would revise policy to address this.

These four Judicial Review claims all concerned attempts to apply as homeless in February 2010 by Messers Khazai, Mirghani, Azizi and Ms Ibrahim. There were 3 elements to the claims, as all four were heard together:

i) that the instructions to Homeless officers in an email from the interim head of housing needs dated 24 February 2010 were unlawful ii) that this email amounted to the tort of misfeasance in public office iii) that Birmingham operated a blanket policy on 'same day' s.184 decisions that was unlawful

Khazai and the email of 24 February

Mr K applied to Birmingham as homeless. His application was not taken and he was not offered interim accommodation, although homeless and in priority need. Instead he was referred to Midland Heart Housing Association as a 'funded support service'.

Mr K's solicitors had come into possession of an email of 24 February 2010 from Mr Hardy, Birmingham's interim head of housing needs. The email was:

sent to two group addresses, one being the Neighbourhood Office Service Delivery Managers and the other being the Neighbourhood Office Service Delivery Officers. It is said on behalf of the Council that this would have comprised some 40 people in all who would have been expected to "cascade" this instruction to the frontline staff who would deal with applicants coming through the Neighbourhood Office doors.

What the email said was:

Dear All Please note with immediate effect all single homeless who are presenting as homeless/roofless and Domestic Violence victims requiring refuge must be referred to the appropriate funded support service. We should not be completing a homeless application. For single person under 25 they should be referred to St Basils .... For vulnerable singles over 25 they should be referred to Midland Heart .... Victim of Domestic Violence requiring a place of refuge should be referred to Trident .... Victims of Domestic Violence who are able to stay at home but require support should be referred to Birmingham & Solihull Women's Aid More detailed guidance notes are being produced and will be distributed in advance of the briefing session next week Wednesday, but the above arrangements above already should be in place. Monitoring of the arrangement is in place and if there are any problems with referring to the agencies, please advice (sic) myself or Saeed Akram.

As a vulnerable single over 25, Mr K had indeed been dealt with in the terms set out in the email - referred to Midland Heart.

We don't need to spend any time pointing out just how stunningly unlawful the instructions set out in the email actually are, comprising an utter failure to undertake Part VII duties. Indeed, Birmingham admitted as much in their Acknowledgment of Service.

Birmingham's defence was that the email was in error and that this error had been picked up and corrected pretty much straight away, starting with the two briefing sessions that followed a few days after 24 Feb. Brum stated that at the briefing sessions, Mr Hardy had said the instruction was wrong and that preventing homelessness should run in parallel with a homeless application.

Unfortunately for Brum, when Mr Hardy gave evidence at the hearing, he said

that there was no specific reference to the incorrectness of his e-mail at the briefing on 26 February and, it seems, at the subsequent briefing. All that was said by him at those briefings was that, whatever actions were being taken to try to prevent homelessness by the parallel process to which I have referred (see paragraph 29), it was to be understood by those dealing with applications that "a key element [was that] if someone wishes to complete and present as homeless then we should be taking that application" - in other words, dealing with the application as an application. Mr. Hardy said that was made clear verbally to those people who attended that "we had to take homeless applications" and that the message conveyed was that "under no circumstances should you not be taking homeless applications.

This was, as the Court observed "not a very promising start to the credibility of the Council's factual case". And it got worse.

an e-mail was produced during the hearing which was sent by Vicki Pumphrey (who, as Homeless Policy Manager, was No. 2 to Mr Hardy) on the afternoon of 26 February (at 14.32) in which she referred to his e-mail of 24 February and said that "non-compliance" with that e-mail "is being monitored by Saeed and the Team Leaders."

In fact, Mr Hardy's first emailed retraction of the email of 24 Feb was not until 17 March, after Mr K had issued his claim for Judicial Review. This said

"For clarification again, under no circumstances should a person be refused the completion of a homeless application or turned away. The purpose of referring homeless people to the Single Points of Access is to offer specialist preventative and housing options. This referral process can be undertaken in parallel with the completion of a homeless declaration. Every person approaching as homeless on the day requesting interim accommodation will be contacted with a decision that same day."

But yet another retraction had to be sent by Mr Hardy on 7 July 2010, clarifying further. On the evidence, it was clear that the Council's case that the email was an error that was rapidly corrected didn't stand up. The sequence of events did not represent "a satisfactory response to an instruction said to have been recognised early as wrong and unlawful. Quite why it was dealt with in such a way has not been fully explained to me."

Held: The instruction in the email of 24 Feb was unlawful, and in following it in Mr K's case, Birmingham had acted unlawfully.

The email and misfeasance in public office

The Claimant argued that the email amounted to a cynical disregard for the Part VII duties because of the financial consequences to Birmingham. On that basis, Mr Hardy's state of mind at the time of sending the email amounted to "reckless indifference to the illegality of his act" (*Three Rivers DC v Bank of England* (No 3) [2003] 2 AC 1). *Southwark LBC v Dennett* [2008] HLR 23 on the requirement of subjective intent noted.

The court had a certain difficulty in that Birmingham's disclosure on the decision making process after Kelly & Mehari had "not been very satisfactory" and the Court did not " feel that the full audit-trail prior to Mr Hardy's instruction has been revealed". Nonetheless, proceeding on the basis that the duty of candour had been discharged, there was nothing to support the conclusion that there had been an 'institutional' decision to avoid the Part VII duties.

40. The issue, therefore, is, as I have said, Mr Hardy's state of mind at the material time. He was, in my view, uncomfortable in the witness box and repeated the mantra that the procedures foreshadowed in his e-mail were intended to run in parallel to the ordinary Part 7 processes. He was unquestionably a longstanding, loyal, employee of the Council who had worked for nearly thirty years in a Department that, at least during the period with which this case is concerned and almost certainly for much longer, faced unique management problems because of the volume of applications made. He said that he chose to work in this area because it was something of importance to him.

41. He said in his evidence that his e-mail was composed without input from anyone else or, as I understood him, as a direct result of the internal processes of review that had taken place following the decision in Kelly, Mehari & Others to which I will refer later. That was modified to some extent when various versions of a policy document were revealed (see paragraph 61 et seq) but, nonetheless, his essential position was that he took the initiative of sending his e-mail without reference to others. I am very surprised that one person should take upon himself responsibility for articulating some fundamental approach to considering applications by those alleging homelessness when the

Council, as a body, had been criticised recently in a judgment of this court about its approach to such applications. There are two possible explanations: either Mr Hardy was not being frank about the full involvement of others in the internal processes and that there was indeed an "institutional" decision (involving others in the internal structure) to issue the direction in the e-mail; or he took the essential initiative himself without taking direct advice from others before he did so and without anyone "proof-reading" the e-mail or checking it for accuracy and validity. If it was the former, it would be difficult to understand how the illegality of what was contained in the e-mail could have been overlooked, particularly if legal advice had been taken during the processes. If it was the latter then, despite his long experience in the field, it is at least possible to see how infelicitous drafting could lead to conveying an unintended message.

The court found that whatever was in Mr Hardy's mind at the time, "it was not of the nature of the bad faith and reckless indifference to the illegality of what he was putting forward necessary to found the tort of misfeasance in a public office". The email was more likely to have been the product of oversight and ill-considered drafting than a brazen instruction to ignore statutory provisions.

The 'same day' policy

The cases of Mirghani and Azizi both involved former asylum seekers granted leave to remain and therefore facing the discharge of NASS accommodation and support. They both applied to Birmingham as homeless.

Mr M, after being told repeatedly to 'come back the next day' (for two weeks) had his application taken on 4 March 2010. What purported to be a s.184 decision letter was written the same day, but sent to his previous address, finding him homeless, eligible but not in priority need. (The present court found, given the background and present health problems "it is difficult to see on what basis he could not be said to be both homeless and in priority need".).

Interim accommodation was refused until the threat of judicial review proceedings, but then Birmingham sent notice to quit on the basis of discharge of duty, based on the letter sent to the previous address. Mr M was evicted. He went to his solicitors, who then found out from Birmingham about the s.184 letter sent to the previous address on the date of Mr M's application.

His solicitors that day requested interim accommodation pending a review of the priority need decision (under section 188(3)) and identified the defects in the Homeless Officer's decision. By letter communicated to his solicitors shortly before 6 p.m. that day, the Council accepted that there appeared to be a "deficiency or irregularity" in the decision but refused to provide interim accommodation pending the review. One reason given was that because he had applied for State benefits and housing assistance he had demonstrated an ability "to access services and [had] managed to do this whilst having no settled accommodation of his own."

On 26 March the present proceedings were instituted and Mr Mirghani was then granted interim accommodation pending the review. The decision following the review was set out in a letter dated 22 June when the Council notified Mr Mirghani that it accepted that he was in priority need and was owed the full housing duty.

While Mr M's individual issue was therefore resolved, the claim proceeded, with Mr A's, on the basis of 'wider interest' - the 'one day policy'.

Mr A was also granted leave to remain and faced the end of his NASS accommodation.

57. Six days before his NASS accommodation ceased to be available to him, on 2 February, he presented himself as homeless to the Council, but was told to return the day he was to be evicted. He sought advice from Shelter and in the early evening of Friday 5 February Shelter sent by fax to the Council a written homelessness application on his behalf with supporting letters from his GP and the multi-disciplinary pain clinic as evidence of his back condition. Shelter requested that interim accommodation be provided whilst enquiries under section 184 were carried out.

58. On Monday 8 February a representative of Shelter spoke to Ms Deborah Mosley who said that Mr Azizi was not in priority need and, accordingly, the Council could not assist him. That evening Simon J made a without notice order requiring the Council to provide suitable accommodation for Mr Azizi for the nights of 8-9, 9-10 and 10-11 February, giving the Council liberty to apply to set aside or vary the order on 12 hours' notice. A little later a letter setting out the reasons for Ms Moseley's decision was faxed to Mr Azizi's solicitors. I need not set it out in detail, but it is plain that her conclusion was that he was not "in priority need" and accordingly no duty to provide interim accommodation arose. She concluded that he was entitled to go on the Housing register as an applicant.

Mr A had since found private sector accommodation

Following a Freedom of Information request, the Claimants' solicitors had obtained some policy and procedure documents drawn up following Kelly & Mehari. Version 3 of one of those documents stated, in part:

The Homeless Team will respond to NAIS within 60 minutes of receipt of the application confirming receipt and the name and contact telephone number of the officer managing the application. The Homeless Officer will, where possible, indicate to the NAIS officer the length of time they believe it will take to make a decision on the application. The Homeless Team will aim to make decisions on all applications before 17:15 Monday – Thursday and 16:15 Friday, however, where this is not possible and the customer is remaining at the Neighbourhood Office they will inform NAIS to allow for the continued management and support of the customer until a decision has been made. The following test under S188 (1) Housing Act 1996 will be applied. If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of the Part. … Following the interim duty decision, the duty officer will telephone the customer to notify of the S188 decision and: If interim accommodation is agreed, the approved request will be forwarded via the homeless database to Temporary Accommodation team who will arrange the provision of emergency accommodation. If interim accommodation is refused, the decision will be communicated directly to the customer verbally. A copy of the S184 decision letter will be saved to the database for NAIS to access, the original letter will be sent direct to the customer by 1st class post

The Claimants argued that the process in the document - making decisions before times specified, communicating interim accommodation decisions and saving a copy of the s.184 letter to the database - amounted to a general 'same day' approach to decisions. After all, an adverse decision on interim accommodation almost inevitably means an adverse s.184 decision.

However, the Court found that while aspects of the document would certainly support such a reading, taking it as a whole, the reading was was less certain. Birmingham argued that the document referred to 'homeless on the day' applications only, the proper s.188 test was set out, and, if followed conscientiously, the low threshold of a.188 decision meant that there was nothing wrong in reaching a s.184 decision at the same time if the threshold was not met. These submissions were accepted.

There was no blanket one day policy on the evidence. However, the decisions on interim accommodation in both Mr M and Mr A's cases were unlawful, even if the question was now academic.

However, the Court also noted that "I do think that there is scope for improving the drafting of this document" and further that "I have no doubt that, if it has not occurred since March this year, a thorough review of the procedures adopted should be undertaken with the benefit of high level legal advice. Whilst I do not underestimate the practical difficulties faced by the Council in fulfilling its statutory duties, the nature of those statutory duties is now well-established and ought to be capable of being applied without the significant mistakes made in the cases before me."

On the same basis, the Council's argument that these were wholly academic cases that should not have been heard was dispatched:

my principal concern about granting a declaration that each of the refusals to grant interim accommodation was unlawful is (a) that it might encourage other claims to be pursued beyond a stage which, in the ordinary course of events, is legitimate and proportionate and (b) that it might discourage applications for a review of an adverse decision through the ordinary statutory processes. The other side of that particular coin, which I see as unique to the present proceedings, is that there has been a significant history of criticisms of the Council in operating Part 7 in the past and a decision of this court only a couple of months or so prior to the material decisions in the present cases which roundly condemned the systemic failure then perceived to be affecting the decision-making processes. A declaration from the court can reinforce the message that the house needs to be put in order and is justified on the basis that it fosters good administration. It is for that reason that I have, on balance, been persuaded to make appropriate declarations in the three cases other than Ibrahim. I do wish to make it absolutely plain, however, that this should not be seen as any encouragement to pursue each and every case in which the Council falls short of its statutory obligations under Part 7 to a full hearing once the failure has been rectified; far from it.

[That sounds like something of a warning to Birmingham - NL]

Ibrahim

Ms I's claim, which was a renewed oral permission hearing after rejection on the papers, had been advanced by the Claimants as evidencing a common theme of the Council's attempts to avoid Part VII obligations wherever possible.

There had been a delay in taking Ms I's application and a further delay in deciding on interim accommodation, which not provided until interim relief in the JR had been obtained. The full housing duty had subsequently been accepted.

There was no common theme with the other cases. No relief was required or possible. Permission refused.

Declarations of unlawfulness made in respect of the email of 24 Feb in Mr K's case and the decisions of not being in priority need in respect of Mr M and Mr A.

The claim in respect of misfeasance in public office dismissed.

Costs of half (Mr K) and two thirds (Mr M and Mr A) to the claimant. No order as to costs on Ms I.

I don't think any comment is particularly necessary. I presume that Birmingham will begin sending policy and procedure communications on self-destructing tapes.

Overstepping the mark

Sat, 16 Oct 2010 09:52:21 +0000

J

Wandsworth LBC v Watson, Court of Appeal, Oct 12, 2010 - Lawtel note only

This was an unopposed appeal by Wandsworth against a decision of a recorder on a s.204 appeal. Ms Watson applied to Wandsworth for assistance under Part 7, Housing Act 1996. She claimed to have been a victim of violence and, in her application, asked not to be housed in Clapham Junction or Battersea, because she had been attacked in those areas. Wandsworth offered her accomodation in western Roehampton. She rejected this offer because she said her attacker lived in the area; she had neglected to mention this when she applied because she did not know that Roehampton was in Wandsworth. A review under s.202, 1996 Act was rejected, as there was said to be no risk of violence in that particular part of Roehampton.

The recorder allowed an appeal under s.204, 1996 Act, holding that the decision was peverse; the authority had failed to deal with certain parts of the evidence and had misconstrued the facts.

The Court of Appeal allowed a further appeal. The recorder had effectively substituted her decision for that of the authority. She had not engaged with the authority's decision that there was no risk of violence to Ms Watson in that particular part of Roehampton. The recorder was really saying that she would have given different weight to parts of the evidence, but the decision of the authority was one that was reasonably open to them to reach.

Social housing reform "consultation"

Mon, 22 Nov 2010 12:00:33 +0000

Dave

The heavily trailed (eg here and here), "cataclysmic" consultation paper on social housing reforms has been published by CLG today. There is much to digest and much will be left to individual PRPs and local authorities to work out. The "consultation" is limited either to specific groups or to more specific issues without challenging the underlying rationales. The Localism Bill, shortly to be introduced will carry the main proposed changes. It also seems like there will be considerable residuary powers retained centrally and locally. The executive summary of the paper (at pp 9-11) pretty much does the job if that's all you read, but there are subtler effects and difficulties which one might anticipate on a first reading of the paper. If you are looking for keywords, they seem to be flexibility (tenure and rents), choice, change, deregulation, re-regulation. There are some good bits (assisting the resettlement of ex-offenders/the deinstitutionalised) and some frankly barking bits (most of the rest of it). Anyway, here's my summary:

Tenancy Reform: The "social offer"

The search is for flexible local solutions to individual housing needs (and non-needs, of which see below) and reforms to the current "social offer" (an ugly label used throughout the CP, but, I suppose, is discursively intended to offer as a comparator to the private rented sector - "PRS" - offer). The current secure tenancy framework is regarded throughout as "inflexible" and a tenancy "for life". The way of resolving that is to leave the current security of tenure system in place, and (importantly) protecting the current tenants from the new regime, but introduce a "flexible tenancy" for a proposed minimum of two years which can be granted to new occupiers. The two year period is up for consultation, but note the point at para 2.49 that "We would for example expect social landlords to provide longer tenancies to families with children as a safeguard against disruptive changes".

Six months before the end of the fixed term, the landlord is to issue a "minded to" notice if it has decided not to extend the term and offer "advice and assistance" (hopefully more than chucking a list of relevant websites/available accommodation at the recipient). This may be a positive aspect of the proposal, but raises concerns about how that letter might be framed and how lawyers are to interpret its framing (presumably like a homelessness decision?). The principle here seems to be similar to the method of determination of introductory/demoted tenancies, with a right to review, but with the added protection of an appeal to the County Court "on the limited grounds that the landlord has made an error of law or a material error of fact" (para 2.32). I wonder whether that will pass an Article 8 assessment.

Social landlords will have the option of the type of tenancy to grant (secure/assured or flexible) but will have to publish their strategic policy, which appears to require only that they "set out the broad objectives to be taken into consideration by individual social landlords in the area regarding their own policies on the grant and reissue of tenancies" (para 2.19). Such strategies will be drawn up by local authorities (even non-stakeholding ones) in collaboration with other housing providers and interest groups (eg tenants). Publication of such policies will apparently provide the requisite transparency. Some parameters will be set centrally in legislation and there will be a direction to the relevant regulator of a "Tenancy Standard". The terms of that standard will undoubtedly be significant but, at the moment, it is framed essentially as fairly minimalist principles-based regulation which will be "brief and focus on principles, and should avoid detailed prescription" (para 2.43).

Snuck away at paras 2.35-2.37 is an important qualification to all (flexible and otherwise) future social tenancies regarding succession: there will be a minimum right of succession only once and only to the spouse or partner of the deceased tenant. Social landlords will be able to grant more than that, though.

The right to buy/right to acquire will be retained for all these new tenancies.

The affordable rent regime, under which PRPs are able to grant tenancies at 80% of market rent from April 2011, and will be phased in, but the changes detailed above will also apply to these parts of the social offer (para 2.8).

If I was cynical - and regulars will know that I am - I would suggest that these reforms have been intended to offer a more level competitive set of arrangements between the "social offer" and the PRS, but more of that below.

Initial conclusion: so-called flexibility will result in more complexity and confusion in the short to medium term, with a prediction of legal challenges to possessions and the re-drawing of the intensity of the proportionality defence.

Empty Homes

There are a number of paragraphs in a short section on empty homes, which make much the same set of empty observations as past CPs of the last thirty or so years. Frankly, rich people with empty homes are not going to be a target of this government.

Allocating social housing

The headline here is that at least some of the 2002 Homelessness Act changes will be unwritten. Transfer households are to come off the housing register, so that they can more effectively compete for an allocation and use the new national home swap scheme and facilitate chain swaps (paras 4.18-22, and section 5, esp para 5.4 about data pooling and 5.5 about the whizzy new www system). In other words, because such households may be less needy, they are rarely going to get an allocation/letting under the current scheme. There will be no requirement for open lettings (unless this is what the local community wants). There is an odd para (4.7) in which CLG appears to be applauding local authorities gatekeeping practices in respect of households with no chance of an allocation. But the key para here is 4.9, which delimits the kinds of additional local exclusions which authorities might consider: only those in housing need; residency criteria; past tenancy record; those with sufficient resources toa ccess the private sector. It doesn't need a crystal ball to foresee how that might operate (or to predict DDA/Equalities Act challenges).

There is an open question on the reasonable preference categories but CLG's present position is that they are currently appropriate - or they are leaving the door open to just getting rid of it altogether (but there's little point after *Ahmad* anyway).

Homelessness

There are the good bits (ex-offenders and deinstitutionalised patients, although this is for a PRS support scheme: para 6.4) and a decision not to change the priority need categories, and the bad bits (for those with a long memory, remember the DoE's 1994 CP on homelessness [albeit slightly nicer put here]?). Basically, a "priority need for housing", in CLG's view, should not equate to a need for social housing (para 6.9). Therefore, they propose to amend s 193 so that an offer in the PRS will count as an offer irrespective of whether the household agrees or not: "This will depend largely on the circumstances of the particular applicant (and his or her household), but also the availability of suitable accommodation in the private rented sector, and the pressure on social housing in the district" (para 6.12). Anybody following Dave Hill's oversight of the Westminster CC and Schapps/Freud correspondence will find para 6.13 of interest regarding out-of-area offers.

The offer will be of a PRS AST of a minimum of 12 months and the SoS will take regulatory powers to vary the minimum fixed term length "in the light of experience and market conditions (but this could not be for less than 12 months)" (para 6.16).

Overcrowding

Section 7 is the oddest section of all. It describes the problems of overcrowding and the complex, obsolete legislation around it, and recognises some good practice, but then "we welcome views on the reform of the legal and regulatory framework concerning overcrowding" (para 7.9). CLG apparently has no ideas itself, although there is a steer in consultation question concerning the HHSRS (on which see the interesting case of *Hashi v Birmingham CC* reported in this month's Legal Action - our note to follow hopefully but we need the transcript, hint, hint).

Regulation

This simply confirms what we already know about the (barking) demise of the TSA and the (equally barking) decentred approach to regulation.

Boris takes over

One last thing snuck away at para 1.25: Boris is to get all decisions over housing investment in London. Nothing on whether he gets regulatory oversight as well but I guess that follows.

Consultation Period

The consultation closes on 17.01.2011 - responses to the lovely Frances Walker at CLG or by email to housingreform@communities.gsi.gov.uk

HHSRS, overcrowding and homelessness

Mon, 22 Nov 2010 23:37:59 +0000

Dave

I could bore for England about the significance of the HHSRS, overcrowding and their relationship with the definition of homelessness, as well as the significance of the reworked notion of "reasonable to continue to occupy" by the HL in *Moran*, having worked on this for the last 18 months. In *Hashi v Birmingham CC*, reported in this month's Legal Action, James Stark, to whom we are grateful for the transcript, has succeeded before HHJ Oliver Jones QC in the Birmingham County Court, in arguing that Birmingham failed to take account of the significance of an HHSRS assessment in the context of the definition of homelessness. This case, although only at County Court level, is interesting for a number of reasons in the context of homelessness and particularly the use of the HHSRS.

In summary, the basic question for Birmingham was whether Ms Hashi, who lived with her three children in a small two bedroomed flat, was homeless for the purposes of s 175(3). The flat was not statutorily overcrowded. There was a conflict on the evidence as to whether Ms Hashi and her three children were living in a Category A or B hazard for HHSRS purposes. Ms Hashi's expert insisted that there were both category A and B hazards; Birmingham's only that there were Category B hazards (Band D) but that there was a "probability of 'harm through stress and lack of personal space". The review decision adopted Birmingham's own assessment, naturally, but did not say why it did so and why it preferred that assessment. That was an error of law. Further, the review decision focused on overcrowding, which was not so bad that the property was statutorily overcrowded, without ever getting to the heart of its effects on the "pattern of family life" both now and in the future. Indeed, the review decision focused on the question of overcrowding to such an extent that "although [the reviewer] purported to consider the particular problems of the particular family in the particular accommodation, and the detailed reports that were very case-specific, these considerations were effectively dismissed or ignored in favour of either total reliance or over-reliance upon the test of statutory overcrowding which ... was wholly wrong" (at [22]). In fact, the future was barely considered at all, so that Birmingham's case really fell at the first hurdle - after all, that is precisely what Baroness Hale was requiring local authorities to do in *Moran* (and, it might be added, significantly lowering the threshold for a finding of homelessness). Birmingham's argument that, as they had given Ms Hashi points reflecting her housing need "to pave the way for the future allocation of a larger property" was rightly dismissed ("Points do not *per se* relieve the overcrowding problem").

It would have been interesting to have been a fly on the wall at the hearing of this appeal - HHJ Jones QC seems to have accepted James Stark's argument all the way, but in another court before another judge with a different counsel ...

Private Sector Accommodation and Part 7

Tue, 30 Nov 2010 23:32:10 +0000

NL

Hanton-Rhouila v Westminster City Council [2010] EWCA Civ 1334

This was a second appeal from a s.204 Housing Act 1996 appeal which had been dismissed by a Circuit Judge. Mrs Rhoulia had applied as homeless to Westminster and the appeal was of Westminster's rejection of her application on the grounds that she was not homeless.

The basic facts were that Mrs Rhoulia had applied as homeless after being asked to leave by her sister in law, with whom she and her husband had lived since 2007. Mrs R suffered from cancer, kidney failure and severe depression. On about 28 April 2009, Westminster accepted the application, began enquiries, and offered temporary accommodation in a B&B, which proved not to be suitable. No other temporary accommodation was found.

After Mrs R's first approach, in March 2009, Westminster had placed Mrs R on the Home Finders Payment Scheme, which was a form of discretionary deposit payment scheme for a 12 month minimum assured shorthold tenancy in the private sector. Following the B&B not proving suitable, and in the absence of other temporary accommodation, Mrs R continued to look at private tenancies under the HFP scheme. On 6 May 2009, Mrs R signed an agreement for a 12 month AST of a property.

On the same day, and without completing its enquiries under s.184, Westminster made a s.184 decision and rejected her application on the ground that she was not homeless under s.175 Housing Act 1996, as she had accommodation available to her - the new tenancy. Westminster had paid £1,900 to the landlord as an incentive (it is not clear on what basis - advance rent, deposit or one-off payment. I presume as deposit).

Mrs R requested a review, in part on the basis that she had not been advised that accepting the private sector tenancy would result in the termination of her homeless application. She maintained that Westminster's officer had told her "that she would not be removed from the homeless persons' waiting list, as the property was temporary accommodation". Westminster rejected this on review, finding that she had been advised on the effect on her Part 7 application, and that she was indeed not homeless. Mrs R went to s.204 appeal on the basis that the Council "acted unfairly in failing to fulfil an obligation to tell her that her acceptance of the offer of "temporary accommodation" in the form of the shorthold tenancy of the property terminated her status as a homeless person and her Part 7 application.". She asserted that she remained homeless under HA 1996 and was still owed a duty under s.193. The Council had failed to determine her application.

On appeal, it was held that:

the Council behaved perfectly properly in taking the steps that it did in suggesting that she looked for alternative accommodation. The reviewing officer made findings of fact which, on the basis of the evidence before her, she was entitled to make: see paragraph 21 of the judgment. The Council had not failed to make proper inquiries. It had reached a decision as to whether she was homeless according to the

statutory definition see paragraph 24. As she was not homeless, no duty was owed to her under Part 7. It was unnecessary for the Council to consider other matters relevant to what, if any, duty was owed. In deciding that she was not homeless advice as to the consequences of her acceptance of the property was irrelevant.
Whether the Council had acted properly or not in assisting Mrs R in securing accommodation prior to making a s.184 decision was irrelevant to to the question facing the review officer. Further, quashing the decision could only result in a fresh review decision reaching the same conclusion. If Mrs R's tenancy was brought to an end she could make a fresh application. Appeal dismissed.

On appeal to the Court of Appeal, Mrs R accepted that there was nothing intrinsically wrong in the Council assisting a Part 7 applicant to find accommodation via another route prior to the conclusion of s.184 enquiries. However, she argued that there was a:

failure of the Council to inform Mrs Rhouila of the effect on her rights in respect of both short and long term housing under Parts 6 and 7 of the 1996 Act if she accepted accommodation made available for her outside Part 7 i.e. that the Council would conclude that she was not homeless, that it would terminate consideration of her application and that she would lose her statutory reasonable preference in the allocation of long term accommodation under Part 6. It was incumbent on the Council, Mr Manning submitted [for Mrs R], to provide her with clear information as to such possible consequences so that she could make a properly informed decision.
The Homeless Code of Guidance was cited, including paras 2.13 and 6.4:
2.13. Housing authorities will need to ensure that the implications and likely outcomes of the available housing options are made clear to all applicants, including the distinction between having priority need for accommodation under Part 7 and having priority for an allocation of social housing under Part 6.

