Homelessness - Nearly Legal 2012-2014

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Not a Good Idea

One to be filed under 'Do not do this, ever'.

R (Grimshaw) v LB Southwark [2013] EWHC 4504 (Admin) [Not on Bailii, I've seen a transcript]

This started out well enough, as a judicial review claim of Southwark's decision to terminate temporary accommodation. Soon after issue and interim relief had been granted, Southwark entered into discussions and, on 10 December 2012, an offer of accommodation was made to and accepted by the Claimant. Thus, one would have thought, the claim was effectively settled and its purpose fulfilled.

Nobody told the Admin Court. On 19 December 2012, the claim was given permission on the papers, with no update on the situation having been provided.

The Claimant's solicitors, Gans & Co, then appear to have had a bit of a brainwave. Instead of telling the Court that the claim was disposed of, on:

> 10 January 2013 they gave notice on the claimant's behalf that the claimant intended to make a claim for damages. This claim was said to arise in circumstances where the claimant had apparently been over paid housing benefits while housed in temporary accommodation which, following the defendant's decision to terminate her temporary accommodation, she was now having to pay back. The suggestion, apparently, was that she had a claim for damages for having to repay the housing benefits which she had received in excess of the amounts to which she was entitled.

On 26 April, the Court order that the matter be listed for disposal unless the Claimant provided a consent order or notice of withdrawal in 14 days. The Court was still none the wiser.

Gans & Co sent a draft consent order to Southwark to withdraw the claim, then promptly withdrew that offer and maintained that the claim for damages continued. And so in July 2013, the claim was heard for disposal. Southwark applied for a wasted costs order against Gans & Co.

The purported damages claim got short shrift.

> That was a manifestly spurious claim to attempt to argue within these judicial review proceedings for two reasons. In the first place it was a different claim from the original claim for judicial review for which permission to proceed had been given; and secondly the claim only has to be stated for it to be apparent that it had no realistic prospect of success.

And so to the wasted costs application. Counsel for Gans & Co, instructed the previous evening, did his best, arguing that

> in substance, that the claimant was not prepared to consent to her claim for judicial review being withdrawn and wished to pursue the housing benefit claim, and his instructing solicitors went along with that.

That did not go down well:

> That answer is, I am bound to say, a wholly inadequate one for Gans & Co to put forward. In the first place, and particularly when acting for a legally aided client, a solicitor has a duty to the legal aid fund and the court not to maintain spurious litigation simply because the client wishes that to be done. They should have, if necessary, ceased to act and certainly reported the matter to the legal aid authorities rather than continued in pursuit of an obviously hopeless claim. Secondly, that answer does not explain the failure of Gans & Co to answer correspondence or to engage in any meaningful discussion with the defendant's solicitors over the period of months which have elapsed since 10 January when the issue of housing benefit was first raised, or certainly

> since the consent order was sent in draft and then withdrawn in May.
>
> Since then, Gans & Co have failed to take any steps either to withdraw the claim or, if necessary, remove themselves from acting on the claimant's behalf, did not inform the court of the position and did not respond to correspondence from the defendant until, I am told, Monday of this week when finally instructions were obtained and it was indicated on the claimant's behalf that the claim would no longer be pursued.

The Court was satisfied that the three requirements for a wasted costs order had been met.

> firstly that the legal representative has acted improperly, unreasonably or negligently – and for the reasons given I am quite satisfied that that requirement is met in this case. Secondly, that such conduct caused the applicant for a wasted costs order to incur unnecessary costs; as I have already explained that happened in this case. Third, that it is in all of the circumstances just to order the legal representative to compensate the applicant for the whole or part of the relevant costs.
>
> In my view it is entirely just that Gans & Co should pay costs here. They have wasted not only time spent by the defendant's solicitors and counsel, but the time of the court, including the hearing today, which would have been wholly unnecessary if they had acted reasonably and professionally in conducting this litigation. I consider that the costs should be awarded on the indemnity basis to mark the unreasonable nature of the conduct of Gans & Co.

Attempts to argue over specific costs and rates were batted away and a wasted costs order of £6,049.63 made.

Ouch. The lesson being that this is the kind of bright idea it is better not to have, or to explain to the client that it is not a bright idea at all.

Not adding up

As the number of people becoming homeless from private sector accommodation continues to rise, and as private sector accommodation is used for discharge of duty and temporary accommodation by Councils, the issue of affordability becomes more and more important. Both intentional homeless decisions and suitability decisions can rest on affordability.

The Court of Appeal considered affordability and the proper approach to it in *Farah v London Borough of Hillingdon* [2014] EWCA Civ 359.

This was the second appeal of Hillingdon's s.202 review decision upholding the first decision that Ms Farah was intentionally homeless from her private sector tenancy because she had failed to pay the full rent.

Ms F applied as homeless, stating that she could not afford the rent:

> To substantiate this, she completed an income and expenditure form showing income from benefits of £311.42 per week and expenditure of £349.69. Further inquiries of the Department of Work and Pensions disclosed that, prior to the commencement of the lease in April 2011, her disability living allowance was raised to £51.40 per week from £18.95 thereby increasing her income from benefits to £344.52 per week. The expenditure included £10 for the cost of haircuts for her children and £10 for a weekly swimming session for them. A further £50 was included in the form for taxi fares with a note that, because of her disabilities, the appellant cannot walk for more than 3-5 minutes at a time and has to use taxis in order to do her shopping. She also gave the Council her January 2012 bank statement.
>
> The points about her disability were included in the notes of her interview in which she also said that her rent had fallen into arrears by about £300 per month and that she had been unable to reduce the

> arrears. The housing officer's notes recorded shortfalls in the amount of available housing benefit over rent which fluctuated in amount depending on whether the appellant was in receipt of discretionary housing benefit in any particular period. Importantly, the notes also refer to a period between May and August 2011 when the appellant was required to repay a social fund loan by weekly deductions of £34.27 from her income support payments thereby increasing the shortfall in her income.

The Council found her intentionally homeless. The s.184 decision did not address the social fund loan deductions, or indeed, Ms F's disability.

> Your income and expenditure shows that you had expendable income of -£38.27. However this reflects items we would not consider to be necessities such as payment to credit card and swimming which amounts to £35.00 according to your estimate. This still leaves you in a minus figure of £3.27 which would show that the property may have been unaffordable for you.
>
> However, according to the DWP your weekly income was £344.52 and not £311.42. This shows your weekly expendable income as -£5.17. However, when we remove the items that are not considered essential, your weekly expendable income amounts to £29.83."

Even on this assessment, the property would have been unaffordable by £2 for about 5 months, by £7.86 for about 2 months, by £17.86 for about 3 months and by £27.77 for 3 months. There was no detailed address to this, instead the decision maker said:

> I have also noted that some items in your weekly expenditure are exaggerated for a family of 4 with 3 children being under the age of 11. Therefore taking all above into consideration I am satisfied that the property was affordable for you.

On review, Ms F put in detailed submissions on her disability and thus need for taxis

for transport, and other aspects of affordability. The Council legal department, in responding on interim accommodation pending review on 15 October 2012, stated:

> The weekly expenditure figure that she gave us amounted to £349.69 creating a minus amount of -£38.27 but her expenditure breakdown included £50.00 per week on clothing, £25.00 per week on credit card payments (a secondary financial liability as unsecured debt), £50.00 per week on taxis and £10.00 per week on haircuts.
>
> These details make it clear that Ms Farah was not properly prioritising the payment of her primary financial liabilities over her secondary liabilities and non-essentials. From the above, it is quite clear where your client could have made weekly savings."

This letter introduces clothing and taxis as items to be eliminated (as overspend), for the first time.

The final s.202 review response stated simply:

An affordability assessment carried out for the period during which Ms Farah was resident at the property shows that the rent shortfall would have been affordable to her had she prioritised those payments over non-essential and secondary financial liabilities.

Ms F brought a s.204 appeal, which upheld the Council's decisions. Ms F then brought a second appeal to the Court of Appeal, arguing "the reviewer does not appear to have considered the appellant's financial circumstances in making the assessment of affordability or the other matters referred to in the Guide and that the review decision is unreasoned."

The Court of Appeal noted the Homelessness Code of Guidance 2006, at 17.40

> In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant

> would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit. This amount will vary from case to case, according to the circumstances and composition of the applicant's household. A current tariff of applicable amounts in respect of such benefits should be available within the authority's housing benefit section. Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials."

This broadly mirrored the case law, notably, R v Brent LBC, ex p. Baruwa (1997) 29 HLR 915 in which Schieman LJ said:

> "On a strict reading of the statute, a person who deliberately refrained from paying his rent in circumstances where he used the only assets at his disposal for buying necessary food for himself and his family would be regarded as homeless. There is ample authority for the proposition that this is not so. Kennedy, J put it thus in a different context from the present in an oft cited dictum in R v London Borough of Hillingdon, ex p Tinn (1988) 20 HLR 305 at p 308:
>
> "As a matter of common sense, it seems to me that it cannot be reasonable for a person to continue to occupy accommodation when they can no longer discharge their fiscal obligations in relation to that accommodation, that is to say, pay the rent and make the mortgage repayments, without so straining their resources as to deprive themselves of the ordinary necessities of life, such as food, clothing, heat, transport and so forth."

In this case, Ms F argued, Hillingdon had simply not addressed "which further items of expenditure ought to have been reduced or eliminated and no consideration was given as part of that exercise as to how any such savings could have effectively eliminated not only the weekly deficit in the payment of the current rent but also any

arrears which had accrued in the past through, for example, the repayment of the £500 to the social fund".

The Court of Appeal concurred:

> the correct starting point is the review decision itself. This appeal can only succeed if we are satisfied that the review decision discloses an error of law in one of the senses referred to earlier. The reviewing officer correctly set out her task as being to ascertain whether the s.184 decision was a correct legal decision, that the conclusions were fair and reasonable and that the facts could have led to no other outcome. But the decision as recorded in the letter of 3 December does not in my view carry out this exercise. The passage quoted earlier at [14] is a verbatim repetition of what Ms Brickwood said in her earlier letter of 10 October when refusing the appellant's request for accommodation pending review. It makes no reference to the Guide; to the appellant's own explanation for her expenditure and the consequent arrears of rent; to the housing officer's judgment as to what items of expenditure were non-essential; or to the issue of whether other items of expenditure were excessive. Nor does it review any of the conclusions in the s.184 decision. Instead, it merely states that the affordability assessment that was carried out shows that the rent would have been affordable had the appellant prioritised her expenditure. No reasons are given for accepting the correctness of that assessment.

Even if it were wrong to begin with the s.202 decision, the s.184 decision was equally flawed:

> [31] I accept, of course, that it is neither realistic nor necessary to expect already burdened local authorities to identify each and every paragraph of the guidance they have taken into account or provide an over-detailed set of reasons for reaching their financial conclusions. Cases like Birmingham City Council v Balog [2013] EWCA Civ 1582 show that this is not necessary. But, as in all cases, the level of detail necessary will usually

> depend upon the issue to be decided and the facts of the particular case. In some cases it will be enough to say that the housing authority concluded that the amount spent on a particular form of expenditure was excessive or unnecessary without going into further detail or qualification. In other cases, where the tenant has produced and relied on a justification for the expenditure under review, a more detailed explanation of the reasons for rejecting those arguments may be required.
>
> [32] The present case falls, in my view, into the latter category. The housing officer had already in his s.184 decision letter made specific deductions in expenditure by removing the credit card and swimming payments. But he had not explained which of the remaining items was in his view excessive or why. Given that one of these items was the £50 spent on taxis (which was arguably essential) and the other items were money spent on food and clothing, it was, I think, incumbent on the reviewing officer to re-visit this part of the assessment and to explain why she had reached the same conclusion. It is not enough to say that the appellant's solicitors failed to raise those specific points when requesting the s.202 review. The reviewing officer was under a statutory duty to review the decision which had been taken and the reasons for it. This involved considering any obviously relevant matters: see Cramp v Hastings Borough Council [2005] EWCA Civ 1005 at [14].

While this case might have been a marginal decision, that made the clarity of reasons all the more important – it called for a reasonable explanation of the points on which Ms F failed. While Hillingdon argued it was obvious to Ms F why she failed, the Court of Appeal disagreed:

> She was never told what other expenditure she should have postponed and the sums she spent on food, clothing and taxis were not so large or obviously excessive as to require no explanation for being treated as excessive. Nor is there any indication of how the social fund payments were factored into the decision. The letter from the Council's legal department of 15 October also raises an obvious concern that the assessment which has been made may simply be wrong.

The review decision was quashed and remitted for fresh decision.

Comment

The significance of this case is that it is a reminder, both to Councils and to applicant's advisors, that affordability is to be taken serious and dealt with in detail. While some elements of Ms F's spending, such as credit card payments, were clearly not priority in comparison to the rent, there was, on any proper analysis, still a shortfall become income and outgoings, particularly during the period of the social fund repayment deductions. Hillingdon did not so much analyse this as carry out a hand waving exercise, one which was not refined even after, for example, a detailed explanation of the taxi costs had been provided.

Except in the clearest and most obvious of cases, a Council should not find intentional homelessness on the basis of an affordability assessment stating merely "some items in your weekly expenditure are exaggerated". Which items? By how much? And why exaggerated? The review decision should also deal with those points – whether or not raised in such detail by the applicant – see para 32.

Where affordability has become a key issue after benefit cuts, and homelessness from the private sector now the single largest single kind of homelessness (and rising), this is a welcome reminder from the Court of Appeal of how it should be approached.

> "Annual income twenty pounds, annual expenditure nineteen [pounds] nineteen [shillings] and six [pence], result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery." Mr Micawber in David Copperfield.

I don't like reg.8, no no I love it

Mohamoud v Birmingham CC [2014] EWCA Civ 227

As all of our readers doubtless know, the way that decision making in homelessness cases works is something like this: a first decision is made by someone on behalf of a local housing authority; if that is in the applicant's favour, all well and good; if it isn't, the applicant can ask for a review; that review is carried out by someone else on behalf of the authority, who might overturn the original decision or who might confirm it; if they confirm it, the applicant can appeal to the county court.

Recognising that at the review stage it is quite possible that the authority might realise that there had been a bit of a mistake in the original decision (which is inevitably bashed out in 20 minutes as a cut-and-paste job from various templates), provision is made in the review procedure for the authority to tell the applicant that they think there has been a mistake, but that they are nonetheless planning on upholding the first decision. The relevant provision is regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999:

> 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 or in writing.

So, the reviewing officer has to consider whether there is a deficiency or irregularity in the first decision. For these purposes, "deficiency" has been held to mean "something lacking" which is of sufficient importance to justify the safeguards afforded by reg.8: see *Hall v Wandsworth LBC* [2004] EWCA Civ 1740; [2005] HLR 23.

Importantly, that "something lacking" might be the failure to deal with events after the first decision, even though they (fairly obviously) could not have been dealt with at that time: see *Banks v Royal Borough of Kingston-upon-Thames* [2008] EWCA Civ 1443; [2009] HLR 29. In *Banks*, the initial decision had been that the applicant was not homeless or threatened with homelessness. After that decision, but before the review decision, he was given notice to quit by his landlord. The council nonetheless upheld the decision on the basis that, although he was now homeless, he was not in priority need. He was not given any opportunity to make representations about the council's intention to find that he was not in priority need. His appeal was allowed by the Court of Appeal (who also made some acerbic comments about the whole thing being a waste of money because in that case it was clear that he would have had a right to make a fresh application).

Turning then to the facts of this case. M had separated from her husband and was staying with a friend. M was asked to leave by that friend when she discovered that M was pregnant. M applied to BCC for housing under Housing Act 1996. Her homelessness application form, which would have been filled in by a council employee while M was present, recorded that M spoke English and did not require an interpreter. It also said, several times, that M had been told that BCC would only make her one offer of housing.

In due course, BCC made an offer of a 2-bed flat to M. That offer was contained in a letter which stated that:

> [W]e only have to offer you accommodation once. We are offering you this accommodation as your one and final offer in order to discharge our duty to you
>
> If you turn this offer down without good reason we will not offer you any more accommodation.

M rejected the offer on the basis that it was too small, she was frightened of heights and did not want to live in a high-rise flat. BCC decided that the offer discharged its duty under the 1996 Act.

M then went to solicitors (Shelter West Midlands), who asked for a review on her behalf. In that request for a review, it was said that:

> [Y]ou have failed to consider all of Miss Mahamoud's circumstances leading up to the refusal- including the fact that English is not her first language and she found the entire process confusing and there was no support to make it less confusing for her.

At the time when the full housing duty was accepted, she was advised by several friends that she would be entitled to up to three offers of permanent accommodation. Miss Mahamoud had seen them go through similar circumstances and had no reason to question the advice they gave her. English is not Miss Mahamoud's first language and she did not fully understand the section 184 letter that was sent to her. She relied on friends to advise and guide her as they had gone through the homelessness process themselves.

Miss Mahamoud was confused by the bidding process, she understood that she could bid on three properties per week and thought that this supported that her friends advised her she would get three offers.

The review officer upheld the first decision. M appealed to the county court, arguing (amongst other things) that there was a deficiency in the first decision which should have triggered reg.8. As no notification had been given by BCC in accordance with reg.8, the decision should be quashed.

On first appeal, the county court judge find against M, holding that the situation was different to *Banks*. In that case there had been a change of circumstances after the original decision and before the review decision. Here, the matters complained of had been within the applicant's knowledge before the first decision, but had not been advanced. The judge held that the first decision "did not become deficient as a result of the review officer dealing with additional matters raised by Shelter or in subsequent interview on the facts of this case".

M appealed to the Court of Appeal. The principal judgment was given by Proudman J, who allowed the appeal. Moore-Bick LJ added a few words of agreement, while

McFarlane LJ simply agreed with Proudman J.

In Proudman J's view, the analysis preferred by the county court judge and put forward again by BCC failed to give reg.8(2) "the purposive construction required by the decision in *Banks*, the relevant purpose being one of overall fairness in giving the applicant the opportunity to make representations for the purposes of the review." ([38]). Proudman J went on at [39]-[40] to say that:

> While it is superficially attractive to draw a distinction between new matters and matters known to the applicant from the outset, I do not see that there is any real distinction between a new matter and a matter, such as confusion, which is capable of explaining the very reason why the point was not taken at the point of the original decision.

It follows that *Banks* was interpreted too narrowly by the judge below, confining the principle that one can look at new matter to determine deficiency only to cases where the point could not have been taken by the applicant at the outset.

BCC had 3 other arguments in support of the review decision. First, that the "the question whether there is a deficiency in an original decision is a matter for the reviewing officer having regard to the relevance and importance of the matter raised by the applicant on the review". On the facts of this case, that did not assist because ([46]):

> Some common sense has to be applied. To the extent that the assertions were manifestly insupportable [the review officer] was entitled to hold that there had been no deficiency in the original decision in failing to consider them and therefore no requirement for a "minded to find" notice. If she were to make such a finding, however, she should have given full and detailed reasons for doing so which would enable this court to take a view as to the sufficiency of that finding. If on the other hand Ms Mohamoud's reasons were at all plausible, more than shadowy, a "minded to find" notice should have been sent to enable Ms Mohamoud to argue the point.

Secondly, that the decision under challenge, *i.e.* BCC's decision to discharge duty following the refusal of an offer of accommodation, related to the suitability of the property and the reasonableness of rejecting it, but not whether or not M had understood the process. That was rejected by Proudman J – reg.8 is about procedural safeguards to ensure that an applicant is fairly treated.

Thirdly, there had been no complaint about the alleged deficiency during the review process. That was also rejected by Proudman J as going

> against the finding in *Johnston* [*Lambeth LBC v Johnston* [2008] EWCA Civ 690 (our note here)] that a reviewing officer's failure to serve a "minded to find" notice is not cured by the applicant having had the opportunity to make representations before the decision. In *Ibrahim* [*Ibrahim v Wandsworth LBC* [2013] EWCA Civ 20 (our note here)] the lack of complaint was merely one of the matters which Etherton LJ took into account in deciding that the outcome would have been the same in any event. I observe that in the present case Shelter did draw the reviewing officer's attention to the relevant matters. ([51])

Therefore, M's appeal was allowed, notwithstanding that

> this means that there will be an extra layer of bureaucracy and that the Council will fear that an applicant, unsuccessful at the stage of the original decision, can have another bite at the cherry at the review stage by asserting fresh matters already known to him. However, each case depends on its own facts and where, as here, the applicant's case is one of confusion it strikes at the heart of the fairness of the procedure. ([55])

Anyway, just for S and J, here is *Dreadlock Holiday*.

Discharge of duty by helping eviction.

This sounds like a rather odd case, noted on the Garden Court bulletin. It is a refusal to grant permission for Judicial Review of a Council's refusal to carry out a review of the method it had decided upon to discharge its full housing duty.

Still with me? Right.

R (Miah) v Tower Hamlets LBC [2013] EWHC 4434 (Admin) [note on the Garden Court bulletin]

Ms M applied as homeless to Tower Hamlets. She had the beneficial interest in a property (not the legal title) and the property was tenanted. TH's initial decision, that she was not homeless because she had the house, was eventually quashed in a s.204 appeal. The County Court decided that the house was not 'available' to Ms M because it was tenanted.

Tower Hamlets then accepted a full housing duty but decided it would fulfil that duty by giving advice and assistance to Ms M to secure her own accommodation by obtaining possession against the tenant of the property.

Ms M asked for a review of this decision, but Tower Hamlets declined to carry out a review. Ms M issued a judicial review claim of this refusal to review.

According to the Garden Court bulletin, the High Court refused permission on the basis that:

> The claimant could pursue the county court appeal or put new information to the council indicating why she could not proceed with an eviction as it had proposed.

[Update]
I've now seen a transcript. It appears that it is was accepted by both parties after discussion in the hearing:

> "that the decision letter under challenge of 28 May this year is a decision in respect of which the claimant has a right of appeal to the County Court on a point of law. Though, as the Defendant declined to review the original decision, it cannot be a case where the claimant can say that she is dissatisfied with the decision on the review because there was no review, it can however be characterised as a case where no review had been carried out and notified within the prescribed period."

That answers my initial puzzlement about this decision, given that s.204 provides:

> (1)If an applicant who has requested a review under section 202—
> (a)is dissatisfied with the decision on the review, or
> (b)is not notified of the decision on the review within the time prescribed under section 203,he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision.

I could see no provision for a s.204 appeal of a refusal to conduct a review, just of the decision on review, or a review decision not being made in time. But it appears to have been accepted here that a refusal to conduct a review amounted to 'not notifying' the applicant of the review decision in the prescribed time.

On that basis, the High Court decided that there was another, more appropriate route for a remedy. Despite Ms M arguing that the best she could get from a s.204 appeal was a determination that the decision refusing to carry out a review was an error of law, but that would not get her the review requested, the High Court accepted that there was little else that it could order too.

So, apparently a refusal to carry out a s.202 review counts as not notifying the applicant of the review decision within the time prescribed and the appropriate route is s.204.]

Deciding without a decision

R (on the application of PK) v Harrow LBC (2014) QBD Admin 30 January 2014 [Lawtel note, no transcript yet]

This judicial review is possibly one for the 'what were they thinking?' pile.

The Claimants were the children of M. The family was street homeless and destitute following eviction. It appears that Harrow had decided there was no duty to accommodate M, as the family was referred to Social Services.

Harrow carried out an assessment, then said that it was obliged to provide the children with accommodation under s.17 and s.20 Children Act 1989, but not the mother.

The children applied for judicial review, and interim relief was granted. The children argued that as the assessment meant they would be separated from their mother, Harrow had not addressed their rights under Article 8 of the Convention.

Harrow admitted that the assessment engaged Article 8, but argued that its assessment did not amount to a decision.

Rather unsurprisingly, the High Court held that the assessment was indeed a decision. No proper human rights assessment had been carried out and the decision therefore failed to take into account the children's Article 8 rights. *R (on the application of G) v Barnet LBC* [2003] UKHL 57, [2004] 2 A.C. 208 considered on the extent of the s.17(1) duty. The decision was unlawful.

Comment

I really want to see a transcript of this, or at least get more detail. I find it hard to believe that Harrow actually defended on the basis that the s.17 Children Act assessment was not a decision, or that there wasn't something more to it than is set out in the lawtel note if they did argue that.

While *R(G) v Barnet* found that there was no mandatory duty to provide housing to the parent of a child to whom as s.17/s.20 duty was owed, it is surely now generally understood that any decision that engages the child's Article 8 rights has to involve a consideration of those rights and that an interference with them has to be for a legitimate aim and proportionate. That is going the be a high threshold for the decision to meet for separating child and parent in these circumstances. Not actually considering the child's article 8 rights at all is surely inevitably going to be unlawful.

Homeless Counties

A brief note on what I think was a homelessness s.204 appeal, but have only a local newspaper report to go on. The issue was the status of the review officer, and specifically, whether St Albans District Council had, as it purported to do, contracted out its homeless reviews to Minos Perdios. Mr Perdios should need no introduction to regular readers, and we have visited the 'contracting out reviews' issue in *Shacklady v Flintshire* and most recently in *Tachie, Terera and Il v Welwyn Hatfield BC* [2013] EWHC 3972 (QB) [our report].

It appears that in this case, brought by Ms Hadnutt, St Albans DC was found to have failed to adequately amend its constitution, or make the necessary resolutions in council cabinet, to lawfully be able to contract out its statutory review duties under Housing Act 1996. While in *Tachie*, Welwyn BC managed to escape by retrospectively ratifying the contracting out decision, St Albans managed not to do that, either.

What I take to have been the Circuit Judge (confusing said to have been sitting in Bedford Magistrates Court, but really has to have been as a County Court CJ) apparently held that as a result, Mr Perdios had no authority to make homeless review decisions 'on behalf of' St Albans, and that every review decision made since Mr Perdios started, some 4 years ago, was accordingly unlawful.

Ms Hadnutt will presumably now have to have a fresh review decision made by a Council review officer.

Toby Vanhagen was counsel for Ms Hadnutt. We would be very happy to have more details of this case.

I must confess to living in St Albans. I'm now wondering whether I should encourage my firm to set up a branch and save my commute. After all, they have a lot of review decisions to reconsider

No reason for reasons redux

Solihull Metropolitan Borough Council v Khan [2014] EWCA Civ 41

A rather odd second appeal from a s.204 appeal decision. At issue was whether the Council's review officer should take into account "the homeless person's state of knowledge about the Council's rejection of the person's reasons for stating he or she did not wish to live in a particular area". In short, was an absence of a stated reason for a decision a potential issue on review.

Ms K had applied to Solihull as homeless and a full duty accepted. Her application for permanent housing stated that she did not want to live in "Chelmsley Wood because of her fear of attack in that area from a gang associated with her husband". Solihull had decided, apparently without informing Ms K, that her reasons for fear of attack in Chelmsley Wood were unfounded and she had been made an offer of property in that area. Ms K had refused that offer and requested a review of suitability. The review upheld the suitability of the offer. Ms K brought a s.204 appeal.

> Ms Khan's case was that, despite being told by an officer of the Council that inquiries would be made about the gang, no one told her until after the review decision that the Council did not believe she had reasonable grounds for fearing living in Chelmsley Wood. The argument accepted by the Recorder was that where the person offered accommodation did not know that the reasons for excluding an area had been rejected by the Council, it was not open to the Council to conclude that that person's rejection of the offer was unreasonable.

Solihull appealed the s.204 appeal outcome. Although the case was academic by the time it reached the Court of Appeal, Ms K having obtained private sector accommodation, the Court nonetheless decided to hear the appeal, apparently because Solihull feared it might owe a continuing duty to Ms K and because 'other appellants' were said to be using the same argument in Birmingham County Court. There was no representation for or attendance by Ms K.

The review decision by the contracted out reviewer, Minos Perdios, had acknowledged Ms K's subjective feeling that the property was not reasonable but, following *Ahmed v Leicester City Council* [2007] EWCA Civ 843, he considered that the evidence was such that her beliefs were not objectively reasonable. In particular he found that there was no evidence about the gang threat that Ms K had said was present in the area found in the Council's own investigations (which, of course, Ms K had not been told about).

At first instance, the Recorder had found:

> The case put on behalf of Ms Khan was that, before she refused the offer, she did not know that the Council had made enquiries and rejected her case as to why she felt scared to live in Chelmsley Wood, or that the Council had taken the view that she would be physically unsafe if she lived in Shirley. The Recorder stated that Ms Khan had not been told this, either in the "final offer" letter or in any oral or written communication before she had to decide whether to accept or reject the offer: judgment, [24].

> The Recorder relied in particular (see judgment, [38] and [43]) on the judgment of Pill LJ in Ahmed v Leicester City Council [2007] EWCA Civ 843 at [18], [22] and [23] and on paragraph 6.15 of the Statutory Code which I have set out at [7]. In Ahmed's case, Pill LJ stated at [23] that "there may be cases where matters which arise on the review are such that they can only fairly be resolved if there is some dialogue between the reviewing officer and the [individual involved]". The Recorder considered (judgment, [43]) that this was such a case. She stated (at [45]) "an important personal characteristic of [Ms Khan] was what she knew, or did not know, about the outcome of the [Council's] enquiries into the factual basis for her fear for her personal safety in Chelmsley Wood, and hence her knowledge as to the [Council's] state of mind in making an offer of accommodation in an area for which she had not expressed a preference, as a result of an internally generated 'bid'". The absence of a dialogue between the Council and Ms Khan on the outcome of the Council's enquiries into the factual basis for her fear for her safety in Chelmsley Wood before that was used to determine an issue as to suitability against her interests was also, stated the Recorder (judgment, [45]), contrary to paragraph 6.15 of the Statutory Code.

The review officer 'should have asked more questions', the Recorder held, before reaching conclusions on the objective reasonableness of Ms K's subjective view.

On second appeal, Solihull argued that to accept Ms K's argument was to undermine the Court of Appeal decision in *Akhtar v Birmingham City Council* [2011] EWCA Civ 383 [Our report].

> In that case, this court (see [46]) rejected the submission that, as a matter of principle, every offer letter should give reasons explaining why the offered property is considered to be suitable and reasonable for the applicant to accept. Etherton LJ, with whom Maurice Kay and Rimer LJJ agreed, did so because it was implicit in any offer of accommodation that the housing authority did consider the questions of suitability and

> that it was reasonable for the homeless person to accept the offer. The Recorder does not expressly explain why she rejected this submission. It is possible that she considered that her decision was not inconsistent with the decision of this court in Akhtar's case because of the recognition by Pill LJ in Ahmed's case of the need for dialogue in some cases.
>
> If that was her reason, in my judgment it overlooks the importance of Etherton LJ's statement at [47] of Akhtar's case. He there rejected the submission that the homeless person was entitled as a matter of fairness to an explanation of the limited basis upon which a review had been successful, absent which he was allowed to assume that the housing authority had made a simple error in its subsequent offer of another property. He stated that was not a reasonable assumption for the homeless person to make because that person "could easily have obtained confirmation by speaking to a responsible employee of [the housing authority] ".

If Ms K was concerned that the Council had made an error in offering the property in that location, she should have raised it with the Council rather than simply refusing the offer. The Recorder's decision would, in effect, "introduce an obligation to give reasons for the property offered, at least where the property offered is in an area which the homeless person has stated she does not wish to live." This could not sit with *Akhtar*.

However, while there might be practical benefit to Councils in issuing standardised offer and decision letters, this should:

> not be pressed too far lest housing authorities believe that they do not need to give individual attention to the particular position of the homeless person with a priority need. That person will have, as Ms Khan had, indicated needs and preferences in the initial application. The housing authority must take those into account, even if it is ultimately not able to meet them, whether because of scarcity of available housing in

> a particular area or, as in this case, because the factual premise for the needs and preferences has been rejected.

Appeal allowed.

Impossible Preference: Excluding the homeless from housing lists

R (Jakimaviciute) v LB Hammersmith and Fulham [2013] EWHC 4372 (Admin)
[Not generally available yet. I've seen a transcript]

This judicial review permission hearing raises very significant issues for post Localism Act Council allocation policies. The central issue is the Council's ability under the Act to set an allocation policy that includes 'qualifying classes' and excludes other classes. Housing Act 1996 (as amended by Localism Act) s.160ZA states:

> [...]
> (7) Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.
> [...]

Meanwhile s.166A(3) provides:

> As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

(a) people who are homeless (within the meaning of Part 7);

(b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);

(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;

(d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and

(e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

The scheme may also be framed so as to give additional preference to particular descriptions of [people within one or more of paragraphs (a) to (e)] (being descriptions of people with urgent housing needs).

Now, H&F's allocation scheme set out 'classes of persons who will not normally qualify for registration to participate in the allocation scheme'. These classes include, at paragraph 2.14 (d):

"Homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty, unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant .. "

Ms J, the Claimant, fell into this class, having been placed in a private sector short hold tenancy as temporary accommodation after H&F accepted the full homeless duty. H&F refused to add her to the housing list. Ms J brought a judicial review claim

alleging unlawfulness as she was not being given a reasonable preference as a homeless person – s.166A(3).

Before D Gill, sitting as a Deputy High Court Judge, the renewed oral application for permission did not go well.

> 9. Mr Chataway [for Ms J] submitted that if the discretion provided for at Section 160ZA (7) is as wide as contended by the defendant, that would mean that it would be open to any local authority to exclude anybody to whom they would otherwise have an obligation to give a reasonable preference. That submission in fact emphasises the fact that the intention was to give the local authority a wide discretion to decide, in the light of the housing shortages and the demand for properties, how to go about discharging their duty. There is nothing arguably irrational in the public law sense in that concept, although I make the point, for the record, that it has not been said on the claimant's behalf that the defendant's allocation scheme is irrational.

> 10. When one steps back and looks at how these relevant provisions are organised, it is clear, it seems to me, that Section 160ZA sets out the provisions which confer on the local authority the duty and power to decide who are qualifying persons. Section 166A sets out the principles to be followed in setting up the allocation schemes, in particular the priorities to be given amongst the qualifying persons.

> 11. Since this key issue is determinative of this renewed application for permission and I have decided that it is unarguable, I do not need to go on to consider the other arguments. So permission is refused.

What was decided then, is that the reasonable preference 'priority' only applies to people who are on the list. And as Ms J was in a class excluded from the list, she didn't even get to the point where reasonable preference was an issue.

I understand that permission to appeal to the Court of Appeal has been filed.

Comment

Yes, you have got that right. If this decision was correct, then it would be entirely possible for a Council to exclude any and all homeless applicants, whatever duty was owed, from the Part 6 housing allocation list. The fact that a reasonable preference is to be accorded to a homeless person in the meaning of Part 7 is neither here nor there, as they would never get to the point where issues of priority *within the list* would apply.

It is not just H&F, other councils have pulled similar wheezes on excluding some homeless, whether intentionally homeless or in 'secure temporary accommodation' (something of an oxymoron). Barnet is one (and apparently H&F thanked Barnet for their assistance in devising H&F's allocation policy. Given that Barnet's published allocation policy appears to believe that Barnet is in Wales, one would have thought any borrowings should be carefully considered).

But, the decision is far from unproblematic. For example, the "Allocation of accommodation: guidance for local housing authorities in England" published by DCLG to accompany the Localism Act amendments coming into force contained the following, under 'Qualifying':

> 3.20 In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.
>
> 3.21 Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground

of anti- social behaviour.

The difficulty here is that the Guidance both acknowledges that there is a potential power to exclude 'reasonable preference' people from the housing list as a non-qualifying class, even while stating that Councils should avoid doing so. The question, then, is how far H&F (and Barnet et al) could be said to have had regard to the Guidance in formulating their schemes and non-qualifying categories.

Oh brave new world. It will be very interesting (not to say very important) to see how this or a similar case goes on appeal (or JR if permission given on appeal).

HB and Exempt accommodation: unreasonably high rent

I admit that *SS v Birmingham CC* [2013] UKUT 418 (AAC) has been on my to do list for a while and that, possibly, the main reason for finding the time to write it up is because I'm on a two hour strike (#fairpayinHE). But, it is a really quite important case about the application of the unreasonably high rent rule for "exempt accommodation" in Reg 13 and Sch 3 of the 2006 Housing Benefit regs. The principal question of law concerns the meaning of "suitable alternative accommodation" in those regs.

Roshni is a charitable organisation providing a women's refuge for women from the South Asian continent. They lost their Supporting People funding in 2010 (roughly £120k) and employed a consultant to work out the costs of providing accommodation and housing services to their clients. The actual rent was increased in line with this assessment to £257.87 of which £132.80 was core rent and £109.37 was service charges for which HB was also payable. Birmingham sought to restrict the eligible

rent in line with the unreasonably high rent rule to £179.20, relying on five other comparators of suitable alternative accommodation, whose rent ranged from £140.75 to £210.16. Oddly, it seems that Birmingham applied the reduction in relation to the service charge element in their original decision (I say oddly because the service charge was actually less than that applied by at least some of the comparators – not great decision-making, I'd say, but possibly justified by the lack of clarity in what is included in the "service charge", see [16] – and Birmingham conceded this point in the FTT).

The FTT decision was a mess on the facts and clearly wrong, as Judge Mark points out (quite nicely). The key issue in the AAC, though, was whether the five comparators were appropriately used as such bearing in mind that those comparators may well have received public subsidy. Judge Mark effectively distinguished *R v Coventry CC ex p Morgan*, QBD, 07.07.1995 (in which Collins J held that public sector accommodation was not an appropriate comparator for private sector rents) by restricting the ambit of that case to comparing like with like "so far as practicable" ([28]) or "so far as reasonably possible" ([32]). Where there are no relevant unsubsidised comparators, it is "permissible and necessary" to look at subsidised rents. But, at [33], here's the rub:

> [F]or an unsubsidised rent to be *unreasonably* high in comparison with that charged by the subsidised landlords, it would normally have to be shown that the size of the rent exceeded what the other rent could be expected to have been but for any element of discount. I do not totally rule out any other possibility, for example where a subsidy has been lost because of some wrongdoing by the landlord, particularly where there is no shortage of suitable subsidised accommodation. However, the present case concerns refuges for women against whom violence has been perpetrated. The number of places needed in hostels for such women and their children may well exceed the number of places for which public funding is available, particularly at a time such as the present when public funding is being substantially reduced across the board. Many if not most of those availing themselves of such accommodation would need to obtain housing benefit to pay the rent. Without housing benefit, and without being subsidised by public or private funding, a charity could not

> operate a hostel that was needed to cater for those who could not get into a funded hostel because it could not recoup its reasonable operating costs. This would leave victims of violence either homeless or at risk at the homes they wished to leave.

So, it seems that, bar wrongdoing, the subsidy element needs to be taken away and the purpose of the organisation considered in that determination, including its reliance on HB. The burden of proof is, of course, on the Council seeking to exercise this discretionary power. In this case, Birmingham had not done so on the facts available to Judge Mark.

Intentionally homeless via co-tenant.

Viackiene v Tower Hamlets LBC (2013) CA (Civ Div) 11/12/2013 [Not on Bailii, note on Lawtel, not seen full transcript]

Ms V was the joint tenant of a private property under an assured short hold tenancy. The other tenant was J. Both were jointly and severally liable for the rent. However, there was an arrangement by which Ms V paid the majority of the rent and J the remainder. J lost his employment and did not pay his share of the rent. The landlord proposed to Ms V that she should find another co-tenant, with the landlord's assistance. Ms V did not do so and the landlord brought possession proceedings for rent arrears.

At eviction, Ms V applied to Tower Hamlets as homeless. TH found that she was intentionally homeless. This decision was upheld on review at County Court s.204 appeal. Ms V appealed to the Court of Appeal.

She argued that her homelessness was not due to a deliberate act or omission on her part. When the landlord had offered to assist in finding another co-tenant there were factors constraining her decision: She wanted to keep J as co-tenant; she was concerned that any new co-tenant would be unknown and might also not be able to pay the share of rent; she was under emotional pressure due to the threat of eviction; and she was concerned about the suitability of other accommodation.

The Court of Appeal held:

The review officer had used a checklist, on which whether MS V had done or failed to do something deliberately for the purposes of s.191. The act identified was that Ms V had failed to maintain the full rent for a period of two years, despite a number of reminders and being given opportunities to rectify the situation.

The landlord's offer of help to find a more suitable co-tenant was one such opportunity. Replacing J might not have been straightforward but it was possible and Ms V had declined that offer. Ms V had had a solicitor in the possession proceedings so advice was available about replacing J and about whether housing benefit would cover the full rent.

The question of suitability of other accommodation was not relevant to the landlord's offer. Ms V's desire to keep J as co-tenant had not been put forward on review and was surprising, given that it was a purely commercial relationship, which had broken down on his failure to pay rent. Concerns about any potential new tenant had also not been raised on review, but the landlord's offer was reasonable and genuinely made.

The Judge below was right to find that the reviewing officer was entitled to decide that Ms V's failure to engage with the landlord's offer amounted to intentional behaviour on her part and there was no error in law in the officer finding it was her deliberate decision to refuse that landlord's offer that had led to her homelessness.

Comment

I don't think that this should be taken as in any sense a precedent for a tenant failing to find a new joint tenant being intentional homelessness. The key element is the landlord's offer to assist, that Ms V actively declined a potential resolution to the rent

shortfall. As finding a new joint tenant would involve terminating the current tenancy (something apparently not directly addressed in this Judgment) , it is clearly not a reasonable step to take without the landlord's clear support in doing so.

A Christmas gift for you: Contracting out and more

I appreciate that it isn't exactly pc still to like Phil Spector's album, but I do think it remains the best of the lot. And, in a way, *Tachie, Terera and Il v Welwyn Hatfield BC* [2013] EWHC 3972 (QB) is a Christmas gift for local authorities which have contracted out their homelessness decision-making (on which we have paused for comment a couple of times here and here). Frankly also, as we shall see, in my view they really got away with it, not just on the contracting out issue but also on some pretty ropey, undoubtedly harsh decision-making. It's a bit of a monster of a case, which was transferred from the County Court to the High Court and, one suspects, is on its way to the Court of Appeal and quite possibly the Supreme Court. Fair play to Toby Vanhegan for bringing the challenge and trying (unsuccessfuly) to sustain it against what sounds like a pretty hostile judicial audience; and also to Ranjit Bhose for successfully defending it all.

Welwyn decided to go down the ALMO route, pretty late in the day, after their housing options review. Their cabinet resolved to seek the Secretary of State's approval which was forthcoming. On 31 March 2010, the Council itself in full meeting (at which the Cabinet members attended) then approved the delegation of the housing management functions to the ALMO. They amended the modular management agreement, which was not very wise, as we shall see. They also contracted out by way of delegation the housing advice and housing needs service – ie their Part VII functions – which their solicitors confirmed was fully compliant with the 2006 Contracting Out SI. Subsequently, perhaps after Toby Vanhegan began

sniffing around, in January 2013, the full Council recorded that the period of the contracting out be 10 years, ratified the management agreement so far as necessary, and approved an amendment to the Council's constitution to remove uncertainty as to its meaning. Again reading between the lines, after service of Toby Vanhegan's skeleton argument, the Deputy Leader of the Council and Executive Member, Resources made a decision under the Council's special urgency provisions on 25 November 2013, effectively seeking retrospective to ratify the earlier decisions. This was, undoubtedly, perspicacious.

The Council's original constitution contained a distinction between, on the one hand non-executive functions, which could be contracted out, and "discretionary decision making", which could not be contracted out (Article 11.4). This bizarre distinction not unreasonably led to the argument that Part VII decision-making, being discretionary, could not be contracted out under the terms of the constitution. Now, academics and others will appreciate the literature on the meaning of discretion (Kenneth Culp Davies, Keith Hawkins, Roy Sainsbury, Denis Galligan, Carol Harlow, Rick Rawlings etc etc) and practitioners will, no doubt, be aware of the pretty convincing line of authority that basically says Part VII is discretionary. As Vanhegan seems to have put it (pace Sainsbury), even the "robotic" stuff, like enquiries and investigations is discretionary in nature. Jay J (great name btw) found against him, and his reasoning is utterly unconvincing. He envisages a spectrum of decision-making, from high level political decisions to the robotic decisions (visions of Peter Crouch here), "with a significant grey area between" – what Dworkin might have referred to as the hole in the doughnut, although that analogy is inexact here. Jay J says:

> Within this grey area one may well discern "elements of discretion", but I would prefer to characterise these as evaluative judgments which entail an assessment and interpretation of the available material, and the drawing of inferential conclusions from the facts as found by the local authority. I cannot accept that decisions of this nature amount to "discretionary decision making" within the meaning of the exception to Article 11.4. *[26]*

Apparently, Part VII is a "tightly controlled statutory scheme" and the fact that different local authorities might reach different decisions on the same evidence " does not convert the process into 'discretionary decision-making'". As I say, that

reasoning doesn't really convince me. Article 11.4 was just wrong-headed and just because that would have meant they could not delegate their functions under the 1996 SI surely could not undermine its clear words (although Jay J seems to think it could: [30]).

However, the Appellants did win on the ground that, as this was a contracting out of an "executive function", it could only have been done by the Cabinet, not by the full Council. Jay J subsequently regards the procedural challenges "arid and technical" ([57]) – well, they may be, but that is kind of what the law requires; and, if you don't comply with the law normally, then you're in trouble.

Nevertheless, this was a pyrrhic victory because Welwyn's retrospective ratification was regarded by Jay J as sorting out the procedural mess they had got themselves into. In answering the question whether Welwyn had reasonably applied its special urgency procedure (presumably to ward off the vampiric Vanhegan), Jay J held that this was not the exercise of a draconian power like HMO enforcement (W*ebb v Wandsworth LBC* (1989) 21 HLR 325); it was simply an inconvenient minor procedural error to fail to convene a Cabinet meeting on 31 March 2010 "which scarcely impacted on the substance of the matter". Apparently, a negative Part VII finding is not draconian because we are not dealing with the removal of private law proprietary rights but the distribution of scanty resources in a system of social welfare. My strong suspicion is that different people could take a different view on that point.

The other points of equal interest, particularly to DCLG (which presumably will be joined on the anticipated appeal), are, first, whether the Public Contracts Regs 2006 apply to an ALMO. At heart here, the issue is pretty central to housing policy, viz are ALMOs controlled by the council. If they are, then the exception to those regs opened up by the ECJ in *Teckal Srl v Commune di Viano* applies. Of course, Jay J held that the exception did apply, even though the ALMO board had a three to one non-Council majority. Here, I can see Jay J's point – the nature and purpose of an ALMO, as I have written about previously, is to act as a separate vehicle to conduct the Council's housing management functions but it can hardly be described as being independent of the Council. However, as others have told me in the past, that dependence does not always mean that ALMOs do as they are told by the Council. There is an interesting point here which demands careful analysis, I think.

The other interesting point is that the original delegation to the ALMO was not time restricted as required by the contracting out Act. Jay J regarded this as a bad point, as the resolutions (on which the Council were unable to rely) satisfied him that the "surrounding documents point ineluctably to the conclusion that the relevant authorisation" was time limited. Hmm, again.