6.4. Housing authorities should ensure that the implications and likely outcomes of the available housing options are made clear to all applicants, including the distinction between having a priority need for accommodation under Part 7 and being in a "reasonable preference" category for an allocation of housing under Part 6. Authorities must not avoid their obligations under Part 7 (especially the duty to make inquiries under s184), but it is open to them to suggest alternative solutions in cases of potential homelessness where these would be appropriate and acceptable to the applicant.

Mrs R submitted that such advice should be in writing. The effect of the Council's approach to advising her was that she was deprived of any real opportunity to make an informed decision whether or not to accept the offer of the property. She had no proper information about the adverse consequences and the disadvantages of accepting the offer of the assured shorthold tenancy. Had she realised that the consequence of accepting the property was that she would no longer be entitled to assistance under Part 7, she would not have pursued that option. She was provided with unsuitable interim accommodation at the Leinster Hotel. She requested alternative suitable interim accommodation. The Council was aware that what was identified and was to be offered to her by the landlord was on a different non-Part 7 basis. It was also aware, though she was not, that the effect of her accepting the offer was that she would lose the right to pursue the Part 7 application, her prospect of obtaining the benefit of a Part 7 full housing duty and her statutory priority in respect of the allocation of long term accommodation to her as amongst the most vulnerable and least well resourced members of society.
There was no evidence that the officer who had advised Mrs R had informed her of the consequences for her Part 7 application and his email to the review officer did not suggest that he had. The review officer's decision was therefore contrary to the available evidence

Westminster accepted that it was good practice to take steps to ensure that Mrs R was advised of the effects of accepting the property on her Part 7 application, but there was no formal requirement that it be in writing. The Court noted that it would be good practice for the advice to be in writing, but agreed there was no requirement.

Held: Mrs R's appeal did not raise any particular legal or procedural unfairness in the review decision. There was no point of law at issue. It just cam down to whether the review officer was entitled to decide as they did on two issues of fact:

First, the review officer was plainly entitled to conclude that Mrs Rhouilia was not homeless once she had taken the tenancy of the property: it was accommodation which it was reasonable for her to occupy and she accepts that it is suitable.

Secondly, the review officer was entitled to reject the various factual assertions made in the letter from her solicitors requesting a review about the handling of her Part 7 application.

The review officer's decision on these was not perverse. Mrs R may have believed that she was told the AST was 'temporary accommodation', but it plainly wasn't and it did not mean that she had been told by the officer that it was.

Mrs R's allegations of lack of advice and being misled had been investigated by the review officer and the review officer was entitled to conclude there was no evidence to support the allegations.

Appeal dismissed.

Comment While Westminster didn't fall into the same trap as Lambeth in *R(Raw) v Lambeth* [2010] EWHC 507 (Admin) (our report here) in that they did not end s.184 enquiries until Mrs R had accepted a private sector tenancy, the facts of this case will sound familiar to many. What Mrs R was alleging was, in effect, housing options being deployed to avoid a full housing duty by securing a private tenancy, but apparently without the applicant being advised of the effects on her application of doing so. Clearly whether Mrs R was so advised was a disputed fact, and the review decision that she was, was upheld. But even if Westminster did fully advise her, it remains true that many aren't so advised - again see *Raw*.

At first appeal, the CJ had held that the advice given to Mrs R was effectively beside the point - the review officer was to decide on whether the decision that she was not homeless was correct. At least the Court of Appeal finds that the 'critical point' was whether "

By 'arranging' such a tenancy rather than making an offer of one, the Council is saved the requirements of accepting a duty. While an offer of a private sector tenancy, once a duty has been acepted, can of course be an offer for the purposes of s.193(5), it remains that the s.193 duty would revive if the tenancy came to an end and there was no other change in the applicant's circumstances - *Griffiths v St Helens MBC* [2006] EWCA Civ 160. Such an offer can also be a qualifying offer under s.193(7B) with all that entails.

Of course, if a properly advised applicant takes up a private sector tenancy rather than following the Part 7 route, that is a choice for them. And providing those options is a thoroughly valid thing to do under the broader rubric of 'preventing homelessness'.

In any event, this may well become thoroughly academic, in view of the current Green Paper, the effect of which is that an offer of a private tenancy can be sufficient for full discharge of duty. For the moment though, it puts a road block in the way of challenging the adequacy of advice and decision making for homeless applicants also put on such a 'private sector route' scheme.

Relying on advice on the LHA

Mon, 06 Dec 2010 21:42:13 +0000

NL

Ombudsman's Decision: Complaint against Newham LB [2010] Complaint no 09 003 325 9 November 2010

Hat-tip to the Garden Court bulletin for this one. Miss Thornton (pseudonym) was in temporary accommodation provided by Newham LBC pursuant to the full housing duty. She had been in it for some time. The temporary accommodation was in LB Redbridge, but paid - via housing benefit - for by Newham as TA. Miss T wanted to change the temporary accommodation as the heating in the flat had failed.

Newham told her she could be assisted through its 'bond scheme' - a deposit provision scheme that supported a private sector tenancy for a period of no less than 12 months. Miss T found another flat in the same block, minimising disruption. She and the landlord (who had to be approved under Newham's scheme) approached Newham to ask what the available Local Housing Allowance would be for this flat. Miss T and the landlord were told it would be £874.99 from October 2008. The landlord agreed to let as this rate and Miss T signed a 12 month tenancy agreement. Newham sent a confirmation letter to both stating that the landlord was eligible under the bond scheme and that Waltham Forest Council would be responsible for the LHA (not Redbridge).

However, as Miss T found out some months after applying, the LHA in LB Redbridge was £17.30 lower that she had been advised by Newham's officer. She could not afford the shortfall. Newham's officer had made a mistake, looking at the LHA for Outer East London, not Outer North East London.

Miss T applied for discretionary housing payments to cover the shortfall. Redbridge refused. She turned to Newham to help. Newham admitted their error, but offer to once again assisted with alternative accommodation via the bond scheme. Miss T refused, on the eminently reasonable grounds that this would mean breaking her 12 month tenancy agreement and leave her liable for the rent, as well as meaning further upheaval and costs for her and her daughter. The landlord also complained to Newham, reminding them that the level of rent on the tenancy had been based on their assessment of the LHA payable.

Nothing happened. Miss T took a complaint to the Ombudsman.

Newham argued that although their officer had made an error, the email and letter to Miss T and to the landlord had mentioned Waltham Forest, not LB Redbridge, and that both should have been aware the property was in Redbridge, so alert to the error. Further Newham had offered to assist with alternative accommodation.

The Ombudsman was not impressed.

The Council has said that Miss Thornton and her landlord should have recognised that the Council had identified the flat as being in a neighbouring borough and so checked the validity of the information they were given. But in my view, it was the Council's responsibility to give accurate advice, and the fact that neither Miss Thornton nor her prospective landlord identified the error would seem to indicate that they had a reasonable expectation that they could rely upon what they had been told without scouring the document for potential errors. Miss Thornton and her landlord subsequently agreed the rent based on this information in the full knowledge that it did not exceed the LHA rate as it could not do so as part of the terms of the bond scheme. Miss Thornton was therefore confident that her housing benefit application would result in a determination that she was eligible to meet her rent liability for the duration of her tenancy unless her financial situation changed. It was not reasonable for the Council to expect Miss T to move when their error came to light, not least as she would still be liable for the rent for the rest of the 12 month term of the tenancy [and if I may add how on earth could this actually be considered a remedy? One that the Council even argued to the Ombudsman!]
For these reasons I consider an appropriate remedy would be for the Council to pay the difference between the LHA rate paid, and the rent that was charged, for the 12-month period of the tenancy agreement. This amounts to £899.60. In addition I think the Council should pay £250 to Miss Thornton for her time and trouble in pursuing this complaint and the anxiety she has undoubtedly been caused. I recommend that the Council reminds all of its officers tasked with giving advice regarding LHA of the potential implications on people's lives of getting the advice wrong and to check the exact location of properties as well as the commensurate rates on the Valuation Office Agency's LHA Direct website regularly as they are subject to change.

Localism Bill published

Tue, 14 Dec 2010 09:45:46 +0000

Dave

The Localism Bill was published yesterday. I suppose it might be seen as an exciting time for the housing sector - somebody described it as a potential "paradigm shift" at an event I was at last week - but, whether or not that is correct (and it could yet turn out to be), it has left me profoundly depressed about the processes of government. The consultation document on which some of the housing provisions are based was published on 22.11.2010 (our discussion) with a closing date of 17.01.2011. The Bill has been published before the full analysis of responses to that consultation has been completed or, indeed, before many have crystallised their thoughts to respond to it. It seems that, whatever you think about the coalition proposals, and there are a range of views being expressed, doesn't really matter because the coalition is pressing ahead with them anyway. Minor amendments can be made, for sure, but the principles, which are hotly contested in the sector (as any reader of Inside Housing will be aware), are set in stone. The students are right to have been radicalised by the processes of government, and I feel similarly radicalised both in their cause as well as on the Localism Bill.

And all of the stuff in the CP is in it (other than the overcrowding section, which, frankly, was a bit of a waste of space - just get rid of sections 325 and 326 and rely on the HHSRS). There are other clauses as well, interesting in their moment, for example:

- the Housing Ombudsman's entrepreneurial accretion of jurisdiction has extended to housing complaints from local authority occupiers in respect (inter alia) of the provision and management of stock (cll 153-5), but there is a filter (the complaint must be referred by an MP, councillor or "designated tenant panel"), which is much-derided in relation to the Parliamentary Ombudsman, and provision for the housing ombudsman's judgments to be enforceable as if they were an order of the court;
- the HRA goes (but that was on the cards under New Labour anyways) (cll 140-7);
- the Welsh Assembly gets housing finance and accounts powers (cl 152; see also David Smith's post on previous powers to the Assembly, the expression "Let's all move to ... Wales" being particularly apt now)

As for the CP stuff:

- the TSA's functions are transferred to the "regulation committee" of the HCA (Schs 16 & 17)
- Standard-setting powers in relation to exchanges (cl 148);
- Limits on succession rights (cll 134-5);
- The new procedure for requiring a landlord to agree to transfers is set out (cll 132-3);
- The new "flexible tenancy" regime, including a mandatory right to possession on certain conditions being fulfilled regarding a review and notice (see discussion of CP) (cl 130, see esp new s 107D, which is sure to be the next battlefield for proportionality and public law defences), together with the new duty to create yet another strategy, the tenancy strategy (cll 126-9);
- Consequential, tricky amendments to introductory, demoted and Family Intervention tenancies are set out (cll 131, 136)
- The homelessness alterations, previously trailed, although it is tricky to make sense of them to be honest (cll 124-5)
- Changes to the allocations "rules" (for England only), so that the old s 167 only applies to Wales, and a new s 166A applies to England) - the key changes, I think, are in cl 120, which introduces a s 160ZA into the Housing Act 1996 enabling local authorities to set up their own "qualifying persons" to whom an allocation can be made, subject to regulations (cl 160ZA(7)-(8); and amendments to s 159 taking transfer applicants out of Pt 6.

The brilliant Baroness

Fri, 28 Jan 2011 16:53:08 +0000

Dave

Yemshaw v Hounslow LBC [2011] UKSC 3

While my NL colleagues are off partying at a secret location for lunch, I've managed to steal a few precious minutes from an appallingly tight deadline (Sinead: if you're reading this, it'll be there, honest) to write a paean of praise in honour of Baroness Hale's judgment in this case. It is quite simply, as NL has put it, Baroness Hale at the top of her game; a brilliant, tightly argued, academic but practical, rich and deep appreciation of homelessness law and its underlying philosophy (cf the "provocative" approach taken by the Daily Mail in their, ahem, "interesting" comment on the case - more of which, possibly, later). Her judgment in *Yemshaw* provides the principal justification for the reams of academic literature that now exists *about* her (rather than written by her).

Background

The background to Yemshaw has been covered by NL (here), which was concerned with the Court of Appeal judgment. The issue for the Supreme Court was the definition of "violence" in s 177(1), Housing Act 1996, for the purposes of the definition of homelessness. The Court of Appeal considered themselves bound by *Danesh v Kensington and Chelsea RLBC* [2006] EWCA Civ 1404, despite the fact that the Code of Guidance had defined "violence" more broadly, but, in any event, they rather agreed with the narrow take on "violence" in *Danesh*.

Outcome

In the Supreme Court, the actual outcome was that violence is to take the same meaning as in the family law context: "'Domestic violence' includes physical violence, *threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm*" (*Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2)* [2009] 1 WLR 251, at [2], emphasis added; *Yemshaw*, at [28]). Baroness Hale (with whom Lords Hope and Walker agreed) gave the leading judgment; Lord Rodger gave a concurring judgment, out of deference to the CA; and Lord Brown doubted the result but, in the oddest final paragraph, basically said that he didn't care enough to dissent ("At the end of the day, however, I do not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent. I am content that the views of the majority should prevail and that the appeal should be allowed": [60]).

Baroness Hale made clear that the question for the local authority (following on from *Birmingham CC v Ali* - our note here) is essentially about the future, ie the probability of the acts continuing in the future ("This is the limiting factor. Sections 177 and 198 are concerned with future risk, not with the past": [34]). Further:

I accept that these are not easy decisions and will involve officers in some difficult judgments. But these are no more intrinsically difficult than many of the other judgments that they have to make: …. Was this, in reality, simply a case of marriage breakdown in which the appellant was not genuinely in fear of her husband; or was it a classic case of domestic abuse, in which one spouse puts the other in fear through the constant denial of freedom and of money for essentials, through the denigration of her personality, such that she genuinely fears that he may take her children away from her however unrealistic this may appear to an objective outsider? This is not to apply a subjective test (*pace* the fifth reason given in *Danesh*). The test is always the view of the objective outsider but applied to the particular facts, circumstances and personalities of the people involved. (at [36])

My suggestion is that, just as the *Holmes-Moorhouse* paragraphs pop up in practically all local authority skeleton arguments, this paragraph is likely to be in most appellants. Homelessness decision-making is a difficult job, but it has to be done.

Reasoning

Although Baroness Hale made it look relatively easy, this result was rather more difficult to achieve (as is clear from Lords Rodger and Brown's judgments). It required deft footwork, using the history of the homelessness legislation, method of statutory interpretation adopted in *Fitzpatrick v Sterling HA* [2001] 1 AC 27, combined with "modern" understandings of domestic violence. The interpretation meant that the phrase "domestic violence" in section 177(1) is left virtually redundant (a historical vestige, in essence - see the quizzical discussion at [9]-[11]) and, it is to be noted the ambit of the phrase "other violence" in section 177(1) (as amended) was unclear and left open (Baroness Hale could see both sides of the argument: [35]; note to self - one for the future). Anyway, starting from the top ...

As Baroness Hale pointed out (at [7]-[8]), the definition of "violence" is an important question because of its "deeming" or "passporting" effect - that is, a person falling within this definition will not only be found homeless but will also be found not intentionally homeless (and will affect the ambit of the local connection provision). Its parameters, then, are crucially important. Baroness Hale traces the rather tawdry history of section 177(1) back to the inane distinction that used to be drawn between violence inside and outside the home; and the proviso that local authorities are entitled, in exercising their decision-making on homelessness and intentionality, in relation to reasonableness, to have regard regard "to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation" (now s 177(2)). As regards the latter, Baroness Hale suggests that "this strongly suggests that regard may be had, not only to the *quality* of housing available locally, but also to the *quantity*" (at [5]; on which Ian Loveland's academic work from the early 1990s is interesting by the way).

The history of the "deeming" provision enabled Baroness Hale to make a number of points about section 177, as original drafted. She notes, first, that it expressly includes violence against other members of the household; and second, that it was not limited to violence from someone living in the same accommodation but covered violence from an "associated person" (see s 178). Those changes, though, did not alter the underlying, fundamental purpose.

The development of policy and family law understandings about "domestic violence" were also relevant to the discussion, and Baroness Hale brilliantly interweaves that development with homelessness law. So, after tracing the development of the family law approach, she notes that "it cannot be a coincidence" that the definition of an associated person in section 178 closely resembles that in the Family Law Act 1996 (at [22]); and

All of this indicates a consciousness in 1996 of the need to align housing, homelessness and family law remedies for victims of domestic violence, so that they could have a genuine choice between whether to stay and whether to go and the local authority or social landlord would not be obliged to continue to provide family sized accommodation to the perpetrator. There was also an explicit acknowledgement in the report which led to the Family Law Act 1996 and by the Home Affairs Committee that "violence" could have a wider meaning than physical contact. (at [23])

This tracing process led Baroness Hale to the *Fitzpatrick* approach to statutory interpretation. In essence, some statutes are to be read as "living law", ie interpreted by reference to their current meaning as opposed to the meaning which they might have had at the date on which they came into force: "The essential question ... is whether an updated meaning is consistent with the statutory purpose" (at [27]). What were the statutory purposes:

In this case the purpose is to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm. A further purpose is that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere. (at [27])

Those purposes would be achieved if the court adopted the family law definition of violence. Further, that interpretation was not inconsistent with the statutory provisions in Part 7. Yes the Secretary of State has a power to include other forms of ill-treatment falling short of actual violence within s 177(1), but that had not been done because the SoS already believed that the word bore that wider meaning. If there was concern that the threshold was being set too low, Baroness Hale observed (and, in doing so, drew on her family law knowledge as well as brilliantly undercut any potential dissent):

The advantage of the definition adopted by the President of the Family Division is that it deals separately with actual physical violence, putting a person in fear of such violence, and other types of harmful behaviour. It has been recognised for a long time now that it is dangerous to ignore what may appear to some to be relatively trivial forms of physical violence. In the domestic context it is common for assaults to escalate from what seems trivial at first. Once over the hurdle of striking the first blow, apologising and making up, some people find it much easier to strike the second, and the third, and go on and on. But of course, that is not every case. Isolated or minor acts of physical violence in the past will not necessarily give rise to a probability of their happening again in the future. (at [34])

It's just brilliant stuff. Lord Rodger's concurring judgment looks like it could have been written 30 years ago by contrast. Lord Brown - well, read it and see what you think. it's not uninteresting in terms of the value judgments he is making (see especially [57] where he draws a distinction between the urgency in actual violence cases as opposed to those "subject to psychological abuse").

Right, back to that deadline ... (oh, and hope the rest of you NLers enjoyed the long, luscious lunch - not that I'm jealous or anything)

Who knew?

Sun, 06 Feb 2011 13:23:45 +0000

NL

Two cases on a similar issue to report, one in the High Court and one in the Court of Appeal. Both concerned Section 202 Housing Act 1996 reviews and both dealt with issues of the notification of the review decision. The cases are not available on bailii yet, or apparently elsewhere, but are reported in Sweet & Maxwell's Housing View and I've seen transcripts. The cases are:

Dragic v LB Wandsworth High Court (QB) 21 January 2011 QB/2010/0485 *Dharmaraj v LB Hounslow* Court of Appeal, January 24, 2011 B5/2010/0201

Dragic v Wandsworth This was a second appeal from a County Court s.24 Housing Act 1996 appeal. Mr Dragic was owed the full housing duty by Wandsworth. He had been in temporary accommodation and refused an offer of permanent accommodation that Wandsworth considered was suitable. Mr D requested a s.202 review, which was carried out. In a letter dated 23 March 2010, Wandsworth concluded that the accommodation was suitable and it was reasonable for Mr D to accept and live in the accommodation in discharge of s.193 duty.

This was the point that things went wrong and that gave rise to the issue on appeal. The issue was, quite simply, whether notification to Mr D's solicitor of the review decision was notification to Mr D, for the purposes of the 21 day deadline for filing a s.204 appeal. Wandsworth had sent the review decision letter to Mr D's then solicitors, Morgans. It was found, by the first instance appeal court, that notification would therefore have taken place on 25 March 2010, giving a deadline for the filing of appellant's notice of 14 April 2010.

The Appellant's Notice was actually sent to the Court by Mr D's new solicitors, Blacklaws on 16 April and issued on 19 April. In directions, the Circuit Judge noted that an application to extend time to appeal had not been made until 5 July 2010. At the hearing of the s.204 appeal, the Circuit Judge held that the appeal was made out of time. The CJ rejected the argument that time began to run when the applicant received the notice, not his solicitors, based on the word 'his' in s.204(2), on which more below. The CJ held that the usual rule that where a solicitor is acting for an applicant, all that was necessary was to serve the solicitor applied.

The appellant's solicitors argued that permission to appeal out of time should be granted because Morgans had told the appellant they could not act in the appeal for funding reasons and Blacklaws did not receive the review decision until 31 March 2010.

The CJ held that this was not a good reason, based upon an attendance note from Morgans which apparently showed that the appellant had been informed of the procedure and time limits for appeal on 25 March. Further the appellant had contacted Blacklaws on 25 March and "all the new solicitor had to do was contact Morgans to clarify the position".

On second appeal, Mr Justice Supperstone QC heard the appellant's argument that:

The CJ was wrong in law to hold that the 21 days ran from the date of notification to the appellant's then solicitor. This ignored the word 'his' is s.204(2) and was inconsistent with *Barrett v Southwark LBC* [2008] EWHC 1568 (QB) [our report here], where time was taken to run from the date the letter was received by the applicant, which was the day after the notification was received by her advisers. Time should run from the date the decision letter could have come to the applicant's attention, not his solicitors. This was supported by s.203(8)

S.204(2) reads: "An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review." ['he' being the applicant]

S.203(8) reads: "Notice required to be given to a person under this section shall be given in writing and, if not received by him, shall be treated as having been given if it is made available at the authority's office for a reasonable period for collection by him or on his behalf."

Mr Justice Supperstone QC dismissed the appeal. *Barrett* did not argue the agency matter fully, so was not relevant. The issue in *Barrett* was

rather whether the relevant date was the date of letter or date of receipt. In any case, the appeal was well out of time.

The general rule of notification to an agent is in *R v Chief Immigration Officer Manchester Airport ex p Insah Begum* [1973] 1 WLR 141 and followed in *Tkachuk v SoS for work and Pensions* [2007] EWCA Civ 515. "Notice is sufficient to comply with the Act if given to the applicant himself or his agent, provided the agent is authorised to receive it on his behalf or may be presumed to have such authority."

Dharmaraj v LB Hounslow

And in case one was wondering if the issue might yet go further, the Court of Appeal got to have a go shortly afterwards.

Mr D had applied as homeless following a possession claim by his private landlord. The LL claimed for rent arrears. Mr D was found intentionally homeless by decision letter dated 13 August 2009. On 19 August 2009 Mr D's solicitors requested a review and on 21 September 2009 submitted documents and a statement in support - Mr D's argument being that the landlord had got rid of him as he complained a lot about failure to repair defects.

On 28 September 2009, the Review officer faxed a 7 page decision to Mr D's solicitors. The review upheld the s.184 decision. At the end of the letter, it stated that the applicant had "21 days from the date of this letter" to appeal on a point of law.

On 13 October 2009, notice of appeal under s.204 was issued. The basis of the appeal was that:

there was the procedural deficiencies in the notification, the consequence being that there was no effective review decision made and therefore it was the original decision that the Appellant had made himself intentionally homeless which was the decision being appealed. If that prong were unsuccessful and the review decision is on appeal, the reviewing officer had failed to take into account relevant considerations.
The appeal was dismissed on both grounds by HHJ Mitchell at Central London County Court. The applicant appealed on the first issue, that there was no effective review decision.

At the Court of Appeal, the applicant argued that:

S.204(1)(b) provided that an appeal may be brought on the original decision if the applicant is not notified of the review decision with the (56 days) period set out in s.203.

1) The review letter is defective because the final paragraph does not comply with s.203(5) because it should have said that the Appellant had 21 days from his being notified of the decision to appeal;

2) By reason of s.203(6) notice of the review is not to be treated as given;

The argument was therefore that
sending the Appellant's notice by fax [to the solicitors] did not comply with the statute. The notification was still defective in form despite being sent on the same day. The language of the Act allowed no scope for the interpretation that the local authority were arguing. Further, there had been no waiver by the Appellant of the right to argue that there was no review decision capable of an appeal.
Hounslow argued that:
1) The review letter complied with the statute because it correctly informed the Appellant of the date by which to appeal. The Appellant was notified by virtue of it being faxed;

2) If s.203(5) was not complied with the time limit did not start to run against the Appellant but the review decision should not be treated as a nullity;

3) The notice of appeal was issued as an appeal against a s.202 decision and the Appellant had the opportunity to consider it. The Respondent asked the court to consider the parliamentary intention of the legislation when making its decision.

The Court of Appeal found that notification to the applicant's solicitors was good notification, despite the arguments raised on the meaning of s.203(8) and s.204(2), as in *Dragic*. There was no requirement for personal service and the Council was entitled to take the solicitor as being the appropriate person to serve. "The appointment of Solicitors to request a review carries with it a holding out of those Solicitors to be authorised as able to receive". The decision in *Dragic* - properly mentioned by the applicant's barrister who also acted in that case - upheld.

The review decision letter therefore correctly set out the time for appealing, given that it was faxed within working hours. Further,

It is not right to construe s.203(6) as imposing a linguistic requirement that the review decision letter must use precisely the language of s.203(5). What matters is the substance of the information to be supplied rather than the precise form.
Appeal dismissed.

Comment

If I'm being honest, I'm not particularly surprised by the outcomes here. Certainly my presumption was that if a solicitor had made review submissions, service of the decision on the solicitor would be service on the client, for the purposes of the deadline to appeal. While statute does specify 'his being notified', a solicitor formally acting would surely stand in as that person. That the Council would be entitled to rely

upon it as service upon the applicant is really to say nothing more than the Council are entitled to presume that the applicant's solicitor will inform their client promptly and not faff about. It is worth noting that *Barrett* did involve an 'extension' of a day from the date a review decision was received by the applicant's advisers, but that the advisers were an Advice Centre, not solicitors.

The finding on the language of the '21 day warning' in *Dharmaraj* is perhaps a little less than helpful, though. While the phrasing used -21 days from the date of this letter' - was good in this this instance as the letter was faxed in working hours, it is a phrasing that crops up all too commonly on letters that are posted and are received two, three or more days after the date on the letter.

The Court of Appeal make no particular finding on that possibility, but do state that it is not a matter of including the precise statutory wording:

The wider approach is to consider whether there is a breach of the underlying purpose of the statute, not to automatically make it a nullity. I simply can't see why the notification in the review decision should not be required to set out the correct position, without ambiguity or indeed error.

In a situation where someone may be trying, with considerable difficulty these days, to find an advisor, an apparent shortening of time could cause them to give up while still within the time limit. My view is that it would hardly be a hardship to Councils for the stock phrase pasted into the end of each s.202 review decision to properly and accurately read ' within 21 days of the date you received this letter'. There is no valid reason for them to say anything else.

What to review?

Mon, 31 Jan 2011 21:17:30 +0000

NL

Nzamy v Brent London Borough Council Court of Appeal, January 26, 2011 [Arden eflash 420. Not on Bailii yet, but we've seen a transcript of the extempore judgment]
The appellant and family were in permanent accomodation provided by Brent following a previous homeless application. Following reports of threatened violence against them relayed to Brent, which appears to have been effectively taken as a homeless application, Brent made an offer of alternative accommodation in December 2008. Mr & Mrs Nzamy did not consider that the property offered was suitable. Brent wrote to them stating:
Should you not accept, the Council will construe that it has DISCHARGED ITS STATUTORY DUTY to you. This will include terminating the licence for any temporary accommodation you may occupy and no longer offering any further assistance with rehousing.

Under section 202 of the Housing Act 1996 you have a right to request a review of this decision if you do not agree with it.