And then we get to the substance of the appeals themselves, all of which go against the Appellants. There are some nuggets here as well. Tachie and Terera are intentionality decisions. The questions here were around whether their accommodation was reasonable to continue to occupy and good faith – the review decisions were particularly harsh, had a whiff of procedural impropriety about them, and made at least one unfortunate comment (referring to a "lifestyle choice"). On the Tachie appeal, there was a ground of appeal which Jay J mentions without extrapolation which is being saved for the Supreme Court (what was it? If anybody knows, please tell).

But what really got my goat was the decision in Mr Il's case that he was not in priority need as not vulnerable. This seemed a pretty clear Reg 8(2) point. In essence, his GP and the ALMOs own medical advisor had said that he was vulnerable. The s 184 decision was not vulnerable. On review, the ALMO's medical advisor changed their mind and Mr Il's representatives weren't given an opportunity to comment on a further revised opinion. Just what was going on? And this is an open and shut Reg 8(2) case, isn't it? I repeat what Jay J says at [90] without further comment:

> This ground of appeal turns on what is meant by *"deficiency or irregularity in the decision, or the manner in which it was made"*. In my judgment, the regulation is referring to a procedural error, to something which has gone wrong in relation to the decision making process requiring heightened obligations of fairness on the local authority to give the Applicant a further chance to make representations, if necessarily orally. Mr Vanhegan submitted that this criterion is met but I cannot agree. A change of mind by the Respondent's medical advisor cannot properly be characterised as a "deficiency or irregularity". Put simply, nothing "went wrong" with the decision making process. I do accept that

> standard principles of fairness required the Respondent to give this Appellant the opportunity to address the medical officer's change of mind and this is exactly what happened here. However, I do not accept that ordinary principles of fairness required the Respondent to give this Appellant yet further opportunities to address the third medical opinion, which in any event was slightly more favourable to him than the second. Mr Vanhegan urged me to approach this case on the basis that it is clear that the Respondent did not even *consider* whether regulation 8(2) could apply to these facts. It is unclear whether the Respondent went through this thought process, if only to reject it; but whatever the position it is plain to me that regulation 8(2) does not apply. That is the end of the matter.

A *Shala* challenge was also unsuccessful.

I don't think we've heard the last of this one.

Out of order

R (CN) v LB Lewisham; R (ZH) v Newham LBC [2013] EWCA Civ 804

This is a very important decision from the summer. For some reason we haven't got round to writing it up before now. In the meantime England have managed to retain (yay) and then lose (boo) the Ashes, so it just goes to show that there are worse things in the world than tardy blog writers.

The issue in the two cases is neatly stated by Kitchin LJ at [2]:

> "The central issue on this appeal is whether the decisions in *Manek* and

> *Desnousse* continue to bind this court in the light of the decisions of the Supreme Court in *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 AC 186."

(In addition to those citations, Kitchin LJ could have referred to this on *Pinnock* and this on *Powell*. *Manek* and *Desnousse* are before our time).

The Protection from Eviction Act 1977 provides that a landlord cannot recover possession of premises "let as a dwelling" or "occupied as a dwelling under a licence" without first getting a court order for possession (s.3). The 1977 Act also provides that a notice to quit a periodic tenancy of premises "let as a dwelling" or notice to determine a periodic licence "to occupy premises as a dwelling" must give at least 4 weeks' notice and contain prescribed information (which is set out in the Notices to Quit etc Prescribed Information Regulations 1988.

In *Mohamed v Manek & RB Kensington & Chelsea* (1995) 27 HLR 439, the Court of Appeal held that where a local housing authority provides B&B accommodation to a homelessness applicant, while the authority carries out its enquiries to decide the extent of the duty owed under Pt 7, Housing Act 1996,* that accommodation is generally not let as a dwelling, so s.3, 1977 Act does not apply to it.

In *Desnousse v LB Newham* [2006] EWCA Civ 547; [2006] QB 831, the Court of Appeal was asked to reconsider *Manek* in light of the Human Rights Act 1998 having come into force. A majority of the Court of Appeal considered that *Manek* still applied.

As we all know, in *Pinnock* and *Powell*, the Supreme Court held that art.8 of the European Convention on Human Rights required the availability of a proportionality assessment of an eviction in a claim for possession brought by a public authority. In *Powell*, one of the occupiers was housed under Pt 7 duties, but this was under s.193(2) (the "full" housing duty).

In *CN & ZH*, the claimants argued that the *Manek* and *Desnousse* could no longer stand, given the Supreme Court decisions in *Pinnock* and *Powell*.

The brief facts of the two cases are that CN was born in August 1994. In 2011 his family were evicted for rent arrears. They applied to Lewisham for assistance. Lewisham placed them in temporary accommodation and then decided that they were intentionally homeless. Lewisham told them to leave the temporary accommodation. When challenged by the family's solicitors, Lewisham said that they did not need to obtain a possession order before evicting them. Judicial review proceedings were launched, challenging Lewisham's decision to evict without a court order. Although an interim injunction was granted, requiring Lewisham to continue to accommodate, the High Court then refused permission for JR. That was successfully appealed to the Court of Appeal, which decided to retain the substantive JR.

ZH was born in March 2012, just a few months after his mother had given up her tenancy in Liverpool and moved in with her sister and aunt in East London. In August 2012 the aunt asked her to leave and she then approached Newham for assistance. Newham placed her and her son in temporary accommodation and then decided that she had made herself intentionally homeless by giving up her tenancy. Newham told her that she had to leave the temporary accommodation. As with CN's case, JR proceedings were issued challenging the decision to evict without a court order. An interim injunction was granted and this time the High Court granted permission for JR. The claim was transferred to the Court of Appeal, so that the two cases could be heard together.

The Court of Appeal (Moses, Kitchin & Floyd LJJ) dismissed the claims. The lead judgment is given by Kitchin LJ. Moses LJ adds a few words and Floyd LJ agrees with both of them.

Kitchin LJ said that *Manek* and *Desnousse* were still good law, notwithstanding *Pinnock* and *Powell*. Temporary accommodation under s.188 or s.190, 1996 Act, was to be treated differently to accommodation granted under the full housing duty contained in s.193: [75].

Although a proportionality assessment is, in principle, available, that could be achieved through a JR claim rather than forcing local authorities to bring possession proceedings in every case. Moses LJ cites *R (JL) v Secretary of State for Defence* [2012] EWHC 2216 (Admin) as an example of a proportionality assessment being

conducted in JR (our note here, this decision was upheld by the Court of Appeal: [2013] EWCA Civ 449).

Nor did s.5, 1977 Act, apply so that the detailed requirements for NTQs needed to be followed. That provision only applied where a licence "to occupy premises as a dwelling" was involved. *Manek* had decided that temporary accommodation under s.188, 1996 Act, was not "occupied as a dwelling under a licence" for the purposes of s.3, 1977 Act. The language used in s.3 and s.5 was so similar that this meant that this sort of accommodation also did not fall within s.5: [77].

Counsel for the occupiers appears to have recognised that it was going to be tough to convince the Court of Appeal to take this step, so sought to persuade them that if they were going to dismiss these cases they should still grant permission to appeal to the Supreme Court. That did not convince the CA (see [83]).

The Court of Appeal decision will definitely not, however, be the last word on the matter – the Supreme Court *has* granted permission to appeal and has placed a stay on the CA's order. Expect a hearing in the spring or early summer next year, with judgment probably after the summer vacation and a write-up here sometime in 2015

* Actually, *Manek* considered the predecessor provisions to Pt 7, 1996 Act, which were contained in Housing Act 1985.

Shortfalls, guidance and intentionality

Birmingham City Council v Balog [2013] EWCA Civ 1582

A s.202 review decision on affordability was at the centre of this second appeal, brought by Birmingham after a s.204 appeal decision went against them. The issue was to what extent the review decision should manifest attention to the statutory

guidance (the July 2006 Guidance) on affordability.

Mr B had been the tenant of a flat in Thanet, occupied by him, his wife and two children. The household had moved out in April 2012 and moved into his mother's property in Birmingham. Soon after, the mother asked them to leave and Mr B applied as homeless to Birmingham.

Mr B said that the tenancy of the flat had come to an end and that he had been told he had to leave. He also said that the property was in a very poor state of repair, so it was not reasonable for him to remain. Birmingham asked the letting agents, and the Environmental Health department of Thanet District Council, who said, variously, that the property had had a lot of remedial work over the year before Mr B left, the remaining deficiencies were minor, and that Mr B had not been asked to leave. Birmingham's s.184 decision found Mr B intentionally homeless for these reasons, adding that there were £715.94 in rent arrears.

Mr B sought a review. Submissions were made for Mr B by Shelter, which did not, yet, address affordability, focussing on the condition of the property, anti social neighbours, Mr B being told the tenancy would not be renewed. On the arrears, it was simply stated that Mr B did not know of arrears and thought HB covered the rent.

Following a council interview with Mr B, the review officer issued a minded to notice, noting deficiencies in the original decision as it had failed to consider affordability, but stating the officer was minded to find against Mr B. Mr B did not make any further submissions and Shelter were no longer instructed.

At the interview Mr B had said that his income

> comprised child benefit, tax credit and jobseekers' allowance and amounted to £920 per month. His expenditure included sums spent on water rates, gas, electricity, housekeeping, TV licence, telephone and school meals and amounted to £946.18 per month, leaving a monthly deficit of £26.18.

The s.202 review decision stated, on the affordability issue:

You have provided an income and expenditure form for the period you were resident at the property. The form suggests that your income was £920 per month, and that your outgoings were £946.18 per month. You have not included housing benefit as income on the form and similarly not included your rent on the form as an outgoing. The figures provided suggest you have a deficit of £26.18 per month. I note that you have been employed during periods of the tenancy, and you have provided wage slips confirming your income. The wage slips you have provided correlate with periods when your housing benefit was reduced and you would have been required to pay a top up amount. I am satisfied that benefit services would have calculated your income and entitlement correct for this period, and that you would have been awarded the correct entitlement for housing benefit when considering your income. I am of the opinion that you could have afforded the rent during periods of employment, as your income increased by approximately £300 per month, and you were required to pay £180 towards your rent. I am satisfied during this period the rent was affordable. When your employment stopped, housing benefit covered your rent and I am therefore satisfied the rent was affordable for this period of your tenancy.

I note that there may have been a period you were required to pay £41.72 towards your rent whilst you were unemployed. I have considered your income and expenditure form for this period and considered if you could have reduced possible outgoings to ensure the top up amount could have been paid. I note that you have attributed £693 per month to housekeeping. Whilst I acknowledge you would have had essential housekeeping outgoings such as food shopping, I am satisfied £693 is a large amount for your family size and could have been reasonably reduced by more cost affecting [sic] shopping. I am satisfied that you could have reduced your outgoings by the stated £26.18 deficit and by a further £41.72 to ensure your rent was paid. I do not consider you would have had to sacrifice essential amenities to do so, and I am satisfied that you could have reasonably performed this task in your household. Accordingly, having considered your monthly outgoings, I am satisfied

> that the rent was affordable and it was reasonable for you to remain for this reason.

In short, the rent was affordable.

Mr B appealed. The Circuit Judge did not uphold the appeal grounds of inadequate reasoning and irrationality, but did find that the review decision was defective in the consideration of affordability. Specifically, there was no specific reference to the Guidance, para 17.40 specifically. Further, the decision did not show that Mr B's residual income had been considered.

> 25. [...] I reached this conclusion (a) because the relevant provisions of the July 2006 Guidance were not mentioned in the section of the review decision letter in which affordability was addressed and (b) because nowhere in its reasons did the respondent give any indication that it had considered whether the payment for accommodation would have left the appellant with less than the level of income based job seekers' allowance. Nowhere in its decision did the respondent state that it had decided that it was inappropriate to take into account the July 2006 Guidance nor did it give any explanation for not taking into account the provisions of the July 2006 Guidance. It appeared that the relevant provisions of the July 2006 Guidance on affordability, in particular paragraph 17.40, had simply been overlooked. The respondent did not of course have to follow the July 2006 Guidance but it did have to have regard to it.

> 26. Having considered the detailed analysis on affordability in the decision letter, I was not satisfied that the respondent had regard to the July 2006 Guidance at all in relation to the issue of affordability. Nor did I conclude that this was a case in which it was inevitable that the respondent would have reached the same result if the provisions of the July 2006 Guidance had been taken into account. There was simply no basis for making that finding. An analysis of the income and expenditure figures in the light of the relevant provisions of the July 2006 Guidance

> may have led to a different conclusion.

Birmingham appealed to the Court of Appeal.

!7.40 of the Code of Guidance address residual income after meeting accommodation costs. It states:

> In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based job seekers' allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit. This amount will vary from case to case, according to the circumstances and composition of the applicant's household. A current tariff of applicable amounts in respect of such benefits should be available within the authority's housing benefit section. Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials. The Secretary of State recommends that housing authorities avoid placing applicants who are in low paid employment in accommodation where they would need to resort to claiming benefit to meet the costs of that accommodation, and to consider opportunities to secure accommodation at affordable rent levels where this likely to reduce perceived or actual disincentives to work.

The Court of Appeal had regard to the all too familiar passages from *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7 on the 'benevolent approach' to be taken to the interpretation of review decision letters by the Court.

Birmingham argued that

> the council asked itself the right question, namely whether the property was affordable, and assembled the necessary material to answer it.

> Particular consideration was given to the income and expenditure analysis in assessing whether, having paid the rental shortfall, Mr Balog would have been able to afford the basic amenities of life. Although it is true to say that the review decision does not in terms refer to paragraph 17.40 of the 2006 Guidance, consideration was plainly given to it, and that is enough. The Recorder fell into error in finding to the contrary.

Mr B argued that the Recorder had reached the right decision. Not only was there no mention of the specific para of the Guidance, unlike other parts of the review letter, but no consideration of whether Mr B's residual income was less than Income Support or (IB) JSA.

> the benefits paid to Mr Balog represented a minimum level of income for him and his family. Payment of the rental shortfall would have left Mr Balog with a level of income nearly £70 per month less than this minimum. Moreover, the benefits paid to Mr Balog left him below the UK poverty line even before this shortfall was taken into account. In all these circumstances no housing authority acting rationally and properly directed in law could have decided that the property was affordable.

The Court of Appeal looked at the context of the affordability issue being raised, noting that it had not been raised by either Mr B (or his representatives) or the Council until the review officer's minded to letter, and that Mr B had not made any response or further submissions in response to that letter.

Further, the issue of affordability only arose during the periods when Mr B was unemployed, but there was an unexplained deduction in HB meaning he had to pay £41.78 per month to the rent. Thus the issue was whether Mr B could afford that shortfall for the periods in which it occurred.

> In answering this question it can be seen the Review Officer gave careful consideration to whether Mr Balog could have reduced his outgoings. He noted that Mr Balog had attributed £693 to housekeeping and observed that this seemed a large amount for such a family and that he believed it

> could have been reduced by more effective housekeeping. This, he thought, would have allowed Mr Balog to cover both the rental shortfall and the deficit of £26.18 to which I have referred at [11] above. Further, it was a reduction that Mr Balog could have made without sacrificing essential amenities.

On the issue of attention to the Guidance, the review officer should be found to have given it attention.

Firstly, the review officer had taken on the issue of affordability for himself and had identified the deficiency in the first decision. So it was reasonable to assume that the issue was in his mind throughout.

Secondly, the review officer had clearly had regard to the overall Guidance in general terms, as it was referred to in several places.

Third, while no express reference was made to para 17.40, this should not be surprising where it was not an issue that had been raised by Mr B

> In my judgment Review Officers are not obliged to identify each and every paragraph of the guidance which bears upon the decision they have to make. That would be to impose upon them a wholly unreasonable and unnecessary burden. I do not therefore accept that the absence of any express reference to this paragraph indicates that the Review Officer failed to have regard to the guidance it contains.

Fourth, the review officer had analysed with care "the circumstances in which Mr Balog would be required to make a contribution to the cost of housing and the impact this would have on his household". In particular he had addressed the effect of having to contribute from time to time about £42 per month towards the rent while Mr B was unemployed. The review officer was also aware of the shortfall in Mr B's income and

> recognising the potential hardship this would cause, the Review Officer

> then went on to consider whether this would deprive Mr Balog and his family of the basic essentials. In all the circumstances of this particular case, he found that it would not. As he put it, they would not have to sacrifice essential amenities. In my judgment this exercise involved precisely the kind of analysis which is envisaged by paragraph 17.40 of the statutory guidance.

Lastly, there was admittedly no direct reference to the Guidance recommendation "that housing authorities should regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the applicable level of income support or income-based jobseekers' allowance". However the review officer had approached the issue of affordability with a concern that Mr B should not be "required to pay any larger sum than he could manage". To criticise this for failing to include specific reference to the Guidance was "the kind of nit-picking analysis" deprecated by Lord Neuberger in *Holmes-Moorhouse*.

Birmingham's appeal allowed.

What use is a Zambrano right of residence?

A couple of years ago a lot of lawyers practising in housing, immigration and welfare benefits got very excited by the case of *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09. The reason for this excitement was that the ECJ said that art.20, of the Treaty, required member states to grant a right of residence to a third country national, who was the primary carer of an EU national, if a refusal to would result in the EU national being forced to leave the EU..More excitingly, this applied to EU nationals who had not left their member state, i.e. it would apply to the parents of British nationals.

This, everyone presumed, would mean that not only would such a right of residence prevent removal, it would also open the door (or if you write for the Daily Mail the "floodgates") to entitlement to welfare benefits and housing. This appeared to be confirmed in the case of *Pryce v Southwark LBC* [2012] EWCA Civ 1572, in which the Court of Appeal held – albeit after Southwark had conceded the appeal – that a *Zambrano* right of residence conferred a right to welfare benefits and housing.

Now unsurprisingly there has been a large amount of fire fighting on behalf of both the Government and the courts. First, the Government passed regulations excluding those with a *Zambrano* right of residence from being entitled to housing under Part 6/7 and to welfare benefits. Second,in *Harrison v SSHD* [2012] EWCA Civ 1736, the Court of Appeal held that the right only extended to those person who cared for children who would otherwise be compelled to leave the country.

Finally, in *R (Sanneh) v SSWP* [2013] EWHC 793 (Admin), the Administrative Court held that the provision of subsistence payments and accommodation under s.17, Children Act 1989 were sufficient to ensure that an individual would not be compelled to leave the UK.

In *R (HC) v SSWP* [2013] EWHC 3874 (Admin), HC sought to challenge the regulations that excluded her from housing assistance and the provision of welfare benefits, including child benefit. HC was an Algerian national. She married a British national and had two children from him. Her children were therefore British. She was the victim of domestic violence and left her partner. She had been dependent on her husband and as a result turned to Oldham social services for assistance under s.17, Children Act 1989. They gave her accommodation and subsistence payments.

She was, for the reasons set out above, not entitled to housing under Part 7 or any welfare benefits. She therefore decided to judicially review the SSWP and DCLG on the basis that the regulations, excluding her from both types of benefit, were unlawful because they discriminated against her.

Her claim failed, however, because the evidence showed that, like in *Sanneh*, she was not compelled to leave the UK. She was being provided with subsistence payments and accommodation by Oldham under s.17, Children Act 1989. More damagingly, her own evidence set out that even if her claim failed she would not leave the UK.

That should have been that. However, the Administrative Court went a step further

and considered whether, if she had a right to reside, the Secretary of State's decision to exclude her from being eligible for housing or welfare benefits amounted to unlawful discrimination. He found that it did not.

First, the treatment did not amount to direct discrimination as it was not on the basis of nationality rather immigration status; it was therefore indirect discrimination. Such discrimination was therefore lawful if it could be justified, i.e. it was a proportionate means of achieving a legitimate aim.

Here the Government contended that the discrimination was justified because:

1) The regulations further the policy of the Government that only those people who are entitled to income related benefits under national law, European Union law and international law have access to those benefits.

2) It encouraged third party nationals, who had children, to be self-sufficient rather than relying on the state.

3) It will maintain the strength of its immigration control.

The margin of appreciation accorded to the State was broad and the court held that these justifications were well within the Government's margin of appreciation; they were not "mainfestly without reasonable foundation". As such, the regulations were lawful.

Comment

This is unlikely to be the last word on the subject. I would be very surprised if there was not an appeal in this case and *Sanneh* is in the process of seeking permission to appeal. I am also aware that the Court of Appeal will be considering the lawfulness of the Part 7 exclusions in the context of an appeal from a s.204 appeal in the county court.

There are two issues really which require sorting out here. The first is when the right to reside arises. The second is what a person with the right is entitled to.

I think it is very unlikely that the right will arise where s.17, Children Act 1989 payments are being made. While it is a question of fact in each case, in such

circumstances, it is hard to see how someone would be compelled to leave and any decision to that effect would surely be upheld.

Second, the more interesting question is whether the Government's justification will be upheld by the Court of Appeal or Supreme Court. That is a hard one to predict, but my instinct is that it will notwithstanding the fact that the justification, at the moment at least, does not appear to distinguish why those with a *Zambrano* right to reside should be treated differently to those with a more conventional right.

On families, powers and duties to accommodate

R (on the application of MK) v Barking and Dagenham London Borough Council [2013] EWHC 3486 (Admin) [Judgment on Lexis, not on Bailii yet]

A judicial review raising the extent of a Council's duties and powers under s.17 Children Act 1989 and s.1 Localism Act 2011 (the general power of competence) in providing housing for someone not otherwise eligible for housing assistance.

MK was from Nigeria. She was in the UK illegally. A current application for leave to remain had been refused and was under appeal to the First Tier Tribunal. (If MK left the UK, this appeal would fall.) MK's age was unclear. Barking had assessed her date of birth to be 4 June 1993 and that assessment was taken as correct in this case, though MK claimed to be two years younger.

She had been living with her aunt, Ms A, and her aunt's two young children. She first came to Barnet Council's attention when Ms A was imprisoned for fraud. A family friend came to look after the children, including MK. At that time, both Ms A's children and MK were taken as 'children in need' by Barnet. The 2009 assessment

found that MK regarded Ms A as her mother and helped out with the care of the two younger children.

Ms A herself did not have leave to remain and applied for leave for herself, her children and MK. This is has not yet been decided.

On Ms A's release, the family moved to barking. MK attended school, got her A levels and an offer of a degree place, though funding was not available due to her uncertain immigration status.

Ms A faced eviction from her private rented accommodation and sought assistance from Barking. Barking initially proposed that the whole family should return to Nigeria, but after *Birmingham City Council v Clue* [2011] 1 WLR 99, in view of Ms A's article 8 application for leave to remain, Barking offered Ms and her two children support and accommodation under s.17 Children Act 1989. Barking declined to assist MK. Ms A has a one bedroom flat with her two sons. MK was staying there, on the floor, then with a friend, before becoming homeless.

Barking had found that MK was not a child in need, nor a formerly relevant child, having never been a looked after child. Barking decided that it had no power to provide MK with accommodation. Their initial assessment had noted that MK had a home life with Ms A and the children.

MK brought a judicial review, arguing:

> that she is destitute and that unless accommodation and monetary assistance is given to her, the impact of her current circumstances, having regard to her age, her sex and the length of time she is likely to be without support, is likely to be so severe as to amount to inhuman or degrading treatment within the meaning of that phrase in article 3 of the European Convention of Human Rights. She also maintains that her current situation impairs her right to a family and private life under article 8

and

> that the Defendant had the power to act to avoid a breach of those rights, i.e. by making use of section 17 (3) of the Children Act 1989 (coupled with section 17 (6)) or by using their power under section 1 of the Localism Act 2011.

Barking argued that:

> Section 17 (3) cannot and should not be used to avoid the impact of statutory provisions preventing the Claimant, who has no right to remain in the UK, from accessing most benefits. That section is clearly designed to benefit children and not a member of their family and the purported use of the section is ultra vires the authority.
>
> Neither can the Localism Act be used to avoid the prohibitions on other statutory means of relief which might otherwise be available to the Claimant were it not for her immigration status.

The High Court noted that both the s.17 Children Act and the s.1 Localism Act powers were constrained by paragraph 1 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002, which prevented their use for those unlawfully in the UK save to the extent that it was necessary to prevent a breach of their convention rights (para 3(a) of Schedule 3).

MK's argument that there was a power under s.17, as accommodating MK with the family would promote or safeguard the welfare of the children. However, the High Court accepted Barking's assessments which found that Ms A's parenting capacity was adequate and there was no reason to regard MK as an integral part of the family. (The *Holmes-Moorhouse* approach to homeless review decisions being expressly adopted for Children Services assessments and a review here).

ML argued that this case was the same as *Clue*, and

> were support under section 17 (3) and (6) to be withheld there would be a breach of convention rights in the sense that the Claimant would be

> destitute and her article 3 rights would be likely to be breached, unless she returned to Nigeria in which case she would forfeit her extant appeal which is based on human rights grounds. Section 17 (3) is sufficiently broad to cover the provision of accommodation and cash to the Claimant, a member of the family of her two nephews.

Barking argued that MK was seeking support and accommodation for herself, but, not being a child in need or formerly relevant child, s.17 support could only be provided where required to promote or safeguard the welfare of the children, here Ms A's two sons. There was therefore no power to use s.17 and to do so would be both ultra vires and contradict a clear government policy. R.(G) v Barnet London Borough Council [2004] 2 AC 208 (HL(E)) establishes that it is not possible to carve out a section 17 duty to house families where children are already accommodated. Per Blackburn-Smith v Lambeth London Borough Council [2007] EWHC 767 (Admin) and Dobbs J:

> " the defendant's powers were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament had determined that the claimant should be excluded from mainstream benefits; "

The High Court agreed with Barking.

> Section 17 (1) gives a clear indication of the purposes for which the powers in that part of the Children Act should be exercised. To utilise the section 17 (3) power either to house the claimant separately or even to accommodate her by granting her a licence to live at the flat in which her aunt and her cousins are housed would, in my judgment, be using the power for a collateral and improper purpose. I agree that to use the section in this way would be ultra vires the authority.

On the Localism Act, the s.1 power was to enable a Local Authority to have the power of an individual.

> an individual is not able to provide part III Children Act services nor part VII Housing Act services nor public money which comprise the services and things which the Claimant is, in fact, seeking. Those functions may only be exercised by a local authority. Section 1 of the Localism Act is an enabling section which, for example, gives a Local Authority the power to enter into contracts or leases. It was not intended by Parliament as a means of overriding a clear statutory scheme prohibiting the provision of benefits of all kinds to those unlawfully in the UK.

Adopting the words of Sedley LJ in *R(Badu) v London Borough of Lambeth* [2006] 1 WLR 505 at para 72 speaking of section 2 of the Local Government Act 2000, the predecessor of section 1 of the Localism Act in England:

> "[A] local authority is not obliged but is permitted to use its alternative powers [in section 2] so long as it does not exercise them with the object simply of circumventing restrictions – even restrictions which are incompatible with Convention rights – built into the impugned power "

So section 1 of the Localism Act 2011 "may not be used to empower the Defendant to provide accommodation and basic subsistence to the Claimant."

And finally, did:

> the combined effect of [*R (Limbuela) -v- Secretary of State for the Home Department* [2006] 1 AC 396 (HL(E))] and *Clue* establish that there is a free standing duty to accommodate and provide cash to a person like the Claimant who is within the boundaries of a local authority and whose Convention rights are threatened? Is there some positive duty independent of the Children Act part III or Housing Act duties?

The High Court held not. *Limbuela* was simply a case about the proper statutory construction of s.55(5)(a) NIAA. Notably, Lord Bingham's judgment began:

> "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3."

The Court of Appeal decision in Clue expressly concerned a scenario in which

> a person is unlawfully present in the United Kingdom within paragraph 7 of Schedule 3 [to] the 2002 Act, and is destitute and **would otherwise be eligible for services of a kind listed in paragraph 1 of Schedule 3**"
> [Emphasis in judgment]

But in this case, even if MK were lawfully present she would not be eligible for s.17 assistance, for the eases given earlier.

For good measure, the High Court quotes Sedley LJ in *Badu*

> "What Hooper's case .does in my respectful view establish is that a power to make alternative provision does not become a duty simply because the principal power is subject to statutory restrictions which are incompatible with Convention rights.
>
> By parity of reasoning, all such powers remain in being. But is it then open to the public authority in whom they are vested, if minded to do so, to use them for the purpose of circumventing or replacing the non-compliant one? Once the purpose of section 6(2) is recognised as being the preservation of Parliamentary sovereignty, the answer must be no. Such a use of power would have an illicit purpose. Thus a local authority which resolved to use section 17(6) of the Children Act 1989 in all cases which fell foul of section 185(4) of the Housing Act 1996 would in my judgment be abusing its powers.

Application for Judicial Review dismissed.

> There is no free standing power vested in the Defendant to accommodate

> the Claimant nor are they permitted to exercise their section 17 Children Act or section 1 Localism Act powers to assist the Claimant and, as a result, I dismiss her application.

More children and housing duties

AT & Ors v London Borough Of Islington [2013] EWCA Civ 1505

We are a bit late with this one, but while we are on the interrelation of duties to children and housing duties, this was an an application for permission to appeal a judicial review decision on the interrelation of s.17 Children Act 1989, s.11 Children Act 2004 and the Housing Act 1996 parts 6 and 7.

AT and her husband have two sons, aged 5 and 2, both of whom have disabilities. One son has serious autistic spectrum disorder and the other Down's syndrome. They live in a one bedroom flat on the second floor of a block with no lift. The flat is damp and suffers from a mouse infestation.

Both children are recognised to be 'Children in need' under s.17 by Islington.

What was at issue (amongst other matters initially raised in the JR claim) was the adequacy of Islington's assessment of need, as it related to housing need. The relevant passage of the assessment read:

> "A key contributing fact to the family's difficulty and stressful circumstances is the current housing, which is severely overcrowded, with inappropriate conditions of damp and mice infestation and with significant safety concerns. With 446 points they are entitled to rehousing and can bid for a suitable property."

AT's argument was that the assessment failed to identify the specific time-frame for rehousing the family. At first instance there had been other issues, such as failure to recognise the difficulty in dealing with stairs.

The Admin Court had found the criticisms of the assessment to be unreasonable and unrealistic, commenting:

> "At the heart of the criticism of the latest assessments is the complaint, almost amounting to anger, that the defendant has failed to provide the family with suitable permanent accommodation. That is not a result which can be guaranteed by a proper discharge of the duties I am considering at this stage."

The argument on the need for a specific time-frame for rehousing was raised in the permission hearing. AT argued that this was necessary for the assessment to fulfil the requirements of statutory guidance:

> "The relevant statutory guidance required that following assessment of the needs of children 'in need' there should be-
> An analysis of the needs of the child;
> Identification of whether and, if so, where intervention will be required to secure the wellbeing of the child;
> A realistic plan of action (including services to be provided) detailing who has responsibility for action, a timetable and process for review."

This amounted to a requirement for 'a detailed operational plan'.

Lord Justice McCombe did not accept this. Quoting Munby J (as he was) in *R(B) v Lambeth LBC* [2006] EWHC 639 (Admin)

> "1. The primary decision-maker is the local authority and not the court. The court's function is one of review, not to come to its own assessment of what is in the child's best interests.

> 2. It is for the local authority not the court to make the initial and core assessments of the children.
> 3. The Administrative Court exists to adjudicate upon specific challenges to discrete decisions. It does not exist to monitor and regulate the performance of public authorities.
> 4. As counsel for the local authority put it, core assessment should not be subjected to a line by line comparison with the Framework. Core assessments are intended to assist local authorities to discharge their duties to children. The purpose of the process is not to enable claimants' lawyers to carry out such a comparison in order to find some trivial difference with a view to fashioning that trivial difference into a ground for judicial review."

Further, on the issue of whether the assessment contained sufficient detail on housing need to amount to a suitable plan, it clearly did.

> The assessor could not accurately assess that which it was not within his power to assess. He or she was not able to predict with accuracy what could be achieved or what might be achieved in housing terms. The housing problem was clearly identified. The assessment identified the need for rehousing and the authority's need to liaise with the housing officials to secure what was required. However, the Children's Service officers could not produce by magic housing which was not in their gift. That depended upon the housing duties of the Council.

Clearly there needed to be continuing action, but "the failure to achieve suitable permanent accommodation was not a result which could be guaranteed by discharge of the duties being considered by the court at this stage of the judicial review."

Permission to appeal refused.

Children and Intentional Homelessness

Hurzat v Hounslow LBC (2013) CA (Civ Div) 21 November 2013 [Not on Bailii yet, Lawtel note]

What is the relationship between Housing Act 1996 Part VII and Children Act 2004? Does the duty under s.11 Children Act to safeguard and promote the welfare of children have a bearing on decisions on intentional homelessness under Housing Act 1996? While this case provides a partial answer, it was not, I think, a great case on the facts for testing the interplay of the Acts.

Ms H is married with 3 young children. She applied to Hounslow as homeless following eviction for rent arrears. Hounslow decided she was intentionally homeless as, although her housing benefit had been reduced, they determined that she could have made up the shortfall on the basis of her income and expenditure. Hounslow decide that Ms H had instead spent money on non-essential items, like repaying a debt to a friend and pocket money for the children.

This was upheld on review and S.204 appeal. Ms H appealed to the Court of Appeal.

Ms H argued that in reaching its decision on whether she could pay the rent, Hounslow had failed to have regard to its duty under s.11 Children Act.

The Court of Appeal found:

Following *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, a decision that affected the upbringing of a child had to be made with the well being of the child as a primary concern. Where the decision affected the child more indirectly, the interests of the child would still be primary, but may be outweighed by other factors, *R (on the application of HH) v Westminster City Magistrates' Court* [2012] UKSC 25.

Housing Act 1996 s.191 provided no room to deploy the principles of s.11 Children Act when making decisions on intentionality, such that the answers to the questions

posed would be the same in any event.

However, the Council had taken into account the expense of Ms H looking after her children in considering whether it was reasonable for her to remain at the property, and rejected her assertions. It was absurd to suggest that whether Ms H had spent too much on pocket money for her children depended on consideration of s.11 Children Act.

This was not a case like *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, where there had been a failure to have regard to disability. In *Pieretti*, disability had been relevant to whether the acts leading to homelessness had been intentional.

It was not the case that s.190(2) Housing Act 1996 might not apply when the best interests of the child were considered. The 1996 Act was not rewritten by s.11 Children Act 2004.

Ms H's appeal dismissed.

Expensive choices

One of a couple of cases on intentional homelessness and affordability of accommodation.

Noel & Anor v London Borough of Hillingdon (2103) CA (Civ Div) 21 November 2013 [Lawtel note, not on Bailii yet]

[Update 11/12/13, now on bailii]

N had applied to Hillingdon as homeless, following eviction from an assured short hold tenancy. Hillingdon found him intentionally homeless and this was upheld on review and by the County Court on a s.204 appeal. Mr N sought permission to appeal

to the Court of Appeal.

Mr N had been living at the house of his partner's mother. He had then taken an assured shorthold tenancy at a rent of some £1350 per month. His total income was about £1000 per month, from benefits. N only made small and sporadic payments of rent, and failed to keep to an agreed payment plan. N had not applied for an increase in his benefits when his partner and her child had moved in with him, and his partner had not applied for benefits. When N was evicted, arrears of rent were £14,000.

Hillingdon had found intentional homelessness on the basis that N had deliberately selected a property that was too large and too expensive for his needs, failed to apply for an extension of housing benefit and his partner had failed to apply for benefits. These acts led to his eviction for rent arrears.

N's argument on appeal was that the Council should have considered the period when N was living at his partner's mothers home and whether it was reasonable for him to remain there. As N could never have afforded the rent at the subsequent property, it should not have been treated as accommodation available to N at all.

The Court of Appeal were not persuaded.

Where there were multiple causes of homelessness, it was sufficient that an act or omission of N was one of them, *Chishimba v Kensington and Chelsea RLBC* [2013] EWCA Civ 786. An objective assessment of the likelihood that homelessness would result from N acts or omissions was required, as a question of fact for the decision maker.

The Council had determined that N's acts and omissions, as above, had caused his eviction through rent arrears. On the failure to claim an extension of housing benefit, it was likely that this would have been awarded and would have covered the ongoing rent, avoiding eviction. N had not only failed to pay the rent, he had not even paid the amount of the housing benefit he had received, which may have avoided or delayed eviction.

The property was accommodation, as it had been open to N to either seek employment and/or increase his benefit such that the property would be affordable

and thus accommodation for N.

Appeal dismissed.

Get your excuses for your excuses in early

Poorsalehy v Wandsworth LBC (2013) QBD 07/11/2013 note on Lawtel, not on Bailii yet]

A cautionary tale, albeit one that was rather hard on Mr Poorsalehy. Mr P had applied to Wandsworth as homeless. His application was rejected by s.184 decision and the s.202 upheld the decision (I've no idea about the details).

Mr P instructed solicitors to appeal under s.204 Housing Act 1996 in March 2012.S.204(2) and (2A) provide:

> (2)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.
>
> (2A)The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied—
> (a)where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time; or
> (b)where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission.

Mr P's appeal was lodged shortly after the 21 days required in (2).

An application for permission to appeal out of time was filed in July 2012. The witness statement to the application provided a good explanation as to why the appeal was brought slightly out of time. However the application and statement did not address why the application for permission itself was not filed until some 4 months later.

The first instance Circuit Judge refused an extension of time to bring the appeal on the basis that no good reason had been provided for the delay in applying for permission to appeal out of time under (2A)(b).

Mr P appealed, on the basis that the failure to apply for permission promptly, or to explain the delay, was his solicitors, not his. He should not be fixed with the failings of his solicitors.

The High Court held that there was no general rule that fixed a party with the procedural errors of his solicitors.

However, Mr P could not simply hide behind saying it was his solicitor's fault. He had to show a reason or cause for the delay. That burden could be discharged by showing he had relied on incompetent solicitors, *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 W.L.R. 1666 and *Corbin v Penfold Metallising Co Ltd* considered. This depended on the facts of the case and evidence of the extent of Mr P's knowledge.

In the present case, there was no evidence at all. The Judge below could not be criticised for finding that the delay was profound and prolonged, such as required explanation. There was no evidence before the Judge below on the extent of Mr P's involvement. As there had not been such evidence to mean that the Judge was bound to conclude that Mr P was not at fault, the appeal could not succeed.

Comment

Before anyone asks, no, I don't know who the solicitors were!

While the policy reasons for this decision are clear – the prospect of every procedural failing resulting in an appeal by the client is not one the Courts would welcome – this

does seem somewhat harsh on Mr P.

There are some procedural steps in which the client is likely to play a very small part, or next to no part at all. An application for permission to appeal out of time, for example, would only require the client's input to the extent of instructions as to the reason for the delay to the appeal, which one would certainly expect to have been taken at the same time as the instructions on the appeal.

So, unless Mr P had given instructions on the appeal, but had somehow failed, despite being asked, to give instructions to the solicitors on reasons why the appeal was out of time, and had continued to fail to do so for some 4 months, it is hard to see how he could be considered to be 'involved' in the delay. This scenario is not impossible, of course, but does seem rather unlikely.

But the absence of evidence in this case must be key. If there had been evidence from Mr P on, for example, what instructions he gave the solicitors and when, and maybe what he was advised about deadlines, the appeal may have had better prospects. Though how that evidence should have been before the Judge below when Mr P was still represented by the solicitors is less than clear.

I don't want to go to Lambeth

Can a refuge be a 'residence of own choice' for the purposes of Local Authority decisions about local connection in homeless applications? This is a rare Court of Appeal decision on the issue. In addition, can a Reg 8(2) 'minded to' letter requirement be triggered by events during the review and after a first 'minded to' letter has been sent?

London Borough of Wandsworth v NJ [2013] EWCA Civ 1373

NJ applied as homeless to Wandsworth. She had been the victim of domestic violence in Leicester and came to London to seek refuge. With the assistance of a charity, she was found a refuge place in Lambeth, the first available. There she and her daughter received counselling and support. After 6 months it was decided she was ready to move to mainstream accommodation and she applied to Wandsworth, to make 'a fresh start', because she had friends in the area and because she intended her daughter to go to school there. She also reported her ex-partner, who was charged with a very serious assault.

Wandsworth's s.184 decision was that NJ was homeless, eligible and in priority need, but because she had a local connection to Lambeth, the criteria for a referral to Lambeth under s.198 Housing Act 1996 were met, and Wandsworth referred NJ's application to Lambeth. NJ requested a review of that decision under s.202.

Wandsworth sent a 'minded to' letter, saying the review officer was minded to find against NJ on

> i) the reasons why the Respondent wanted to be housed in Wandsworth, namely friends and her attendance at church there;
>
> ii) the question as to whether the Respondent's residence in Lambeth was her normal residence of choice.

Shortly afterwards, NJ moved to a refuge in Southwark, following the visit from a friend from Leicester and information suggested her ex-partner was trying to locate her.

NJ's solicitors responded to the 'minded to' letter, arguing the failure to accommodate NJ was unlawful and stating:

> "1. Local Connection is a discretionary requirement and the authority should not apply it in these circumstances;
> 2. Our client does in any event have a local connection to Wandsworth;
> 3. Our client does not have a local connection to Lambeth because a refuge cannot be a 'residence of choice', and she formed no real

connection with the area; and
4. Even if our client did have a local connection to Lambeth, she should not be referred there because she is at risk of violence in the borough. If the Authority had made inquiries before making the referral, they would have discovered that our client was at risk in the area and would not have made the referral."

The review officer upheld the s,184 decision, stating she had considered:

i) all the information available to date;
ii) the issues relating to residence of choice;
iii) the issues relating to risk of violence in the Lambeth area;
iv) the facts relating to special circumstances; and
v) the facts relating to the Respondent's daughter's place at a school in Wandsworth.

Lambeth wrote to NJ to say they accepted the referral and the duty to accommodate.

NJ appealed the review decision. At the s.204 appeal, the Court found:

i) [...] that the SRO had misdirected herself as to the test to be applied when deciding whether or not the Respondent's residence in Lambeth was of her own choice. He held that the SRO should have asked herself the question "did you choose to live in Lambeth" as opposed to the question which she did ask, namely "did you choose to reside in the refuge"; had the SRO asked the first question, it would have produced the answer "No"; see paragraph 14 of the judgment.

ii) Second, having referred to Al Ameri v Kensington and Chelsea RLBC [2004] 2 AC 159, the judge concluded that, on the facts, the Appellant had not chosen to live in Lambeth. At paragraph 15 he said:

"Had A presented herself to any local authority that could be said to have been a matter of choice but she did not. What she sought and was

provided with was a refuge by a charity that has a number of refuges. They placed her where they had a space and that happened to be in Lambeth. I agree with the submission that the Senior Reviews Officer asked herself the wrong question living in Lambeth and in doing so made an error of law. On the facts of this [case] A did not choose to live in Lambeth she was placed there and the fact that other choices may have been available does not mean in my judgment that it was a matter of choice".

iii) Third, the judge concluded that the initial decision (i.e. the section 184 decision) had been defective and that, accordingly, it was unreasonable for the SRO not to have invoked the Regulation 8(2) procedure so as to afford the Respondent a further opportunity to make representations. He dealt with the issue at paragraph 24 of his judgment in the following terms:

"24. In this case the issue of domestic violence was stated in the 184 decision although not explored or expanded upon and it is clear that the Reviewer took account of further representations and made some enquiries. It is of interest to compare and contrast what is said in the 184 decision and the review decision. In the 184 decision (pages 15-16) there is an acceptance of the fact that there had been historic domestic violence without more whereas the review decision deals with the possibility of a continuing risk over the best part of 2 pages – from the middle of page 42 to the top third of page 44. Does that amount to a "deficiency"? In all the circumstances of the case I consider it does. There have been significant developments. A has been seen by other people who know her ex-partner and has been moved out of Lambeth to another refuge in the adjoining borough of Southwark. The threat of violence to A is at the heart of this case and this appeal. A has been denied the opportunity of commenting on the reasons why the risk of future violence has been discounted. This is a case where it can be said that it was in the Wednesbury sense unreasonable not to have invoked the Regulation 8(2) procedure. This may be a case where the reviewer thought that further representations would have made no difference but that is not the test."

The Court i) allowed the Respondent's appeal; ii) quashed the review decision; iii) ordered the Appellant to ensure that accommodation was available for occupation by the Respondent and her daughter pursuant to section 193 of the 1996 Act.

Wandsworth appealed on two issues:

> i) First, was it open to the Appellant on the information before it to conclude that the Respondent's residence in Lambeth was "residence of [her] own choice"?
>
> ii) Second, when reaching its decision had the Appellant complied with Regulation 8(2) of the Regulations?

The Court of Appeal rehearsed the now familiar precedents on the approach to be taken when considering a s.202 review decision, up to and including *Holmes-Moorhouse v Richmond-upon-Thames BC* [2009] UKHL 7 on 'the benevolent approach' to be taken in interpreting the review decision.

On the issues raised by Wandsworth:

> i) NJ argued that the question posed by "section 199(1)(a) was whether residence in a particular district was the individual's own choice". Following *Al Ameri v Kensington and Chelsea* RLBC [2004] 2 AC 159, "Where the choice was made by someone else it did not become the applicant's choice merely because s/he "was content to reside there, or went there voluntarily" or because s/he could "stay where he was when the offer was made"".
>
> iii) Therefore where the fact that someone resided in a particular district was because of some other choice, for example a choice between being homeless and having accommodation, or someone else's choice, the statutory test was not met.
>
> iv) Insofar as it could be said that the Respondent made a "choice" at all, it was limited to the decision to flee domestic violence and to enter the

> refuge system. However, that choice did not concern the one choice to which section 199(1) was directed – namely the choice to live in the district of the LBC or indeed any other district. That decision was made by the refuge system and was no more the Respondent's choice by her having acquiesced in it. There was no way therefore in which it could be said that the Respondent's residence in Lambeth was "of her own choice". The failure to acknowledge this was the fundamental flaw in the SRO's decision.

The Court of Appeal was not convinced. Noting that *Al Ameri* concerned NASS accommodation and that the House of Lords had found that NASS accommodation could never be the applicant's own choice, the Court decided that there was no immediate relation between *Al Ameri* and the present case.

> In contrast, in the present case, the SRO was, in my judgment, entitled to conclude on the material before her that the Respondent had voluntarily chosen to come to London (as opposed to any other part of the country) and had voluntarily chosen to seek assistance from the particular charity which housed her. Whilst it was true that, apparently, the only refuge place available in London was in Lambeth, nonetheless the Respondent had voluntarily chosen to accept the refuge's offer and to reside in Lambeth. As the SRO pointed out, when the Respondent arrived in London in June 2011 she had the right, as a homeless person, to apply to any local authority for accommodation. Indeed she could have chosen to live in any other area of the country apart from London. Instead she chose, for understandable reasons, to reside in the women's refuge place offered to her in Lambeth. Whilst she might have preferred to live in another district, and whilst she might have considered that, given her need for support, she had, from a practical point of view, a very limited range of options given her wish to live in London, other than to accept the Lambeth placement, nonetheless in my view the SRO was, as a matter of law, entitled to conclude that the Respondent's residence in Lambeth was of her own choice. On any basis, it was one made by her voluntarily.