The Nzamys wrote a 4 page letter asking for a review, setting out why they didn't consider the offered property suitable, as it was worse than were they were. It set out the steps the family had taken to improve their current property and steps taken by others, including the Council and the police. It ended:
Now, I ask you kindly to look at our case…..and make a right decision… Finally, I ask you please to offer us permanent accommodation ..but until that time we can wait in our current flat…

Brent took this as a request for a review of the suitability decision and found against the Nazmys. There was an appeal to the County Court, then this second appeal to the Court of Appeal.

The review officer upheld the alternative accommodation as suitable and it appears also he inferred there was a discharge of duty. The judge in the county court upheld the review officer's decision and, whilst his judgment is not entirely clear, he inferred that there was a discharge of the duty and dismissed the appeal

At the Court of Appeal, the appellants argued that their letter should be taken as a request for a review of both the suitability decision AND the decision to discharge duty.

The parties were agreed that the review decision did not properly consider the decision to discharge duty, but Brent maintained that the Nzamy's handwritten letter was a request for a review of suitability only, which the review officer had properly considered. In any event, there had been no decision to discharge duty until a later stage.

The Court of Appeal, in Black LJ's extempore judgment found that:

13. Against that background, it must be asked what was on the agenda of the review officer in conducting the review? One has to look at the letter seeking a review in order to decide that. Plainly it is necessary to look at the handwritten letter by an individual applicant with common

sense and to take a broad view as to what is being sought. If the family were to be allowed to "wait in their current flat" until permanent accommodation became available, they had to disrupt the local authority's intended conclusion that their duty under s.193(2) would be discharged.

14. Against that background and bearing in mind that the authority's letter of 23 December 2008 had made plain that they would discharge their duty, it is difficult to construe the final passage of the appellant's letter of 4 January 2009 as anything other than a request that the review officer should view the letter as a request for a review of suitability and as a request for a review of the decision to discharge the duty.

The prospective decision by the Council to discharge duty set out in its letter of December 2008 was itself reviewable. (As per *Ravichandran v Lewisham LBC* [2010] EWCA Civ 755 - the link is to our note - which is not cited but clearly is followed.) The Council had made it clear that it would discharge duty and this was reviewable.

The appeal was allowed and remitted to the Council for a s.202 review of the decision to discharge duty.

So, Local Authorities should take a common sense view of review requests by un-represented applicants and take a broad view of what is being sought. A strict or legalistic view should not be used to exclude a review of decision to discharge.

Unreasonable bungalow

Mon, 21 Feb 2011 21:44:28 +0000

NL

Anya Thompson v Mendip District Council, Taunton County Court 3 December 2010 [Unreported elsewhere].

This was the s.204 Housing Act 1996 appeal of a decision by Mendip DC that its offer of a two bedroom bungalow was an offer of suitable accommodation under s.206 of the Act and, therefore, it was right to discharge duty under s.193 of the Act.

Ms Thompson had been a traveller for 20 years. In February 2008, she moved her caravan onto land in Glastonbury owned by Mendip. She was served with a removal order in June 2008, but after negotiations, was allowed to stay. Ms T applied as homeless, and was initially turned down as not in priority need. After a report by a consultant psychiatrist, and consideration of a second medical opinion, Mendip revised that decision and in April 2009 accepted that it owed the full duty. Ms T was found to be suffering from anxiety and long-term depression, which was ameliorated by a rural living environment, and that conventional accommodation, certainly in a built up area, would make her 'very anxious and worsen her depression as well as conflicting with her cultural values'. (This opinion was not challenged at any point by Mendip).

In December 2009, Mendip offered the two bedroom bungalow. Ms T refused and asked for a s.202 review of its suitability. The review letter contained a stated that "As Ms Thompson is a member of the gypsy community, there is a requirement for the Council, when considering the suitability of any offer of accommodation to her, to give special consideration to securing accommodation which will facilitate her traditional way of life". The review then cites *R (Price) v Carmarthenshire CC* [2003] EWCA 42 Admin and the relevant passage of the Code of Guidance . Nonetheless, the review concludes that the offer of accommodation was suitable as "it was the only type of accommodation which could be offered at this time due to there currently being no suitable alternative to facilitate Ms Thompson's cultural lifestyle".

On appeal, Ms Thompson argued:

The decision was wrong because it failed to consider relevant facts, namely the existence of other sites. The Gypsy and Travelling Strategy document contained a list of potential sites. There had been no consideration of this and thus potnetial provision of accommodation for Ms T.

The decision was wrong because the decision-maker had misapplied the principles in *Cadona v Mid-Bedfordshire Borough Council* [2004] EWCA Civ 925. and *Lee v Rhondda County Borough Council* [2008] EWCA Civ 1013 . *Cadona* concerned urgent circumstances where all the Council could offer was B&B accommodation. This decision was upheld by the Court of Appeal.

Para 59 of Auld LJ's judgment in *Cadona* was quoted, to the effect that this was short term accommodation as a short term measure taken as a last resort. It was not the case that there was such urgency in this case.

In *Lee*, there was no evidence as to psychiatric harm being caused by bricks and mortar accommodation, and, it was submitted, the law in *Cadona* was not altered by the Court of Appeal in *Lee*.

The review decision was unreasonable because of the evidence as to the effect of conventional accommodation on Ms T's mental health. The offer of accommodation made fell below the minimum line.

In response, the Council argued that:

This was temporary accommodation and the situation could be reviewed.

There was no positive obligation on the Council to create a travellers' site

Enquiries had been made as to the availability of a site via engaging an 'expert', Mr Swift. These enquiries did not have to be 'of a CID standard' and those made showed no sites.

On the medical evidence, the Council argued there was little it could do. Ms T had chosen an unconventional lifestyle and could do more to help herself.

Held: In view of the medical evidence, the review decision was unreasonable and must be quashed. 'Suitable must be given a broad meaning' and the accommodation offered did fall below the minimum standard when considering Ms T's circumstances which included her mental health.

This was enough for the appeal to succeed. However, the other grounds would also have succeeded. The decision maker failed to carry out adequate enquiries, failed to have regard to the information that found its way into the strategy document and either did not know of, or ignored, the existence of sites with the potential to accommodate Ms T whether in the ownership of the Council or not.

Further, the decision maker had failed to have regard to the principles in *Cadona* and *Lee*. The application of *Cadona* is limited to circumstances of urgency.

Decision quashed.

Comment While this is only a County Court appeal, the interpretation of *Cadona*, on when bricks and mortar accommodation may be considered suitable for travellers, is clear in its direction. Further, on the evidence of the Council's own strategy document, there were potential sites not considered in the review, strengthening the argument against the 'this is all that is available' decision. But it is the medical evidence - unchallenged - that was clearly most persuasive here. It could not be reasonable, or suitable, to place the appellant in accommodation which would exacerbate her depression.

To some extent, that key finding on the medical evidence side steps the issue, raised in a rather unsubtle and unappealing way by the Council, of a distinction between new travellers - a choice of lifestyle - as opposed to gypsies or travellers as an ethnic or cultural group. As we saw, this distinction was raised - without conclusion - by the ECtHR in *Horie v UK* [our report], with the question being posed whether a 'personal choice' of lifestyle would attract the same 'positive obligation to facilitate a way of life' as that owed to an ethnic or cultural group. I suspect this a question that will be revisited here in the future.

It's not how long it is...

Tue, 22 Feb 2011 21:16:10 +0000

NL

...but what you do at the end of it that counts*

FMB (EEA reg 6(2)(a) – 'temporarily unable to work') Uganda [2010] UKUT 447 (IAC)

The Immigration and Asylum Tribunal (Upper Chamber) is not our usual stamping ground, but this is a decision which has considerable broader significance for housing and benefit eligibility. It dates from November 2010, but we've just come across it. At issue was the meaning of Regulation 6(2)(a) Immigration (European Economic Area) Regulations 2006, which hold that an EEA worker does not cease to be treated as worker (and hence lose the right to reside and benefit/housing eligibility) if:

that the person "is temporarily unable to work as the result of an illness or accident.
What does 'temporary' mean in the context of the regulation? I won't go into detail of the facts of the case, but it involved someone who had worked for 2 years as a teacher, then was unable to work for 4 years, then became a student. (The immigration question was this person's right to reside and his daughter's, a Ugandan, right to come to live with him).

The Secretary of State had refused the daughter a permanent residence card on the basis that the father was not a qualified person who had exercised treaty rights for more than 5 years, relying on that 4 year period of not working. This was overturned by the Immigration Judge, who found that 'temporary' in Reg 6(2)(a) meant that any illness or incapacity which was less than permanent must be regarded as temporary.

The Secretary of State appealled, initially on completely misconceived grounds of 'unreasonable burden to a social assistance system', Reg 13(3)(b). Unfortunately for the SoS, this regulation only applied to an initial right of residence for 3 months. A day before the hearing, the SoS sought to amend to argue that a temporary period of incapacity could not be as long as 4 years, (albeit with no authority on the point, and without being able to say what third state fell between 'temporary' and 'permanent').

The respondent argued that the regulations gave set period of time where such periods were intended. The omission in regard to 'temporary' was significant. Secondly:

when the EEA Regulations were read as a whole, reg 6(2)(a), relating to temporary inability to work, and reg 5(3)(b), relating to permanent cessation of activity, dove-tailed together in a manner implying that a person not permanently incapable of work was to be regarded as temporarily incapable of work.
The Upper Tribunal held that, if an inability or incapacity to work was not permanent, then it should be considered as temporary, citing the first definition in Collins English Dictionary (1991) of "Not permanent; provisional". It noted in passing that "A finding of temporary inability to work for an extended period would not be sustainable if a person having given up work owing to illness then abstained from working voluntarily." The appeal was dismissed.

So there we have it - binding authority for the proposition that there is no set (or arbitrary) cut off to the period for retaining worker status while temporarily unable to or incapable of work as a result of illness or accident. I've seen this crop up in homeless eligibility and it would also be relevant for benefit and Part VI eligibility.

*Sorry, sorry. I'm really sorry. I did try, but I couldn't come up with anything better as a title. Quite a few worse, but none better.

Hounslow v Powell newsflash

Wed, 23 Feb 2011 14:11:21 +0000

NL

The judgment in *London Borough of Hounslow v Powell* [2011] UKSC 8 (Aka, Powell, Hall and Frisby) is out. We have a detailed post coming shortly on this significant judgment on proportionality defences after *Pinnock*, but for now, the headlines are:

Introductory tenancies - These are caught under the proportionality defence. S.127(2) Housing Act 1996 to be read accordingly.

Section 89 Housing Act 1980 - A court can't make a possession order that defers possession for longer than the maximum period permitted under s.89, even if it considers it would be proportionate to do so. The Supreme Court declines to make a declaration of incompatibility in respect of S.89. There is no evidence that the period of six weeks maximum is insufficient to meet the needs of cases of exceptional hardship.

Temporary accommodation under Part VII Housing Act 1996 - there is nothing in Part VII which prevents a court from refusing to make a possession order if it considered it was not proportionate to do so. Possession proceedings against occupiers of temporary accommodation provided under Part VII can also face a proportionality defence.

There is no requirement for a local authority (public function landlord) to set out its legitimate aims in making a claim for possession, the presumption is legitimate purpose in managing housing stock. (The bare private law right to ownership is not sufficient by itself). The landlord may set out other reasons if it wishes.

In general, the Court views the prospects of a successful proportionality defence as being in 'exceptional' cases.

On the actual cases, Ms Powell had been offered alternative accommodation - appeal allowed on the basis there was no good reason to maintain the possession order. Mr Hall had presented no grounds for a seriously arguable case that the possession order in his case would be disproportionate and his appeal would have been dismissed, but Leeds had already offered him a secure tenancy so there was no reason to maintain the possession order and his appeal was allowed. Likewise, Mr Frisby had advanced no grounds for arguing that the possession order in his case was disproportionate - appeal dismissed. Pyrrhic victories on the whole then.

There is a lot more in the detail, and much to discuss - coming soon.

This is a local town for local people ...

Thu, 03 Mar 2011 16:33:32 +0000

Dave

Forgive the slight delay, but DCLG published their summary of responses to their Consultation on *Local Decisions: A Fairer Future for Social Housing* (which we discussed here) on 28 Feb. The outcome of the consultation appears to be, um, full steam ahead on the Localism Bill. I have to say that any reader of *Inside Housing* would be surprised by the results. I seem to have got regular updates from *IH* that social landlords (of whatever political hue) weren't going to touch the new flexible/affordable tenancy regime with a bargepole. Well, I was wrong. Surprisingly significant proportions of respondents wanted the new flexibilities: two-thirds said they "expected to take advantage" of the flexible tenancy regime with a fifth undecided (para 3.2); 78 per cent of respondents would use the new "flexibility" about discharging Part 7 duties through the private rented sector (para 6.3); less surprisingly, perhaps, two-thirds of LAs welcomed the proposed allocations flexibility or indicated that they would consider setting restrictive qualification criteria including local connection (para 4.3). Forgive the extreme use of the "F" word here, but it is used 50 times in the document.

If you get bored by stats, there are some choice bits. For example, the government has clearly been stung by the criticism of its HB changes. In response to concerns about the impact of these changes on the "new flexibilities" around homelessness discharge, DCLG says:

6.6 In fact, in the vast majority of areas, people will see a reduction of £15 per week or less in the Local Housing Allowance. We expect that some people will be able to make up the shortfall themselves and other tenants will be able to renegotiate rents with their landlords. 6.7 In some of the more expensive areas in the country there may be less affordable property available so some tenants may need to move to find cheaper accommodation. Even so, nearly a third of properties will still be affordable to Housing Benefit customers in London. Government is making £190m of additional funding available to help local authorities to provide support where it is needed.

Whether you buy into that or not, the empirical evidence to follow of the evaluation of these changes will prove interesting (DWP were trying to get an evaluation commissioned within a timescale so tight that some people didn't bother putting in).

There's also criticism of some respondents failing to appreciate that separating transfer applicants from newbies won't be a requirement, just an option.

But the really crucial bits of this document are in Section 8. Here, DCLG begins to outline its thinking on what the tenancy and mobility standards might look like (and, on which they are going to consult again): paras 8.10-12 and 8.24 are required reading. I don't repeat them here as they are long but scroll down to page 48-9 and 51-2. The latter is a little dull - internet-based mobility search engines but note the final bullet on p 52, which follows some of the responses that many tenants just don't have internet access.

There's more choice bits in Section 8:

- the length of the flexible tenancy: despite "a large majority" of respondents believing that two years isn't long enough (para 3.24), the two year period remains "though we would expect ... the vast majority of tenancies to be provided on longer terms, particularly for vulnerable households or those with children" (para 8.6);
- the length of the flexible tenancy (again): despite "a majority of respondents" believing that there should be a longer minimum term for some groups (eg those fleeing domestic violence or with children in full time education) (paras 3.29-30), this hasn't found its way into the proposals (or at least I couldn't find it, presumably because of the prospect of legal challenge);
- allocations: apparently, the additional flexibility achieved by taking transfers out of the equation (if so desired) will lead to "less risk of challenge from those on the waiting list in housing need" (para 8.16);
- allocations (again): this is really for the afficionado, who's aware of priority schemes for "good tenants" (like operates in Irwell Valley), but the government appears to back allocations schemes which "rewards tenants with a good track record" (para 8.17), which might make for an interesting series of challenges.

My sense is that, perhaps counterintuitively given the "local" nature that there will be plenty of opportunities for lawyers to muscle in on the local love-in - consultation on changes; increased use of internal reviews/appeals/complaints (see bullet points 4 and 6 in para 8.11); definition of "vulnerable households" (see bullet point 7 in para 8.11); issues over tenancy renewals, etc. There are lots of unfortunate traps here and, one notable absence from this summary (which was presumably raised by at least the lawyer respondents, who don't get mentioned [!]): *Pinnock*.

Why are they there?

Sun, 06 Mar 2011 17:18:27 +0000

NL

Hemans & Anor v Windsor and Maidenhead Royal Borough Council (2011) CA Civ Div 2 March 2011 [Lawtel note of extempore judgment. Not on Bailii yet]

This was an appeal by Windsor of the first appeal of a Housing Act 1996 s.202 review decision that it was reasonable for the wife to continue to occupy a private sector property, so that she was not homeless. At issue were:

i) whether a private sector tenancy that had been arranged for a wife by another local authority, following an incident of domestic violence, could be said to be available to the husband, following their reconciliation.

ii) whether the review officer was entitled to find that the circumstances in which the wife came to occupy that property were irrelevant.

The husband and wife, with their daughter, originally lived in army accommodation on Windsor's area. The husband was a soldier and the wife worked locally. Following the husband's return from a tour in Afghanistan, he experienced a breakdown. He was discharged from the army and they were given notice to quit the army accommodation. Following incidences of domestic violence, the wife and daughter were considered to be at risk and placed in a refuge by the social services department of another local authority. The second local authority then accommodated the wife and daughter in a two bedroom house under an AST. The wife was granted a one year break by her employer. The husband underwent treatment and he and the wife wished to reconcile and for him to live with her. They applied as homeless to Windsor.

Windsor decided the wife was not homeless, that it was not unreasonable for the husband to share that accommodation, and that the circumstances concerning the wife's departure were irrelevant in considering the suitability of her current accommodation. This was upheld on review.

On first s.204 appeal, the Judge found that the accommodation was not available to the husband, for the purposes of of s.175(1)(a), s.175(1)(b) or s.175(1)(c), so that he was homeless. On the other hand, the Judge rejected the argument that the wife was homeless because it was unreasonable to expect her to occupy the two-bedroom house when that accommodation had always been intended to be temporary, that she had been placed there by social services for child protection reasons, and she would be unable to care properly for their daughter if she returned to her job some distance away.

On appeal by Windsor (and cross appeal by the applicants), the Court of Appeal held that it was clear that the husband and wife wished to re-unite, by making a joint homeless application. The wife had therefore implicitly consented to the husband living with her, which amounted to a licence for the husband to occupy the two bed private accommodation. There was no statement from the wife to the effect that she wished to be reconciled subject to the condition that the husband never stay at the property. The Court below had therefore erred in finding that the husband was homeless.

However, while noting that in determining the lawfulness of a review decision, the approach should be a 'fair' one, not technical (*Holmes-Moorhouse v Richmond upon Thames LBC* (2009) UKHL 7), in the present case, the review officer had misdirected himself in considering the circumstances in which the wife had come to occupy the two bed property as being irrelevant. That went to the heart of the decision as to whether it was reasonable for the wife to live in that property. The Judge below was in error to accept that the circumstances were irrelevant. The review decision was therefore fundamentally flawed and was quashed.

The Schleswig-Holstein Question

Fri, 18 Mar 2011 16:14:41 +0000

J

As Lord Palmerstone might have said: "Only three people have ever really understood this eligibility business - the Prince Consort, who is dead - a German professor, who has gone mad - and I, who have forgotten all about it." That, frankly, sums up my (and, I suspect, your*) view of eligibility and Part 7, Housing Act 1996.

Sadly, as all housing lawyers know, it's impossible to understand homelessness law these days without also having a basic grasp of immigration law and, of course, the rights of EU nationals. Since 2004, there has been (in effect) a two-tier system for EU nationals, with nationals of the A8 states (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Slovakia) and the A2 states (Romania and Bulgaria) having various restrictions imposed on them.

The restrictions on the A8 states are, broadly, a requirement to comply with the Worker Registration Scheme and, if they're in the UK otherwise than in accordance with the scheme (subject, as always, to exceptions), then they've got no right to reside and, hence, are not eligible for assistance under Pt 7, Housing Act 1996.

The restrictions in the WRS were part of a temporary package of measures approved when the A8 joined the EU. That temporary package expires on May 1, 2011 and cannot be renewed. Accordingly, an SI has been made which will bring the WRS restrictions to an end (subject to transitional provisions): see the *Accession (Immigration and Worker Registration) (Revocation, Saving and Consequential Provisions) Order 2011*. The position is that, from May 1, 2011, A8 nationals are to be treated like other EU nationals.

*except Toby and Adrian

Well, that's embarrassing

Thu, 24 Mar 2011 21:01:07 +0000

Dave

You know how when you search for something that isn't there on NL, it comes up with that (quite annoying) "well, that's embarrassing" logo? Well, I searched last night for *Vilvarasa v Harrow LBC* [2010] EWCA Civ 1278 but couldn't find it. Then, it struck me that maybe it was embarrassing and I'd said I'd do it back in November when it came out (in response to one of NL or the Chief's lists that they regularly produce of what's interesting) but hadn't done it. I could have kept quiet, but Vilvaras is really quite significant on the section 193 duties. So, somewhat belatedly, we come to this really rather important limitation on *Ravichandran v Hounslow LBC* (which in turn confined *Omar v Birmingham CC* to its own facts). The issue concerns the section 193 duties and, more specifically, the differences between those duties. *Ravichandran* sought to provide an overview and rationality to what otherwise seemed something of a ragbag, and an inconsistent one at that. It was concerned with the section 193(7) waiting list offer (suitable, reasonable and discharge of duty - all reviewable).

In *Vilvarasa*, on the other hand, the Court of Appeal first had to determine which duty Harrow were seeking to employ and then had to face a really rather difficult (and clever) argument from Iain Colville for *Vilvarasa*, which, frankly, the Court of Appeal met with the meat cleaver of *Holmes-Moorhouse*. Anyway, the facts: Harrow owed the main homelessness duty to Mr Vilvarasa. It sent him a letter informing him that it was offering him temporary accommodation under section 193. The CA found that this letter was clearly referring to a section 193(5) temporary accommodation offer. The letter didn't identify a particular property. One was subsequently identified which Mr Vilvaras refused, whereupon Harrow sent him a decision that the property was suitable and reasonable. They gave him a further opportunity to take the property and review it, or reject and review it. Mr Vilvarasa took the latter option and was unsuccessful on review. The review decision found that the offer was suitable and reasonable and discharged duty.

The first ground of appeal was that Mr Vilvarasa hadn't been given all the information (ie the identity of the specific property) at the time of

the offer. The offer was clearly made under section 193(5), even though it referred to reasonableness and was not specific in the offer letter - it was an offer of temporary accommodation. Iain Colville's point was that the actual specific property could have been identified at any time in the future and all the information needed to be given at the time of the section 193(5) offer. That didn't wash with this CA, which said that this was fact specific - if there had been a very long period elapsed between the letter and the identification of the property, you might be in with a shout but that wasn't this case. In any event, the point from section 193(5) "... is merely that the required information must have been supplied by the time the applicant refuses. There is in fact nothing in the statute to require the relevant information to have been given by the time the offer is made" (at [26]).

The second ground of appeal was where it got interesting. Iain Colville argued that Harrow had treated it throughout their decision-making on refusals and reviews as a section 193(7B) offer, hence the significance of them saying that the offer was "reasonable". The argument was that "suitability" for the purposes of sections 193(5) and (7B) involve rather different considerations - indeed, one might say that was the whole point of *Ravichandran* (and, one might say by inference, *Awua*). The CA's dismissal of that argument is less than convincing, in my humble opinion. They say first that Harrow were clearly dealing with it as a s 193(5) offer; they considered suitability in the review process and the rest was essentially just otiose; *Ravichandran* was a case where the local authority were trying to change tack mid-stream (if that doesn't mix metaphors) and so was distinguishable; "it seems to me completely unrealistic to think that it was nonetheless addressing itself to suitability as if this was a subsection (7B) case" (at [37]); and, in any event, *Holmes-Moorhouse:*

In my judgment this is precisely the kind of case in which Lord Neuberger's approach is particularly apposite. The blunt truth is that, in the final analysis, Mr Vilvarasa is seeking to take advantage of a minor slip by a local authority in circumstances where it is idle to imagine that this slip could possibly have affected either the substance or the fairness of its decision. (at [39])
All of this just seems thoroughly unconvincing and I wondered whether Iain Colville is seeking leave to appeal (but, if he had, I suspect that the UKSC would have heard it by now).

Sorry for the delay - I'm off to my other guilty secret, "The Good Wife" ...

Face time

Sun, 03 Apr 2011 19:02:26 +0000

NL

Makisi & Ors v Birmingham City Council [2011] EWCA Civ 355

Does the right to make oral submissions to a review officer on a s.202 Housing Act 1996 review, following a 'minded to' letter, mean that the applicant has the right to insist on a meeting?

This was the Court of Appeal hearing of three joined second appeals, from s.204 appeals to the County Court. All three appellants were appealing review decisions by Birmingham City Council. One of the County Court appeals, that of Ms Makisi, we previously reported here. The other appellants were Mr Yosief and Mr Nagi.

I won't go into detail of the facts in each case. It is sufficient to note that in each case, a s.202 review was underway, whether of a s.184 decision, or of suitability of a final offer of accommodation. In each case, save for that of Mr Nagi (to which we'll come back at the end), a 'minded to' letter under 8(2) of the 1999 Review Procedures Regulations was sent, indicating that the review officer was minded to hold against the applicants despite deficiencies in the original decision. The letters invited the applicants to make further submissions, orally or in writing.

In each case, the applicants' solicitors requested an 'oral hearing' by way of a face to face meeting, not least because credibility was an issue. In each case Birmingham rejected (repeatedly) a face to face meeting and insisted that oral submissions would be by phone, with an interpreter if required. Birmingham then phoned the applicants (not their solicitors) and promptly made adverse decisions.

In each case, as in our report on Ms Makisi's case, the s.204 appeal on grounds that the applicant had the right to request face to face oral submissions (with their representatives present) failed, with the Circuit Judges holding that reg 8(2) did not make express provision for an oral representation being by face to face meeting, or confer a right to such a meeting.

At the Court of Appeal, the appellants did not dispute that oral representations can include representations made by telephone, *Bury MBC v Gibbons* [2010] EWCA Civ 327 [our report here], but argued that it was for the applicant, not the authority, to decide whether the representations should be at a meeting rather than by phone.

They argued that the 1999 regulations were made pursuant to s.203(2) HA1996 which says that provision may be made by regulations as to the circumstances in which the applicant is entitled to an oral hearing and by whom he may be represented at that hearing (which was the view expressed by Carnwath LJ in *Hall v Wandsworth LBC* [2004] EWCA Civ 1740).

Further, paragraph 19.12 of the Code of Guidance, commenting on Reg 8(2), is headed 'Oral Hearings', where 19.10 and 19.11 are headed 'written representations'.

As Reg 8(2) gives the applicant the choice of making written or oral representations, or both, it would be odd for the Authority to then have the right to determine how these representations should be delivered, an there was no express provision for them to have that right.

The appellants argued for the value of such a right, citing Rimer LJ in *Lambeth LBC v Johnston* [2008] EWCA Civ 690 [our report here]:

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. [53]
For those with a weak case, or poor writing skills or where credibility was in doubt, this was a valuable right, but these were also the cases where the review officer was most likely to refuse a request for an oral hearing.

The appellants further argued that an oral hearing could include evidence from third parties:

44. [...]The appellants point out that an applicant can provide new evidence at any time prior to the conclusion of the review, and that to bring third parties to an oral hearing might be the best way to do so.

45. Ms Tueje envisaged that the review officer might also ask third parties to give evidence at such an oral hearing, and, if they did, that the applicant or the applicant's representatives would be able, in effect, to cross-examine them. Mr Stark also considered that there might be circumstances in which a third party could be cross-examined by the applicant or the applicant's representative. Mr Nicol, on the other hand, submitted that the review officer could refuse to permit any cross-examination at such a hearing.

Birmingham argued that under Part VII Housing Act 1996 generally and indeed under the 1999 Regulations, matters of procedure were usually a matter for the Local Authority. Under s.184 it is for the Authority to make enquiries and satisfy itself, with no place for representations set out and no right to make them. At 6(2)(b) of the Regulations, where a request is made for a review under section 202 of the Act the Authority shall "notify the applicant of the procedure to be followed in connection with the review".

It was extremely unlikely that Parliament had intended the applicant to have the right to such an extensive hearing, with cross examination of third parties, contended for by the applicants, and there was nothing in Reg 8(2) which required the Authority to notify the applicant of a right to a hearing.

Birmingham argued that Regulation 8 had not been made pursuant to s.203(2)(b), rather it was made pursuant to "the more general provision in section 203(1) of the Act, which stipulates that the Secretary of State may make provision by regulations as to the procedure to be followed in connection with a section 202 review." The reference to s.203(2) in the preamble to the Regulations was actually a reference to s.203(2)(a) - requiring a person of appropriate seniority who was not involved in the original decision - and pointed to Reg 2, which addressed that requirement.

There was no argument or issue on the question of oral representations in *Hall v Wandsworth London Borough Council*, so the appellants could not rely on Carnwath LJ's views. Moreover, *Hall v Wandsworth* did hold that:

"the role of the reviewer remains that of an administrator, not an independent tribunal". The review process, Mr Manning observed, is not a judicial one but an administrative one: the right of an applicant to demand a hearing, certainly of the kind envisaged by the appellants, is not consistent with such an administrative, non-judicial, process.
The Regulations should be compared with the Introductory Tenants Review Regulations and the Demoted Tenancies Review Regulations, both of which confer on the tenant in express terms a right to request an oral hearing and specify with some detail the procedure to be followed at such a hearing. The absence of such express terms in the Regulations would indicate that a right to an oral hearing was not being conferred, particularly as the first set of review procedure regulations (the current being the third) were made at the same time as the Introductory Tenancy Review regulations, and made no reference to an oral hearing at all.

The kind of extensive hearing sought by the appellants would be to judicialise an administrative process and impose a significant resource burden. Birmingham argued that:

in the field of statutory social welfare schemes, where the administering authority's obligations under the scheme could, equally viably, be construed (1) in two or more ways, one of which would permit a significantly lower expenditure of resources than the other or others, or (2) as permitting the authority to take account of its resources in deciding how to perform the duty, the court should prefer the construction that allows resources to be conserved rather than an alternative construction which would require the greater expenditure of resources. In other words, the authority should be allowed the benefit of a choice to perform its functions in a less expensive manner. The respondent's skeleton argument cites in support of that proposition R v Gloucestershire County Council ex p Barry [1997] AC 584, esp at 604E-F and 605 (Lord Nicholls), R v East Sussex County Council ex p Tandy [1997] AC 714, esp at 747B (Lord Browne-Wilkinson), and Ali v Birmingham CC [2010] UKSC 8; [2010] 2 AC 39, at [4] –[6] (Lord Hope). [57]
And finally, *Bury v Gibbons* was a case in which the Authority had simply ignored a request for an oral hearing and not on the point of whether the Authority could decide what form those took.

Held, in Etheton LJ's lead judgment:

1. Regulation 8(2) gives the applicant the right to demand an oral hearing. Regulation 8(2)(b) of the 1996 Review Procedures Regulations was made pursuant to section 203(2)(b) of the Act, and this view was supported by the Code of Guidance and the heading to the relevant

section being 'Oral Hearings'. Rimer LJ in Lambeth v Johnston was right to describe the opportunity of face to face advocacy as “a potentially invaluable procedural right in all cases”. It would further be odd if the Authority was to be given the power to decide on whether that invaluable right should or should not be exercised without any express provision in the Regulations to allow them to do so.

Birmingham's argument on the general procedural powers of the Authority was not accepted, s.184 and Reg 6 concerned earlier and different stages of the homeless application. Neither di the comparison with the Introductory and Demoted tenancy review regulations assist, as these "concern a local authority landlord’s decision to terminate an existing tenancy and to obtain possession, bringing to an end an existing property interest and the current right of enjoyment of residential accommodation" and it was wholly understandable why in such circumstances detailed rights and prescriptions should be set out. In contrast, the S.202 process was an administrative one, which does not engage Article 6.

2. The applicant did not have the right to call any third party witnesses to such a hearing or to cross examine. Reg 8(2) solely concerned representations by the applicant (or on his behalf) made to the reviewer. The review officer is "able to determine where and when the hearing takes place and the procedure to be followed, including finding out in advance who will attend".

3. On Birmingham's argument on interpretation according to impact on resources:

I do not accept the respondent’s submissions that the issue of resources supports its interpretation of regulation 8(2). Aside from what I have said about the limited nature of a hearing under that regulation, I do not consider that this aspect of the respondent’s case is supported by the authorities on which the respondent relies. R v Gloucestershire County Council ex p Barry and R v East Sussex County Council ex p Tandy were cases concerned with the quite different question of the extent to which a local authority was entitled to take into account resource considerations in deciding what welfare services it should provide. Ali v Birmingham City Council was concerned with whether Article 6 of the Convention was engaged by decision-making functions of a local housing authority and its review officer under the homelessness provisions of Part 7 of the Act. That is not an issue in the cases under appeal. In any event, the short procedural answer to the respondent’s submissions on resources is that there was no evidence in any of the trials of the cases under appeal, and there is no evidence before us, as to the resource implications of applicant’s right under regulation 8(2) to demand a hearing of the kind I have described; and there is no respondent’s notice in any of the appeals raising the issue of resources.
Appeals of Ms Makisi and Mr Yosief allowed.

Mr Nagi was in a rather different position. While the reviewers in the other two cases had admitted that there were deficiencies in the orginal decisions (in one instance saying the applicant was intentionally homeless without giving reasons or explaining what it meant!) and thus that Regulation 8(2) was engaged, this was not so in Mr Nagi's case.

The s.202 review was of a finding that the property he had been given by Birmingham remained suitable, where Mr N had sought a transfer saying it was no longer suitable by reason of his wife's medical condition. The review officer had written saying that "he was minded to hold against Mr Nagi. The review officer said that, although he did not consider there to be any irregularity or deficiency in the original decision, he was nonetheless offering an opportunity for Mr Nagi to respond. He said that, if Mr Nagi or his wife wished to provide any further information on those matters on which the review officer was minded to find against them, they or someone acting on their behalf could make oral representations, further written representations, or both oral and written representations." From there, the same path of insisting on a telephone hearing was followed.

The question, then, was whether Regulation 8(2) was engaged in Mr N's case. And that turned on whether there was a deficiency or irregularity in the original decision. Mr N's s.204 appeal on that ground had been rejected and the Court of Appeal heard his second appeal on that.

Following Carnwath LJ in *Hall v Wandsworth*:

To summarise, the reviewing officer should treat reg 8(2) as applicable, not merely when he finds some significant legal or procedural error in the decision, but whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker. …” [30]
Therefore Mr N had to establish:
that no reasonable review officer could have concluded that regulation 8(2) was not engaged because the letter of 20 October 2010 disclosed neither a significant legal or procedural error nor that the respondent had failed to address, or address adequately, an important aspect bearing on the decision. In making that evaluative judgment as to whether an important aspect had not been addressed, or addressed adequately, the review officer would, as Carnwath LJ said, look at the matter in a broad and untechnical way.
Holmes-Moorhouse was (inevitably) quoted on housing officers not being lawyers in support of taking the broad and untechnical view.

For Etherton J, while the letter was poorly written and bore all the hallmarks of a clumsily adapted form letter, it could not have left a reasonable reader in any doubt as to the basis of the decision, even if at times it referred to 'your medical condition' rather than that of Mr N's wife.

The letter expressly referred to both Mrs Hassan’s physical difficulties and, more particularly, the safety aspects of her use of the stairs in her medical condition. Moreover, the bullet points stated expressly that the respondent had taken into account the information in Mr Nagi’s application form, the information he had supplied about his wife’s medical condition, and the advice given by NowMedical. No reasonable review officer could have been left in doubt that all the significant issues had been addressed.
Accordingly Etherton LJ dismissed Mr N's appeal

Maurice Kay LJ agreed but was less convinced by the decision letter

81. [...] I am more critical of it than Etherton LJ is. It is not an impressive document. Leaving aside its drafting shortcomings, I have come close to concluding that, even on the basis of the broad approach we are required to take, it falls short of achieving sufficiency of reasons. In particular, the sentence “I conclude that your wife’s condition does not prevent her undertaking some stairs” is taken from the report of Dr Keen. However, that report was more explicit. It went on to say: “I acknowledge her concern regarding safety on stairs, but the description of her fits … does not indicate that these are of sudden or dramatic onset and are preceded by a period of shakiness which acts as sufficient warning to her if on stairs.”

82.In my view, the decision would have been more intelligible if it had included this explanation. I am content to agree that the reasoning in the decision letter was sufficient but the carelessness and the laconic nature of the explanation did cause me to hesitate.

Mr N's appeal dismissed

James Stark for Ms Makisi Patricia Tueje for Mr Yosief Nik Nicol for Mr Nagi All instructed by Community Law Partnership

Jonathan Manning, Emily Orme, Stephanie Smith and Annette Cafferkey for Birmingham CC.

Postscript I noted in the report of the first appeal in *Makisi* that the decision that the Local Authority could insist on a telephone call only went strongly against the spirit of *Lambeth LBC v Johnston* and it is good to see the Court of Appeal taking the view that it does. While representations by telephone call may be sufficient, it is hard to see on what basis (other than their own pressures of time) a review officer could come to a considered assessment of whether face to face or by telephone was called for. Now it is established that the right to decide whether to make oral submissions by telephone or by a face to face hearing is the applicant's.

Seeking third party witnesses and cross examination may have been a stretch for the appellants. Hearing representations is not necessarily quasi judicial and seeking such elements in what was conceded to be an administrative matter would be distinctly new.

Also interesting to see Birmingham's resource argument. While it is fairly summarily kicked out of touch here - and would have to be, given the findings on Reg 8(2) - I suspect that we will see versions of this argument again in the future.

As a complete aside, back in 2009 we actually had someone from Birmingham's HPU - a review officer I think - post a comment on Nearly Legal masquerading as a Shelter volunteer and seeking our views on whether the applicant could insist on an oral hearing in a Reg 8(2) situation. Luckily, the Birmingham officer wasn't very good at pretending to be a Shelter volunteer and was exposed. You can see it in the comments to this post. She or he may have had to wait for a while, but now they've got a definitive answer.

Never apologise, never explain

Tue, 12 Apr 2011 21:11:54 +0000

NL

Akhtar v Birmingham City Council [2011] EWCA Civ 383 [not on bailii yet, we've seen a transcript]

When a Local Authority accepts the applicant's case on a review under s.202 review under Housing Act 1996, is there or should there be a duty to give reasons why the applicant was successful and on what objections they were not successful?

This was the combined permission and substantive hearing of a second appeal from a s.204 appeal to the County Court.

Ms Akhtar was a homeless person. Birmingham had accepted a full duty following her application. Birmingham had offered a permanent property at 41 Twickenham Road, in the Kingstanding area of the city. This was a 3 bed and 2 living room property. Ms Akhtar lives with her seven children aged between 12 and 21. She viewed the property then refused it as unsuitable. Birmingham confirmed the offer as suitable and Ms A sought a review of that decision, giving three reasons why the property was not suitable.

The first was that Twickenham Road was too small. The second was that it was too far from the facilities her family needed. It was said, in particular, that the Appellant had been living for some time in temporary accommodation in Moseley, and her children were settled in local schools; one of her daughters was in a GCSE year; and one of her sons had special needs; her children also attended the local Islamic school at the mosque in Balsall Heath. The third was that she would feel isolated and unsafe in the area: she saw no Pakistani people there.

Birmingham decided on review that the property was not suitable. The decision letter to Ms A said simply that and that she would be made a further final offer. No reasons why the property had been found to be not suitable were given.

On the same day, the review officer recorded in a file note:

Offered 3 bed parlour type. Household mum + 7 children. NB Eldest daughter is now 21, requires room of her own under new Allocations Policy. As such, family need a property with 5/6 bedrooms under this policy. Property offered is not large enough to discharge duty to this household in accordance with Allocations Policy…

Birmingham made a further offer of a property at 45 Hartley Road, also in Kingstanding. This was a 4 bed and 2 living room property. Ms A viewed the property and refused it. Birmingham determined that it was suitable. Ms A sought a review through her solicitors, giving as her reasons that:

the property was too small for the Appellant's family; the property was too far from the Appellant's "established areas of choice" since the Appellant and her family were currently living in the Moseley area of the city and her children were well settled in their local Islamic schools; the Appellant did not feel safe in the area, as she did not see any Pakistani people there, and she felt that her family would be isolated and unsafe in the area
The letter added "You will have on record that the Housing Department have previously offered our client property in the Kingstanding area of the city and deemed it unsuitable; in the circumstances we fail to see how the current offer could have lead [sic] you to discharge your duties in this matter."

Birmingham wrote to say it was minded to uphold the decision and that the Twickenham Road property had only been considered unsuitable because if its size. An apology was made if the previous review letter had not made that clear. After a further exchange, in part on the issue of whether the previous review decision had been made solely on the issue of size, Birmingham upheld the decision.

Ms A appealed, on amongst other grounds

the Respondent failed to provide reasons as to suitability and reasonableness in the offer letter of 12 August 2009 and the letter of 17 August 2009; and the procedure was unfair because the Appellant did not know the Respondent's reasoning at the time she refused the offer of Hartley Road and was under the impression the Respondent would accept the same objections as had been made in relation to the Kingstanding area on the previous offer of Twickenham Road.

The appeal was dismissed, in part on the basis that "it was the Appellant's decision to take the risk whether the review of Hartley Road would succeed; there is no statutory duty to give reasons for a favourable decision; the need for reasons is related to the opportunity to appeal, and it is only if the applicant is dissatisfied with the decision upon review that he or she has an appeal under section 204(1)(a) of the Act"

Ms A appealed to the Court of Appeal. She argued

First, the Judge was wrong to conclude that there was no justification for implying a duty to give reasons in the Twickenham Road review decision letter of 5 May 2009 and the Hartley Road offer letter of 12 August 2009. Secondly, the Judge was wrong to state that neither letter contained a decision amenable to challenge by way of review and appeal under the Act.

She argued that "(1) there is no general duty to give reasons for administrative decisions; (2) in an appropriate case, a duty to give reasons will be implied at common law where necessary to ensure fairness; (3) the categories of case in which the common law will imply such a duty are not closed or fixed; (4) there is no general principle other than fairness to determine whether reasons should be given; (5) it is necessary to look at the features of each case to see whether there is a duty or not; (6) the features of the present case show there was a duty to give reasons in the letters of 5 May 2009 and 12 August 2009.".

Propositions 1 to 5 were accepted by Birmingham, but not the 6th.

Ms A further argued that the first review letter of 5 May 2009 "was a decision within section 202(1)(b) of the Act and capable of being appealed to the County Court under section 204(1)(a)", apparently on the basis that she was dissatisfied with the lack of reasons. Alternatively, if the review letter had said the Twickenham Road property was unsuitable by reason of size and otherwise suitable, that decision as to suitability would be appealable.

Next, she argued that:

unless there is an obligation to give reasons in a successful review decision letter and an offer letter, the housing authority could avoid with impunity, at the stage of those letters, its obligation to take into account all relevant matters. Indeed, Mr Nicol [for Ms A] observed, that is precisely what the Judge found had happened in the case of Hartley Road. [the initial decision on the second offer]

While Part VII did not set out a general duty to give reasons, it remained an issue for a potential common law duty. In this case there was an unfairness in the lack of reasons being given which had left Ms A uninformed about her position on the second offer, as she believed the offer had been, in effect made in error because of its location.

Further, the letter setting out the offer of either property, and significantly the second, did not set out the reasons why the offer was considered suitable. This should be done as a matter of principle.

Held: The only issue to be determined was whether on the facts of the case, the omission of reasons in the first review decision and/or the second offer letter was so unfair as to be a breach of Birmingham's common law duty.

It was unusual that Ms A claimed "a legal entitlement to be given reasons for the review decision in respect of Twickenham Road, not so that she could have challenged that review, but so that she could better deal with a separate and subsequent offer of a quite different property".

No fault could be found with the decision of the Judge below. The facts of the case were not capable of giving rise to a common law duty.

1. There was no evidence that the first review officer had even considered the suitability of the location, having decided the size was unsuitable. The appellant had not argued that there was a duty to consider each and every objection to the suitability of the property, having decided for the applicant on one ground. There was no basis for such a duty.

2. There was no authority for the proposition that the issue of location could have been appealed, despite the review being decided in the applicant's favour.

3. "It is trite that, in the case of appeals from one court to another, the appeal is against an adverse order of the court and not against the reasoning underlying a favourable order. I can see nothing in the Act to suggest that a different principle applies in relation to decisions of a housing authority appealable on a point of law under section 204."

4. "section 203(4)(b) of the Act does not require reasons to be given in the hypothetical situation postulated by Mr Nicol. Confirmation of the "original decision on any issue" within section 203(4)(b) refers to the resolution of a review against the applicant. It does not refer to the confirmation of a decision which plays no part in the resolution of the review in favour of the applicant".

5. There was no reason why a letter offering a property should set out the reasons why it was considered suitable. "It is obviously implicit in every such offer that the housing authority considers the property to be suitable in all material respects, including location, size and configuration".

6. It was not reasonable for the appellant to assume that she had been successful on all grounds of her objections to the first offer. The appellant could easily have sought confirmation of that view, but did not.

7. "any potential unfairness to the Appellant was, in any event, avoided by the prominent warnings in both letters of the consequences of refusing a final offer, and notification of the ability to accept the offer and still to challenge it by way of review".

Permission given but appeal dismissed.

A room of one's own

Thu, 21 Apr 2011 22:25:34 +0000

NL

Virginia Woolf famously remarked that for a woman to write fiction, she required enough means to support herself and a room of her own. For homeless applicants, though, sometimes separated spaces can be the problem.

Aliya Sharif v Camden LBC [2011] EWCA Civ 463 (on Lawtel, not on Baili yet)

The issue on this appeal to the Court of Appeal was whether provision of two separate flats on the same floor of a building used as a hostel could be suitable as temporary accommodation for the applicant's household.

Ms S had applied to Camden as homeless. Her household consisted of her father, who was in poor health and for whom she was the carer, and her younger sister, a minor at school. Camden accepted that it owed Ms S the full housing duty. Camden initially put them in temporary accommodation in a three bed private house. Camden then offered them temporary accommodation in two separate flats, nos 125 and 132, some yards apart, in a building used as a hostel. The proposal was that Ms S and her sister would stay in one flat and her father in the other. Camden took the view that this was suitable accommodation for her and her household under section 193(5) of the Act.

Ms S refused the offer on the basis that her father was not a well man and that they should be permitted to live as a single family unit in the same accommodation. The accommodation was therefore not available to her. Camden upheld the decision that the accommodation was available and suitable and promptly discharged duty under s.193(5).

The decision was upheld on s.202 review. Ms S appealed under s.204 Housing Act 1996.The appeal was dismissed by HHJ Mitchell at Central London County Court.

S.176 provides

Meaning of accommodation available for occupation Accommodation shall be regarded as available for a person's occupation if it is available for occupation by him together with: (a) any other person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him. References in this Part to securing that accommodation is available for a person's occupation shall be construed accordingly.
On the first appeal below, HHJ Mitchell:
said that the Guidance issued by the Secretary of State, to which local housing authorities are required by section 182 of the Act to have regard in the exercise of their functions relating to homelessness, indicates that authorities can use hostels. He referred to *London Borough of Ealing ex p. Surdonja* (1999) 31 HLR 686 and *R v Hillingdon LBC ex p. Puhlhofer* [1986] AC 486. He said that Scott Baker J in Ex p. Surdonja indicated that he was of the view that local authorities can fulfil their obligations by offering what could be described as split accommodation. The Judge quoted Lord Brightman in Ex p. Puhlhofer, and, in particular, Lord Brightman's observation (in the context of the Housing (Homeless Persons) Act 1977 ("the 1977 Act") at 517E-G that it was for the local authority to decide as a matter of fact whether

something was accommodation within the ordinary meaning of that word. The Judge then considered the issue of suitability, and held that suitability had been properly considered by the review officer, and so the appeal on that ground also failed.
On second appeal to the Court of Appeal, Ms S that Camden could not discharge its duty under s.193 by provision of separate flats. She argued that the meaning of s.176 was that accommodation had to be available for her and any person who ordinarily resided with her and that wholly separate accommodation could not satisfy that requirement.

The Court of Appeal found that the policy of Part VII housing Act 1996 was to keep families together as far as possible (*Din v Wandsworth LBC* [1983] 1 AC 657 in relation to the 1977 Act precursor). The difference between s.16 of the 1977 act and s.176 was marked in the statement of this intention. S.16 had provided for those 'reasonably expected to reside' with the applicant, while s.176 stated 'normally resides with..'. On any ordinary use of language, s.176 could not be satisfied - they could not be described as living together with each other.

However, Camden argued that 'accommodation' was not defined in Part VII Housing Act 1996 and that *Puhlhofer* meant that accommodation could mean two separate dwellings. Further, Camden's provision of two flats in the same building was in line with the purposive reading of Part VII to keep families together.

Camden argued that an offer of 'accommodation' pure and simple satisfied the requirements of s.176, and all else was an issue of the requirement that the property must be suitable - sections 193(5), 193(7F) and 206(1). Ms S argument that there was a two stage process - "whether the offered accommodation first satisfies a requirement of section 176 to accommodate in one property all the members of the applicant's family normally residing with the applicant, and, secondly, whether the accommodation is suitable for everyone who will live in it" - was wrong for that reason.

Thus the only test was one of suitability, as supported by *Ex p. Surdonja*, and so found by the Judge below. (The Court in *Surdonja* rejected two properties a mile apart as being suitable, but Scott Baker J suggested that 'separate rooms in the same hotel' may be suitable). No challenge had been brought to suitability in the Court of Appeal. Reference was also made to *R v Lambeth LBC, ex p Ly* (1986) 19 HLR 51, in which a judicial review was refused for a Vietnamese grandmother who had just arrived in London to challenge a decision to accommodate her and 4 grandchildren in a property some 2 miles from that was already occupied for some time by her son, daughter in law and another 4 children. (although the ratio was clearly that the others could not 'reasonably be expected' - under the 1977 Act - to reside with her, as she had been separated from them for some years and had only just arrived in London).

And, of course, Camden pleaded limited housing stock and resources available to them. Offering a single unit of accommodation may be practically impossible for them. This must be seen in the context of a duty to provide temporary accommodation. If Ms S were right, this would extend to interim accommodation pending decision under s.188.

The Court of Appeal, in Etherton LJ's sole judgment, held that Camden's argument that s.176 did no more than identify the group of people against whom suitability was to be assessed was wrong. The statutory language was clear and Camden were ignoring the meaning of 'together with'.

I do not accept that, on any ordinary use of language, the residents of two self-contained flats, however close are the flats to one another, who do not share any communal living areas, can be said to be residing "with" each other or in occupation of one or other or both of the flats "together with" each other. It makes no difference how often they may visit each other and share each other's company. I do not consider that the observations of Simon Brown J in Ex p. Ly and of Scott Baker J in Ex p. Surdonja, in both cases obiter, support Mr Colville's submissions to the contrary. In Ex p. Ly Simon Brown J was considering the very different wording of section 16 of the 1977 Act. Furthermore, he was concerned with the category of applicant in what is now section 176(b) of the Act, described in statutory language ("who might reasonably be expected to reside with [the applicant])" which gave the housing authority an obvious latitude. In Ex p. Surdonja Scott Baker J expressed the view that accommodation might satisfy the requirements of section 176 of the Act if it comprised "separate rooms in the same hotel". Such an arrangement, however, is quite different from occupation of separate self-contained residential units with no sharing of any living areas.
Camden's analysis of Scott Baker J's view in *Surdonja* was also wrong:
In his actual analysis, however, Scott Baker J expressed the conclusion of law (at page 691) that "the combined effect of sections 188 and 176 is that the accommodation provided for the applicant must be sufficient to accommodate his wife and family as well". That was apparently expressed by him as a minimum legal requirement, and not merely as a facet of suitability on which the housing authority could form its own view.
While the pressures on Local Authorities in respect of provision of accommodation were recognised to be acute, the policy of Part VII was a matter for Parliament. In any event Camden had advanced no practical evidence at all as to the seriousness of the effects of the interpretation of s.176 at issue and Camden had in fact secured Ms S and her household accommodation for 5 years before the offer in the present case.

Appeal allowed.

Comment So, as it apparently needed clarifying, the 'together with any person who normally resides with him as a member of his family' in s.176 is not a 'suitability' issue, on which the Local Authority is entitled to draw its own conclusions. It is a simple requirement for accommodation, which precedes any suitability issues. And two separate flats, even within the same building, will not count as a unit of accommodation for the purposes of s.176. Mind you, the meaning of 'normally resides with' was not in issue in this case, it being accepted that the father did normally reside with Ms S. Further cases on that definition can be expected...

Only Connect

Sun, 08 May 2011 22:25:54 +0000

NL

TG, R (on the application of) v London Borough of Lambeth (Shelter Intervening) [2011] EWCA Civ 526

The disconnection between Local Authority Social Services and housing departments has been a frequent topic here and in the courts, not least in the House of Lords decisions in *R (G) v Southwark LBC* [2009] UKHL 26 and *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14. There has also been plenty of Government guidance on the issue, both statutory and non-statutory: the 1999 "Working Together to Safeguard Children"; the 2000 "Framework for the Assessment of Children in Need and their Families"; the Homeless Code of Guidance in various versions; the 2008 "Joint working between Housing and Children's Services: Preventing homelessness and tackling its effects on children and young people"; and the 2010 "Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation".

So, one might reasonably expect Local Authorities to be fairly clear about what they ought to do when faced with a homeless 16 or 17 year old, which is to refer the child to its Children Services (Social Services) Department for assessment as a potential child in need. One might expect this. One might well be disappointed.

In this case, Lambeth failed to refer the young person, and still don't have a policy in place for such interaction between housing, youth offending services and Childrens Services departments (although a draft is apparently 'just about to be signed'). Still more worryingly, when Shelter and Children's Legal Services requested information from 144 Local Authorities about their procedures as research for their intervention in this case, two thirds failed to respond at all and the level of compliance in those that did reply was 'a mixed picture'.

It is against this background of a persistent and possibly widespread failure to implement the required procedures by Local Authorities that this case plays out.

In 2006, TG, who was known to the Lambeth Youth Offending Services (YOS), approached a member of YOS, Ms Acquah, and told her he could no longer remain living with his mother and intended to apply to Lambeth Homeless Persons Unit as homeless. He was 16. Ms Acquah was a qualified social worker with experience in working with children and young people. After speaking to TG's mother, Ms Acquah wrote a report which she gave to TG to give to the HPU. The report concluded "This young person is in desperate need of housing and would hope that his housing need is met as he fulfils the Child in Need criteria". Lambeth Housing Department then provided TG with accommodation under Part VII Housing Act 1996 and the HPU did not make a referral to Children's Services.

In 2009, when TG was 20 and in need of housing assistance, following contact from TG's solicitors, Lambeth decided he was not a 'former relevant child' under section 23C(1) Children Act 1989 and that he was therefore not owed the continuing duties. This was on the basis that TG had not been a 'looked after child' for the 13 weeks needed to be an eligible child or indeed at all.

TG brought a judicial review, asserting that the housing provided by Lambeth Housing was, or should have been assistance under s.20 Children Act 1989. At hearing of the Judicial Review in 2010 (our report here), the claim was dismissed on the basis that, although Ms Acquah was a social worker, she was not part of the Children's Services Department. Therefore, following *R(M) v Hammersmith*, and as Children's Services had not had any contact with TG, the accommodation provided by the housing department could not be classed as being under s.20 Children Act. Although the "Housing Department or the YOT should probably (as a matter of good practice) have referred the Claimant here to the team in charge of children's social services …", this was not enough to bring the case over the 'dividing line' set in *R(M) v Hammersmith*.

TG appealed to the Court of Appeal, with Shelter intervening in writing.

The Court of Appeal politely but firmly disagreed with the High Court. Firstly, it was not the case that Lambeth 'probably' should have referred TG to Children's Services 'as a matter of good practice'. The 1999 guidance then in force, given under s.7 Local Authority Social Services Act 1970, stated:

A number of the children and young people who fall within the remit of YOTs will also be children in need, including some whose needs will include safeguarding. It is necessary, therefore, for there to be clear links, both at [Area Child Protection Committee]/YOT strategic level, as well as at child-specific operational level, between youth justice and child protection services. These links should be incorporated in each local authority's Children's Services Plan, the ACPC business plan and youth justice plan itself. At the operational level, protocols are likely to be of assistance in establishing cross-referral arrangements.
This was guidance on which the Local Authority "shall... act" (s.7). "In the absence of a considered decision that there is good reason to deviate from it, it must be followed". Lambeth had failed to do so with no good reason.