In addition:

> I do not consider that the SRO asked herself the "wrong question". Whilst she did ask herself the two questions: "a) do you normally reside in the refuge in Lambeth? b) Did you choose to reside in the refuge?", adopting a "realistic and practical approach" to the relevant passages in her letter dated 26 July 2012, it is clear that she fully appreciated that the refuge was in Lambeth and that the relevant question was whether the Respondent had chosen to reside in Lambeth. To construe her letter as not addressing the question as to whether the Respondent had chosen to live in Lambeth is to adopt the technical and nit-picking approach condemned by Lord Neuberger in Holmes-Moorhouse v Richmond (supra). As Mummery LJ emphasised in El Goure v RBKC, [2012] EWCA Civ. 70 at 44, if the relevant passages are read in the context of the decision as a whole, it is manifestly clear that the SRO was addressing her mind to the right question.

The first issue went therefore against NJ.

On the second issue, whether the Council had complied with its obligations under Regulation 8(2) in reaching its decision, the Court of Appeal was less satisfied.

NJ's case was that

> the initial decision was defective because (necessarily) it did not address the subsequent events relating to the Respondent's concerns about the possibility of her ex-partner trying to find out where she and their daughter lived, the potential risk of violence in the Lambeth area, and the Respondent's consequential transfer to a different refuge located in the London Borough of Southwark. Accordingly Mr Westgate submitted that it was incumbent upon the SRO, before making her final decision, to write a further letter to the Respondent, notifying her that the SRO was nonetheless minded to affirm the initial decision and her reasons for so doing, and giving the Respondent, or someone on her behalf, an

opportunity to make further submissions orally or in writing, or both orally and in writing.

The Court of Appeal agreed.

In my judgment, and despite Mr Lintott's submissions that the identification of a "deficiency" was a factual matter for the SRO's decision alone, there was indeed a material deficiency in the initial section 184 decision; and the judge was right so to conclude. That was because the Appellant's initial decision in its letter of 7 March 2012 that "we are satisfied that you would not be at risk of domestic violence in the [Lambeth] area", necessarily did not, and could not, take into account the subsequent evidence relating to the Respondent's new concerns about her ex-partner tracking her down at the Lambeth refuge, and her consequent move to the Southwark refuge.

It is clear from the court's decision in Banks v Kingston-upon-Thames RLBC [2008] EWCA Civ 1443 that a purposive interpretation has to be given to Regulation 8(2) and that an original decision may subsequently be rendered "deficient" in the light of intervening events which occur between the date of the original decision and that of the review decision; see e.g. per Lawrence Collins LJ at 70-72.

In the present case there was, in my view, no, or no adequate, consideration by the SRO as to whether the initial decision was deficient on these grounds. That was perhaps not surprising since it was only after the SRO's original "minded to find" letter dated 30 March 2012 that the SRO was informed, in the further written representations made by the Respondent's solicitors dated 11 July 2012, of the Respondent's fears that her ex-partner was seeking to locate her and her subsequent move to the Southwark refuge in the light of those concerns. The nearest that the SRO came to considering whether there had been a deficiency in the initial decision on these grounds was her statement at page 5 of the review decision that:

> "it is impossible to accept your representatives submissions that this council failed to make enquiries whether you were at risk of violence in Lambeth, when you never made such a claim".
> She did however in her section 202 review decision extensively and carefully consider the further written representations made in relation to the issue of "risk of violence in the Lambeth area". She concluded that there was no such risk.

So, although a 'minded to' letter had already been sent, and the representations on the risk of violence in Lambeth post-dated that letter, the requirement for a 'minded to' letter under regulation 8(2) was triggered again, because unless she did so, the applicant was denied the opportunity to comment on the reviewing officers reasons for discounting the future risk of violence.

Lambeth LBC v Johnston [2008] EWCA Civ 690 and *R(Mitu) v Camden* [2011] EWCA Civ 1429 made clear that such a procedural obligation arises. The failure of the initial review to address subsequent concerns about the risk of violence in Lambeth "was a deficiency or irregularity of "sufficient importance to the fairness of the procedure to justify [the] extra procedural safeguard" required by Regulation 8(2)".

Appeal allowed to the extent of removing the requirement on Wandsworth to secure accommodation. The matter remitted for the further s.202 review decision.

Comment

The finding on Reg 8(2) has to be right, simply on the basis that a review can and should take into account subsequent events and changes in circumstances.

The very broad view of 'choice' taken by the Court of Appeal in this case would seem to mean that 'placement' by any agency, charity or indeed Council could be read as 'residing by choice' if there was a conceivable alternative that the applicant might have pursued.

As an aside, in view of the allocation policies adopted by some London councils that exclude from eligibility people have have not lived in the borough for a period of year

'by choice', it may actually be that this expansive view of 'choice' turns out to be of use in challenging eligibility decisions.

Accept no substitutes

P v Ealing Borough Council (2013) CA Civ Div 05/11/2013 [Not on Bailii yet. Note on Lawtel]

This was Ealing's appeal from a s.204 appeal brought by Ms P. At the s.204 appeal, the Circuit Judge had varied Ealing's review decision that Ms P was intentionally homeless and substituted a decision that she was unintentionally homeless.

Ealing's appeal was on the basis that the CJ should instead have remitted the matter to the Council for a fresh review decision.

Ms P, who is disabled and uses a wheelchair, had an assured short hold tenancy of an adapted property. She alleged that a near neighbour had sexually assaulted and then raped her. She made a statement to the police as per s.9 Criminal Justice Act 1967. The police investigated the allegations, but no prosecution was brought. Following this Ms P's relations with neighbours deteriorated and she claimed to have been harassed and threatened.

Ms P appealed as homeless to Ealing, on the basis that she had relatives in the area. Ealing decided that the current risk of violence or the threat of violence directed at Ms P was low and that Ms P was no homeless. On review, Ealing's officer decided that on the basis of all the information, Ms P's allegations of sexual assault were unproven, and that she had accommodation reasonably available to her and was intentionally homeless from it.

Ms P then appealed under s,204 Housing Act 1996. The Judge had regard to the s.9

statement and decided that the Council had failed to take that statement into account as a relevant matter. The review officer's view that Ms P's situation was safe was not a permissible view for the officer to take. The review decisions as quashed and the CJ held that there was no prospect of the Council properly deciding that Ms P was anything other than not intentionally homeless, so varied the decision accordingly.

Ealing's appeal to the Court of Appeal was on the grounds that while it accepted the quashing of the review decision, the CJ had gone too far in reaching his own conclusion, based on materials that were not before the Council.

The Court of Appeal held that the question for the Judge below was whether, if the local authority taken account of the s.9 statement as a relevant consideration, there was a real prospect of it properly finding that Ms P was unintentionally homeless. (*Tower Hamlets LBC v Deugi* [2006] EWCA Civ 159).

The Council was the fact finder and decision maker. It had not had the opportunity to consider the s.9 statement. That this failure might be its own fault was irrelevant.

The s.9 statement had not persuaded the CPS to bring proceedings and there was clearly potential further investigation to be conducted into the matter.

The Judge below had not been correct to conclude that Ms P's statement was so compelling there was no chance of a rational Council decking that the allegations were not substantiated in fact and so it was reasonable for Ms P to remain in that property. The s.9 statement was untested and the Council had not had the opportunity to consider or investigate the allegations. The CJ had been wrong to vary the decision.

Matter remitted to the Council for a fresh decision.

Comment

While the principle of the Council as decision maker is clearly correct, this judgment does cause a bit of eyebrow raising in the finding that it was irrelevant that a failure to consider a relevant document or information was, or may be, the Council's own fault.

The prospect then is that a s.204 appeal, based upon the Council's failure to address certain relevant information that was before it, could never result in the Judge varying

the review decision, simply because the Council had actually failed to consider the relevant information, even though put before it. Quashing and remitting is the best that could be achieved.

Homelessness Appeals and Costs

This is a brief note on a recent High Court appeal dealing with the issue of costs on withdrawn s.204 appeals (*Unichi v LB Southwark 16/10/13*-from a Lawtel summary, not on Bailii).

The Local Authority discharged its duty towards Ms U under s.193(6)(b) of the Housing Act 1996 after she had been evicted from her temporary accommodation for rent arrears. The finding of intentional homelessness was reviewed and during the review process, Ms U's solicitors alerted the Council to the fact that Ms U had learning difficulties and that a psychologist's report would be obtained. The review was completed before the report was issued and Ms U appealed to the County Court. The Council offered to carry out a fresh review, the appeal was withdrawn but there was no agreement about costs. The County Court judge made no order because the Council had put forward a number of cogent reasons why the appeal might have failed.

Andrews J allowed an appeal on the costs issue. Following *M v* Croydon, the starting point where the applicant had obtained the relief she was seeking was that she was entitled to her costs. It was not appropriate for the judge to enquire into the reasons

for compromise or the merits of the appeal. There were no special circumstances justifying a departure from the general rule. It might have been otherwise if the Authority had been taken by surprise by the report but that was not the case here as the Authority had been placed on notice of it and it was relevant to the issues raised on review.

Comment: this case follows on neatly from the case of *Emezie* which we reported a few months ago (our note here). The Emezie judgement followed a similar course in the context of judicial review and it is helpful to see the same principles derived from *M v Croydon* being applied to s.204 appeals.

Better Late than Never?

Peake v LB Hackney [not yet on Bailii] is another cautionary tale about the importance of lodging statutory homelessness appeals within the 21 day limit.

Ms P was found intentionally homeless by the Council following the surrender of a tenancy of accommodation which she occupied with her family in Lewisham and her subsequent departure from her mother's home. Ms P requested a review of the initial decision and the negative review decision was notified to her on 4/12/12. Ms P explained in her appellant's notice that the initial 21 days were taken up with searching for private sector accommodation, raising finance and attending a DWP Back to Work scheme. She also had difficulties obtaining representation for the appeal until 2/1/2013, when she approached Hackney Community Law Centre. Counsel was instructed on 7 or 8/1/13 and the appeal was lodged on 15/1/13.

On Ms P's application, the County Court judge made an allowance for the Christmas and New Year period and found the appeal to be roughly 2 weeks late. In looking at

the initial 21 days, the judge assessed Ms P's 'judgement call' and considered that the steps she took (or failed to take) could not be treated as a good reason for not bringing the appeal in time. In other words, it was perfectly possible for Ms P to lodge her appeal within the statutory time limit and she could not expect the Court to grant relief if she failed to do so.

On her appeal to the High Court, Ms P argued that the judge ought to have dealt with the question of 'good reason' from a subjective viewpoint. In approving *Barrett v LB Southwark*, [our note here] Lewis J held that the subjective/objective distinction was not helpful. Ms P's circumstances were relevant but they still had to explain the delay for not bringing the appeal in time. Lewis J agreed with the County Court's assessment of Ms P's judgement call.

Ms P then argued that by failing to take into account the merits of her appeal, the County Court had determined her civil rights in violation of Article 6 of the ECHR. Lewis J held that so long as it was permissible for Parliament to impose time limits for the bringing of appeals, coupled with the power to extend the limit for a good reason, the fact that the Court could not then look at the merits if it found no good reason did not involve a breach of Article 6.

The Appeal was dismissed.

Comment: the Article 6 point was dealt with briefly in this judgement but the relevant ECHR case law would appear to support the Judge's assessment, even if Ms P's argument had a certain ring to it. Art 6 goes hand in hand with Art 13 (the Right to an Effective Remedy) and a State is entitled to impose restrictions on an individual's right of access to a Court so long as the restriction is proportionate and the essence of that right is not impaired (*Ashingdane v UK*). States enjoy a margin of appreciation in imposing time limits which ensure legal certainty and finality (*Stubbings v UK*) and where a scarce resource such as housing provision is involved (*Bah v UK).*

Not pending this appeal

Zak Johnson v City of Westminster [2013] EWCA Civ 773 [Not on bailii yet, transcript on Lawtel]

When bringing a second appeal to the Court of Appeal from a section 204 Housing Act 1996 appeal to the County Court, what is the applicant's route to challenge a refusal by the local authority to provide accommodation pending appeal to the Court of Appeal?

Mr J had applied as homeless and, following a negative decision and negative s.202 review, he appealed to the County Court. The Council refused accommodation pending appeal until Mr J had sought an order under s.204A of the Housing Act 1996 for accomodation pending appeal. That application was compromised with the Council providing accommodation. The s.204 appeal was dismissed and Mr J applied to the Court of Appeal for permission on a second appeal. Mr J requested continued accommodation pending the Court of Appeal hearing from the Council. This was refused.

Mr J then applied to the Court of Appeal for interim relief – the provision of accommodation pending second appeal.

The question for the Court of Appeal was whether it had jurisdiction to make such an order.

Mr J argued that:
1. There was jurisdiction under CPR 52.10(1) as there was a pending appeal to the Court of Appeal from a County Court decision.
2. The Court of Appeal should constitute itself as the Administrative Court to consider the Council's refusal to provide interim accommodation.
3. The Court of Appeal had 'implicit jurisdiction' to achieve the two principle objectives of correcting wrong decisions and ensuring pubic confidence in the administration of justice.

The Court of Appeal noted that s.204A(3) meant that there could not be an application to the County Court for interim relief, as the appeal was subsequent to the 'final determination' of the County Court of the main appeal. However s.204A(2) made it clear that any appeal against a decision not to provide interim accommodation pending appeal could only be made to the County Court.

The s.204A powers given to the County Court were intended to replicate the limited powers that had been available on judicial review of a review decision, prior to the 1996 Act. They only applied in the limited position of the Council refusing to provide accommodation pending a s.204 appeal. They did not apply once a s.204 appeal had reached a final conclusion and a second appeal was pending to the Court of Appeal. There was therefore no question of the Court of Appeal exercising the County Court's s.204A powers in this situation. The Court was not prepared to read the words "or any appeal therefrom" into the end of s.204A(3), or imply them, though such a construction if there were no other means of recourse of the courts.

However, there is such a means of recourse, by Judicial Review. The suggestion in *R(Konodyba) v RB Kensington & Chelsea* [2011] EWHC 2653 (Admin) [our report] that there might be 'a respectable argument' that Judicial Review was no available was wrong.

The suggestion that the Court of Appeal had a power under CPR 52(10)(1) was also not accepted. That provision only applies to appeal or pending appeals before the Court of Appeal. However, the 1996 Act clearly treats appeal of review decision and the discretion to provide accommodation pending appeal as discrete issues (even though both can be dealt with in the same notice of appeal as per PD52D 28). In this case there had been no order by the County Court under s.204A so the refusal to grant accommodation was not an issue appealed to the Court of Appeal.

If there had been an application to the County Court under s.204A and that had been refused, and permission sought to appeal to the Court of Appeal, that would have been a 'second appeal' so CPR 52.13 would apply. Whether that appeal should be to the High Court of Court of Appeal not decided, but obiter, probably to the Court of Appeal.

GIven the framework of the 1996 Act and the availability of judicial review, the 'implicit jurisdiction' argument was rejected. This was not a 'case of last resort'.

Mr J should seek judicial review. The Court of Appeal was not prepared to constitute itself as the Administrative Court for this purpose. The time to hear argument on the Mohammed criteria and application in this case was too limited.

In the absence of jurisdiction, application dismissed.

Comment

Worth noting, procedurally. Taking a s.204 appeal decision to the Court of Appeal will require a judicial review alongside it to challenge a refusal to accommodate pending second appeal by the Council, assuming that there is a viable challenge on failure to apply *R (Mohammed) v LB Camden* [1998] 30 HLR 315 principles.

The exception is where what is being challenged is the County Court's refusal to order temporary accommodation pending s.204 Appeal on a s.204A application, and that is *probably* an issue for the Court of Appeal, where CPR 52.13 applies.

No more than a statistic

There have been a number of priority need cases in the Court of Appeal recently and *Johnson v Solihull MBC,* June 6, 2013, unreported [from a lawtel note] is another one.

Mr Johnson was 37 years old. He was a heroin addict, suffered from depression and had spent many periods in custody since he was 13 or 14 years old. For several years he had not had his own home, and would either stay with friends or family or sleep rough. He subsequently applied to Solihull for assistance under Part 7, Housing Act 1996. The authority decided that he did not have a priority need because he was not vulnerable. This decision was upheld on a review. In doing so, the reviewing officer, when comparing Mr Johnson to the "ordinary homeless person", referred to a report

which contained statistics demonstrating that a number of homeless people suffered from mental illnesses and drug problems.

The county court dismissed Mr Johnson's appeal and Mr Johnson appealed to the Court of Appeal. He contended that (1) the reviewing officer had wrongly applied the test of vulnerability, as she had used as the comparator a homeless person affected by drug use rather than a homeless person who did not have such issues; (2) the composite assessment approach required of the reviewing officer when she considered "other special reason" under s.189(1)(c) meant that she should consider the individual factors and how they related to each other; (3) the judge had been wrong to limit to long-term prisoners the application of the Homelessness (Priority Need for Accommodation) England Order 2002 art.5(3), which provided that a person who was vulnerable as a result of having served a custodial sentence had a priority housing need.

The Court of Appeal dismissed the appeal. The reviewing officer had been entitled to, when comparing Mr Johnson's circumstances to the ordinary homeless person, to determine that the ordinary homeless person was likely to suffer from mental illness and / or drug problems and it could not be said that the reviewing officer had failed to consider all of Mr Johnson's circumstances together.

Nor was the reviewing officer wrong to find that Mr Johnson was not vulnerable by way of his imprisonment; he had not become institutionalised and the other evidence showed that his released had not led to him being vulnerable.

Comment

This decision, in my view, is contrary to the purpose of the Act and takes *Pereira* a step further than was intended. The purpose of the Act was to ensure that people who are at more risk of suffering harm when homeless are given accommodation. I freely accept that to make that judgment you need a comparator, but the comparator should be someone who is able to cope if they were homeless. The ordinary homeless person may well suffer from mental health problems, but so what? The question is whether they are vulnerable or not. If the majority of homeless people are vulnerable then the comparator should no longer be the ordinary homeless person.

It will be really interesting if this goes higher. As far as I am aware the House of

Lords/Supreme Court have never looked at the question of vulnerability and this case would appear ripe for the Supreme Court to look again at Pereira and to see if it is – to use the oft quoted phrase – fit for purpose 16 years on.

Out of Area Placements

Shelter has recently issued its 2012 statistics of homeless households who were temporarily accommodated outside London. 31 London councils provided data, which have revealed that out of 11513 households, 120 (or 1%) were accommodated more than 20 miles from the capital.

I think I can safely predict, given the imminent London-wide housing benefit cap, that the 2013 percentage will be significantly higher. Indeed, the signs are that out-o--area placements are becoming the norm rather than the exception. The consequence of this will be more litigation and our attention has been drawn to a recent High Court challenge to a decision made by LB Newham to accommodate a family in Liverpool in performance of its s.193(2) duty (*Loylu Begum v LB Newham CO/5827/2013*-unreported).

Ms Begum's household included a disabled son, who suffered from behavioural impairment, focal onset epilepsy and suicidal tendencies, which were liable (according to the medical evidence) to be triggered when travelling by car. Ms Begum was in receipt of DLA for her son and a social services support package was in place. Following a period spent in B&B accommodation, the family was offered accommodation in Liverpool on 1/5/13. Newham argued that it was not reasonably practical to offer affordable in-borough accommodation in light of the anticipated benefit cap. The offer was nevertheless refused and the Claimant argued that the Authority had not taken proper account of the s.149 Equality Act duty, Art. 2 of the 2012 Suitability of Accommodation Order and her Article 8 and Article 14 Convention Rights. Nor had Newham enquired properly, it was argued, into whether

there was suitable accommodation closer to London.

On the application for interim relief, Cox J ordered on 15/5/2013 that the Authority provide suitable accommodation for the household pending completion of the review. As well as criticising the Council's failure to respond fully to the Claimant's pre-action correspondence, the Judge commented that it would be appropriate to order interim relief on the basis of the son's medical and behavioural disabilities.

It is understood that Newham have taken no steps to discharge the Order and that the family remains in B&B accommodation.

Clearly, this is not the end of the story and the case will have to go through the reviews and (possibly) the appeals process. However, the case is a useful indicator of the factual and legal issues which will come into play when (and probably not only if) out-of-area placements are challenged in future.

Too soon?

Unusually, this is a published Judicial Review permission decision. Further, Anthony Thornton QC J has 'certified that this judgment may be cited and referred to in other cases or situations. This direction is made pursuant to paragraph 6.1 of the Practice

Direction (Citation of Authorities) [2001] 1 WLR 1001, CA.'. Why will become clear.

IA, R (on the application of) v City of Westminster Council [2013] EWHC 1273 (QB)

This was a combined permission hearing and hearing of an application to extend an interim injunction that the Defendant provide accommodation to the Claimant. The Judicial Review claim was (and is)

> of 3 decisions that had been made by the defendant were made under Part VII of the Housing Act 1996 that is concerned with applications to a local authority for assistance in cases of homelessness of vulnerable people in priority need. The decisions were:
> (a) The defendant's decision dated 7 March 2013 that the claimant was not in priority need; and
> (b) The further decisions dated 5 and 12 April 2013 refusing to secure that accommodation was available for the claimant's occupation pending its review of its decision dated 7 March 2013.

Mr IA had approached Westminster as homeless after being evicted from a private tenancy, apparently because the landlord wanted a higher rent than LHA would provide, though the landlord also talked about a forthcoming cap on LHA. When he approached Westminster, he had with him a GP's letter:

This gave a brief description of the depression and panic attacks, insomnia and back and leg pains that he was suffering from and listed his current medication. The report stated that:

> "[IA] 33 years old patient who has been registered in my practice since July 2010. He has the following medical problems:
> Depression and Panic attacks: He suffers from long standing depression, panic attacks and low mood for a number of years now. He has been previously followed up by psychiatrist at his previous GP following being tortured back in Iran in 2005 and is currently being referred to our In-house counsellor for further help and support. He is on regular medication.

> Insomnia: He suffers from insomnia and lacks concentration which is affecting his daily activities.
> Back pain: He suffers from chronic lower back pain and has been under the physiologist at his previous GP.
> Leg pain: He suffers from pain in both legs more so on the left side which is affecting his mobility.
> He is on the following medication:
> Co-Codomal Tablets 2 prn 30 tablet 15. 2.2013
> Diphenhydramine Hydrochloride Tablets 50 mg od 40 tablet 13.12.2011
> Citaloprara Hydrobromide Tablets 40 mg od tablet 25. 2.2013
> Due to the above medical condition, [IA] is finding it difficult to cope and will need help and support with his daily needs. His condition has been aggravated and vulnerable due to the fact that he has been issued with an eviction notice from his current accommodation.
> Thank you for taking his medical condition into careful consideration when dealing with his housing matter."

Mr IA had a short interview with a caseworker in the HPU, answering some questions, and handed over the GP's letter. At the end of the interview, the caseworker printed off, signed and gave him a section 184 decision letter, stating he was not in priority need. According to Mr IA, the caseworker did nothing else during the interview than talk to him and type up parts of the decision letter.

The decision found that Mr IA was unintentionally homeless and eligible but not in priority need and that the s.192 discretion to accommodate would not be exercised.

The S.184 decision letter read, in part:

> "By law, when deciding whether someone is vulnerable, we must look at whether they are less able to fend for themselves, when homeless, so that they will suffer injury or detriment in circumstances where a less vulnerable ordinary person would be able to cope without harmful effects (R v London Borough of Camden ex parte Pereira (1998)).
> Our enquiries indicate that none of the above applies to you.

You told me that you suffer from depression, insomnia and anxiety and that you have leg and back pain. You told me that most of your conditions relate to when you were tortured whilst you were incarcerated in Iran. You told me that you take medication regularly and that you will be seeing a counsellor for further support.

You provided me with a letter written by your GP. In the letter, your GP states that you suffer from depression and panic attacks and that you have done for a number of years. He writes that you were previously referred to a psychiatrist and that you are currently waiting to see a counsellor. He states that you take regular medication. He states that you suffer from insomnia and lack concentration. He states that you have back pain and leg pain, which can affect your mobility. He states that you have seen a physiotherapist in the past.

He states that you find it difficult to cope and need help and support with your daily needs. He notes that your condition has been aggravated due to the threat of your becoming homeless.

You are currently prescribed [set out].

We sought advice from our in-house medical advisor regarding your health problems. She told us that you do not appear to be on any combination of medications that we would normally associate with someone who has a severe or unstable mental health issue. There is no apparent requirement for urgent specialist interventions and treatments. You are not on a care plan or in receipt of any care services that would normally be associated with someone who has a severe inability to function on a daily basis because of a significant mental health problem.

> She noted that you have long standing depression. This suggests that the depression is manageable and would continue to be manageable if you were to become homeless. You appear to be receiving adequate support from your GP and are receiving appropriate medication. There is nothing to suggest that this would end if you were to become homeless.
>
> There is nothing to suggest that you have any severe or enduring medical conditions that would prevent you fending for yourself if homeless.
>
> I have also looked at the possibility that you are vulnerable for another special reason. I have carefully considered your situation and all the information you have provided in support of your application. I have decided that you are not in priority need, nor do I consider that your circumstances constitutes another "other special reason".

Note that reference to seeking 'advice from our in-house medical advisor'. Mr IA's evidence was that nothing of the sort had occured during his interview, from handing over the GP's letter to receiving the s.184 letter. The Court noted that "that the qualifications and experience of this medical advisor are not provided and no record of the conversation in which the advice was provided has been made available."

Mr IA found solicitors who requested a review and interim accommodation pending review. This letter said, in part:

> 1. Our client is suffering from mental and physical health conditions and is therefore vulnerable.
> 2. Our client instructs us that his mental illness has required him to see a psychiatrist in the past and that he suffers from panic attacks and is extremely vulnerable.
> 3. We are instructed that our client sought asylum here in the UK in 2009 from Iran, where he was a political activist against the government there and where he was tortured mentally and physically for an extended period because he was protesting against the local government.

4. Our client instructs us that he has no support network as all his family and friends are in Iran and he is alone in the world, troubled and isolated. Our clients instructs us that he has recently become aware that five of his friends, who were politically active with him, has been sentenced to death and this has left him suffering from insomnia because of the stress and worry about the safety of his family and friends.
5. Our client instructs us that his mental health has deteriorated as a result of the news about his friends and family, but this has been further exacerbated by his current housing position.
6. Our client instructs us that he has developed suicidal thoughts and ideation, including auditory thoughts of self-harm and has stated that he feels that "there is no reason for life" during our meeting with him.
7. Our client instructs us that he is currently under the care of a GP at [the Medical Centre close to his flat] and that he is taking medication for his depression and insomnia, including Diphenhydramine Hydrochloride and Citalopram Hydrobromide. We enclose a copy of a report from his GP obtained by our client for your consideration.
8. We are instructed that our client's low mood and lack of sleep has left him unable to engage with other people and get motivated to carry out daily tasks as he just wants to stay in his room.
9. We are instructed that due to experiencing one personal crisis after another, he has become despondent and unable to cope.
10. With regard to his physical health, our client instructs us that he suffers from chronic back and leg pain which leaves him unable to move and affect his mobility, which would continue to deteriorate if he were made street homeless.

This was refused. On Mr IA's vulnerability and the further submissions, the refusal simply stated "[IA] suffers from some physical and mental health problem (sic) but the Council does not consider that these circumstances is sufficiently clear to justify exercising the Council's discretion to provide temporary accommodation pending the outcome of the review."

The council refused to reconsider this decision after a protocol letter of claim, which stated, in part:

It is evident that the Local Authority's letter dated 5 April 2013 fails to adequately consider and investigate the new information provided to the Local Authority in the claimant's letter of 4 April 2013 and it cannot therefore be said that the authority reached a properly or adequately reasoned decision. Accordingly, in the absence of proper investigation and therefore reasoning, the decision is unlawful as the decision cannot be said properly to have applied the Mohammed test.

In particular, the claimant's suicidal ideation has been dismissed as an incidental thought linked to his current circumstances and has not been accepted as a sign of mental illness. However, the claimant is suffering from long standing depression, panic attacks and low mood that have been confirmed by the claimant's GP and for which the claimant has sought the assistance of a psychiatrist in the past. The Local Authority will note that the mental conditions suffered by the Claimant are recognised mental health problems therefore our client does have mental health difficulties which make him vulnerable.

Further there has been a failure to apply the correct test as the Local Authority have looked at the claimant's ability to cope and find alternative accommodation in the private market in the past, not his vulnerability since the change in his personal circumstances, particularly about hearing the news of his friends and linked political activists being sentenced to death in Iran, which the claimant has instructed has caused him to suffer from insomnia and has impacted on his ability to carry out day to day tasks due to lack of sleep.

This is directly linked to the authority's failure to make proper inquiries that the new information provided to them in the claimant's letter of 4 April 2013 should have led to, rather than relying on the information they already had and were relying on.
[...]
The Local Authority will note that the claimant is an asylum seeker from

Iran where he was tortured and incarcerated for 40 days. Due to the extreme anxiety discussing these issues elicits, the claimant has particularly vivid memories of incarceration and the traumatic recollections which he is unfortunately forced to relive on a daily basis. This additional reason clearly makes the claimant particularly vulnerable and if made street homeless there is a strong likelihood that the trauma of fleeing Iran and the torture he has suffered there would manifest itself in a further deterioration of the claimant's mental and physical health. We submit this point has clearly not been fully considered or investigated before the decision to refuse interim accommodation was made."

Westminster's response was dismissive:

In your letter you take the view that the merits of our original decision on accommodation pending review are flawed. You state that the letter failed to take into consideration new information provided to the authority in your letter dated 4 April 2013. In particular you refer to your client mentioning to your firm that he is feeling suicidal. In our letter dated 5 April 2013 we attributed these thoughts to his circumstances rather than his mental health. As noted in your letter we are in agreement that [IA] has mental health issues, but there is no evidence to suggest that his mental illness is the cause of his present thoughts regarding harm. No definitive evidence has been presented to support the idea that [IA's] thoughts of harm are attributed to mental illness.

We had already had sight of [the GP's] report dated 27 February 2013 and this was taken into account by our own medical advisor, the s 184 decision-maker and in our letter of 5 April 2013. The letter was written recently and makes no mention of [IA] having thoughts of self-harm or suicidal ideation or of him having a history of such ideas. I'm therefore not prepared to exercise discretion simply because your client mentioned these thoughts in your office.
You also suggest we have failed to apply the correct [Periera] test. I

> disagree. The decision makes reference to numerous aspects of your client's circumstances including his mental health, his physical health and his overall circumstances including his ability to manage his day to day affairs i.e. his tenancy. I am of the view that your client's ability to find accommodation and maintain a tenancy was a relevant consideration as the GP letter dated 27 February 2013 made a reference to his ability to manage his day to day affairs. Even so, this issue is just one aspect of his case and the decision letter which does look at his mental health issues, and other reasons and does apply the Pereira test, must be read as a whole.
>
> [...]
>
> The Council has had regard to the information contained in your fax dated 12 April 2013. I do not consider this letter to contain any new information, material or argument, which might have a bearing on the original decision and cause us to exercise our discretion in your client's favour throughout the review period.
>
> No new information has been submitted with your letter on the 12 April 2013. I note no new argument has been put forward which you headed under merits, and so I have addressed the issues above.

The claim was issued with a without notice application for interim relief, which was granted. Somewhat surprisingly, Westminster applied to have the injunction discharged. That application somehow got turned into the present application to continue relief, which didn't bode well for them.

And so it proved. The Court granted permission on the Judicial Review and continued the injunction for Westminster to accommodate until hearing.

On permission [paras 23-33]

> (1) The section 184 decision

The claimant's prospects of showing that this decision was unlawful, flawed with procedural irregularity and Wednesbury unreasonable are very strong for the following reasons.

Failure to pursue inquiries. It is clear from the Homelessness Code that in a case involving alleged vulnerability due to mental health and other reasons, a housing authority should immediately after receiving an application or referral undertake an initial screening exercise to determine whether it has reason to believe that the applicant is unintentionally homeless, eligible for assistance and in priority need. This exercise should be undertaken within a day of the receipt of the application and, if the authority has reason to believe that its Part VII duties are engaged, it should embark on the necessary inquiries (in the plural) and should make interim accommodation available to the applicant pending the conclusion of those inquiries. These inquiries should not take more than 33 days, save in exceptional circumstances, but in many cases should take significantly less time than that.

It is significant that the applicant does not have to "prove his case". The inquiry process is an inquisitorial one and the Code clearly envisages that the case worker undertaking that inquiry will, in a case such as the claimant's, pursue a number of avenues of inquiry. Where mental health issues and issues arising from historic mistreatment of former asylum seeker are concerned, the housing authority should normally consult with the applicant's medical advisers, both present and past and with the relevant mental health services and will usually seek obtain a further assessment and report from a psychiatrist. Where, as in this case, it appears that the applicant is depressed, alone, unable readily to cope with day-to-day living tasks, unemployed and possibly unemployable, has no settled links with England or the English way of life and has minimal support mechanisms at his disposal, the inquiries would be expected to extend to a detailed inquiry into the applicant's way of life prior to his

homelessness.

It would have been impossible for any of these inquiries to be undertaken in this case during the initial screening interview. All the caseworker had to work with, save for IA's answers, was the helpful and revealing but inevitably very short Medical Report from the claimant's GP. This GP was clearly one who would have been known to the Housing Options Homelessness team as one who had a good experience of homeless vulnerable people since his practice was in the very area where the claimant came from and was located close to the relevant offices of the defendant. That report described the claimant as finding it difficult to cope and as one who "will need" (note the future tense) help and support with his daily needs. Moreover, his condition would be aggravated and made vulnerable due to his having been served with an eviction notice. Given that the report attributed these difficulties directly to his long-term depression, panic attacks, low moods, insomnia, chronic back pain and leg pains which affect his mobility and that he had suffered torture in his home country as recently as 2005 prior to his arrival as an asylum-seeker in England, it seems irrational and, indeed, perverse for the defendant to conclude that there was no reason to believe that the claimant was vulnerable and in priority need and to screen him out of the section 184 inquiries that it otherwise had a duty to undertake.

It follows that the claimant has a highly arguable case for demonstrating that no section 184 inquiry was ever conducted and that, perversely, the inquiry was screened out by the adverse screening decision taken on 7 March 2013.

Procedural irregularity. It is doubtful whether the decision-maker consulted the in-house medical advisor about the specific details of the claimant's case at all. If such a consultation took place, the only matter

upon which advice was apparently taken was as to the normal reason for prescribing the three repeat medications referred to in the GP's report. No reference was apparently made to the various known circumstances of the claimant's case and the qualifications and experience of the advisor are not identified. Unless that advisor was a psychiatrist, it seems unlikely that such advice as was given could or should have been relied on without further reference to the claimant's GP Furthermore, fairness dictated that any advice received by the defendant should have been referred to the claimant's GP, and possibly his previous psychiatric advisor, for comment and response before a final priority need decision was taken.

Wednesbury unreasonable. The decision, if it be a section 184 decision, failed to take account of any of the inquiries that section 184 envisaged as being required on the facts of a case such as this one. The decision-maker should, it is to be presumed, have sought details of the case presented to the UK Border Agency that led to the claimant being granted asylum, of the nature and contents of the psychiatric assessment and treatment he had previously received, of the reasons for the proposed counselling, of the reasons why the landlord had terminated the claimant's tenancy and of any independent evidence of the claimant's living difficulties. The GP should have been asked to provide a full report and an independent psychiatric assessment should have been considered. These further details and any other further details should have been considered against the reported mental and physical difficulties reported on by the claimant and the GP. That should then have led to the vulnerability assessment which is in the nature of a risk assessment which assessed the extent to which the claimant would be vulnerable if homeless and the relative vulnerability he would suffer from compared to that of other homeless vulnerable people.

None of these matters were considered, or sufficiently considered, by the decision-maker and, on these grounds as well, the claimant has good

prospects of success in showing that the decision was flawed.

Section 188(1) duty

If the section 184 decision is flawed and susceptible to challenge on any or all of the grounds set out above, it follows that the claimant has good prospects of showing that the defendant is in breach of its section 188(1) duty in not providing the claimant with interim accommodation pending the provision of a lawful section 184 decision.

Section 188(3) duty

The claimant's solicitors provided significant additional information to the defendant following the section 184 decision relating to the claimant's possible significantly deteriorated mental health, his inability to cope with homelessness and the additional difficulties he was experiencing as a former asylum seeker who had received very shattering and painful news from his home country that was directly linked to his own pre-asylum experiences. Further details were also provided as to his loneliness, his lack of any support mechanism and as to the debilitating nature and effects of his depression, physical disabilities, insomnia and other similar factors.

None of this additional information had been assessed by appropriate inquiries and the most distressing of these details were dismissed in somewhat cavalier and speculative fashion by the Team Leader and, subsequently, by the Housing Options Service Manager. It followed that, in the light of the original apparently flawed section 184 decision, the Pereira decision taken by the defendant in refusing the claimant interim accommodation pending the review of his case was highly arguably flawed since it made no assessment of the merits of the claimant's case that he was vulnerable on mental health and other grounds, it failed to take account of the Case Worker's failure to make any inquiries when reaching the section 188 decision, it did not assess or inquire into the new material submitted by the claimant's solicitors and it overlooked or dismissed peremptorily the claimant's personal circumstances.

The Court therefore found that Mr IA had 'good prospects of success' in obtaining a judicial review of the defendant's interim accommodation decisions.

In view of this, the decision on the injunction was inevitable.

> Given the good prospects of success in the judicial review, it is clear that the claimant was correct in seeking, and the court's decision was not open to challenge in granting, an interim injunction requiring the claimant to be provided with interim accommodation. The injunction can be seen to have been appropriate both on the grounds that there was a continuing apparent breach of the duty to provide interim accommodation pending a valid section 184 decision and because the section 188(3) discretionary decision was flawed on Wednesbury grounds.
> The interim injunction should be continued until the review decision is available. The claimant is entitled to the costs of the injunction proceedings to date. Such costs should be assessed forthwith in conjunction with a public funding assessment.

Comment

Costs against Westminster on the injunction proceedings, and an assessment of the JR claim as 'very strong' are a very clear indication of where this claim would be heading for Westminster. Highly unusually, the Court certified the judgment for reference and citing in other cases, 'given the importance and topicality of the decision in the field of Part VII homeless applications'.

It may be that there are other cases against Westminster imminent, but in any event, this is a clear shot across the bows of Local Authorities that have taken up a practice and/or policy of 'instant' or same day s.184 decisions, in order to avoid having to provide interim accommodation under s.188(1). If the applicant is prima facie unintentionally homeless, eligible and in priority need, inquiries must be undertaken, and those inquiries should extend further than just the evidence presented by the applicant, if that evidence is enough to give reason to believe that he or she may be unintentionally homeless, eligible and in priority need.

In short, any 'on the day' decision where no further inquiries have been made is likely to be unlawful unless there was no apparent reason to believe that the applicant may be homeless, etc.

Any approach such as Westminster's, completing a pro forma s.184 in the interview, let alone referring to an 'inhouse medical expert' who apparently wasn't consulted at all on the evidence here, is unlikely to constitute adequate inquiries in anything but the most obvious case.

On the making of inquiries, the following comments in the judgment are worthy of note:

> Where mental health issues and issues arising from historic mistreatment of former asylum seeker are concerned, the housing authority should normally consult with the applicant's medical advisers, both present and past and with the relevant mental health services and will usually seek obtain a further assessment and report from a psychiatrist.

And

> It is doubtful whether the decision-maker consulted the in-house medical advisor about the specific details of the claimant's case at all. If such a consultation took place, the only matter upon which advice was apparently taken was as to the normal reason for prescribing the three repeat medications referred to in the GP's report. No reference was apparently made to the various known circumstances of the claimant's case and the qualifications and experience of the advisor are not identified. Unless that advisor was a psychiatrist, it seems unlikely that such advice as was given could or should have been relied on without further reference to the claimant's GP. Furthermore, fairness dictated that any advice received by the defendant should have been referred to the claimant's GP, and possibly his previous psychiatric advisor, for comment and response before a final priority need decision was taken.

For applicants with mental health issues, this is very helpful. It is not unusual for an 'in-house medical advisor' (usually at GP level) to be consulted about prescriptions and the applicant's condition dismissed on that basis. The upshot of this case is that any such advice by the 'in-house medical advisor' should be referred to the applicant's GP and/or psychiatric advisor for response.

While *Shala v Birmingham CC* [our note] was concerned, on a strict reading, with whether an 'in house' GP could be considered equal to the applicant's consultant psychiatrist, this case appears to widen the doubts about the extent to which the Local Authority could rely on advice from a non-specialist in house GP advisor, at least without referring that advice to the applicant's GP/consultant, at least in mental health cases.

We will have to see if this case goes to full JR hearing, though it seems doubtful, but this permission and injunction decision is clearly and strongly set out. All should take note.

Priority need

Hotak v Southwark LBC [2013] EWCA Civ 515 concerned a short point on whether an authority was entitled to have regard to the assistance that a homeless person would receive, in the event he became homeless, when determining whether he was vulnerable or not.

The facts of the case were this: Mr Hotak had come to London with his brother. They moved into a flat in Peckham. They were asked to leave the flat and both approached Southwark for assistance (albeit Mr Hotak's brother at that time was ineligible for assistance and so the application was made in Mr Hotak's name only).

Southwark accepted that Mr Hotak's suffered from depression, post-traumatic stress

disorder and a learning disability, all of which had resulted in him self-harming while in prison. Southwark also acknowledged that these conditions were "serious" enough to mean that he "might" be vulnerable. Moreover, Southwark also conceded that if he was street homeless, and on his own, then he would be more likely to suffer harm or injury than the ordinary homeless person.

However, Southwark also took into account the support that Mr Hotak received from his brother. This amounted to daily personal support, including prompts to undertake personal hygiene, to change his clothes, to undertake a routine, and to organise health appointments, meals and finances. Southwark were satisfied that Mr Hotak was not vulnerable because if he were to be homeless he would not suffer harm or injury because he would continue to receive this kind of support from his brother.

Mr Hotak appealed against this decision to the county court. He contended that when assessing a person's vulnerability Southwark were restricted to considering how an applicant would cope if they were homeless on their own without assistance from anyone else or, alternatively, Southwark's decision that Mr Hotak's brother could provide such support was not open to it on the evidence. This appeal was unsuccessful in the county court and Mr Hotak appealed to the Court of Appeal on the first ground only.

The appeal was dismissed. The reviewing officer, once he was satisfied that a person suffered from a mental illness, was required to consider whether, by reason of that mental illness, when homeless, the applicant would be less able to fend for himself than the ordinary homeless person, so that he would suffer harm or injury. This was a "composite assessment" which required the reviewing officer to take into account all of the applicant's personal circumstances. It was not permissible for the reviewing officer to make an assessment of the applicant's vulnerability in isolation from his personal circumstances, which in this case included the support offered by his brother.

Rather helpfully, however, the Court of Appeal did make clear that an authority cannot simply rely on an existing support network to uphold a finding that a person is not vulnerable. The reviewing officer would have to give proper weight to the support network available:

> "[42] The effect of a support network in the applicant's existing home is unlikely to be the same as the effect of a similar support network when the applicant is made homeless. Even if the reviewing officer is satisfied that the support network would remain in place it may not, in a situation of homelessness, be sufficient to enable the applicant to fend for himself as would the average homeless person. For example, the old age or mental ill health or physical disability of the applicant may be such that no amount of support will enable the applicant to cope with homelessness as would a robust and healthy homeless person. It seems to me that a fair evaluation of all the evidence is critical to the sustainability of the reviewing officer's decision."

Comment

This decision is not all that surprising. The question of whether someone can cope on the streets is a very fact sensitive judgment and plainly the authority making the decision can take everything into account. As the Court of Appeal caution, however, in the vast majority of cases the fact that someone has a support network at home is unlikely to protect them sufficiently while on the streets to ensure that they do not suffer harm or injury. But, as that judgment is for the authority subject to an irrationality challenge, it is going to quite hard to challenge.

Not So Great Expectations

We are all aware that there is no general entitlement to permanent accommodation via the Part VII route (*R v Brent ex p Awua*). So it is interesting to find a s.204 appeal where it was argued that the Appellant had a legitimate expectation of permanent accommodation in preference to anything else that the Council might offer.

The judgement in Obiorah *v LB Lewisham [2013] EWCA Civ 325* contains, unusually, scant background information about the Appellant and the property that was offered to her in discharge of the homelessness duty.

The Court of Appeal's judgement reveals a long history of accommodation that was offered, withdrawn and compromised on review/appeal from 2004 onwards.

It is apparent that that Appellant had mobility issues and that recommendations were made on 21/1/10 for the Appellant to be made one Part VI offer of lifted accommodation within the Lee Green ward.

Lewisham proceeded to offer the Appellant temporary accommodation at Flat A, 7 Cambridge Drive, London SE12 8AG on 14/6/11. The Appellant responded by asserting her right to permanent accommodation, the offer was remade and the Appellant reiterated her argument. Lewisham treated her response as a request for a review and there followed a 'minded to' letter (which the Appellant states she did not receive) inviting further information and/or representations.

The s.202 decision was made on 15/8/11 and it upheld the offered accommodation as suitable for the Appellant. The letter also referred to the possibility that the temporary let might have been converted in due course to a permanent let under Lewisham's 'temporary to permanent program.'

The appeal to the County Court was dismissed and on appeal to the Court of Appeal, permission was granted on the strength of a (rather convoluted) procedural fairness ground. An application was made for additional grounds to be added (breach of Reg 8(2) of the Review Procedures Regs, breach of legitimate expectation and unfairness) and the application and substantive appeal were dealt with together on 28/2/13.

On the question of legitimate expectation, reference was made to the section of Lewisham's policy, which states: 'if the local office accepts that any of these guarantees is not met, the offer will be withdrawn and another one made when a suitable property becomes available'. It was accordingly argued that this gave rise to an expectation that further permanent accommodation would follow a withdrawn offer.

McCombe LJ dismissed this ground, concluding that there was nothing in the

Council's policy or in any other representations it made to suggest that it was relinquishing its right to offer temporary accommodation to the Appellant. If the Appellant held entrenched views about her right to permanent accommodation, this was through no fault on the Council's part.

The Reg 8(2) issue is curiously vague and the Judge's finding was that the Appellant failed to make out her case that Reg 8(2) applied at all.

The final ground related to the passage in the review decision referred to above about the conversion of the temporary let to a permanent let. The Appellant's argument was that this decision ought to have been communicated to her so that she could make a properly informed decision whether to accept it and that it was unfair to withhold it. It was alternatively argued that the absence of this information was a deficiency in a Reg 8(2) sense. The Judge disagreed: firstly the Act contained no obligation to communicate such information and secondly, the Appellant failed to engage with the Authority in the review process. It cannot therefore be said in those circumstances that any non-disclosure on the Authority's part was unfair.

The Appeal was dismissed.

Comment: I initially felt sympathy for the Appellant in respect of the fairness ground as I suspect she might well have had a change of heart had she been told of the possibility of the conversion of the temporary let to a permanent one. On the other hand, had the Appellant accepted the offer and moved in, she could hardly have expected the review decision to be quashed for want of disclosure, irrespective of how she conducted herself in the course of the review. In other words, an applicant who has refused could not expect to find themselves in a better position than one who has accepted the property. It therefore all boils down to whether offered accommodation is suitable and the old adage that if in doubt, accept and request a review.