On the facts, Ms Acquah certainly should have referred TG to Children Services for assessment. Has she done so, it was clear that, as in her report, he would have been a child in need under s.17 Children Act and the s.20 duty would have arisen.

While the situation did resemble that in *R(M) v Hammersmith*, it was not the same.

Ms Acquah was a social worker with qualification in child care and support. She was appointed as a member of the YOS in 2005. YOS was part of a division of Children's and Young Persons Services in Lambeth, although Children's Services per se was another division. In October 2005, Crime and Disorder Act 1998 section 39(5)(aa) came into force, which provided that the YOS should include at least one "person with experience of social work in relation to children nominated by the director of children's services". Ms Acquah was therefore:

not merely a qualified social worker with experience of social work in relation to children: her membership of the YOS reflected a statutory requirement that at least one of its members should have such experience. In the YOS she represented, as Lord Justice Toulson suggested in

argument, the eyes and ears of the children and families division of the CYPS.
Lambeth's (astonishing) argument was that Ms Acquah had not been nominated to be the person with experience of social work in YOS by the Director and that no-one had ever been so nominated. In effect, they sought to defend the appeal by arguing that Lambeth had been and remained in continuous breach of its duty under s.39(5)(aa). The Court of Appeal did not agree. Nomination involved nothing special and by continuing Ms Acquah's secondment to YOS, the Director 'nominated' her.

Therefore Ms Acquah's actions could be imputed to the Children's Services department. Indeed her report was only suited for the consideration of that department, not the housing department. As TG had been in contact with Children's Services through Ms Acquah, Lambeth's actions fell to be considered in terms of what they should have done.

On the evidence, there was no doubt that TG would have been assessed as a child in need. Contrary to Lambeth's argument that TG may well have not agreed to s.20 support if it had been offered, he would have accepted it, as it was manifestly in his interests to do so. This part of TG's appeal allowed - he should indeed have been treated as a 'former relevant child' in 2009. TG was now 22, however, and beyond the age limit for assistance as a former relevant child. The parties were to seek an agreement on future steps or at least an enquiry into what support should now be given.

The Court of Appeal is clear that this judgment should serve to "advertise the need for all local authorities to take urgent steps to remedy" any failure to ensure co-ordination between housing, youth offending and Children's Services departments.

There was also the question of the past. TG had been deprived of support as a child in need and the continuing duty to a former relevant child. His claim for judicial review also included a claim for damages for breach of Article 8 under the Human Rights Act.

Although it was a technical possibility, the European Court of Human Rights had never held that a failure to provide financial or other support to a person amounted to a breach of Art. 8. If the failure was so gross as to amount to inhuman or degrading treatment, then Art 3 was engaged. In *Andersson and Kullman v. Sweden* (1986) 46 DR 251, the COurt dismssied an application that a failure to pay childcare payments was a breach of Art 8. In Marzari v. Italy (1999) 28 EHRR CD 175, a claim that moving the disabled applicant from an adapted flat to another, unsuitable, one was a breach of Art 8 was declared inadmissible:

… although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 … … no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment.
However, there was a domestic case where a breach was found. *R (Bernard) v. Enfield LB* [2002] EWHC 2282 Admin, on a failure to provide suitable accommodation under s.21 National Assistance Act 1948 to a severely disabled elderly woman and her family. A breach of Art. 8 was found as they had been condemned to living conditions held to mean that it was virtually impossible for them to have any meaningful or private life.

No breach was found in the joined appeals of *Anufrijeva v. Southwark LBC and R (N) v. SSHD*, [2003] EWCA Civ 1406, " In Anufrijeva Southwark had failed to discharge its duty under the Act of 1948 to provide accommodation suitable for two parents and for three children, together with a grandmother who was substantially disabled and in extremely poor health. In N the SSHD had wrongfully ceased to pay state benefits to an asylum-seeker as a result of which (so far as relevant) he had had to sell all his furniture and kitchen equipment and therefore to sleep on the carpet and to eat cold food. This court held that in neither case was there a violation of Article 8."

In this latter case, the Court noted that it would be a very rare case in which a failure to provide positive support would be a breach, save perhaps where resulting degradation was such as to invoke Art. 3, and went on to observe, in relation to Bernard:

"We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that art 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage art 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, art 8 may require the provision of welfare support in a manner which enables family life to continue."
Although there had undoubtedly been a significant failure by Lambeth, and TG had been deprived of the pathway plan, of the adviser and [...] of financial and other support for the appellant pursuant to ss 23B and 23C of the Act, the question was what the situation was of TG now (or over that time) that arose through Lambeth's failure.
He does not contend that from 2006 to date he suffered inhuman or degrading treatment for the purposes of Article 3. It appears that from October 2006, when he ceased to be accommodated by Lambeth, until October 2009, when a possession order was made against him, he was the holder of an assured shorthold tenancy of accommodation granted to him by the YMCA; that from then until December 2009, in response to the threat of these proceedings, Lambeth again provided him with accommodation as a children's services authority; and that since December 2009 it has done so as a housing authority under the Act of 1996. The appellant does not contend that at any material time he was on the streets or lacked the funds with which to subsist.
The impact on TG's private, social and work life in evidence was far too nebulous, speculative and apparently slight to give rise to an Art 8 breach. The duties to aid personal development were cast at an appropriately high level "of which we should all be modestly proud and which in my view we should strive to retain in being notwithstanding the state's temporary financial difficulties,", but they are creatures of statute and enforceable only on that basis. They are not the manifestation of the State's obligation under Art 8. Permission for a claim for damages under Art 8 refused.

Comment Local Authorities should take careful note if they have not already implemented a suitable policy and procedure for referring 16 and 17 year old homeless children. Although not expressly held to be so in this case, there is a clear suggestion that the Court took the view that such a failure was unlawful, without considered reasons why.

Further, although not going against *R(M) v Hammersmith*, which is binding as a House of Lords decision, it is clear that the Court of Appeal was not prepared to see Lambeth escape their failure on a technical point on which social services department the social worker concerned belonged to, let alone whether she had been 'nominated' by the Director of Children and Young People's Services or not..

While the principle of *R(M) v Hammersmith* was that it would be unfair to impose an additional degree of duty on unified authorities, as opposed to those where different authorities had housing and social services functions, that does not mean that unified authorities should or can avoid making the appropriate cross department connections.

The Art 8 damages point is perhaps unsurprising. The reluctance to cast specific provisions as a positive duty under Art 8 is understandable. But the lack of any recourse in damages in view of such a failure to carry out a duty is frustrating.

Someone to watch over me

Thu, 12 May 2011 19:30:50 +0000

NL

R (Nassery) v London Borough of Brent [2011] EWCA Civ 539

This was the appeal of a judicial review of Brent's decision on provision of care and accommodation under section 21 National Assistance Act 1948.

Mr N was an Iranian asylum seeker (granted indefinite leave to remain during the course of the case). He suffered from mental illness. In late 2008 he had applied for assistance under s.21. Although he had subsequently become eligible for housing assistance under Part 7 Housing Act 1996, he did not consider that the provision of accommodation alone under HA 1996 would be suitable, so no homeless application had been made and no decision as to any duty made by Brent. For that reason the claim continued.

The issue was the meaning and extent of 'care and attention' under s.21(1)(a) as a condition for the provision of accommodation under NAA 1948. What Mr N sought was accommodation with regular visits from a social worker with whom he could discuss his day to day problems. Brent had carried out an assessment under s.47 Community Care Act 1990 (actually two assessments). In the assessment, Brent had found:

(1) that no current difficulties, over and above ongoing medical care, lack of access to funds and immigration status in the United Kingdom, could be identified; (2) when Mr Coxall asked Mr Nassery what help he needed, he identified the need for help in making appointments and asked to be given £10,000. Subsequently he said that he was capable of making his own appointments; (3) in the assessment of mental health, the report records that Mr Nassery's cuts had fully healed, and that the impression was "of a young man who was exhibiting no outward signs of mental illness but who had been under a lot of stress and has poor coping strategies when dealing with things such as deportation and perilous financial situation."; (4) Mr Nassery's GP agreed that he should be referred back to his care and that he could provide supportive counselling services; and (5) if those services were not suitable, Brent could make a referral for psychotherapy.
On that basis, there was no need for care and attention, other than medical services.

In early 2009, Mr N had made repeated suicide attempts, calling someone each time. There were a number of incidents of self harm. Then:

on 18 May 2009, he poured petrol over himself and called the emergency services. On their arrival he had a lighter in his hand. He was admitted to a psychiatric hospital again. On 25 May 2009, he absconded and went to Euston station where he poured petrol on himself and stood on the tracks, threatening to commit suicide. He may also have been drinking petrol. This is the only occasion when Mr Nassery did not call for help when he was feeling suicidal. On his return to hospital he said he wanted to be given a social worker, someone he could talk to. He was given the provisional diagnosis of personality disorder. He was discharged on 14 June 2009.

In August 2009, two consultant psychiatrists reported on Mr Nassery at length. Dr Kishore's diagnosis was that he had an adjustment disorder or post-traumatic stress disorder, rather than a personality disorder, and was at medium risk of self-harm or suicide, with a risk of unintended suicide. He recommended support or counselling through the psychology services or, if not, counselling at primary care level. Dr Amin was the consultant for Mr Nassery during his hospital admissions. He considered that Mr Nassery had an emotionally unstable personality disorder characterised by disharmonious relations with others. He added that Mr Naasery did not need psychiatric services but could benefit from a supportive counselling or psychotherapy. although he recognised that Mr Nassery might not engage in this.

Brent's decision, following assessment, concluded that:

The issue of Mr Nassery's ability to perceive the need to seek help was explored in the course of assessment, and he confirmed that in a crisis or if considering self-harm he would call an ambulance and/or go to A & E as he has in the past. He is clearly able to do this. His insight into his mental health is demonstrated by the fact that by compliance with medication he has remained well for a year now, without any incidents of self-harm reported, to the extent that he has been able to establish a relationship with his girlfriend and to obtain employment. [...]

Mr Nassery plainly has a need for accommodation and subsistence support and a need for medication and medical support (possibly counselling). Neither a need for accommodation or a need for medication amount to a relevant need for care and attention the purposes of s.21 of the National Assistance Act 1948.

In the Judicial Review, Mr N's solicitor had filed a witness statement setting out his high degree of concern for Mr N's well being and that he had, exceptionally and personally, arranged to see Mr N twice a week. His view was that Mr N required supervision, care and attention for fear that he would seriously injure himself or others. Mr N filed a statement that he was hearing voices and had recently assaulted his girlfriend.

At the judicial review, Mr N argued that i) Brent had failed to take proper account of Mr N's underlying health problems or the risk they posed for the future; ii) Brent had failed to have regard to the need to avoid the risk of self harm, rather paying attention to would Mr N would do if he did self-harm.

HHJ Robinson held that Brent's risk assessment included a risk management plan and that had referred to the assault on Mr N's girlfriend. This was an isolated incident and Brent was not under any obligation to consider it in more detail. On the underlying health issues, Brent had considered them in the risk assessment. Brent were unaware of an attempt at self-harm in December 2009, so the omission was of no consequence.

Brent was entitled to conclude that the need to speak to someone for support did not mean that Mr N was in need of care and attention, rather counselling and psychotherapy, which were medial services. There was not much more assistance a social worker could provide.

Mr N appealed to the Court of Appeal. The Court considered *R(M) v Slough BC* [2008] UKHL 52 (our report here) as the leading case on s.21(1). In summary, their Lordships' view in M was taken as follows:

Both the passages last cited emphasise that there must be a need for care and attention at the time of the provision of the supported accommodation, though in the case of a progressive illness, or physical or mental state which is liable to deteriorate without care, it can be a small-scale need at the outset. In the course of his speech Lord Neuberger held a person had to be in need of care and attention before section 21(1) could be invoked but that in the case of a progressive illness it would be possible for the authority to provide accommodation for a person who was *to some degree* in need of care and attention, in anticipation of the illness deteriorating.

Mr N appealed on the basis that the Judge was wrong to separate his most recent behaviour (a period relatively without incident) from the history of the case. There was a persistent condition giving rise to a need for care and attention, even though the more extreme aspects of the condition manifested sporadically. In these circumstances a s.21 duty arose. The Judge was also wrong to reject the argument that Brent had failed to to apply the test in *R(M) v Slough* properly by focussing on the extent to which Mr N had sought help at the time of self-harming, rather than whether he needed to be looked after to prevent harm, given the foreseeable risk.

Brent submitted that s.21 was not engaged unless there was a current need to be "looked after". It was not enough that the person might, at some future date, need to be looked after. That was the role of s.47 Community Care Act 1990.

Lady Arden, in the sole judgment, held that Brent were:

correct to make the point that section 21(1) addresses current need but both Lady Hale and Lord Neuberger accepted that there could be a situation where it was clear that a person was in the early stages of what would be likely to develop into much more serious illness, some flexibility was allowed provided that at all times there was indeed a need for care and attention. The same must apply to both physical and mental illness.

In this case, at the time of his assessment, Mr Nassery's condition appeared to be under control. Accordingly, it could not be said that he was in present need of care and attention. I have set out the assessment in some detail above and it is noticeable how Mr Nassery accepts that he can manage his current condition and how he does not ask for help. The assessment does not suggest that Brent should not have accepted his view on this: on the contrary, the conclusion of the assessment, of which I have set out an extract above, stated that he had an appropriate level of insight and perception of when help is needed and the ability to act appropriately in seeking it.

Further, where there is more than one course capable of meeting the client's need, it is open to the Authority to permit the client to choose between them.

It is quite clear that Mr Nassery chose a situation where he would have to be responsible for obtaining help if he felt an episode of what Miss Bretherton calls bizarre behaviour approaching. Brent was clearly sufficiently confident that he could do this to permit him to do so. Miss Bretherton criticised the assessment on the basis that it was not put to Mr Nassery that he was no longer at risk because of his medication, but I do not consider that that is a fair criticism to make because it is for those performing the assessment to determine what the risk was, and the chances of its maturing.

Mr N's ability to seek help was the focus of Brent's assessment, but that included the ability to seek help before an incident occured, not, as Mr N had argued, once self harm had happened.

The decision to dismiss the claim was upheld.

Mr N was taken to have advanced a new argument in oral submissions, that "Mr Nassery has a need for someone to talk to on a very regular basis. She submits that he is "obsessed" with speaking to someone about the most basic decisions in life, and that he has become so anxious about basic issues that he is unable to function". This was not put forward to Brent highly at the time of the decision and Mr N's answers at the time did not suggest it. The proper course of action on this would be to request an assessment on this 'new' need and it would be for Brent to assess it.

Comment While to some extent, this is not a surprising decision in the light of *R(M) v Slough*, it does raise a difficult point around, for example, health issues which might well be recurrent and serious, but not manifest all the time. Mr N's case might not be the most straightforward test case on its facts, the border area of 'some flexibility' or 'a physical or mental state which is likely to deteriorate without care' has grey areas where a condition is not straighforwardly 'progressive'.

Judicial review costs redux

Tue, 17 May 2011 19:54:14 +0000

NL

We've seen reports of a case called *R (Ambrose) v City of Westminster* (Admin Court 13 May 2011. Not on Bailii or reported elsewhere so far). It was a judicial review of a refusal to provide interim accommodation pending review. Westminster had apparently decided that because they had arranged housing in Hackney, it was for Hackney to carry out an assessment under s.17 Children Act 1989, rather than refer the applicant and child to its own social services department, although the child remained in school in Westminster.

An interim order to provide accommodation pending judicial review was obtained and unsuccessfully challenged by Westminster. Westminster eventually carried out a Children Act assessment and the applicant's step-son found to be a child in need, who should not be separated from the applicant. Eventually private accommodation was offered. The JR was then academic at a pre-permission stage, leaving only the issue of costs, which Westminster didn't concede.

At the hearing, Westminster argued *Boxall* (*R (Boxall) v Mayor and Burgesses of Waltham Forest LBC* (2001) 4 C.C.L. Rep. 258) - the correct order was no order as to costs. Westminster's failure to carry out an assessment was an oversight and, in any event, much of the pre-action protocol stage had focussed on the homeless case. In that aspect Westminster were entitled to discharge duty under S.213A Housing Act 1996 by referring the applicant to Hackney Council.

The High Court held that:

- Westminster had made an error of law in not assessing the Claimant’s stepson’s needs under the Children Act 1989, Westminster had a duty to undertake an assessment of a child attending one of its schools even if it had housed them in temporary accommodation outside the borough.
- Westminster had continued to defend what it classed as an “oversight,”
- The Claimant had referred to a duty to assess in the pre-action protocol and Westminster had spoken to the Claimant’s stepson’s school and professed to be aware of the relevant caselaw.

It was therefore appropriate to make an order for costs even though the claim had become academic at the pre-permission stage.

The MoJ's proposed reforms on civil costs do not include implementing qualified one way costs shifting in Judicial Review, (a decision itself the subject of JR pre-action protocol steps by the Public Law Project - on which more shortly). Pursuit of costs in settled or newly academic JRs therefore remains an important issue. The Defendant's standard position is often that the decision at issue was simply a mistake, later corrected - or a settlement is offered on the basis of 'taking a commercial view' with no order as to costs as part of the offer, but it can be worth taking the costs issue further, as here.

We would be very keen to see a transcript of the judgment in this case, if one exists. This note is wholly based on another note of the case from Hardwicke Chambers.

You win some, you lose some

Wed, 25 May 2011 14:36:59 +0000

chief

Oxford City Council v Bull [2011] EWCA Civ 609

In which the Court of Appeal had to consider whether the homeless applicant had made himself intentionally homeless and whether he was in priority need.

Mr Bull separated from his wife in June 2009 and left the home, where she was a secure tenant of the local authority, and moved into a room in a shared house. After a couple of months their three children moved in with him into the shared house. Mr Bull's landlord then gave him notice to quit. Upon an an application to Oxford as homeless, he and the children were given temporary accommodation. Oxford subsequently issued its Housing Act 1996, s.184 decision, to the effect that Mr Bull's children did not reside with him, and he was therefore not in priority need, and that he was intentionally homeless, as it was inevitable that NTQ would be served once he had let the children move into a property that became overcrowded. That decision was upheld on a s.202 review, but Mr Bull's subsequent s.204 appeal was allowed by HHJ Harris QC, who varied the Council's decision to declare that Mr Bull was not homeless intentionally and was in priority need.

Oxford appealed to the Court of Appeal. Pill, Jackson and Tomlinson LJJ allowed Oxford's appeal on the question of intentional homelessness, but not on priority need.

Jackson LJ gave the lead judgment. Unsurprisingly there is plenty of reference to *Holmes-Moorehouse* (our note), and also to *Mohamed v Hammersmith & Fulham* [2001] UKHL 57. In this case the review decision was carried out in February 2010, some four months after Mr Bull and his children had been accommodated together by Oxford in temporary accommodation. It was clear that the review officer had got this question wrong. Jackson LJ said at [39] that:

"... Whatever may have been the position at [the shared house], once Mr Bull and the children moved to [the temporary accommodation] that was where the children resided. It was where they kept their clothes and possessions. It was their main home, from which they went to school. It is quite true that the children went to stay with their mother regularly, but that does not detract from the fact that they resided at their father's house."
Lord Hoffmann's speech in *Holmes-Moorehouse* did not assist Oxford on this point. His analysis in that case had been concerned with the second limb of s.189(1)(b) of the 1996 Act; *i.e*. whether dependent children might reasonably be expected to reside with the applicant. This case turned on the first limb of s.189(1)(b) - whether dependent children did reside with him. Oxford's appeal to the scarcity of their resources was not relevant when the first limb of the s.189(1)(b) test.

Oxford's second ground of appeal was that HHJ Harris QC had erred in finding that Mr Bull was not intentionally homeless. Jackson LJ agreed. The judge below had reached the conclusion that Mr Bull could not have been criticised for having his children come to live with him in the circumstances, but that conclusion was inconsistent with findings of fact that the review officer had made. Allegations had been made about Mrs Bull's ability to look after the three children, but the review officer had reached fair findings of fact that she was well able to look after them properly, and there was no necessity for Mr Bull to take the children in to live with him. The judge had erred in substituting his own finding of fact.

However, Mr Bull argued that it was not reasonable for him to continue to occupy a room in a shared house once the children had come to live with him. It was not accommodation that he could be treated as "having". He could not be considered to be intentionally homeless from accommodation that was no longer "available" to him.

The Court of Appeal was not persuaded by this line of argument. Jackson LJ considered that the children had somewhere else to live (their mother's house), where they could and should have lived. There was no reason for them to live with their father and they were not reasonably expected to do so. Therefore, at the point when he moved the children in with him (leading to the inevitable NTQ), they were not persons who might reasonably be expected to reside with him. As it was Mr Bull's own conduct that had led to his having to leave the shared house, he was intentionally homeless.

Pill LJ added a further comment on the issue of intentional homelessness. In his judgment Lord Hoffmann's reasoning in *Holmes-Moorehouse* was equally applicable to the question of whether a person might reasonably be expected to reside with an applicant for the purposes of deciding whether accommodation was available to them (s.176(b)). Tomlinson LJ agreed with both judgments.

Not too late but too little

Thu, 16 Jun 2011 08:20:19 +0000

NL

Southwark LBC v Barrett Bromley County Court 18/03/2011

A County Court *Pinnock* case. Unsuccessful but interesting in that it was a transitional case, commenced before the Pinnock judgment, and to the extent that it shows the court using the 'seriously arguable' threshold.

Ms Barrett was a non secure tenant, the tenancy being granted under Part VII Housing Act 1996. The landlord served notice to quit after Southwark discharged duty, following Ms B's refusal of alternative accommodation.

Ms B was advised by a solicitor that there was no defence (this was pre Pinnock) and she did not attend the hearing. About 4 weeks later, after Pinnock, she applied to set aside the possession order or, alternatively, stay execution for 3 months. The ground was that to do otherwise would be a breach of Art 8.

The District Judge followed *Hackney LBC v Findlay* (our report) and applied the CPR 39.3(5) checklist. He found that Ms B had acted promptly after finding out about the possession order, had a good reason for not attending trial in the previous solicitor's advice, so cleared that hurdle.

However, there was no reasonable prospect of success in defending the claim as her case did not clear the 'seriously arguable' threshold set out in Pinnock. Art 8 was engaged, but Ms B had been through the s.202 review and had decided not to appeal Southwark's decision that the accommodation refused was suitable or the decision to discharge duty. Application dismissed.

No mention of Powell, which would probably have doomed Ms B to 6 weeks at most, even if she had cleared the threshold.

[Edit 17/6/11. We've had a note from Counsel for Ms B, just clarifying about Powell:

Your report says no mention of Powell. The case was argued the week before the Powell decision was handed down. Judgement was reserved. We subsequently informed the DJ that Powell was due to be handed down and he agreed to receive written submissions on Powell and reserve judgement until receipt of those submissions.

Since he decided that there was no seriously arguable defence, then the point about Powell retaining the limit on suspension at s.89 HA 1980 didn't arise. But NL is right to say that it would have been a difficulty in that all Ms Barrett was arguing for was more time.]

Hat tip to Legal Action recent developments in housing law for this one.

Contracting out reviews

Mon, 04 Jul 2011 14:17:12 +0000

Dave

In *Karaj v Three Rivers DC* [2011] EWCA Civ 768, Ward and Rimer LJJ granted permission to appeal on what appears to be the "*Shacklady*" issue (links to our report), viz whether a failure to follow the proper rules regarding the contracting out of the review process invalidates the (entire) review itself. Three Rivers DC had contracted out their reviews to a well-known contractor. Before HHJ Faber, the *Shacklady* argument had been unsuccessful. Permission was refused by the MR on the papers but granted after a renewed application for permission by Christopher Baker - to whom many congrats - on the basis that here there is an appeal which has a real prospect of success. The court also noted that it would apply the lower threshold to permission (*Elrify*, at [24]) because the matter could not be raised on review. HHJ Faber's analysis was effectively the first such judicial consideration of the contracting out point. Watch out for this one - could be v interesting.

You don't want to do it like that.

Tue, 12 Jul 2011 20:20:35 +0000

NL

The Local Government Ombudsman receives over 300 complaints a year about Local Authorities' handling of homeless applications. The LGO is clearly concerned by what it sees in the matters referred to it as it has now produced a 'focus report' , called "How Councils can ensure justice for homeless people", setting out how local authorities should apply the law properly. This is set in the context of what the report identifies as the growing problem of homelessness.

The report notes that the LGO does not normally intervene where a remedy through the courts is available, but as the remedy here is judicial review, it is not reasonable to expect homeless people of limited means to take this route. (Whether the availability or otherwise of legal aid solicitors able to pursue such an application is a factor in this approach isn't mentioned.)

The report identifies areas of common concern, illustrating them with a case study of a complaint made. These are 'homeless prevention', 'the duty to make enquiries', 'taking applications', and 'interim accommodation'.

On homeless prevention,
Where a person is potentially homeless, councils can legitimately suggest solutions other than making a formal homelessness application. But these must be appropriate and acceptable to the individual. Councils must not try to avoid their obligations to people who are, or may be, homeless. So people must be made aware of their right to make an application if they wish to.
The second of two case studies reads

Tara was a single mum living with her young son in a privately rented flat. The owner of her home announced that it was to be repossessed because he had not been keeping up the mortgage payments. Tara told the council that she and her son would soon have nowhere to live. Two weeks before she was due to be evicted she was interviewed by a council officer. But the advice she was given was never confirmed in writing because the interviewing officer went on sick leave.

The council did try to delay the eviction, although this was not successful. The day before the planned eviction Tara returned to the council to say she was moving in with a friend's family. This was an emergency measure and she would soon have to move on. The officer she spoke to incorrectly assumed that Tara's homelessness had been prevented. Several weeks later, when Tara went back to the council, a manager realised the mistake and the council took a homelessness application. Tara and her son moved into a homeless hostel.
On the duty to make enquiries, the report notes that this duty arises on the low threshold of whether a person may be homeless eligible and in priority need. The case study involves a council that, somewhat surprisingly, appears to believe - and in fact argued - that resource limitations meant it could legitimately not give interviews on the day of application to people it considered to be likely to be 'non-priority' cases. Quite how it could reach that view without an initial interview is a mystery.

Steve was a single man who arrived at the council saying he was immediately homeless and needed help. He suffered from mental health problems but it was not obvious that he may have been in priority need. Because of this, the council failed to deal with Steve as homeless on the day he came in. Instead, he was given advice and invited back for a formal homelessness interview two weeks later. After taking an application, the council then delayed unreasonably in making enquiries about Steve's position. It eventually decided that Steve was not in priority need.

But after a second application, the council decided that he was in priority need, largely because of new information about his medical condition provided by a GP. We decided that Steve suffered avoidable distress, uncertainty and inconvenience because of a two-month delay in accepting and processing his application. He also had an unnecessarily prolonged stay in substandard accommodation. The council said that it had a large caseload and limited staff. It could not guarantee homelessness interviews on the day to people likely to be non-priority cases. But it did pay Steve some compensation. And it reorganised its staff to comply with the duty to take this kind of application without delay.
Perhaps JR might have been a better route to deal with the lawfulness of this Council's view.

On taking applications, the report observes that:

Government guidance says homelessness applications can be made to any council department and do not need to be in a particular form. It says councils should:
provide access to advice and assistance during office hours and have arrangements in place for 24-hour emergency cover, and
publicise the details of homelessness services and provide clear explanations of their procedures.

A council cannot refuse to deal with someone as homeless because they have not applied in writing or any other prescribed manner. The person just needs to make it clear that they are seeking accommodation or help with obtaining accommodation.

That point on publicising the homelessness services is interesting. I can think of a number of local authorities in my area that certainly identify advice on housing options as available to the homeless, but whose websites are remarkably silent on what we used to call the HPU service.

The report goes on to note that the test for taking an application has a low threshold, citing Aweys v Birmingham CC: “In the vast majority of cases, the making of the application will mean that it is difficult if not impossible for the council not to believe that the applicant may be homeless or threatened with homelessness.”

The LGO also notes Aweys as finding that homeless prevention measures cannot lawfully be used to delay accepting an application.

The first case study is a classic form of refusing to accept an application:

Karen, a single young woman in her 20s, was asked to leave her parents' home after she became pregnant. She went to stay with her sister and niece in a one-bedroom flat in London. This arrangement could only be temporary but Karen wanted to stay near her sister so that she could help her with the baby.

So she went to the local council and told them that she was about to become homeless and was in priority need. But the council refused to take a homeless application and told her to go to another London borough. It did not offer any other advice or assistance. Karen eventually did find accommodation elsewhere in the city.

We said: “the handling of this case was careless and there seems to have been a deliberate attempt to prevent access to housing assistance.”
The council accepted it was at fault. It agreed to nominate Karen for housing in its area and to pay her removal expenses. It also paid compensation in recognition of the distress and inconvenience caused.
The second case study is a council refusing to accept an application from a victim of domestic violence, who was living in a refuge. Apparently on the basis that she wasn't threatened with homelessness because the refuge hadn't told the council she was moving on.

They then failed to accept a further application a year later, when she repeatedly stated she was of no fixed abode. She complained to the LGO a couple of years later, after staying with friends and periods of rough sleeping. The Council did accept it was wrong and paid compensation.

On interim accommodation, the report notes that the duty to accommodate is triggered by the low threshold for taking an application. The

case study is a particularly bad example of refusing to deal properly with an application, failing to make even basic enquiries and shifting the burden of proof onto the applicant.

Rebecca had severe mobility problems and used a wheelchair. She moved to a new area with her son who had learning disabilities. She approached her new council with written information, stating that she was fleeing domestic violence. She said she was trying to escape from her former neighbours and members of her husband's family. Rebecca told the council that she had contacted the police and that she was known to social services at her previous home.

The council says that it offered Rebecca a homeless assessment and that she rejected it. But there was nothing in the council's records to suggest that this was so. The council told Rebecca that there was no evidence to support her claims. It did not speak with the police or social services. It placed the burden of proof onto Rebecca, asking her to provide details of police officers she had spoken to and their log numbers.

We found that Rebecca had provided the council with sufficient information for it to have reason to believe she might be homeless, eligible and in priority need. The council should have made enquiries and provided her with interim housing. As a result of the council's failure, Rebecca was forced to sleep on a friend's sofa and endure a period of stress and uncertainty. After Rebecca complained to the Ombudsman, the council agreed to take a homeless application and ultimately provided interim housing. It also reviewed the training needs of frontline staff in relation to people fleeing domestic abuse.
The LGO concludes by making general recommendations for improvement:
make a decision on the same day about whether to offer interim accommodation whenever they take an application and decide to make enquiries

- make a decision on the same day about whether to offer interim accommodation whenever they take an application and decide to make enquiries
- record the reasons clearly if in the above circumstances interim accommodation is not offered
- convey in writing, not informally, decisions that carry rights of review or appeal
- ensure arrangements are in place for referring vulnerable applicants to social services, sharing information as appropriate
- have systems to identify actual or potential homelessness when new applicants join the housing register or when existing applicants provide new information
- keep clear records of all interviews with homeless applicants, including details of advice given, and
- consider whether an individual is homeless and eligible for assistance in cases where people need to move because of harassment or domestic violence.

All in all, a clear restatement of the basic requirements of the current law. It is interesting that the LGO felt the need to produce such an advisory report, but in view of the case studies listed, perhaps not surprising.

As a footnote, the Government is currently proposing to make complaints to the LGO through a third party only (a 'tenants committee' or MP). Quite how this is supposed to work for those complaining about the handling of a homeless application is anyone's guess. Housing providers have complained about this proposal. I would imagine MPs won't be too happy about it either, imagining the queues outside the surgeries.

Eligibility: Reg 6(2)(a)

Fri, 15 Jul 2011 13:15:27 +0000

Dave

News has reached us at NL Towers (or lock-up - see image at bottom of page) from a regular reader/correspondent, Simon Marciniak, of an interesting and potentially important s 204 homelessness appeal decision on the ambit of Regulation 6(2)(a), Immigration (European Economic Area) Regulations 2006, SI 2006/1003. That regulation says that:

A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if - (a) he is temporarily unable to work as the result of an illness or accident.
So, if you are otherwise ineligible and not a worker, but temporarily unable to work due to illness/incapacity, you are treated as a worker and, therefore, eligible. In *Samin v Westminster CC*, Central London CC (July 2011), Mr Samin worked for a short period, was then on JSA and was then treated for PTSD from 2007, from when he was unable to work. Westminster found him not eligible, as we understand it, because he didn't fall within Reg 6(2)(a) on the basis that he was not ill when he gave up work and because his illness was not temporary. HHJ Mitchell quashed that decision, finding that Reg 6(2) operates when a person is *no longer* working, ie if the illness happens after the applicant lost his job and even if the illness was unrelated to his work; and that he was bound by the decision in *FB v Secretary of State for Work* [2010] UKUT 447 (IAC) to find that temporary in para (a) meant not permanent. This is the first time that *FB* has been applied to a homelessness eligibility decision, as foreshadowed by the suggestions in our note of its significance for housing and benefits. But it's "only" a County Court decision, so don't get too excited.

Homelessness, Workers and 'effective employment'

Sat, 30 Jul 2011 19:42:10 +0000

NL

Falastin Amin v Brent LBC, Wandsworth County Court 2011

A county court s.204 appeal on the issue of eligibility of an EU citizen as a 'wroker'. While it is not binding, it sets out a clear position which, given the involvement of Minos Perdios in the review decision, could well be of broader relevance. The following report was provided by lawyers in the case.

Mrs Amin is a Danish Citizen. She applied to Brent for assistance as a homeless person. At the time of her application she was unemployed, however, between the s184 decision and the review decision she obtained part-time work as a Customer Care Assistant working 16 hours per week and earning £92.80 per week.

The review decision was made by Minos Perdios (who makes such decisions for a number of local authorities). Mr Perdios, relying on the decision of Social Security Commissioner Mark Rowland in CH3314/2005, found that Mrs Amin's work did not provide enough income to cover what he considered to be her 'reasonable living expenses'. He found, therefore, that the employment was not "effective" and, consequently, that Mrs Amin was not a 'worker' within the meaning of Article 39 of the Treaty establishing the European Community.

Ms Amin appealed.

HHJ Rylance, sitting at Wandsworth County Court, held that it was clear from the jurisprudence of the ECHR and the decision of the Court of Appeal in *Barry v Southwark LBC* [2009] ICR 437 (our report here) that the question of whether work is "effective" is to be looked at from the point of view of the value of the work to the employer and not to the employee. Commissioner Rowland's formula, adopted by Mr Perdios, was wrong.

Many thanks to Sean Pettit of 1 Pump Court and Tony Owen of TV Edwards for the report.

Morris dancing

Tue, 27 Sep 2011 23:49:44 +0000

NL

Bah v The United Kingdom - 56328/07 [2011] ECHR 1448

This is a decision of the European Court of Human Rights on the regulations for eligibility for housing support, after the declaration of incompatibility in *Westminster v Morris* [2005] EWCA Civ 1184.

It is a very significant case, not least because it has a direct bearing on the 'corrective' amendment that the Government made 4 years later in response to *Morris* via Schedule 15 Housing and Regeneration Act 2008 and the possibilities of any challenge to that Schedule. It also has broader implications for differential conditions for access to social welfare benefits in general, where a child subject to immigration control is a qualifying condition.

At issue is whether regulations preventing a child subject to immigration control from conferring priority need for the parent's homeless application under Part VII Housing Act 1996 were a breach of Article 14 (Discrimination) and Article 8 (family and private life).

Ms Bah was a failed asylum seeker from Sierra Leone. In 2005, she was granted indefinite leave to remain. She then applied to have her son, a Sierra Leonean national born in 1997, join her. He arrived in 2007 with conditional leave to remain - no recourse to public funds. The son is 'subject to immigration control' for the purposes of Asylum and Immigration Act 1996.

Ms Bah applied as homeless to LB Southwark soon after her son's arrival, having been turned out of her private accommodation. While Ms Bah was eligible for housing assistance, LB Southwark disregarded the son in assessing priority need under s.185(4) Housing Act 1996 as he was subject to immigration control. Southwark found she was not in priority need. This was upheld on review. LB Southwark used its rent deposit scheme to find Ms Bah a private sector tenancy, but this was outside the borough, a considerable distance from employment and school, and more expensive. Ms Bah remained on the Part VI housing list and obtained a one bed flat in Southwark in 2009. I presume that Ms Bah taking the private tenancy in 2007 meant that no further recourse to the national courts was possible.

In *Westminster v Morris*, the Court of Appeal made a declaration of incompatibility in relation to Art 14 in respect of s.185(4) Housing Act 1996. That clause states that 'a person who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part [...] (b) has a priority need for accommodation. Ms Morris was a British citizen with a daughter subject to immigration control and the declaration specified that the incompatibility arose from disregarding the dependent child of a British citizen. The Court of Appeal found that the clause was disproportionate to the supposed justification - to preserve immigration control and restrict 'benefits tourism', and that its discriminatory impact could not fall within the margin of appreciation, even if it had been considered.

A Mr Badu's case was heard at the same time. He had indefinite leave to remain (considered by the Court of Appeal to be 'equivalent' to

British citizenship), but as he had ongoing housing needs, a declaration would not have availed him. The Court of Appeal remitted his case for reconsideration to the local authority, with a direction to consider if he could be assisted under other legislation.

Schedule 15 Housing and Regeneration Act 2008 removed the effect of s.185(4) but only for British or EEA citizens and only to the extent that the housing duty could be discharged by an offer of a private sector tenancy, whether or not the applicant accepted that offer (unlike anyone else accepted as in priority need and eligible). This would make no difference to Mr Badu or indeed Ms Bah. As Ms Bah's application had been made before Schedule 15 came into force, the effect of the Schedule was not up for consideration by the ECtHR (although it was raised).

Ms Bah's application to the ECtHR was declared admissible despite the UK arguing it was manifestly ill founded.

Ms Bah's argument was there was discrimination and that the underlying ground was nationality, even if officially cast as immigration status. In *Westminster v Morris*, the Court of Appeal had found that nationality was the underlying ground of the distinction. Weighty reasons were required to justify such discrimination.

The Government's justification (see below) for such discrimination was weak. Further it was illogical to distinguish between purportedly different levels of connection to the UK in respect of priority need for accommodation for homelessness where no such distinction was made for Part VI allocation. The scarcity of social housing did not explain the discrimination as then it would be extended to Part VI allocation via the housing list. Further it could not be argued that EEA nationals had a greater connection to the UK than those with indefinite leave to remain, who were treated in all other practical respects as UK citizens, as EEA nationals had to be 'qualified persons'.

Finally, *Westminster v Morris* was correctly decided and the COurt of Appeal had noted that Mr Badu, with indefinite leave, had 'equivalent status' to citizenship.

The EHRC, intervening, said that this case involved ongoing structural discrimination in domestic housing law. Schedule 15 marked an 'inadequate and grudging approach' to the *Morris* declaration, taken after considerable time. Schedule 15 replaced the old form of discrimination with a new one, differentiation between households in which the child was a 'restricted person' and those where they weren't. The Government's justifications were no different o before and the nationality of the dependant child was simply not relevant to the priority need of the parent.

The Government argued that *Morris* had been remedied by Schedule 15, but that the declaration in Morris did not apply to Ms Bah as she was not a British citizen, only had indefinite leave and was subject to immigration control. She was unable, both before and after Schedule 15 to rely on her son for priority need.

Even if Ms Bah had been accepted as having priority need, conditions in London would have meant a considerable period in temporary accommodation until a permanent offer was made. Temporary accommodation - for an average of 21 months - could be more expensive than a private tenancy. Ms Bah was never 'actually homeless' and there was other legislation requiring assistance to be given to children who were in need.

Differential treatment by reason of the son's immigration status did not fall under Article 14 because the ground was not nationality or origin but immigration status. This was not an 'other status' within the terms of Art 14 as it was a legal status and not a personal characteristic. So there was no Art 14 discrimination.

Alternatively, the ground of immigration status meant that less justification of discrimination was required, as such discrimination flowed from the State's need to control and monitor immigration, The case concerned the allocation of scarce resources - social housing - and there was a wide margin of appreciation on policy decisions.

The justification was the need to allocate scarce resources and the preference to allocate them to those with the greatest level of connection to the UK, which was UK and EEA citizens over those with indefinite leave. It was justifiable to prioritize based on a person and their dependants fixed and permanent rights to be in the UK. The son had no recourse to public funds as a condition of his permission.

Any comparison between the applicant and EEA nationals was irrelevant. More favourable treatment of EEA nationals stemmed from the 'special legal order' of the European Union and the special status of its citizens.

The ECtHR held:

1. The situation being considered was that which held before the implementation of Schedule 15 H&RA 2008

2. It was generally agreed that if there was a breach of Art 14, Art 8 was also engaged.

3. Ms Bah had not identified a specific comparator for the alleged discrimination. If it was a British citizen like Ms Morris, with a child subject to immigration control, then Ms Bah would have been treated in exactly the same way. However, more relevantly, if the comparator was a person with indefinite leave with a child not subject to immigration control, there would have been a difference in treatment. The court did not go further to decide wether Ms Bah was in a position analogous to either comparator, for the reasons below.

4. The alleged ground of distinction was nationality. The Court did not agree. The relevant 'status' was the son's immigration status. However, against the Government's arguments, immigration status can amount to an 'other status' for the purposes of Art 14. A personal status did not need to be immutable or innate (*Clift v the United Kingdom* no 7205/07 July 2010 and *A, and Others v the United Kingdom* [GC] no 3455/05 ECHR 2009).

5. Immigration status was not an immutable characteristic and involved an element of choice, where it does not entail refugee status, as it applies to a person who has chosen to reside in another country. The nature of the status upon which differential treatment is based weighs

heavily on the margin of appreciation to be accorded.Ms Bah entered as an asylum seeker but was not granted refugee status. She then chose to have her son join her. Given the element of choice, differential treatment in this case must be objectively and reasonably justifiable but not to the same weighty degree as nationality.

6. The justification presented by the Government differed from that presented in *Morris*. It was presented as the need for the fair allocation of a scarce resource, to prioritise those who had a fixed and permanent right to reside or had a priority need through dependants with that right.

7. It was legitimate to put in place criteria for the allocation of a social benefit when not arbitrary or discriminatory. Broad categorisations of different groups were permissible.

8. The classes of people set out in s.185 (and amending regulations) could not be considered as arbitrary or discriminatory. Those who have a fixed right to be in the Country or those with permanent unconditional leave to remain are entitled to housing and housing assistance. Those whose leave to remain is conditional on their ability to support themselves without recourse to public funds are not.

9. There is nothing arbitrary in Ms Bah being eligible for social housing but not to be considered in priority need. Priority need would be based solely on the presence of her son whose leave was conditional. Ms Bah had brought her son to the UK in full knowledge of the condition attached to his leave.

10. It is justifiable to differentiate between those who rely for priority need on a person who is the UK unlawfully or with a no recourse condition and those who do not. The legislation in issue (pre Schedule 15) pursued a legitimate aim of allocating a scarce resource between different categories of claimant.

And 11. in considering proportionality, Ms Bah may well have suffered anxiety but was never actually homeless. There were other duties which would have required assistance had she and her son been homeless. The period she spent in a private tenancy was within a similar time scale to the likely period in temporary accommodation had she been accepted. Similarly, there was no certainty that temporary accommodation would have been within the borough.

The effect of differential treatment was not disproportionate to the legitimate aim pursued. The differential treatment was reasonably and objectively justified.

Comment

Oh dear, what a mess.

First, I have to say that I think Ms Bah was right about the spirit, if not the letter of the Court of Appeal decision in *Morris*. A distinction between a British citizen and someone with indefinite leave does not appear to have been something that the Court considered important, let alone a viable basis for differential treatment.

There is also a possibly significant error in the ECtHR's finding that there were other duties under which the local authority would have had to accommodate Ms Bah and her son if they had been street homeless. The son, yes, under Children Act 1989, but assistance for Ms Bah under that act would not have been a duty.

The court does not deal well, or indeed at all, with the argument that it is irrational to restrict homeless assistance on this basis but not eligibility for social housing via Part VI in the same way. The argument is noted as being made by Ms Bah, but the court's conclusions are expressed in terms of eligibility for social housing per se, not even making the argument that homeless provision is a distinct resource or form of provision to Part VI housing waiting lists. The lack of practical effect on Ms Bah as an individual rather helps the court to elide this point.

And that leads on to the suggestion that this was not, perhaps, a great case to bring on the facts. That there was little practical effects of the differential treatment beyond some anxiety for Ms Bah was clearly a significant factor for the Court. Knowing Southwark well as I do, it is hard to argue that Ms Bah wouldn't quite probably have spent a similar period of time in temporary accommodation to the time she spent in a private tenancy, although unlikely to be out of borough in the same way.

The upshot then, is that while immigration status is a relevant status for the purposes of Article 14, it is justifiable to restrict access to homeless assistance, or indeed, social welfare, where the applicant is otherwise eligible if the qualifying factor is a child whose own immigration status is ineligible.

Although the law at issue in this case is that existing before the implementation of Schedule 15 H&RA 2008, any challenge to the distinction drawn in Schedule 15 between British and EEA citizens and those with indefinite leave to remain has now been blown out of the water. If this judgment holds, it is hard to see any such challenge succeeding.

Similarly, any challenge to the differential treatment between a British citizen with child subject to immigration control and one whose child isn't - specifically that an offer of a private sector tenancy is sufficient to discharge duty for the former - must surely face a huge uphill battle. Although in this latter case, the argument about 'a fixed right' and 'level of connection' to the UK would perhaps be harder for the Government to maintain. Still, it is perhaps a good thing that *Morris* didn't go all the way to this ECtHR.

Contracts and public law: The Cornwall case

Mon, 10 Oct 2011 14:49:02 +0000

Dave

Charles Terence Estates Ltd v Cornwall Council [2011] EWHC 2542 (QB) (subnom oh dear, oh dear)

Forgive the length of this note, but this seems to be a significant case with potentially far-reaching ramifications. The judgment of Cranston J (in my view) is mostly spot-on and hugely learned (see well below for an appreciation). It will be interesting to see whether this case goes further - my insider information is less than clear on the prospects of an appeal. For what it's worth, my view is that an appeal would likely be unsuccessful but important in providing clearer lines about the fiduciary duty and capacity issues discussed below, as well as about the housing revenue account.

Background

LSVT of an entire stock poses many problems for local authorities and the transfer association after the transfer has taken place. What seemed perfectly reasonable at the time of transfer can dissipate into acrimony. There are many practical questions once transfer has taken place, not least of which is the mechanism and/or provider through which accommodation can be offered to vulnerable homeless applicants in satisfaction of duties under Part 7, Housing Act 1996. In 2002/3, that problem was exacerbated by central government edicts about the use (or non-use) of bed and breakfast accommodation for families. This is what faced Penwith DC and Restormel BC, in which anybody who has been to Penzance, St Austell or the Eden Project will know has a plenitude of b&b accommodation. (As regards the former, I remember articles in the late, much lamented *Roof* magazine back in the early 1990s about problems between the LA and transfer HA.)

The arrangements

Fortunately, those authorities were approached by a private company, Charles Terence Estates Ltd (CTE) and its sister company, Providers of Accommodation and Support Limited (PAS). The companies were offering to take over and/or do up accommodation which would be leased back to the local authority for use as accommodation for such households on a 25 year term with a break clause after 10 years. They were also offering to provide move-on accommodation (on which more below). There were some differences in approach by the different local authorities, Restormel jumped into the arrangement; Penwith appeared more circumspect at the outset with a pilot but the "pilot" was soon followed by the full agreement being put into place. CTE were also given £350k by each of the councils. The mechanism through which that £350k was given is important. Restormel appear to have used their general powers to make a grant of the money either for the purchase and rehabilitation of the temporary accommodation or for the purchase and provision of move-on accommodation, although that accommodation was never provided. Penwith paid the money by way of loan from its private sector renewal fund under its published policy, "homesafe", although the proper forms were never completed (and an attempt at retrospective changes to the policy to accommodate it never formally completed), and the money was used to provide the temporary accommodation. In both cases, the £350k was to be repaid by CTE (Restormel) or written off (Penwith) if the agreements lasted more than 10 years. Penwith also made a grant of £750k to CTE drawn from its second homes council tax fund.

Now this summary does little justice to the jejeune approach of the councils to the use of their formal powers. This is laid bare in the forensic judgment of Cranston J and bears reading by any local authority officer and member concerned with their proper roles. In very brief summary, it was shambolic (misinformation, incorrect appreciation of the effect of the agreements on the statutory obligations [my favourites is the report to Penwith's resource committee which mentioned the Housing Grants and Construction Act 1996 even though this had been repealed in 2003 - others will found much of delight in the wreckage of these reports], and one could go on; the critique particularly of Penwith is at [87]-[88])). What was driving the councils, though, was the concern about the escalating costs of b&b as well as the government targets.

Penwith rather belatedly reviewed the scheme by way of risk assessment, the Audit Commission became involved - amazingly, the District Auditor said that he was satisfied with the council's approach but that it should have been more explicit about why it didn't tender, should have referred to the relevant financial regs, and should have explained these points to the Members but that the reports "have been transparent and sufficient enough for members to ask relevant questions of the scheme". Penwith also asked a consultant to prepare a report after concerns were raised by Members and officers. The consultant "conducted an internal, and to my mind cursory" review which lead to an email of less than a page (!). More of this below.

In anticipation of the shift to unitary status - hence Cornwall Council's involvement - a report was commissioned on the relationship between CTE/PAS and Restormel/Penwith. The reporter noted that Bournemouth, another council which had entered into similar relationships, had a break clause of three months: "Surely, wrote [the reviewer], one of the two councils' auditors or lawyers would have questioned the length of the leases?" ([51]).

And now, here's the rub: the costs of the leases of the properties entered into by the council. How did they work them out? They appear to have worked out the maximum amount of housing benefit payable, deducted an amount of around £50 per week, and that was it. Thus, CTE got £120 pw for each of the properties grossed up to an annual figure. The Penwith consultant's review noted as follows:

Regarding the discrepancy between the £120 per week rent paid to CTE, and the £175 per week the council charged residents in the single person accommodation, i.e. £55, Mr Lee concluded that this was relatively straightforward because it was comparable to the management fee of £52 the council charged on private sector leases. It was based on the estimated cost of agent's fees, voids, bad debts, repairs and general housing services and its legality was not in doubt. [47]

The issues

After Cornwall took over, it stopped paying the rents on the basis of its reviewer's report. There was another rather crucial issue - changes to HB regulations meant that the calculations of the rent might be out of whack and what was to be done if a household were not entitled to HB? Amazingly, little thought had been given to this risk when the agreements were entered into by Penwith (if the word "jejeune" covers anything, it covers this!), although Restormel did have a provision.

In this action, CTE claimed arrears and the council defended on both private (mistake) and public law grounds (practically all of them).

Mistake

The defence of mistake was clearly a non-starter. Everybody knew what they were doing, but Cornwall had a rather interesting proposition. Penwith and Restormel had no housing revenue accounts ("HRA") after their LSVTs, and the mistake was said to be that the agreements with CTE should have been run through an HRA as well as the fact that the residents would be eligible for HB to meet the rents for which they were liable. Cranston J dismissed this defence on the basis that CTE had no knowledge of the HRA requirement, and Penwith/Restormel had not made a mistake: "None of the reports to the councils' committees mention the HRA. If there was any mistake it was attributable to the fault of the councils, who ought to have known about HRA requirements" ([56]). As regards HB, the agreements were not predicated on the availability of HB and it was not sufficiently vital to avoid the contracts; indeed, even if an occupier was not eligible, Cornwall would have to find the rent from somewhere else in its budget. These agreements were also commercial so reg 9(1) did not apply.

Public Law

On the public law grounds, the starting point (of course) is that burden is extremely high when a public authority is seeking to avoid a contract lawfully entered into on public law grounds. The balance is between protecting commercial contracting and the policy that public bodies must act lawfully. There were three grounds raised: capacity; fiduciary duties; and discretionary decision-making. If you want the punch line now, then it's that Penwith/Restormel were held to have breached their fiduciary duties. But the rest of the judgment will be just as significant to LSVT local authorities concerned by the impact of this judgment (and there may well be quite a few of them).

Capacity

There were two points taken here: the first was about the HRA; the second was about the grants/loans. On the first, the argument for Cornwall was that, although the councils clearly had the power to take the leases, the councils had to run the leases through their HRA - the argument was that rent cannot lawfully be paid if no HRA is kept, and an HRA is a prerequisite of the lawful exercise of powers to take leases over 10 years. Cranston J's position was that this argument was incorrect because the HRA does not operate at the level of individual transactions with a debit value as that value can be made good from elsewhere. I'm not sure that I necessarily follow (ie agree with) that argument but the second point he made was that the leases were with CTE not individual tenants and entry into those leases did not require an HRA and the council's subsequent use of the properties was not relevant to that exercise. Thus, no HRA needed. Again, I'm not convinced that one can unbundle the transaction in that way but a key point for future reference is as follows:

The fact that 25 year leases cannot be accounted for outside the HRA does not render performance of the contracts between CTE and Cornwall Council impossible, or different in quality to any degree. <u>It may simply mean that Cornwall Council must operate an HRA, and if necessary charge no more than local area reference rents</u>. ([70], my emphasis)
As regards the grants and loans made to CTE, Penwith's Homesafe loan to CTE of £350k was unlawful. Not only had the proper procedures not been complied with but also CTE did not qualify for such a loan anyway. Restormel was protected because the Cabinet Committee had authorised the grant.

Fiduciary duties

Cornwall had success here. After a summary of the authorities (*Bromley LBC v GLC* [1983] 1 AC 768, the 'fares fair' case, and *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1), Cranston J understood that local authorities have a fiduciary duty to their council tax payers which included a duty to deploy its financial resources to best advantage, not necessarily thriftlessly, but by balancing its duties to its taxpayers against its other duties. There then followed a discussion of the open market value of these properties, an imponderable because (on CTE's case) these were unlike "ordinary" private rentals, there were no comparables, and the level of HB personal subsidy was set at the standard rate which "should be treated as a carefully considered assessment of the amount which, in each area, it would reasonably be expected to cost to provide accommodation for this group" ([77]).

Cranston J disagreed, however, because "the crucial point is that the councils never had regard to what was the market rent for the various properties leased from CTE" (again !, [79]). the rents had been fixed before the properties had been bought/developed and the figure arrived at was based on the maximum sum available to the councils through rent rebate subsidy: "the rent was formulaic, fixed even before the properties were identified and purchased. The £120 figure was simply multiplied by the number of bed spaces to produce the weekly, and ultimately the yearly, rent for each property" ([79]). In failing to have regard to the market rent, the councils had breached their fiduciary duties.

Discretionary decision-making

This ground concerned improper purposes, irrelevant considerations, failure to take into account relevant considerations, and irrationality. Let me give a flavour of the claim on improper purposes because, in a way, it summarises the problems which the councils had unwittingly entered into (and also the irrelevant considerations):

The improper purposes were said to be to abuse of the housing benefit system by determining rents under the leases with CTE and under the agreements with residents by reference to housing benefit rates; to charge excessive rents to licensees; to pay excessive rents to CTE; to pay such rents to CTE notwithstanding the absence of any adjustment provision for housing benefit changes in the Penwith leases and a provision in the Restormel leases which is virtually worthless; and to pay such rents on the basis that they would contribute to financing move-on accommodation when there was no contractual obligation upon CTE to provide such accommodation and no provision for the repayment of rents if it were not provided. ([82])
It is important to note that these points were disposed of shortly by Cranston J as of no substance, although the provision of move-on accommodation was conceded by CTE: "Foolishly, neither Restormel nor Penwith made the provision of move on accommodation a

contractual commitment on CTE's part. There was not even an incentive in the leases or funding agreements with CTE to live up to the aspiration it set itself." ([84]) That absence of provision suggested that this was not a significant part of the bargain between the parties. If you'll forgive a summary of Cranston J's view of this sub-ground, it is that the reports just about passed muster and all significant relevant matters had been taken into account. Irrationality didn't advance the case any further.