Shelter briefing on private sector discharge

Shelter have produced a briefing on the use of Localism Act powers to place homeless applicants in private sector accommodation, aimed at Local Authorities and Councillors,

> Changes in the Localism Act 2011 give local authorities more scope to place homeless households in private rented homes, increasing your options for placements. These powers also provide an opportunity to build stronger links with local landlords and raise the general standards of rented homes in your area.

The briefing is also obviously of interest and potential use to those advising or acting for homeless people, not least as it engages with the alternatives that might avoid a necessity of private sector discharge.

When fraud is not the operating cause of a person's homelessness

Chishimba v RBKC, Court of Appeal, March 25, 2013, [from a lawtel note - not on bailii yet] concerned an appeal brought by a homeless applicant. The issue was whether Ms Chishimba had become intentionally homeless.

Ms Chishimba approached the authority for assistance under Part 7. When asked about her immigraiton status she supplied the authority with a British passport. The

passport was, however, a counterfeit and Ms Chishimba was not eligible for assistance. She therefore committed, at the very least, the criminal offence under s.214, Housing Act 1996.

The authority, however, were unaware it was a counterfeit passport and appear (it is not entirely clear from the note) to have accepted that she was owed the full housing duty under s.193(2) and provided her with a non-secure tenancy.

Subsequently, however, the UK Border Agency discovered that Ms Chishimba had been using the counterfeit passport and notified the authority. On being made aware of this, the authority decided that Ms Chishimba was not eligible for assistance, told her that the duty under s.193(2) had ceased and served her with a notice to quit determining her tenancy. She was subsequently evicted.

For reasons that are not clear from the lawtel note (but presumably after a fresh application was made to the UK Border Agency on human rights grounds) Ms Chishimba was granted three years leave to remain in the UK and she became eligible for assistance under Part 7. She re-approached the authority for such assistance.

The authority decided, however, that she had become intentionally homeless; Ms Chishimba had, by using the counterfeit passport, committed a deliberate act, in the absence of good faith, which had resulted in her losing her non-secure tenancy, which had been available for her occupation and which was reasonable to continue to occupy. Ms Chishimba appealed to the county court and her appeal was rejected.

On a second appeal, the Court of Appeal allowed Ms Chishimba's appeal. The cause of Ms Chishimba's homelessness was the authority's discovery that she had obtained the property fraudulently. The authority was not entitled to take into account acts that occurred prior to Ms Chishimba obtaining her accommodation, i.e. it could not take into account the use of the passport to obtain the accommodation.

In any event, even if Ms Chishimba had committed a deliberate act that had led to her homelessness, she could not be found intentionally homeless because the property had not been reasonable for Ms Chishimba to continue to occupy; she was not eligible for housing assistance and should not have been provided the accommodation. Once the deception arose there was no possible justification for the continued occupation.

Comment

It is hard to know where to start with this decision. When I first read it I had to re-read it to make sure that I had understood the result. To put it mildly this is a pretty surprising decision (not only policy wise, but also legally). I'm not entirely sure what the authority did to lose this.

It is pretty trite law that the question of what act caused a person's homelessness is one for the authority, which can only be overturned if it is *Wednesbury* unreasonable. Moreover, I don't see why an authority cannot determine the operating cause to have taken place prior to the tenancy being granted. Section 191 does not provide that the deliberate act must occur after the applicant has occupied their accommodation and it would be odd if it did. On the Court of Appeal's analysis someone who defaults on a mortgage after having obtained it fraudulently, i.e. by declaring an income that is greater than they actually receive, would not have become homeless intentionally if they subsequently lost their home because they could not afford to pay it.

Nor should there be any difficulty finding that the operating cause is the criminal or fraudulent conduct. In *Stewart v Lambeth LBC* [2012] EWCA Civ 753, the applicant became homeless after he was evicted for rent arrears. The rent arrears arose, however, after he had been imprisoned for dealing heroin and his sister failed to pay his rent. The Court of Appeal held that the authority was entitled to find that the operating cause of the applicant's homelessness was his criminal conduct, i.e. but for dealing heroin he would not have been imprisoned and would have been able to pay his rent.

In this case it was plainly open to the authority to determine that the operating cause of Ms Chishimba losing her non-secure tenancy was the fact that she had obtained it fraudulently. But for committing fraud she would have been able to remain living in the property and she would not have lost it. Yes, it was only when the fraud was discovered that the steps were taken to evict her, but the cause of those steps was the fraud not the discovery of it.

The second basis for the decision is even more hard to comprehend. In *Birmingham CC v Qasim* [2009] EWCA Civ 1080 (our note here – a case that was as equally surprising to some), the Court of Appeal held that a tenancy granted by a local

authority subsisted even if it had been granted contrary to the authority's allocation scheme (and therefore contrary to Part 6, Housing Act 1996). The unlawful act did not vitiate the tenancy because the power to grant tenancies derived from Part 2, Housing Act 1985 not Part 6.

The same must apply equally to Part 7. The power to grant tenancies comes from Part 2 and it does not prohibit an authority from granting a tenancy to someone who is not eligible for assistance. As such, Ms Chishimba's teancy was lawful and she had every right to remain there until it was determined by a notice to quit, i.e. like anyone else occupying a non-secure tenancy. It is hard to see on what basis that accommodation could be considered unreasonable to continue to occupy.

I'd love to see a note of judgment on this because it may be that the lawtel note has done the Court of Appeal an injustice. Irrespective of that, I can safely say that Ms Chishimba's legal team did a cracking job.

[Edit - We have changed the title after receiving an email suggesting it was causing upset to the applicant in this case. This was certainly not my intention and therefore I have changed it. That does not mean I did not think the original title was unfair or unjustified.]

In the teeth of it

In *El-Dinnaoui v Westminster CC* [2013] EWCA Civ 231, the Court of Appeal found that the offer of a flat on the 16th floor of a block to a household which contained a person with fear of heights was perverse. The offer of accommodation was "in the teeth" of the medical evidence. How could the case have got this far, one might well ask? At heart in this case, there is something interesting about the reception by homelessness officers about medical evidence (see comments at the end). The final point by way of introduction is a hat-tip to Debra Wilson at Anthony Gold who, I'm

told, took Mr El-Dinnaoui's appeal pro bono (and won).

In essence, the El-Dinnaoui household had been provided with s 193 accommodation on the ninth floor of a block since 2002. After a couple of transfer requests in 2002 (one of which was on the basis of Ms El-Dinnaoui's "fear of heights"), which came to nothing (it is not clear why), Westminster accepted that this flat was overcrowded because of the birth of a third child. The key points about this ninth floor flat were (a) there was no direct view of the street below from the windows, and (b) Ms El-Dinnaoui had received CBT in 2006.

The offer of alternative accommodation on the 16th floor came in. The major difference between this property and the other one was that the windows were low down so that there must have been a clear sense of the height of the flat above street level. At the viewing, there were dramatic consequences. Ms El-Dinnaoui collapsed at the lift and an ambulance had to be called. The hospital discharge letter said "had a panic attack while on 16th floor. Has had lifelong fear of high buildings". This was followed up by the GP's letter to Westminster which confirmed severe vertigo and fear of heights, and a subsequent letter which described a long-standing fear of heights, but that there had been no previous treatment. A questionnaire to the GP was answered by somebody else from the surgery who confirmed that the only record about a fear of heights was after the viewing of the property.

The review officer issued a minded to letter and then the s 202 review decision. She wrote that the question before her was whether Ms El-Dinnaoui had an irrational fear of heights or a general dislike. She came down on the side of the latter, suggesting that Ms El-Dinnaoui would get used to the flat over time and risks could be mitigated by "thick nets and curtains or blinds to camouflage the view from the window". The further reasons for this view were that Ms El-Dinnaoui had got used to living on the ninth floor; and none of the medical advisors had given a restriction as to the floor above which Ms El-Dinnaoui should not be offered accommodation: "To me this is an indication that Mrs El-Dinnaoui's case was not sufficiently severe to warrant this".

A failure to make further inquiries challenge was disposed of briefly by the Court of Appeal on the basis of *Cramp*. It was the general perversity challenge which was successful. As Sir Alan Ward, who gave the only substantive judgment, said: 'How, in the teeth of that medical evidence, could one rationally conclude that Mrs El-D

simply had "a general dislike of heights" as opposed to "an irrational fear which would make any property above a certain floor level impractical"?'

The key point was the distinction between the two properties. In the ninth floor flat, one could not see the road below; in the 16th floor flat, by contrast, the windows were only three feet above floor level, giving full view. As for the nets/curtains point made by the review officer, he asked "Is it practical to live behind drawn curtains?". Further, the history invites "only one conclusion", that her collapse when viewing the 16th floor flat was inevitable.

Comment

(i) Given that it is ordinarily implicit in a true perversity finding that the decision should be varied, it is odd that this decision was only quashed. Perhaps this was because there may have been further enquiries which could have been made by the review officer (without having reached the Wednesbury threshold for this appeal). Can anyone enlighten me?

(ii) More significantly, there is a general issue about the use, and veracity ascribed to, the applicant's medical evidence by officers. Here, the medical evidence was pretty clear and, despite there being "no countervailing evidence from a medical expert to refute it", it seems to have been disregarded. There is an interesting finding from the most recent research conducted by Caroline Hunter, Jo Bretherton and Sarah Johnsen, about the use of medical evidence in priority need vulnerability cases:

> *there was little deference to the medical profession – the opinions of the applicants' GPs were viewed with some scepticism. In one authority this was the main source of information, as no in-house service was available, yet the officers tended to revert to their professional intuition about the case rather than rely on what GPs said in response as it was felt they were often "on the side" of the applicant.*

My sense, for what it's worth, is that this research finding verifies what is commonly found by homelessness officers, applicants and their advisors. I mean no disrespect to homelessness officers nor to GPs by this – my suspicion is that many GP letters may well read like exercises in advocacy – but there remains the question of how one should treat such letters.

Residing together, apart.

Sharif v The London Borough of Camden [2013] UKSC 10

Does accommodation available for occupation by a person and those reasonably expected to reside with them have to be in one unit of accommodation?

In this case, the Court of Appeal had said yes (our report here), rejecting Camden's argument that two separate flats on the same floor of a hostel building could be considered as 'accommodation available to occupy' for Ms Shairf, her much younger sister and her father, who needed her care. The full facts are in our earlier report.

Camden appealed to the Supreme Court.

The issue was the meaning of 'together with' in section 176 Housing Act 1996

"Accommodation shall be regarded as available for a person's occupation only 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."

The argument for Camden was that

> Etherton LJ's construction of the statute went beyond what the words justified and would impose an unwarranted burden on the authority. He accepted that one of the social purposes behind the statute was to ensure that families could be kept together. However, that did not necessarily mean in one unit. The correct question to ask was whether the accommodation, even if not in a single unit, was "sufficiently proximate" to fulfil that social purpose. In other words, could the family be described as living "together" even if accommodated in what was technically more than one unit of accommodation? That interpretation was consistent

with the history of the legislation and in particular the judgment of Lord Brightman in *Puhlhofer*. The council was particularly concerned at the suggestion that the statutory requirement could only be satisfied by the provision of "communal living areas". Such a requirement would be novel to housing law generally, and there was no proper basis for importing it into this Part of the Act.

Mr Arden [QC for Camden] referred also to the decision of the House of Lords in *Uratemp Ventures Ltd v Collins* [2002] AC 301, relating to the definition of "a dwelling-house let as a separate dwelling" in section 1 of the Housing Act 1988. It was there held that a single room, even without cooking facilities could constitute a "dwelling-house" as defined in the 1988 Act. Lord Millett said:

"In both ordinary and literary usage, residential accommodation is 'a dwelling' if it is the occupier's home But his home is not the less his home because he does not cook there but prefers to eat out or bring in ready-cooked meals." (para 31).

By analogy, he submitted, neither the word "accommodation" nor the expression "living together" can in themselves be read as containing any implication as to the nature of the facilities to be provided.

For Ms Sharif:

Ms Lieven QC supports the judgment of the Court of Appeal. She accepts that Etherton LJ may have gone too far in suggesting that there need to be "communal living areas". However she supports his essential reasoning, based on the ordinary use of language. The accommodation must be available for "living together". That implies there must at least be somewhere in the accommodation where living together can take place. The test is objective rather than subjective. It is an issue of law on which, at least where the primary facts are not in issue, the court is able to substitute its view for that of the authority. The layout must be such as to facilitate normal family life for those within the scope of the section. That will normally imply a single unit of accommodation, but she accepts that it may be possible to accommodate a family in two rooms in a hostel,

> provided there is a space where some degree of shared family life can take place, even if that is limited to some shared cooking facilities.

Lord Carnwath held that 'accommodation' as a term was neutral, not meaning a single unit. The issue then was the meaning of "available for occupation together with". In Lord Carnwath's view, while it was clear that a single unit of accommodation would pass this test, "it may also be satisfied by two units of accommodation if they are so located that they enable the family to live "together" in practical terms". Whether the accommodation offered by the Authority satisfied this requirement was a simple factual issue: " this comes down to an issue of fact, or of factual judgment, for the authority. Short of irrationality it is unlikely to raise any issue of law for the court."

In this case, while the Review Officer had not addressed the legal question – which had not been raised at that point – the review had considered the care of the father in a separate unit, and found it was no more difficult than on separate floors of a house.

Ms Sharif's submissions echoed the unsuccessful argument in *R v Hillingdon LBC ex p. Puhlhofer* [1986] AC 484 that:

> "in order to constitute accommodation the premises must be such as to enable the family unit to reside and carry on the ordinary operations of daily life there . . ." (p 505B).

The House of Lords had rejected that, and this remained the position, save for qualifications of reasonableness and suitability, which were no longer in issue in this case.

Further, Lord Carnwath thought that Ms Sharif's argument would give rise to 'surprising results. Statutory overcrowding is not relevant to the definition of accommodation available for occupation, though was now relevant to suitability.

> Under the *Puhlhofer* test, a family might be properly accommodated within a single unit even though seriously overcrowded by normal

> standards. But on Ms Leiven's submission, the authority would not have been able to improve its position by offering it an additional unit next door. It also has to be remembered that the same definition applies to the temporary accommodation to be provided while a decision is made on the merits of the claim. It would be odd and potentially onerous if, even while the authority were simply considering the merits of the claimant's position, they were unable to house the family in two adjoining units even on a temporary basis.

Further, Scott Baker J in R v Ealing London Borough Council ex parte Surdonja [1999] 1 ALL ER 566 took the view that:

> "In my judgment the obligation is not discharged by providing split accommodation in separate dwellings. It is the policy of the law that families should be kept together; they should be able to live together as a unit. I can well see that the obligation could be discharged by, for example, separate rooms in the same hotel, but not I think in two entirely separate hostels up to a mile apart." (p 571).

If this were correct, it would be hard to see why two rooms on different floors of a hotel or hostel might satisfy the obligation, but not two adjacent flats. In this case there were cooking facilities in both flats, no doubt at least one set of facilities would be shared.

While *Langford Property Co Ltd v Goldrich* [1949] 1 KB 511 was a Rent Act case, on whether two self-contained flats let together could amount to 'a separate dwelling house'. Somervell LJ held:

"In my opinion if the facts justify such a finding, two flats or, indeed, so far as I can see, two houses, could be let as a separate dwelling-house within the meaning of the definition. What happened here was that the tenant wished to accommodate in his home these relatives to whom I have referred, and he wanted more accommodation than could be found or conveniently found in one flat. He therefore took the two flats and made those two flats his home. [Counsel] suggested at one time that there might

be some absurdity, if, say, a man took under a single lease (which does not seem very probable) two flats in widely separated districts; but that case can be dealt with when it arises." (p 517)

While this was a different statutory context, it was helpful on the ordinary use of language in an analogous context.

Appeal upheld.

Lord Walker agreed with Lord Carnwath.

Lope Hope also agreed with Lord Carnwath, adding:

> There are, nevertheless, two yardsticks that can be applied. The first is what must be taken to be the ordinary meaning of the words that the test uses. The second is the practical one, which follows on the first. Can it be said, in a practical sense, that all the members of the family are living together, although more than one unit is required to accommodate them? The provision of separate units is not, of course, ideal. Some measure of inconvenience is bound to result if a single unit cannot be found. But Parliament has recognised, by refraining from laying down strict rules, that the situations that may confront the local authority will vary from case to case and that it would be unreasonable to prescribe one solution that must be adopted in all cases.

> The test is not there to be exploited. It must be applied reasonably and proportionately. So long as that is done, the aim of the test will have been satisfied.

Lady Hale also agreed with Lord Carnwath

> I agree that this appeal should be allowed, for the reasons given by Lord Carnwath. I understand that this will seem very harsh to a family who

had been housed since 2004 in a three bed-roomed house under a private sector leasing scheme and were then expected to accept much less spacious accommodation. But the suitability of that accommodation is no longer in issue. The only issue is whether it is available for Ms Sharif to occupy "together with" her father and her younger sister.

If one accepts that it is open to a local authority to accommodate members of a family in separate rooms in the same hostel or hotel, sharing cooking and/or bathroom facilities with others, then one must accept that it is possible to accommodate them in separate small flats like these, provided that the flats are close enough together to enable them to eat and share time together as a family. There are passages in the judgment of Etherton LJ which appear to suggest that members of a family are only accommodated together if they have some shared communal living space, in the sense of a shared living room. That would, of course, be ideal. And, as was pointed out in *Birmingham City Council v Ali; Moran v Manchester City Council* [2009] UKSC 36, [2009] 1 WLR 1506, what is suitable for a family to occupy in the short term may not be suitable for them to occupy for a longer period. But we are not concerned with suitability here. To require some communal living space is to impose a standard which is too high to expect local authorities to meet across the whole range of statutory provisions to which the "together with" criterion applies, including the interim duty in section 188 of the 1996 Act. Many of the hotels and hostels currently used to accommodate homeless people do not have a communal living room. It is not surprising, therefore, that Mr Arden, on behalf of the local authority, was particularly concerned about this aspect of the Court of Appeal's judgment. No doubt many of us would wish that there were a much larger supply of affordable housing to enable homeless families to be accommodated in the way which we would ideally wish them to be accommodated. But there is not and the law does not require local authorities to meet a minimum standard which in practice it would be impossible for many of them to provide.

However, Lord Kerr dissented.

> The Housing Act 1996 imposes a duty to provide accommodation which is available to be occupied by one person together with members of his or her family. The legislation clearly contemplates that the accommodation should be provided to an individual. But it is also intended that the accommodation provided to that person should be capable of housing all the members of that person's family together. That idea is buttressed by the requirement in section 176 of joint occupation. Accommodation is only to be regarded as available for occupation if it is available for occupation by the person to whom it is provided together with any person who normally resides with him as a member of his family. There is nothing in the legislation which suggests or implies that the statutory duty will be fulfilled by providing accommodation which, taken in combination with other accommodation, is capable of housing together all the members of the family. Nor does the legislation authorise the provision of different units of accommodation which a family, if well disposed to do so, can use on different occasions for shared family activities. If living together as a family is to mean anything, it must mean living as a distinct entity in a single unit of accommodation.

The focus of s.176 was on accommodation, not the use that a particular family might put it. The accommodation must be of such that it is capable of occupation by the members of the family together, togetherness connoting a combination of people into a condition of unity. This required a single unit of accommodation.

> The appellant [Camden] suggested that the local authority may exercise a judgment as to whether a series of units are suitable to permit members of the same family to live in a condition of sufficient proximity so that they can function as a family unit. (One may observe, as an aside, that sufficient proximity is quite different as a concept, and may be diametrically different in practice, from living together.) The appellant advanced this argument by seeking to assimilate the duty under section 176 with other Part 7 duties. This is misconceived. Ms Lieven was again

> right in her submission that other Part 7 duties, where they involve an element of discretion, are expressly provided with that facility in the language of the Act. The duty under section 176 is quite different. It is an obligation to provide accommodation, the physical dimensions of which are sufficient to allow it to be occupied by the person to whom it is made available together with the members of his or her family. Some limited judgment may be exercised by the local authority in discharging that duty but that judgment is geared to the essentially factual exercise of deciding if the accommodation meets those physical requirements.

On Etherton LJ's suggestion that a feature of accommodation must be communal space where family activities could be enjoyed, this should perhaps be considered as emphasising that the lack of such a feature would indicate that accommodation would not meet the s.176 requirements, rather than being an invariably indispensable requirement. But this was an aside to the principle issue, that there should be "physical accommodation capable of being occupied as a single unit by the person for whom it is provided together with the members of his or her family".

On Camden's complaints that the Court of Appeal judgment would place a terrible burden on Local Authorities, unlike Lady Hale and Lord Hope, Lord Kerr was not persuaded:

> Much was made by the appellant of the considerable constraints that would be placed on local authorities if they were required to house families in single units and were not afforded the opportunity to exercise judgment as to their accommodation in different units. No evidence was provided to support these (to my mind, at least) somewhat unlikely claims. No suggestion was made that any local authority had accommodated families in this way on any widespread basis in the past. Notably, there is nothing in the Code of Guidance: Homelessness Code of Guidance for Local Authorities (2006) which recommends the practice.

> But if the opportunity is available to house families in different living units, there is every reason to suppose that local authorities, with the pressures that are placed on them to meet housing need, will, perfectly understandably, seek to exploit that opportunity to the fullest extent. There is therefore a real risk that one of the principal purposes of the legislation (that of bringing and keeping families together) will be, if not undermined, at least put under considerable strain.

Comment

I am afraid that I must side with Lord Kerr. S.176 does not give any discretion, and requires that the accommodation must be such as to enable the household to live together. There is nothing to suggest that this may be by adding together separate units of accommodation. While the focus here was on temporary accommodation, the s.176 requirement also applies to accommodation provided in discharge of duty. The idea that the duty could be discharged by permanent accommodation across different units of accommodation is clearly a non-starter. The majority appear to have been persuaded that the temporary nature of the accommodation in this case made the split accommodation acceptable – and Lady Hale refers expressly to *Birmingham CC v Ali* on accommodation being suitable in the short term that wouldn't be in the long term. But suitability is a different issue to the fundamental concern of s.176. There is no time limit on whether accommodation is such as to accommodate the homeless person 'together with' their household. It is, or it isn't.

However, the majority judgment is where we now are.

We should note that the majority, via Andrew Arden QC's argument, appear to have imported a new term into considerations of both 'available to occupy' and, no doubt, into subsequent suitability arguments – that of 'sufficient proximity' between separate units of accommodation to be accommodation for one household. Expect arguments over separate flats in the same block, houses on the same street, rooms in the same hotel but not physically connected by interior access, and maybe more.

Setting this up as an issue of factual judgment for the Authority is to fuse s.176 and suitability requirements – for example as Lord Carnwath's statement that s.176 would be satisfied by "two units of accommodation if they are so located that they enable the

family to live “together” in practical terms”. Clearly this is open to variation according to the practical needs of the family, and thus runs into suitability.

When a deficiency makes no difference.

Ibrahim v London Borough of Wandsworth [2013] EWCA Civ 20

The question for the Court of Appeal in this second appeal from a homeless appeal, was “How should the courts deal with a plainly deficient homelessness decision when the deficiency has had no adverse consequences for the applicant?”. The issue being the effect of the lack of a ‘minded to’ letter requesting submissions under Regulation 8(2) Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. As we’ll see, the Court of Appeal agrees on the result, but not on the way of getting to it.

Ms I was a homeless applicant to Wandsworth, following her eviction from a private tenancy (on a s.21 notice, it appears). The landlord claimed that she had not paid the first 8 weeks rent. Ms I had received the rent in Housing Benefit. Ms I asserted that she had paid the rent to the landlord’s brother, who had made the letting while the landlord was abroad.