Outcome

The leases were of no effect and Cornwall had a restitutionary claim for repayment of the rents. CTE defended that on the basis of the restitutionary defence of change of position (cue fond memories of being taught CoP by the late, great Peter Birks, who put up with my hangover state at his Thursday 9am classes; RIP). CTE's change of position defence was successful - they had acted in good faith and could not be taken to doubt the councils' decision-making procedures which were of no interest to them; and it did not matter that CTE had changed its position before it received the monies. The equitable outcome was this:

[S]ince the councils have had the benefit they were supposed to under the terms of the leases it is proper that the level of rent payable in respect of Cornwall's occupation should be the amount that was agreed. As for the Penwith £350,000 loans, the equitable outcome is that CTE should repay them in due course in accordance with the terms and conditions of the relevant loan agreements. ([99])

Cranston J: An appreciation

Ross Cranston is a former academic and I would suggest to anybody with sufficient interest to read his magisterial tome, *Legal Foundations of the Welfare State*. OK, he was involved with the Blair government as an MP and Solicitor General, but (in my view) he is one of the outstanding High Court Judges. He certainly demonstrated that accolade in this case. He weaves a comprehensible survey of basic legal principles with academic work (referring, for example, to the great *Law and Administration* by Carol Harlow and Rick Rawlings - one could say that's the LSE connection, but I'm charitable), and deals with the almost impenetrable HRA provisions with aplomb (although I'm not totally convinced correctly). The point about fiduciary duties is potentially far-reaching and may well cause a few LAs to be just a little concerned.

Not a mother-in-law joke

Sun, 23 Oct 2011 16:26:26 +0000

NL

Abdullah v Westminster City Council [2011] EWCA Civ 1171

Do matrimonial home rights apply where notice to leave to a non-tenant spouse has been given by a joint tenant who is not the spouse? A question raised and answered in this homeless case. This was a second appeal to the Court of Appeal on a homeless review decision under Housing Act 1996 Part VII

Mrs A lived with her husband, her 18 year old son and her husband's mother in a two bedroom Westminster tenancy. The tenancy was a joint tenancy for her husband and his mother dating from 2002. Mr A had fled Iraq some years ago leaving Mrs A and her son, who had arrived in the UK in 2009. Mrs A and her son slept in the living room and there were marital problems. Mrs A also suffered from PTSD after torture and from depression.

In June 2009, Mrs A approached Westminster, telling them that her mother in law had told her to leave the house. In June 2010, she applied as homeless, saying that her mother and husband had told her to leave. Westminster found her not homeless. On review that decision was upheld, in part because Mrs A had previously approached them saying she had been asked to leave but had remained in occupation, and largely on the basis of Section 30 Family Law Act 1996 - that Mrs A had the right not to be evicted or excluded from a matrimonial home by her spouse without leave of the Court.

On the section 204 appeal, Mrs A had argued that her mother in law had told her to leave and that she had no right to remain. The mother in law was not prevented from excluding her under s.30. There had been no licence impliedly granted by the mother in law to Mrs A when she moved in, but even if there were, it could be revoked by the mother in law without the consent or participation of the husband. The property was not a matrimonial home, but even if it were, she had no matrimonial home rights against the mother in law.

The appealed was dismissed. Mrs A appealed to the Court of Appeal.

Mrs A argued that the Recorder in the first appeal erred on three points of law:

First the Recorder made findings of fact which were not considered in the review decision. The review failed to find whether the house was the matrimonial home, who had granted the licence to occupy to Mrs A and whether one joint tenant was legally entitled to end a licence without reference to the other joint tenant. These omissions amounted to a failure to investigate and to consider the basis of Mrs A's occupation. The Recorder had made findings of fact in the place of these omissions which overstepped the boundary of a 'benevolent' approach (*Holmes-Moorhouse v Richmond*) to interpretation of a review decision into the Authority's duty of fact finding.

The Recorder had also erred in holding that one joint tenant could not end a licence unilaterally. The Recorder had held that simply because it was the mother in law who had ended the licence, this did not preclude s.30 matrimonial home rights for Mrs A. However, s.30 only applied

to a property that was or was intended to be the matrimonial home, which was not the case here. Further the simple position was that any joint tenant could carve out a licence from the tenancy and any joint tenant alone could end that licence. Each joint tenant was entitled to the benefits of the whole of the tenancy.

Thirdly, the Recorder had failed to consider whether the Council had determined whether it was reasonable for Mrs A to continue to occupy the property. It had to be reasonable for her to occupy on a relatively long term basis. *Ali v Birmingham CC*.

The Court of Appeal gave these arguments short shrift. The opening of the judgment notes that Mrs A would have been arguing exactly the opposite had she been defending possession proceedings, and that rather sets the tone of the decision.

In Mummery LJ's sole judgment, the Court found that the appellant's arguments had focused almost entirely on the alleged legal errors in the Recorder's decision. However, the crucial decision was that of the first instance review, and "Unfortunately and, in my view, unfairly to the Recorder, the legal submissions for the appeal have been floated free of the specific factors on which the review officer based her decision".

The review officer had considered Mrs A's first approach in June 2009 and the length of time that Mrs A had remained in the property before her second approach a year later. The review officer decided that this suggested that the accommodation was still available despite Mrs A being again told to leave.

Mrs A's solicitor had admitted that she had matrimonial home rights over her husband's 'part of the tenancy' but not that of the mother in law.

The review officer had concluded that the evidence was insufficient to find that Mrs A and her husband had separated and, on the medical information provided, Mrs A's conditions could be managed with the treatment she was receiving.

The review officer had made reference to s.30 and concluded that she could find nothing to preclude the application of s.30 just because the mother also had an interest in the house. S.30 was meant to apply when one spouse had a beneficial interest in a property and the other did not, which was the case here.

The review officer noted that on previous occasions, Mrs A had asked to leave the house because it was overcrowded. The reviewer found that it was not so severely overcrowded as to make it unreasonable for her to continue to occupy.

The Court of Appeal was unable to find any error of law in the review officer's decision and concurred with the Recorder. It was not necessary for the review officer to embark on a lengthy legal analysis of the power of the mother, as one joint tenant, to terminate a licence. It was self evident that the husband was a joint tenant. It was self evident that the property was a matrimonial home for the purposes of S.30. It would be "contrary to the objective of the statute and downright absurd" if s.30 could be defeated simply because the husband was a joint tenant with another.

There was still no sign of the mother enforcing her request that Mrs A leave, which went to reasonable to continue to occupy. The review officer had considered the circumstances, including overcrowding, marital breakdown and Mrs A's medical issues in determining whether it was reasonable to continue to occupy.

The Recorder had not strayed into making findings of disputed fact. The primary facts were not in issue and the Recorder was entitled to consider those facts in relation to s.30 and the Housing Act.

There was no point of law arising from the review decision. Appeal dismissed.

Just one small but crucial fact..

Sun, 23 Oct 2011 21:10:32 +0000

NL

Tricky things, ex parte interim injunctions. Dealt with on the papers, or possibly by a phone hearing with a duty Judge, there is little time for detail and, obviously, no argument from the other side. Which makes it all the more important that the applicant gets things right. We noted some stern words on failure to follow protocol and failure to disclose material facts from Munby J here.

A further warning on the nature and extent of disclosure of material facts comes in *R (On the application of Konodyba) v Royal Borough of Kensington and Chelsea* [2011] EWHC 2653 (Admin [Not on Bailii]. The case also involves the jurisdiction for an application for temporary accommodation pending appeal to the Court of Appeal, which, it turns out, is not at all straightfoward, and whether a fresh application can be made while a previous one is under appeal.

We have met Dr Konodyba before, sacking her legal team at the hearing of a second appeal on her negative homeless decision for making a potential successful argument, against her instructions. That appeal was dismissed.

Dr K made a further application as homeless, refused on the same grounds. That also went to a County Court appeal in May 2011, when the appeal was dismissed. Dr K's solicitors served notice of application to appeal to the Court of Appeal on the Council, but this application was still pending while a transcript was obtained.

Meanwhile, Dr K indicated to the Council that she wished to make a further application as homeless, as the A8 accession period for Polish nationals had ended on 30 April 2011. RBKC refused, saying that she could only have one application live at any one time and her previous

one was ongoing with the application to the Court of Appeal. RKBC stuck to that position and did in fact refuse a a further application in July.

On 9 August, Dr K was evicted from her accommodation. Her son, who suffers from mental health problems, was an in patient, but Dr K was stated to have become street homeless (although no details could be provided by her counsel at this hearing as to where she was staying if anywhere).

No request for temporary accommodation was made until a pre-action protocol letter, dated 22 August, in which the claimant's solicitors challenged the failure to accept the fresh application and the defendant's consequent failure to provide temporary accommodation pursuant to section 188(1) of the 1996 Act as well as the defendant's failure to consider providing accommodation pending the application for permission to appeal to the Court of Appeal pursuant to section 204 (4) of the 1996 Act.
RKBC maintained its position on a fresh application and said that it could not provide accommodation pending appeal to the Court of Appeal it was prevented from doing so by virtue of section 54 and Schedule 3 to the Nationality, Immigration and Asylum Act 2002 paragraph 5, because the claimant is a national of an EEA state other than the UK, unless it would be

necessary to provide accommodation to avoid a breach of the claimant's rights under the European Convention on Human Rights (ECHR) or the Community Treaties, see paragraph 3 of Schedule 3.

RKBC's position on the appeal was, of course, that Dr K was not exercising treaty rights. An assessment on ECHR rights would be caried out. Dr K was provided with temporary accommodation while that assessment was done. On 16 September, RKBC decided there would be no breach of ECHR rights in not providing accommodation, one reason for this being that Dr K had alternative accommodation available to her at an address in Bishop's Stortford, this being a private tenancy she held. Dr K was given 4 days to leave the temporary accommodation, on the basis that this other accommodation was available.

Dr K's solicitors sent a further pre-action protocol letter on the termination of temporary accommodation, which did not deal with the reasons given by RKBC. RKBC's reply set their position out in detail, including question the non-disclosure of the Bishop's Stortford tenancy. They requested notification of any JR application so that they could be represented.

The next day, Dr K's solicitors applied for JR and for interim relief in the form of the provision of accommodation for Dr K and her son pending determination of the application for permission to appeal. The interim relief was granted on the papers. No notice was given to RKBC.

RKBC applied the following day to discharge the injunction. This was the hearing of that application.

RKBC argued that:

There was material non-disclosure because the application for interim relief did not draw the Judge's attention to the tenancy at Bishop's Stortford. RKBC produced a tenancy agreement in the name of Eleanor Novi dated 31 October 2010. There had been possession proceedings for non-payment of rent with a possession order in July 2011. A warrant was issued and a application to suspend the warrant made. A hearing on 7 September 2011, attended by the tenant's solicitor and landlord, was adjourned to 23 September. At that hearing, the tenant did not attend, but no date was yet in place for execution of the warrant. The landlord had confirmed that Eleanor Novi was the same person as the one in Dr K's passport photo.

Against this, Dr K's solicitor had filed a witness statement, stating that at the time of RKBC's letter of 16 September, his instructions were that the Bishop's Stortford property was not accommodation available to Dr K and her son and that his instructions remained the same. There was the likely enforcement of the warrant in addition, making the position unclear.

RKBC's second ground was that

by virtue of section 204 A of the 1996 Act, enforcement of the power to provide accommodation pending appeal against a review on a homelessness decision lies exclusively with the County Court and the High Court has no jurisdiction in the matter.
And lastly that applying the proper test, no injunction should be made.

The High Court held:

There was no dispute over the law on injunctive relief in such cases:

applications for interim relief against a local housing authority by a claimant who seeks an order that he or she be provided with temporary accommodation, although none of the relevant authorities were drawn to the attention of Flow J. The claimant must show at least a "strong prima facie case" and the balance of convenience test in *American Cyanamid Company v Ethicon* [1975] AC 396, does not apply, see *Francis v The Royal Borough of Kensington and Chelsea* [2003] EWCA Civ 443-paragraph 16.
On the jurisdiction argument, S.204(4) provides that an Authority 'may' provide accommodation "until the appeal (and any further appeal) is finally determined", and s.204A provides
(1) This section applies where an applicant has the right to appeal to the County Court against a local housing authority's decision on a review.

(2) If the applicant is dissatisfied with the decision of the authority -

(a) not to exercise their power under section 204(4) (“the section 204(4) power") in his case;

(b) to exercise that power for a limited period ending before the final determination by the County Court of his appeal under section 204(1) ("the main appeal"), or

(c) to cease exercising that power before that time

he may appeal to the County Court against the decision.

(3) An appeal under this section may not be brought after the final determination by the County Court of the main appeal.

The argument was that 'final determination' must be read alongside 'and any further appeal' in s.204(4), thus including any further appeal to the Court of Appeal, while the Claimant argued that the words 'and any further appeal' were conspicuously absent from s.204A. The Court held that there was not a strong prima facie case to support the view that the High Court gained jurisdiction once a County Court appeal had been decided and that s.204A probably encompassed accommodation pending appeal to Court of Appeal.

However, as the Claimant pointed out, this was also a claim for judicial review of the Defendant's refusal to accept a further application and there the High Court most certainly had jurisdiction, a point which the Defendant had missed.

On the material non-disclosure, while the letters about the Bishop's Stortford tenancy had been included in the documents to the application and referenced in the essential reading, there was no mention in the statement of facts and grounds, solely a reference to the Defendant stating that Dr K and her son 'had other accommodation available to them'. It could hardly be a surprise if the Judge had missed the significance of this, not least because the Claimant's solicitors had made no acknowledgment of the Bishop's Stortford issue in correspondence, not even to the extent of saying instructions were being taken on it.

When I asked what steps the claimant's solicitors had taken in response to the information in the defendant's letters over an above the evidence set out in [the solicitor's] witness statement to which I have already referred, counsel told me that they took instructions from the claimant who said that the Bishop's Stortford accommodation was not available to her. I was also told that she had been invited to attend court yesterday to: "Put forward those matters referable to the Bishop's Stortford property which she asserts, but for which public funding cannot be justified." Yet the claimant did not attend court yesterday.
The Defendant had produced credible evidence as to the tenancy, but there was no evidence from the Claimant save the simple instruction that the property was not available to her.
While I fully recognise that there is a duty on a local housing authority to make inquiries when considering the discharge of its functions under part VII of the 1966 Act, in the face of the information which the defendant provided before the proceedings began, in my judgment it was incumbent on the claimant and her solicitors to make inquiries as to the true position relating to this property and to inform the court of it when making the application for judicial review and interim relief. That duty has been breached. Further, even yesterday the claimant was deliberately failing to disclose relevant information despite being invited to do so by her solicitors.
A witness statement had been put forward on the morning that this judgment was given, but had not been considered as being far too late.

If the full picture had been before the Judge on the ex parte application, he would not have granted the injunction, but would have listed an urgent hearing. There had been a material non-disclosure.

It was at the present court's discretion to discharge the injunction even if the Claimant had a strong prima facie case in the proceedings. Such a discretion should be exercised with regard to all the circumstances of the case, including the degree of culpability.

Further issues about the accommodation available to DrK had come to light, including the period of supposed street homelessness in August - no application for interim relief had been made during that time. Dr K had not been residing at the temporary accommodation that was provided by RBKC in September for 'several days at a time', leading RKBC to ask her solicitors where she was on two occasions, with no response. Further, her son was enrolled in a 6th form college in Bishop's Stortford from 1 November 2010.

On lack of merit, it is a very restricted jurisdiction on which the Court can interfere with the Council's decision on provision of temporary accommodation, *R v Brighton and Hove council ex parte Nacion* [1999] 31 HLR 1095. Further in this case, provision of accommodation could only have been under the ECHR, as the Council were otherwise precluded under the 2002 Act.

While the Claimant's letters on the fresh application had raised 'Community rights', there was no explanation in them or the grounds of JR as to how having the main EU rights after April 2011 had improved Dr K's position. At the present hearing, recourse was again had to the *Baumbast* argument raised before April 2011, but no explanation of how the position had changed since the dismissal of the County Court appeal such as would merit the fresh application. There was no strong prima facie case and the Claimant's argument was inadequate. In view of the Bishop' Stortford property issue, there simply was no viable human rights argument. There was also no prima facie case on the provision of temporary accommodation following the second homeless application.

Finally, on the issue of whether RKBC should have accepted the most recent application while the appeal on the previous one was still pending:

I have found this is difficult issue, which suggests that it is arguable that this defendant's decision is based on a misconstruction of a statutory scheme. On the other hand, having regard to the matters I have pointed out, I am not persuaded that the claimant has reached the threshold of showing a strong prima facie case in this respect.
There was therefore no strong prima facie case on any ground on which interim relief would be granted. Even if there was a strong prima facie case on the failure to accept a fresh application, the duty to provide temporary accommodation under s.188(1) only arises if the

Defendant had "reason to believe that an applicant may be homeless, eligible for assistance and have a priority need.". As they had not accepted the application, this question had not been considered by RBKC, making injunctive relief premature. That said:
there will cases where, if there is a strong prima facie case that the authority's decision not to accept an application is unlawful, it can be said with some confidence that there is a strong prima facie case that the duty to accommodate would arise such that on an application for interim relief an injunction would be granted.
In the light of the Bishop's Stortford tenancy, that was not the case here, although it was possible that Dr K may be threatened with homelessness.

Even if this where wrong, this was a case were interim relief would be discharged on grounds of material non-disclosure, for the reasons given above.

In my judgment the application for interim relief and the claimant's opposition to the defendant's application to discharge the injunction granted by Flow J is a gross abuse of the court's discretion to order interim relief and the order dated 22 September is discharged forthwith. The application for permission was not determined at this hearing, the Defendant had not yet filed grounds of defence. However, there was a question whether the claim in relation to the failure to take a fresh application was made promptly.

Costs order reserved for the Defendant to consider applying for a waste costs order.

Comment

Oh dear.

Oh dear, oh dear, oh dear. I sometimes have nightmares like this.

The procedural point on temporary accommodation pending final determination of the appeal is interesting and potentially difficult. What if TA is terminated after an unsuccessful s.204 appeal but while an application for permission to appeal to the Court of Appeal is underway. Can it be the case that a fresh application must be made to the County Court? This was not a final decision on the issue, just a decision on the prima facie strength of the argument, but the Admin Court clearly leaned towards s.204A excluding it from jurisdiction. What of the Court of Appeal itself - would the route be an urgent application for interim accommodation pending permission to be made to the Court of Appeal itself? Or should the County Court be asked to make an order continuing TA on condition that an application for permission to appeal be made within a fixed period?

On the issue of a fresh application while a previous one is under appeal, the Admin Court again does not reach a final conclusion, but I think that the tentative conclusion that RBKC was misreading the statutory provisions in insisting it could not take the fresh application is probably right.

But the headline element of this case has to be the requirement to make sure that the full situation is clear in the statement of facts and grounds of any ex-parte application, certainly for interim relief. It isn't enough for details to be hidden in the documents, even if flagged as essential reading - they must be set out and addressed up front.

How to be 'minded to'?

Sun, 06 Nov 2011 15:50:16 +0000

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Mitu v London Borough of Camden [2011] EWCA civ 1249

In which the Court of Appeal splits over the proper interpretation of Regulation 8(2) of The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, while agreeing on the outcome in this case. Reg 8(2) being the provision that if, in reaching a s.202 Housing Act 1996 review decision:

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 brief facts were that Mr M had applied as homeless to Camden. He said he was homeless as the result of a domestic dispute, that he suffered from depression and epilepsy, anxiety and anger management issues. A medical report was done by a Dr Jackson on the basis of Mr M's medical records, but without seeing him. Dr Jackson was not Mr M's usual GP.

Camden found Mr M intentionally homeless and not in priority need, owed only the s.190(3) duty to the intentionally homeless to provide advice and assistance. Mr M requested a review. Mr M's solicitors made representations that the wrong legal test had been applied by the decision maker and that "You refer to a medical report by our client's doctor Dr Jackson we do not know what report you have considered as neither the writer nor the client knows who Dr Jackson is."

The review officer found that Mr M was not intentionally homeless but that he did not have priority need. The s.202 review decision addressed the medical report:

"Your letter included no new medical information to consider and confirmed our existing understanding of Mr Mitu's medical condition … You have received a copy of the completed medical assessment form, completed by Dr Jackson on behalf of Mr Mitu's usual[ly] GP, Dr Emma Parsons using information taken from the patient's notes. You pointed out that your client did not know who Dr Jackson was but, in these circumstances, I am satisfied the information is reliable."
The review officer also decided that Camden would not exercise its discretion under s.192(3) Housing Act 1996 to provide accommodation, but just owed the s.192(2) duty to advise and assist those not in priority need to find accommodation.

Mr M appealed to the County Court on the basis that the review officer had not followed the correct procedure. Either reg. 8(2) was engaged and Mr M should have been given the opportunity to make representations, or at the very least the review officer should have explained why reg 8(2) wasn't engaged. The appeal was dismissed. Mr M made a second appeal to the Court of Appeal.

Lewison LJ found that:

i) 'the original decision' in reg 8(2) meant the whole s.184 decision, and although there were discrete decisions on eligibility and what if any duty was owed in s.184, it would be wrong to treat them as discrete in deciding if there was a deficiency in 'the decision'.

ii) The words of reg 8(2) must be interpreted in the light of their purpose, set out by Carnwath LJ in *Hall v Wandsworth LBC* [2004] EWCA Civ 1740 at 26:

Thus, the requirement for advance notice of the intended decision in certain cases does not derive directly from the statute itself. The thinking behind such a requirement seems to be that a bare right to make representations on the first decision will not be sufficient, if that decision was itself flawed in some respect, so that it does not represent a full and reliable consideration of the material issues. In that event the applicant's rights are reinforced in two ways: first, by requiring the reviewing officer to give advance notice of a proposed adverse decision and the reasons for it; and, secondly, by allowing the applicant to make both written and oral representations on it.
This was supported in *Banks v Kingston-Upon-Thames RLBC* [2008] EWCA Civ 1443 on the 'objective' of Reg 8(2).

The meaning of 'deficiency' was set out by Carnwath LJ in *Hall v Wandsworth* at 29:

29 …The word "deficiency" does not have any particular legal connotation. It simply means "something lacking". There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge. If that were the intention, one would have expected it to have been stated expressly. Furthermore, since the judgment is that of the reviewing officer, who is unlikely to be a lawyer, it would be surprising if the criterion were one depending solely on legal judgment. On the other hand, the "something lacking" must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. Whether that is so involves an exercise of "evaluative judgment" … on which the officer's conclusion will only be challengeable on Wednesbury grounds.

30 To summarise, the reviewing officer should treat reg.8(2) as applicable, not merely when he finds some significant legal or procedural error in the decision, but whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker. In such a case, if he intends to confirm the decision, he must give notice of the grounds on which he intends to do so, and provide an opportunity for written and (if requested) oral representations.

The relative importance of a flaw, which must be of sufficient importance, is to be considered as per Lawrence Collins LJ in *Banks v Kingston-Upon-Thames RLBC; Makisi v Birmingham City Council* [2011] EWCA Civ 355;
… although the original decision itself cannot be faulted, it came to have a deficiency which was of sufficient importance to justify the additional procedural safeguard, in the sense that further representations made in response could have made a difference to the decision that the reviewing officer had to make.
iii) The present case was on a procedural issue, not a substantive one on whether the decision could stand. Lord Neuberger's obiter comments in *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7 on decisions being capable of surviving an error in reasoning were not relevant.

iv) In *Lambeth LBC v Johnston* [2008] EWCA Civ 690, Rimer LJ emphasised that the right to make further representations was not at the discretion of the reviewing officer, based on the officer's view of whether the representations would be of any value.

v) Camden argued that "a flaw in a decision would only amount to a "deficiency" if (a) it was a relevant flaw, in the sense that it was a flaw in the reasoning on an issue on which the reviewing officer was minded to find against the applicant despite the existence of that flaw; and (b) it was a sufficiently serious flaw to justify the invocation of the additional procedural safeguard". However, this meant writing words into the regulations, narrowing its purpose and narrowing the meaning of 'deficiency' set out by Carnwath LJ. It also went against Lawrence Collins LJ's view of when the procedural safeguard was justified. There was no reason to exclude cases which fell within the ambit of the literal words of Reg 8(2)

vi) In the present case, the review officer had rejected the original decision that Mr M was intentionally homeless, but confirmed the decision that Mr M did not have priority need. The review officer therefore decided an issue against Mr M's interests. The review officer appears to have found that the original decision did not address the issue of Mr M's intentional homelessness adequately, so it was not a reliable consideration of the material issues. 'Broadly and untechnically' if the review officer considers the decision was wrong on an important aspect of the case, then he has identified a deficiency in the decision. So the decision here was confirmed, in part, despite having identified a deficiency. The decision was 'confirmed on different grounds'. A Reg 8(2) notice should have been issued. To hold otherwise was to say that the review officer had the power to decide that nothing the applicant could say would cause him to change his mind.

In his representations Mr Mitu, through his solicitors, had called into question the reliability of Dr Jackson's assessment. Mr Bond nevertheless concluded that Dr Jackson was reliable. Further representations on that question would have given Mr Mitu a chance to persuade him that he was wrong. In addition the fact is that in the present case Mr Bond considered whether Camden should exercise its discretionary power to secure accommodation for Mr Mitu; and decided that it should not. Whether or not he was legally obliged to consider that question, if Mr Mitu had had advance notice that he was minded to reach that decision, he would have had the opportunity to persuade Mr Bond that the discretion should have been exercised in his favour.
Sullivan LJ agreed with Lewison LJ

Rix LJ agreed that the appeal should be upheld, but took a different view on when Reg 8(2) was engaged.

In this case:

the determinative factor is that the deficiency or irregularity identified by the reviewer in respect of the issue of intentional homelessness meant that, if he was minded, as he was, to uphold the original decision in finding that Mr Mitu was not a priority case, his ultimate decision on review would be that Mr Mitu was owed a section 192(2) duty, coupled as it was with a section 192(3) discretion, rather than a stand-alone section 190(3) duty. The effect of the reviewer's way of looking at Mr Mitu's application was that there was not only an inadequacy in dealing with the question of intentional homelessness but also and in any event an inadequacy in giving consideration to the question of Camden's discretionary power under section 192(3). In such circumstances, the reviewer was obliged by regulation 8(2) to give Mr Mitu notice of what he was minded to decide and why, and to afford Mr Mitu an opportunity to make further representations, oral or in writing. It is ultimately clear in the light of Lewison LJ's analysis that, even though the content of the section 192(2) duty is the same as the content of the section 190(2) duty, the fact that the former duty, unlike the latter duty, is coupled with a discretionary power to secure accommodation for the applicant entails that the statutory notice and the right to make further representations in the knowledge of what the reviewer is minded to decide are valuable rights which, on a purposive construction of the regulation, fairness to the applicant requires him to be afforded.
However, a purposive construction of the regulation, as set out in *Hall v Wandsworth LBC* and *Banks v Kingston-Upon-Thames RLBC* meant that what was required was more than the finding of any irregularity or deficiency. Rather the deficiency or irregularity must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. There is therefore a two stage process, first the identification of a deficiency or irregularity in the initial decision and then an evaluative judgment that the deficiency is material to the fairness of the procedure.

It is for the reviewer to evaluate whether the deficiency is of 'sufficient importance'. *Lambeth LBC v Johnston* might seem to go against this view, but it was a case decided between *Hall* and *Banks* and should be considered on its own facts, as in that case the submission that the reviewer had a subjective discretion whether or not to send a notice could not succeed. The Recorder on first appeal in that case had also decided that it was a case where potential further representations had not been rendered otiose. So Rix LJ's view that the flaw must be of sufficient importance to the fairness of the procedure to engage Reg 8(2) was not incompatible with *Johnston*.

If, therefore, in the present case, it could have made no difference to Mr Mitu whether he failed on the ground of intentional homelessness or on the ground of not being in priority need, I would have considered that the flaw identified in the original decision's conclusion about the former issue could not have mattered, since the reviewer decided that issue entirely in Mr Mitu's favour. As it is, however, the flaw did matter, and I agree that this appeal should be allowed.
Comment

I think I have to disagree with Rix LJ on this. The relevant 'difference' for Mr M is not between failing on intentionality and failing on priority need, but between failing and not failing at all. That is the point of the further representations. That would be so even if there was no difference at all in terms of outcome between failing on intentionality and failing on priority need.

Despite Rix LJ's attempts to restrain *Johnston* to its particular facts, the statement of Rimer LJ at para 51 is unqualified:

reg.8(2) is not a discretionary option that the review officer can apply or disapply according to whether or not he or she considers that the service of a "minded to find" notice would be of material benefit to the applicant. Regulation 8(2) imposes a dual, mandatory obligation upon the review officer. First, to "consider" whether there was a deficiency or irregularity in the original decision or in the manner in which it was made. Secondly, if there was—and if the review officer is nonetheless minded to make a decision adverse to the applicant on one or more issues—to serve a "minded to find" notice on the applicant explaining his reasons for his provisional views. In my judgement, there is no discretion on the review officer to give himself a dispensation from complying with either of those obligations. As regards the first part of it, I have referred to the fact that it is not a purely subjective exercise but that failure to arrive at the right "consideration" can be challenged on usual public law grounds. As regards the second part, the language of reg. 8(2) is unambiguously mandatory—"the reviewer shall notify … The assessment of the importance of the flaw is, as Lawrence Collins LJ is quoted as saying above, to be considered in terms of whether further representations in response could have made a difference to the reviewing officer's decision, not, as Rix LJ appears to suggest, whether there is a difference between failing on the original decision and the basis on which one fails the review. This cannot be a subjective decision for the review officer.

However, as Rix LJ was in the minority, it is Lewison LJ's judgment that sets out when Reg 8(2) is engaged and what must be done.

Proportionality. A precis on 'summary'

Tue, 08 Nov 2011 14:58:39 +0000

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Holmes v Westminster City Council [2011] EWHC 2857 (QB)

An interesting appeal from a summary possession order on the issue of consideration of proportionality. While the outcome is not, perhaps, a surprise, some of the arguments are. Plus this is an example of the High Court grappling with how the County Court should approach a summary possession claim, post *Pinnock* and *Powell*.

Mr H had a non-secure tenancy from Westminster as temporary accommodation following Westminster accepting a s.193 Housing Act 1996 duty in 2005. In 2009, Westminster told Mr H it had discharged duty following his failure to attend two appointments for inspection of his accommodation. Mr H requested a review. In the interim, a notice to quit was served and possession proceedings brought in August 2009. These were adjourned pending the outcome of the review. The review decision in January 2010 withdrew the discharge.

However, in February 2010, before the possession claim was withdrawn, there was an alleged assault by Mr H on two council officers. Westminster pursued the possession claim. It should also be noted that Mr H has a history of mental health problems. He has been diagnosed with severe anxiety, obsessional behaviour, depression, paranoid personality disorder, seasonal affective disorder, alcohol dependent syndrome and possibly post traumatic stress disorder.

Mr H filed a defence and Westminster applied to strike it out and alternatively for a possession order on a summary basis. At the hearing of the application, Mr Recorder Widdup made a summary possession order and struck out the defence.

Mr H appealed to the High Court. We'll come to the grounds of appeal later on, but overall, the basis was that a summary order should not have been made when there were disputed issues of fact that went to the proportionality of possession proceedings.

Mr Justice Eady's judgment contains a potted history of human rights and public law challenges to summary possession proceedings, from *Kay v Lambeth* to *Manchester CC v Pinnock* and *Hounslow LBC v Powell*. This is worth reading, but largely straightforward, save that Eady J seems to have some trouble with 'exceptionality'. While he notes the very clear statements in *Pinnock* that 'exceptionality is an outcome not a guide' in considering an arguable Article 8 proportionality defence, he returns to the issue in *Powell*, stating:

It was again emphasised at [37], as in Pinnock, that

" … there will be no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order. It will be enough that the authority is entitled to possession because the statutory pre-requisites have been satisfied and that it is to be assumed to be acting in accordance with its duties in the distribution and management of its housing stock".

It will be observed that this statement of the law comes close, although it has been disavowed, to espousing a test of exceptionality.

[I would say, in passing, that this is not so. That passage in Powell addresses whether a local authority needs to provide a justification for seeking an order in each case and, in saying that they don't, sets out the presumption that the authority would be acting under housing management duties as a justification. That passage has no bearing on the exceptionality of a proportionality defence, as the question is not necessarily whether the LA's actions were justifiable, but whether they were proportionate. Hypothetically, there could be many situations in which the tenant's Article 8 rights made seeking an order disproportionate, but this would not affect a presumption that the Council was acting in accordance with its housing managment duties for the public good.]

Having established the outline of the proportionality defence and that the Supreme Court held that it applied to non-secure tenancies provided under s.193 HA 1996, Eady J looks at the limited guidance to the County Courts to be found in *Pinnock* and *Powell*, He cites para 41 in Powell:

In the ordinary case the relevant facts will be encapsulated entirely in the two legitimate aims that were identified in Pinnock … at [52]. It is against those aims, which should always be taken for granted, that the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances. It is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration of the issues of lawfulness or proportionality. If this test is not met, the order for possession should be granted. This is all that is needed to satisfy the procedural imperative that has been laid down by the Strasbourg court
From this Eady J takes the view that the County Court Judge should
deal with possession claims in homelessness cases on a summary basis unless a proportionality argument has been raised which can be categorised as "seriously arguable". That is to say, I would presume, it needs to be shown that there is a serious argument available that the

public policy considerations guiding the local authority's application for possession should be outweighed in the particular circumstances by Article 8 considerations
On the specific issues raised by a proportionality challenge in a non secure/part VII accommodation case, it is noted that it is open to the tenant to challenge the factual basis for the reason why possession is sought and that the tenant should be told of the reason, pace Lord Phillips at 114 in Powell
Sometimes the authority will be reacting to the behaviour, or perceived behaviour of the tenant. In the latter event the authority may be proceeding on the basis of a factual assumption that is unsound. If the only reason that the authority is seeking possession is that the tenant has been guilty of bad behaviour, obtaining possession will not further the legitimate aims of the authority if that factual premise is unsound. If the defendant is not informed of the reason why the authority is seeking possession he will be denied the opportunity of displacing the presumption that the authority's action will serve a legitimate aim.
In the present case, Mr H had indicated in some documents that he wished to challenge the factual basis of the allegation of assault, stating that he had in fact lost his balance and fallen on the Council officers who were trying to serve him when he tried to rip up the document. This was not in the pleadings, however, and was not the only basis on which the Recorder's decision was appealed.

Turning first to Westminster's submissions, they began with what we might call a 'bold' (in the Yes Minister sense) argument that the proportionality defence didn't apply to non secure/part VII accommodation, submitting:

that Parliament had determined that the Council should have a right to possession without the court considering its reasons: see the Housing Act 1985, Sch 1 at paras 4 and 6. It was submitted that it would be antithetical to the Council's right to manage such accommodation if it were required to give a tenant a right to question a reason for seeking possession. It was argued that there was no legal basis for grafting the rules of natural justice on to a process where the right to possession is considered to be, for sound public policy reasons, unconditional. It was accepted that the rules of natural justice might come into play at a later stage, if the Council sought to argue that Mr Holmes had made himself intentionally homeless. Such considerations should not, however, intrude upon the process of obtaining a summary order for possession.
Rather gently, Eady J found that the Supreme Court had said that the proportionality defence was available and that was that.

It was clear on the facts that the alleged behaviour of Mr H in February 2010 was the reason the Council sought possession. But that in itself did not decide the question of whether the Recorder was entitled to proceed on a summary basis.

Westminster submitted that the Recorder was entitled to do so, that there was no requirement to hold a 'quasi criminal trial' to determine whether Mr H was guilty of assault. What mattered was whether to Council had reasonable grounds to believe he had behaved in the way described by its officers. Unacceptable conduct did not have to reach the standard of a criminal offence or even a civil wrong, nor need to be found so on the evidence. The Council's own anti social behaviour policy set out that it would take 'further action' to protect staff facing serious anti social behaviour and that in the circumstances this included eviction.

On the disputed facts, no positive case for a defence had been pleaded by Mr H. There was, therefore, no 'seriously arguable' defence on disputed facts for the recorder to consider. The burden was on Mr H in the light of the evidence before the Court, but he had not shown 'substantial grounds' for the nedd for a hearing. The Recorder was entirely entitled to decline to give directions for a hearing on the disputed facts and to proceed with a summary hearing under CPR 55.

In addition to raising the disputed facts of the February incident, Mr H argued that:

i) "the Recorder should have given directions to resolve any outstanding dispute as to the underlying facts, for the reason that the relevant law was in a process of development." The hearing was between the judgments in *Pinnock* and *Powell*.

Held, this was not the case. The law had been clarified in Pinnock, before the recorder's decision and the further clarification in Powell was to the same effect in so far as relevant.

ii) Mr H argued on public law grounds, that the Recorder had disregarded relevant matters which should have been taken into account. These originally included Housing Corporation guidance, which was not pursued, and Secretary of State's Guidance the rehabilitation of perpetrators and support for vulnerable groups. This was also dropped, as it had not been raised before the recorder at all. This left the Council's own policy on Anti-Social Behaviour as the matter that the Recorder should have had regard to.

The Council's ASB policy stated that enforcement, including by eviction, would be used in appropriate circumstances and where other attempts at resolution had failed or been exhausted.

Held: The Council had had reference to its ASB policy and indeed had referred to it in a letter to Mr H in April 2010. A further letter had referred to the seriousness of the incident of February 2010 and the decision to pursue possession as a consequence. This was consonant with the policy. So the policy played a significant part in the reasoning behind the decision to pursue possession, unlike *Barber v Croydon London Borough Council* [2010] HLR 26. The Recorder was entitled to conclude there was no cogent evidence on a breach of any policies.

iii) The Recorder should have found a breach of s.49A of the Disability Discrimination Act 1995 by the Council.

Held:

The Recorder in fact asked counsel appearing for Mr Holmes, as emerges from the transcript of the hearing, how it was that she alleged the Council was in breach of its statutory duties. Her response was unspecific, in the sense that she referred to the Council not having taken sufficient account of Mr Holmes' "mental health issues". The learned Recorder rightly noted that there was "a need for cogent evidence of breach of policies or duties under statute before such a defence can carry weight". He concluded that he was unable to identify any cogent

evidence to the effect that there had been a breach of inter alia the 1995 Act
The Recorder had been right to do so.

Westminster argued that "an appellate tribunal could refuse relief in this respect on the basis that any deficiency in the discharge of the statutory duties would be made good following eviction, by reason of the fact that Mr Holmes would continue to be owed duties as a homeless person: see e.g. the discussion of the Court of Appeal in *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834". However, there was no need to decide on that point.

iv) Mr H argued that the Recorder had applied the wrong test on deciding to strike out the defence. He had asked if there was a real prospect of success, where the test on the strike out was whether it was 'bound to fail'.

Held: The Recorder was granting summary possession under CPR 55. The appropriate test for the strike out did not arise directly. However, even if it was a strike out under CPR 3.4, he was entitled to conclude that the defence had no reasonable prospects of success. " It is clear from his judgment that he took the view that the matters raised in the defence were in fact bound to fail."

Appeal dismissed.

No facts please, we're reviewing

Sun, 13 Nov 2011 23:51:35 +0000

NL

Bubb v London Borough of Wandsworth [2011] EWCA Civ 1285

In an appeal under s.204 Housing Act 1996, should the County Court determine disputed factual issues? In this second appeal, the Court of Appeal effectively holds not.

Ms Bubb was in temporary accommodation after Wandsworth accepted the full s.193 housing duty. She was accommodated at a property called Trayfoot Lodge but after a year, in March 2009, she was moved to a property called Clarkson House. In August 2009 Wandsworth decided to offer permanent accommodation in a property called Alfreda Court. Wandsworth's case was that a letter was sent, by hand, to Ms B at Clarkson House on 11 August, setting out the 'final' offer and setting out that this "is a final offer for the purposes of section 193(7) …". It further informed Ms Bubb that, if she thought that Alfreda Court was unsuitable, or wished to refuse it, she had the right to seek a review within 21 days of the offer."

Ms B denied having received that letter of 11 August. She relied on the fact that an identical letter dated 5 August was sent to Trayfoot Lodge, which it was accepted she had not received. There were subsequent telephone conversations between Wandsworth officers and Ms B, and she inspected Alfreda Court on 25 August. She refused the offer in a meeting with a Wandsworth officer on 2 September. Wandsworth then discharged duty under s.193(7). All Wandsworth's letters after 11 August were sent to Trayfoot Lodge, not Clarkson House, including the letter discharging duty.

Ms B requested a s.202 review. An initial review was quashed, then a Mr Adelaja carried out a new review. The review decision in March 2010 addressed both the suitability of the property for Ms B and the issue under appeal, whether she had received the letter of 11 August 2009 including the statutory warning of the consequences of refusing. The review found that the property was suitable and that Ms B had received the letter of 11 August. Ms B appealed to the County Court.

There were a number of grounds of appeal, all dismissed, but most were given full reasons in the Judgment. On the present issue, the County Court Judge simply stated that the Review officer was entitled to find that Ms B had received the letter and had set out his reasons for so finding.

Ms B appealed to the Court of Appeal, having been given permission at oral hearing to appeal "against the Judge's refusal to quash the finding in the Review that Ms Bubb had received the 11 August letter - and hence to appeal against his refusal to quash Mr Adelaja's conclusion that Wandsworth could rely on section 193(7)."

Ms B argued that i) the County Court Judge should have determined for himself the relevant facts relating to the issue of whether or not she had received the 11 August letter and in any event the Judge should have received oral evidence; and ii) that "even if the Judge should have approached the issue on a classic judicial review basis, he was wrong to conclude as he did."

On i) Ms B argued that the assessment of whether or not she had received the letter was not an assessment involving a value judgement for Wandsworth, but a matter of hard fact to be determined by the Court.

The argument was based on *R(A) v Croydon London Borough Council* [2009] UKSC 8, in which the Supreme Court determined that age assessment was a question of fact for the Court in s.20 Children Act Judicial Review proceedings.

However, the Court of Appeal were not impressed, pointing out that the decision in that case was based on the wording of the statute.

While under Part VII Housing Act 1996, a number of what could be described as value judgements were assigned to the Local Authority, such as whether someone was homeless or in priority need, it was at first sight the case that a 'true of false' decision on something like

whether the applicant had received notification under s.193(7) was not expressly assigned to the Authority. However the division between value judgements and true/false factual issues was not so clear cut. Assessment of homelessness involved factual questions and assessment of whether a notification was received might well involve value judgements on the honesty or reliability of the applicant.

But the issue was decided by s.204(1) - any appeal to the County Court from a s.202 review is limited to a point of law. There was no jurisdiction for the Court "to set itself up as a finder of the relevant primary facts for itself."

The County Court jurisdiction was "in substance the same as that of the High Court in judicial review", *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5. Lord Bingham in that case had held that a review decision may be quashed:

"not only ... if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable or ... if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact."

The County Court Judge did not and should not have set himself to establish whether Ms B had received the letter. The County Court judge's role was rather simply asking himself whether the Review's finding that she had received it should be quashed on one or more of the grounds identified by Lord Bingham, above. Ms B's first argument failed.

On whether the Judge should have heard oral evidence, Ms B submitted that even if the appeal hearing was effectively a judicial review, this should not have prevented the Judge hearing oral evidence and in the circumstances this would have been the appropriate course.

While it is, as a matter of principle, open to a Judge in a judicial review to permit parties to adduce oral evidence, following O'Reilly v Mackman [1983] 2 AC 237, this should only be in exceptional cases. The function of Judicial Review is review, rather than a fresh decision. Even when it is an issue of evidence as to factual findings made or not made in a decision, there should only rarely be a need for live witnesses. Even documentrary evidence not before the original decision maker is questionable. "However, particularly given the nature of hearings under section 204, the wide terms of section 204(3), and the good sense and experience of the County Court Judges, nothing in these observations is intended to cut down the flexible and practical approach to section 204 appeals adopted by the County Court."

In the present case, there was no conceivable ground for suggesting that live evidence should have been heard by the Judge. The review was detailed and there was no suggestion of subsequent evidence having come to light.

On ii), was the Judge wrong to reach the conclusions he did?

Ms B argued that the Judge should have quashed the decision that she had received the 11 August letter on the basis of the evidence that was before the review officer. She also argued that the Judge's very brief discussion of the issue should lead to this appeal being successful.

Held, on the brevity of the judgment:

I do not consider that that would be a good reason for allowing this appeal. If this court overturns a full and careful judgment in a judicial review case, because, on one of many points he had to resolve, the Judge merely said that the primary fact-finder was entitled to find a disputed fact in the way that he did, it would send out a most unfortunate message. There is currently much concern about the increasing length of judgments. This is a problem caused by a number of factors, but a significant factor is a worry on the part of the judgment-giver that he may be criticised on appeal for not dealing, often in some detail, with every point that has been raised.

While a party should know why the Judge reached the conclusions he or she did as a fundamental principle, there was no need for the judgment to do into more detail that this principle required. Here the Judge had decided that a clear conclusion by a primary fact-finder, set out in detail, was a conclusion that they were entitled to reach on the reasons given. There was no need to repeat the facts and arguments in the judgment.

Having said that, I accept that, if, as in this case, the judge sets out no independent reasoning of his own, there is a greater likelihood of an appellate court giving permission to appeal, especially if the applicant is able to cast real doubt on the reasoning or conclusion of the original fact-finder. Having read the full judgment giving permission to appeal, I strongly suspect that the complete absence of any independent reasoning on the part of the Judge on the point at issue was a significant and understandable factor in Sedley LJ's thinking. I intend no criticism of the Judge in this connection, but, with hindsight, it would have been better if he given a little more reasoning on this point in his judgment.

In a second appeal in a Part VII matter, the Court of Appeal's function is normally to review the s.202 decision, rather the s.204 appeal decision, *Royal Borough of Kensington & Chelsea v Danesh* [2006] EWCA Civ 1404. So the appropriate course in what remained of this appeal was to decide whether the review officer's decision that Ms B had received the 11 August 2009 letter could stand.

In exercising the reviewing function the Court would ask itself the questions set out by Lord Bingham, above, specifically "there [was] no evidence to support factual findings made or they [were] plainly untenable or [whether] the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact." The Judge below had said "that Mr Adelaja, who conducted the section 202 review, was

"the arbiter of fact", and the "weight to be given to the evidence ... is for him alone"". This might be hyperbolic in the latter part as the Court in a s.294 appeal can review and if necessary reverse finding of fact.

In addition, and following Laws LJ's suggestion of a sliding scale of review, depending on the nature and gravtiy of what was at stake, *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, a reviewing Court should look with some care at the basis for the factual findings, given the importance for Ms B and her son and the 'one off' nature of the case for Wandsworth.

The Court of Appeal judgment then details Ms B's arguments on the facts and addresses itself to the review decision. The finding is that:

in the light of his careful investigation and the reasons which he gave (as summarised in paras 38-42 above), I have reached the conclusion that [the review officer] Mr Adelaja's decision that Ms Bubb received the 11 August letter cannot be impugned. To revert to Lord Bingham's test, it cannot be suggested that "there [was] no evidence to support" Mr Adelaja's conclusion, or that the conclusion was "plainly untenable", or that he "misunderstood or [was] ignorant of an established and relevant fact".

Appeal dismissed.

I understand that Ms Bubb has applied for permission to appeal to the Supreme Court. More information on that when we get it.

That must be annoying

Sun, 04 Dec 2011 17:34:17 +0000

J

Butt v LB Hounslow [2011] EWCA Civ 1372 is, frankly, daylight robbery. You'll remember that in *Bubb v Wandsworth* (our note here), the Court of Appeal made clear that the county court on a s.204 appeal should not start finding facts. Ever.

So, we come to *Butt*. The issue was whether or not the reviewing officer had taken certain matters into account and how the review decision had come to be made, especially, which officer had been involved in that decision. To deal with this issue, the Circuit Judge allowed the review officer to give oral evidence on both issues. And so an appeal to the Court of Appeal. You might have thought that permission would be granted.

Oh no. For, in the view of the MR, it would be "little short of absurd" if disputes over the review procedure could not be resolved by hearing oral evidence as to what happened during the review procedure. Permission refused.

Frankly, this is absurd. How on earth you square this with *Bubb* is beyond me. No doubt this permission decision will be referred to in the application for permission to appeal to the Supreme Court in *Bubb*. On a personal note, I suspect that Toby Vanhegan (a longstanding friend of this blog) must be very annoyed about this, having acted for both *Bubb* and *Butt* and having lost both, for wholly contradictory reasons.

When should an offer be 'suitable'?

Tue, 06 Dec 2011 23:10:28 +0000

NL

Abed v City of Westminster [2011] EWCA Civ 1406

Is an offer of temporary accommodation under s.193(5) Housing Act 1996 unlawful if the Local Authority has not assessed the suitability of the accommodation before making the offer? This was the issue before the Court of Appeal.

Ms A had had her homeless application accepted by Westminster. She and her son were offered temporary accommodation in Ilford. Ms A said that it was not suitable, in part because she was acting as the carer for a disabled nephew in Paddington 5 days a week. She also referred to her and her son's medical conditions. She requested a review (without having accepted the property).

Westminster reviewed and upheld the decision that the property was suitable. Ms A appealed. By way of compromise of that appeal, Westminster undertook a further review. The decision was again confirmed and Ms A appealed again.

Ms A's ground of appeal, not made before the County Court, was:

The single issue is that Westminster followed an unlawful process in making its offer to the appellant because it did not assess the suitability of the accommodation for her needs before making the offer. Thus the entire focus is on the position on, and before, the date of the offer on

11 February 2010. No criticism is addressed to the review process or to the review decision as such. In terms Mr Gannon contends that the ability to challenge the suitability of an offer by way of the review process of the appeal is not an adequate substitute for ensuring that the inquiry and assessment process as regards suitability should take place before the initial offer is made.
Ms A relied on Collins J in *R v Newham London Borough Council, ex parte Ojuri* (No 3) (1998) 31 HLR 452. That case was concerned with suitability and Newham's failure to address suitability before making an offer of 'what was available' - a B&B. Newham's failure to consider suitability meant that it's decision was quashed.

However, that was a Judicial review decision on the temporary duty under s.188, to which the s.202 review and s.204 appeal procedure did not apply. The Court of Appeal therefore found it could not be taken as a precedent for the proposition that a failure to consider suitability before making an offer was unlawful and ineffective, without being curable by the statutory review process. That said, *Ojuri* may be a helpful indicator of the nature of an Authority's duty before it makes an offer.

Ms A also raised *R v Islington London Borough Council Ex parte Thomas* (1998) 30 HLR 111 which refers to the need for the Authority to investigate factors relevant to suitability. In the present case, Westminster had not made any efforts worth regard about factors relevant to suitability prior to making the offer. This, Ms A submitted, made the offer unlawful and initially and incurably flawed.

When Ms A was pressed on the relevance of the statutory review process, it was accepted that there might be a case in which such a defect in the original process, if taken as an objection and properly investigated in the review process, could still be cured if the reviewing officer came to the same conclusion by a fresh and proper process. In which case, the review decision might not be vulnerable to appeal. But in any other case, the review process could not cure the original failure.

But, Ms A also had to accept, a reviewing officer could not be criticised for not having addressed the adequacy of the initial process if it had not been called into question in the course of the review. No such point had been taken in Ms A's review, meaning that Ms A's argument was at a point of generality above the facts of the present case and which could not lead to this appeal being allowed.

The Court of Appeal found that the statutory review procedure encompassed this issue. The review process was introduced to reduce the number of judicial review claims. Instead, most decisions under Part VII carried a right to administrative review, with appeal to the County Court on a point of law.

Following *Omar v Westminster City Council* [2008] EWCA Civ 421, *Mohammed v Hammersmith and Fulham LBC* [2001] UKHL 57 and *Sahardid v Camden LBC* [2005] HLR 11, a review of suitability must take account of facts as they are at the date of review, but on discharge of duty the review was limited to the position at the time of the original decision. *Sahardid*, on point on the issue of suitability, emphasised that the review decision "needs to be taken upon the facts that exist at that time. To do otherwise would be shutting one's eyes to the actual facts, which could cause an injustice".

Further, *R(Calgin) v Enfield LBC* [2005] EWHC 176;HLR 4 had held that procedural defects at an early decision stage could be rectified by the opportunity to put any points about suitability to the review officer for consideration.

No challenge was brought to the review process itself in the present case. That was fatal to the appeal. The remarks in *Ojuri* had no relevance to a case were the statutory review process was available. The Housing Act 1996 provided the applicant the opportunity to challenge the decision and have it fully reconsidered on the full facts submitted. This available reconsideration excludes a challenge on the grounds that the original process was incorrect or even unlawful, as this is superseded by the question of whether the review process was carried out properly or reached a legally correct solution.

While the offer of accommodation under section 193(5) is of significance to the applicant, and accepting the offer, then requesting a review, is not an easy option, that dilemma is inherent to the legislation. As the review process is a continuation or replacement for the initial decision-making, it is analogous to a Judicial review under the old process, i which the original decision had been quashed and a fresh decision required.

In the present case, even if the Authority had indeed failed to make proper inquiries on the issues relevant to suitability before making an offer, the remedy was the right of review. A s.204 appeal was limited to an error of law in the review decision, and not any alleged error in the original decision, but as the review supplanted the original decision, this was not a valid point.

The applicant had had the benefit of a second review and appeal to the County Court. No error in the review decision had been shown or could be shown.

Appeal dismissed.

To let or not to let

Thu, 08 Dec 2011 21:34:07 +0000

SJM

An interesting and novel first instance case has recently emerged from Reigate County Court. Minter v Mole Valley District Council was

heard by DJ George on 25th May 2011 and it was reported in the papers here. The facts in summary are as follows:

M approached MVDC with a view to letting her property in Dorking under the local authority's rent deposit scheme. M was accepted for the scheme and she was introduced to a prospective tenant, Lisa Alexander. The property was let to Ms Alexander on 26th March 2007 and the property was repossessed on 9th June 2008, Ms Alexander having left a trail of devastation in her wake. M in evidence described the state of the property as disgusting: white goods and kitchen units were damaged, there were maggots in the wheelie bins, the shower room contained excrement and the carpets smelled of urine. In addition, Ms Alexander had left behind arrears of £2180.33. M calculated her out-of-pocket expenses to be £4860.27.

M's case against MVDC was that the council had negligently misstated the worthiness of Ms Alexander as a prospective tenant. M described how she overheard a housing officer saying to Ms Alexander in a separate room: "we don't want another Abinger." Although M did not realise the significance of this at the time, it emerged that this referred to the condition in which Ms Alexander had left a previous property at 18 Abinger Close. This indicated that MVDC was well aware that Ms A was a problematic tenant.

The judge accepted M's evidence that the council had given assurances to M that it would vet prospective tenants when she subscribed to the scheme, which meant M was entitled to assume that Ms Alexander would be a suitable tenant. The council had also misrepresented the state of Ms Alexander's previous property in a letter of 8th April 2008, where they stated (falsely) that she had not left it in a filthy state. Despite the council's claims of Ms Alexander's confidentiality and data protection, the judge found that had they asked Ms Alexander for permission to disclose further details of her history, any refusal on Ms A's part would have influenced M when deciding whether to let the property to her.

The judge found that it was reasonable to impose a duty of care on MVDC towards M, that MVDC had negligently misrepresented Ms A's suitability as a tenant and that it was reasonable for M to be compensated for her losses, totalling £4860.27 plus interest of £1153.21 and small claims expenses.

Comment: although this is an uncommon case on its facts, the prospects of similar claims being made in the future are higher in the light of the enactment of the Localism Act and the ability of local authorities to discharge their homelessness duties by means of a private sector offer. I am not aware of any other local authorities who undertake to vet the suitability of accepted homelessness applicants-this would surely be too onerous a task even if they wanted to do it. However, the case may raise the stakes slightly when dealing with applications from the intentionally homeless.

Finally, many thanks must go to Matthew Hearsum of Morrisons Solicitors, who advised Ms Minter and kindly provided a transcript of the hearing.