Wandsworth accepted the landlord’s assertion without asking the brother if he had received the money and found that Ms I was intentionally homeless. Ms I requested a review, arguing, in part, that this was not fair or rational. The review upheld the decision not to contact the brother, as indeed did the subsequent s.204 appeal. However, this was not an issue on which permission was granted for the present second appeal.

The issue under appeal was rather the effect of what was stated in the original decision letter. The letter stated:

> The Council's obligation towards persons considered to be in priority need but intentionally homeless is limited to providing them with advice and appropriate assistance to enable them to find their own accommodation. This means that you are not entitled to rehousing by the Council under the provisions of the above-mentioned Act. In order for you to obtain advice and assistance about the means by which you might find your own accommodation, I have arranged an appointment for you on:
>
> Wednesday 20TH April at 9.15 a.m. with the Council's Housing Options Team.
>
> As you have dependant children I will arrange for you to be referred to our Social Services Department, Children & Families division, in order that they can make an assessment of any further assistance that you might be eligible to, under the provisions of the Children Act 1989.
>
> As you are in temporary accommodation provided by the Council, legal proceedings will be taken to repossess this accommodation.

As Sir Stephen Sedley's judgment notes

> This was seriously erroneous. The council's obligation was not limited to providing advice and assistance. Far from being entitled simply to evict the applicant as threatened, under s.190(2) the council had an obligation to her, as a person with priority need because of her dependent children, to secure that accommodation was available to her for such period as they considered would give her a reasonable opportunity of securing accommodation for herself.

Ms I's s.202 review request, by Battersea Law Centre, didn't raise this 'error' in the s.184 decision, possibly because Wandsworth had subsequently agreed interim accommodation pending review (and later appeal). So there was no detriment to MS I.

The review decision also did not identify the error in the s.184 letter, but did correctly state the Council's obligations on a finding of intentional homelessness, which the review confirmed.

In the s.204 appeal, when this issue was raised, the Court found that while the s.184 decision contained a clear 'factual error', this was:

> not of sufficient importance to justify engaging regulation 8(2). The issue between the parties was whether the appellant had made herself intentionally homeless, not whether the local authority had a duty to temporarily rehouse her. In the circumstances, where the appellant was being temporarily provided with accommodation, the reviewer's failure to engage regulation 8(2) was not unreasonable.

This was the subject of the second appeal to the Court of Appeal.

Ms I argued that

> the reviewer was bound by simple rationality to conclude that there was a deficiency in the original decision. The error was not superficial or trivial: it was radical. It followed that the reviewer had been under an obligation to notify the applicant that she was minded to uphold the decision nevertheless, and to consider anything the applicant said in response before coming to a conclusion. The failure, submits Mr Marshall Williams [for MS I], is fatal to the review decision regardless of the likelihood of a relevant or effective response from the applicant.

The Council argued that

> unless the deficiency amounts to "something lacking of sufficient importance to the fairness of the procedure to justify an extra-procedural safeguard", it is not covered by the regulation 8(2) process, and that whether it is in this class is for the reviewer alone to judge, subject only to

> Wednesbury level oversight by the courts.

And then the Court of Appeal took a couple of different routes.

Sir Stephen Sedley reviews *Hall v Wandsworth LBC* [2004] EWCA Civ 1740 and *Banks v Kingston-upon-Thames RLBC* [2008] EWCA Civ 1443 on the meaning of a 'deficiency' in Regulation 8(2), to the effect that "the 'something lacking' must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard', and 'Whether that is so involves an exercise of 'evaluative judgment' (see *Runa Begum v Tower Hamlets London BC* [2003] 1 All ER 731 at [114], [2003] 2 AC 430 at [114] per Lord Walker of Gestinthorpe), on which the officer's conclusion will only be changeable on *Wednesbury* grounds". [*Hall v Wandsworth* at 29]

Mitu v Camden LBC [2011] EWCA Civ 1249 is taken as an explanation of Hall, when Lewison LJ says:

> Section 203 (4) distinguishes between a "decision" and an "issue". Regulation 8 (2) also speaks of a deficiency in a "decision" and distinguishes that from "issues" on which the reviewer is minded to find against the applicant. Thus a thread running through both the primary legislation and regulations is a clear and consistent distinction between the decision on the one hand, and issues on the other. Mr Russell argues that it is the *decision* that is subject to review, and that it is wrong to split a decision into discrete issues in order to consider whether there is a deficiency in the *decision*. In my judgment he is right."

And finally, the usual passage from *Holmes-Moorhouse v Richmond-upon-Thames LBC* [2009] UKHL 7 [at 51] is aired:

> a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to effect the outcome; sometimes it is obvious

> from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed.

Sir Stephen Sedley is, however, distinctly unhappy with this line of authority. He notes that in the bare wording of Regulation 8(2), "the phrase "deficiency or irregularity" is not qualified by any adjective such as "material" or "significant"". Accordingly,

> If this regulation were unglossed by authority, I would have thought that, beyond the ubiquitous de minimis principle which shuts out trivial or marginal criticisms, the omission of any qualifying adjective is deliberate. It would mean that, while it remains open to the reviewer to find that a deficiency or irregularity was not such as to affect the decision, he or she can only do this after giving a "minded to" notice and considering the applicant's response.

Noting his own insistence on the 'elementary principle' of hearing both sides in *Home Secretary v AF* [2008] EWCA Civ 1148, Sir Stephen Sedley goes on to note

> It needs also to be borne in mind – and the drafter of the regulations will have had well in mind – that many applicants lack advice or representation, and that of these a good many will have poor literacy and language skills. It is unfair and unrealistic to expect every material error to be picked up by such applicants, and both fair and realistic to expect the reviewer to be alert to possible deficiencies and willing to hear what the applicant says about them before deciding whether they are material. It would follow that what the reviewer (whose appointment makes the local authority judge in its own cause) considers to be the case cannot

> lawfully be arrived at by assuming that there can be no answer: the regulation, reflecting elementary justice, would forbid this.

But the body of case law has taken a different path and effectively inserted the words 'affecting the fairness of the procedure' after 'deficiency or irregularity' in the Regulation.

It was now clear that no harm had resulted to Ms I in the end from the deficiency – the double error – in the s.184 decision letter, and that the decision to treat her as intentionally homeless would have been the same even if representations had been made on the technical deficiency of the letter. That didn't mean that the 'double error' was not a deficiency – Sir Stephen Sedley would consider it to be one, "since it went to the heart of the council's obligations and the applicant's entitlements."

But, as the Court's powers were effectively those of Judicial Review, the principle of causation in Judicial Review applied.

> In my judgment the failure of the reviewer to identify and address the deficiency in the original decision was, in the events which have happened, irrelevant to the outcome of the review, since that outcome, given the (now unappealed) finding of intentional homelessness, corresponded both in writing and in actuality with the council's true statutory duties.
>
> It follows that the judge was right to "think fit" – in other words to choose – to confirm the review decision in relation to the patent errors in the decision letter. We are not called upon to decide whether she was also right to confirm it on the remaining issues canvassed before her.

That said

> Both the decision letter and the review letter are disturbing instances of poor public administration, the former for completely overlooking the duty to provide temporary accommodation for intentionally homeless

> persons in priority need, the latter for completely overlooking the oversight. Given the kind of clientele typically involved, I do not accept that such an obvious point had to be explicitly taken in order to be addressed by the reviewer.

Appeal dismissed, albeit clearly reluctantly.

On the other hand, Etherton LJ took a view in line with the authorities mentioned by Sir Stephen Sedley.

> First, it is necessary to consider whether the deficiency or irregularity relied upon as falling within Regulation 8(2) was one which related to a relevant decision. A relevant decision is one which was adverse to the applicant and which the applicant wished to challenge by way of review. Secondly, if there was such a deficiency or irregularity, the reviewer was obliged to consider whether the deficiency or irregularity was of sufficient importance to engage the duty of the reviewer to notify the applicant as provided in Regulation 8(2)(a) and (b). Thirdly, if the reviewer failed to carry out that exercise, or decided that the deficiency or irregularity was of insufficient importance to engage that duty, then that failure or that decision was only challengeable by way of an appeal under section 204 on judicial review principles.

There were two decision made in the s.184 letter. Firstly that Ms I was intentionally homeless. Then secondly that the Council's duty was 'limited to providing advice and appropriate assistance to enable her to find her own accommodation'. The deficiency relied on was only to the second decision.

While that decision was certainly wrong, it

> was not a relevant decision for the purposes of Regulation 8(2) since (1) it was not the subject of any complaint by the applicant about the decision letter on the review; (2) it was not a decision which the reviewer upheld; and (3) the reviewer did not make any decision on the same matter

> against the interest of the applicant, but, on the contrary, stated the council's duty correctly. Accordingly, Regulation 8(2) was not engaged, and that is the end of this appeal.

Even if this were not the case, the appeal would fail on the second stage. While the review officer had failed to take any account of the deficiency, and the reviewer should have done so, there was no requirement to issue a 'minded to' notice under Reg 8(2) as

> In the present case, however, the only conclusion which the reviewer could properly have reached was that the deficiency in the decision letter in the incorrect statement of the council's duty to the applicant under section 190(2) was entirely unimportant since (1) it was not the subject of any complaint by the applicant about the decision letter on the review; (2) it was irrelevant to the decision about which the applicant was complaining (viz that the council owed the applicant no duty under section 193(2)), (3) the council was in fact continuing to house the applicant, and (4) the reviewer could (and did) make clear in the review letter the proper duty of the council under section 190(2)(a). Accordingly, even if the reviewer had identified the deficiency relied upon on this appeal, she would have been bound to conclude that there was no requirement to serve a "minded to" notice under Regulation 8(2), and there would have been no scope for challenging the review letter under section 204.

Appeal dismissed

Mummery LJ, helpfully, agrees with both Sir Stephen Sedley and Etherton LJ. There was a deficiency in the s.184 decision, and the review decision failed to pick up that deficiency and address it. However, as per Etherton LJ, "The applicant did not complain on the review about Wandworth's decision not to inform her of their obligation. The reviewer did not uphold that decision of Wandsworth. By stating Wandsworth's obligation correctly in the review letter of 9 June 2011 the reviewer made no decision against the applicant of which she was entitled to complain."

Appeal dismissed.

Comment

This is a highly frustrating decision. It is true that even if Sir Stephen Sedley's view had prevailed, all that would have resulted was a quashing of the decision and a 'minded to' notice highlighting the defect in the s.184 on the Council's duties and correcting it. However, the reasons given by Etherton LJ and presumably Mummery LJ for dismissing the appeal have, in part, to be wrong.

As Sir Stephen Sedley says, it is not for the applicant to raise a deficiency in a s.184 decision before the review officer has to deal with it. Points (1) and (2) in both the sets of reasons given by Etherton LJ are wholly reliant on the applicant complaining about the deficiency. But this cannot be right. Reg 8(2) puts the onus squarely on the reviewer identifying a deficiency. While this may well be on representations made by the applicant, it is not and cannot be conditional on such representations. Sir Stephen Sedley at 20 and 21 must surely be right on this:

> 20. It needs also to be borne in mind – and the drafter of the regulations will have had well in mind – that many applicants lack advice or representation, and that of these a good many will have poor literacy and language skills. It is unfair and unrealistic to expect every material error to be picked up by such applicants, and both fair and realistic to expect the reviewer to be alert to possible deficiencies and willing to hear what the applicant says about them before deciding whether they are material.
>
> 21. It would follow that what the reviewer (whose appointment makes the local authority judge in its own cause) considers to be the case cannot lawfully be arrived at by assuming that there can be no answer: the regulation, reflecting elementary justice, would forbid this.

Wrong priorities

Every now and again, there is a Local Government Ombudsman report that seems to go beyond individual instances of maladministration and instead capture something of the zeitgeist. The LGO decision summarised here (and see here for the full decision [pdf]) may well be one of the latter (certainly the Guardian thinks so), as arguably what it shows is a Local Authority prioritising its own administrative concerns over its legal duties in both its policy and the operation of policy. There is also a routine failure to ask the kind of questions that might have meant it had to do more. This on top of a series of administrative failures

Ms Andrews (not her real name) applied to Croydon as homeless having been subject to a violent attack at her previous home, when three men broke into the property with weapons, a hammer and knives, and assaulted her and her then partner. She and her two young children were staying with her mother when she applied on 28 April 2010. Ms Andrews was not offered accommodation on 28 April.

On 28 May 2010, the Council wrote to Ms A to say her case 'was with the temporary accommodation team' and she would be contacted. The Council wrote to Ms A's GP to request an accommodation history (!). Eventually, in the first two weeks of June, the Council got information from Ms A's former housing association, and confirmation from the police of the facts of the attack and that it was not safe for Ms A to return.

The Council then write to Ms A to offer her B&B accommodation. She initially accepted until she visited and found it was on the third floor with no lift, was dirty, had broken furniture and wires hanging out of the wall. As she had three young children, two using a pushchair, she told the Council the accommodation was unsuitable. What happened then was disputed. Croydon said Ms A had said to their officer she could stay with friends. Ms A said that the housing team leader told her alternative accommodation would be found. (The Ombudsman decided that Ms A's account was accurate).

Ms A sofa surfed with various friends. Between June and October 2010 she called the

Council 27 times chasing accommodation. The Council had no record of these calls, but Ms A did. Typically the call would be put through to the Council's main call centre when Ms A would be told the officer she needed to speak to was unavailable and she would be contacted. Apart from a contact at the beginning of July to check child benefit payments, Ms A was not contacted at all.

On 7 October 2010, the Council decided it owed Ms A the full housing duty. No letter was sent stating this until 15 November 2010. Then nothing. Ms A called a further 10 times between October 2010 and February 2011 chasing temporary accommodation and apparently not knowing about the Council's decision of October. Again, the Council had no record of these calls, but Ms A did.

Ms A got a solicitor. He wrote on 8 February 2011 demanding accommodation for Ms A. *Mirabile dictu*, Croydon offered accommodation on 9 February. This was B&B accommodation. Ms A went there, but found she felt unsafe. Her solicitor wrote the same day pointing out that Ms A had fled her previous home following a violent attack and was scared in the presence of unknown men. B&B with shared facilities was not appropriate. A review was requested, then abandoned when Ms A was offered self contained accommodation on the same day.

In early March Ms A said that this accommodation was not suitable as there was no lift and she had three young children, two in push chairs. In addition she was required to move in 24 hours. She raised her post-traumatic stress disorder and depression, with medical evidence. In June 2011, the review decision was that the property was suitable. However, the Council agreed to treat a private sector rental that Ms A had found as temporary accommodation.

Ms A's solicitor complained to the ombudsman.

Croydon's representations to the LGO included arguing that Ms A's telephone calls after October 2010 had been chasing 'temporary accommodation' rather than 'emergency accommodation', so this showed she had received the November decision letter The LGO was not impressed by this attempt to avoid problems by raising Ms A's terminology in a legalistic manner.

More significantly, on offering B&B routinely, Croydon said:

In relation to the accommodation issues the Council advised that there is a very small supply of non-hotel or non-annexed accommodation in the borough. It stated that although it recognised that bed-and-breakfast accommodation is far from ideal for homeless families the Council has limited options open to it, particularly given the increasing homeless demand over the previous 18 months. It stated that where a family had to go into bed-and-breakfast it would seek self-contained accommodation and move them as soon as practically possible to ensure that it complied with the maximum six weeks recommended in the code of guidance. It stated that when non-bed-and-breakfast accommodation became available it was allocated using a priority system as follows:

• households where a member has disabilities;

• households who are not able to stay anywhere whilst awaiting an offer – for example, those that find themselves in hotel/annexed accommodation. The length of time they have been in such accommodation will then guide officers around priority;

• thereafter in line with the date of the homeless application.

The Council went on to state that it was not aware of any medical needs for Ms Andrews until March 2011 and that it offered her bed-an--breakfast accommodation when she presented as homeless, which was refused. [...] It stated that as Ms Andrews was not in bed-and-breakfast accommodation when the decision letter was sent to her in November 2010 no priority was awarded to her application, particularly as she had made it clear that she had alternatives.

The officers concerned with arranging accommodation said:

that the only interim accommodation available to the Council when a person presents as homeless is bed-and-breakfast accommodation. She stated that although the Council has access to non-bed-and-breakfast

> accommodation, such as housing association properties, Council properties and private rented properties, it takes a while to put those into place and it would be unfair to give that accommodation to people newly presenting as homeless given that there are a number of people, including families, in bed-and-breakfast accommodation waiting for suitable accommodation to be offered.

It should be said that the Council's response to findings denied that B&B would always be offered in first instance.

> The Council disputed that officers of the Council are not aware of alternative options and that bed-and-breakfast will always be offered in the first instance and will therefore never indicate on the referral sheet that bed-and-breakfast is not appropriate except in the most extreme circumstances. It states that if this were the Council's practice it would be illegal.

However, it is clear that B&B was the default, unless the homeless officer conducting the first interview had noted a particular reason why B&B was not suitable. As the Council said

> It stated that officers are aware that where there are additional factors which may affect a household's requirements, those factors will be noted and considered in requesting accommodation. It stated that no exceptional factors were presented in this case

However, the officers' accounts made it clear that only medical circumstances were considered. On Ms A's application notes, the fact that she was fleeing a violent assault by several men in her home was not noted at all as a factor affecting suitability of B&B accommodation. As the LGO found:

> I am surprised by that comment. Ms Andrews had experienced a violent

> attack on her home [...]. Given that the attack involved a hammer and knives and resulted in Ms Andrews' partner being hospitalised I find it difficult to understand what circumstances the Council would consider to be exceptional if it does not consider Ms Andrews' circumstances to be exceptional.

More generally:

> I am also concerned at the way in which front line staff implemented the Council's policy for the allocation of interim and temporary accommodation in this case in that I have seen no evidence that anything other than bed-and-breakfast was considered for Ms Andrews. I recognise that the Council is a large authority and that its homeless team is under pressure. I also recognise that most people presenting to the Council as homeless have families, which makes it difficult for the Council to offer anything other than bed-and-breakfast accommodation.
>
> However, the Council is subject to government guidance which clearly states that bed-and-breakfast accommodation is not suitable for homeless people with families except as a last resort and then only for a period not exceeding six weeks (see paragraph 10). I am satisfied, based on the responses of officers at interview and following the Council's response to my draft key facts, that the Council failed to consider anything other than bed-and-breakfast accommodation for the complainant when she presented as homeless. In particular, there is no evidence to suggest that her particular circumstances (being on her own with three young children and fleeing from a violent attack on her home) were taken into account when considering what accommodation should be offered to her. While I accept that the Council may well have to offer bed-and-breakfast accommodation, at least for one night, when an applicant applies as homeless due to the lack of options available, I have seen no evidence that officers gave any consideration to whether something other than bed-and-breakfast accommodation should be sought for Ms Andrews given

her circumstances.

In fact, a fairly lengthy list of maladministrations were found, including the failure to properly record her initial homeless application, failing to deal with her telephone calls at all and that Croydon had:

- delayed making a decision on the application and in offering her accommodation
- failed to consider whether the interim accommodation offered to her was unsuitable and failed to identify more suitable accommodation when she refused that accommodation on grounds of accessibility, and
- failed to consider whether bed-and-breakfast accommodation was suitable for her given that she had left her home as a result of a violent attack and had three young children, when Government guidance indicates that bed-and-breakfast accommodation is not appropriate for homeless applicants with families except as a last resort.

Croydon were recommended to:

- apologise to Ms Andrews and pay her £2,500 compensation
- review its policy and practice in relation to consideration of homeless applications, and
- undertake staff training for those frontline staff taking homeless applications, particularly around how to assess if an applicant has particular circumstances that would warrant something other than bed-and-breakfast accommodation being offered in the first instance.

The trouble for Croydon is that the maladministration did not arise from failings in the operation of its policy, it arose from the policy itself. As Croydon made perfectly clear, they did not consider Ms A's circumstances to be 'exceptional' enough to merit non-B&B accommodation being considered. The LGO disagreed, strongly, finding that it was against the Guidance.

It is also worth noting Croydon's position on B&B and the 6 week limit:

> The Council stated that it was lawfully entitled to provide bed-an-
> -breakfast accommodation to Ms Andrews for a six week period. It stated

> that due to limited housing resources in Croydon bed-and-breakfast accommodation has to be use for applicants with a family. It stated that any other suitable accommodation which may become available is therefore offered to those who have already been in bed-and-breakfast accommodation for six weeks or longer. It stated that it was normal and lawful for the Council to prioritise in that way in order to ensure that it did not breach its obligations. It also stated that it would not be appropriate to prioritise someone not in bed-and-breakfast accommodation ahead of those the Council is lawfully obliged to move out of bed-and-breakfast accommodation after six weeks.

In short, then, (and this is my view, not the LGO's express finding) Croydon uses the 6 week deadline as a trigger for attempting to find non-B&B accommodation and this administrative priority is seen as having greater importance than the housing needs of those presenting to it as homeless, as in Ms A's case, unless fitting a very limited definition of 'exceptional circumstances', and that even when the system worked as intended.

One last note, of quite magnificent chutzpah

> The Council also queried whether it was fair for the Ombudsman to reach a conclusion which is adverse to the Council based on telephone calls which have not been documented.

Well, they weren't documented by the Council

Relationship breakdown and intentional

homelessness

Amanda Carthew v Exeter County Council (2012) CA (Civ Div) 4 December 2012
[Not on Bailii, on lawtel only as a note - if anyone has more information or a transcript of judgment, we'd be very grateful...]

Where a homeless applicant had previously transferred their interest in a property to a former parter during a relationship breakdown, can the Local Authority take this as becoming intentionally homeless? Not, it would seem, without more.

This was a second appeal from a s.204 appeal. Ms C and her partner had bought a property in joint names. In 2008 they separated and made an agreement that the partner would buy Ms C's share in the property. The partner paid £15,000 for Ms C's share. Ms C continued to live in the property, paying the partner rent, while the partner paid all of the outgoings including the mortgage. In 2010, they reconciled and the partner moved back into the property, which was formally transferred into the partner's name.

The relationship broke down again and Ms C left the property. She made a homeless application to Exeter CC, which refused a duty on the basis that Ms C had made herself intentionally homeless by transferring her rights to the partner when she knew it would put her at risk of homelessness. The decision was upheld on review, Exeter deciding that the relationship breakdown in 2010 did not break the chain of causation, since the volatility of the relationship meant a further breakdown was foreseeable. The causal point for her homelessness was Ms C's transfer of property rights, not the breakdown in the relationship. The s.204 appeal against that decision was dismissed. Ms C appealed to the Court of Appeal.

Ms C argued that it was the breakdown of the relationship that had caused her homelessness. It was improper for the Authority to bring in 'foreseeability' into its assessment of intentionality. In addition, the Authority had failed to consider whether it would have been affordable for Ms C to remain in the property alone in 2008 meeting all the obligations as sole owner. Also, after the partner had paid the £15,000 he had a right to claim the entire beneficial interest amounting to a proprietary

estoppel.

The Court of Appeal held:

The Authority was entitled to find that the relationship was turbulent, and to take into account the fact that the relationship had broken down in 2008 and within months of the 2010 reconciliation. It was not wrong for the Authority to assess intentionality by reference to the likelihood that the relationship would or might break down again, with consequent risk of homelessness.

However, the review and decision only referred to the financial situation before 2008, talking about Ms C and her partner's joint incomes, rather than Ms C's sole income. The Authority had not found that Ms C could afford the outgoings, including mortgage payments, on the property by herself after 2008. This was a critical defect.

The proprietary estoppel argument was unsustainable because the 2008 agreement for sale was not in writing and unenforceable and there was not enough evidence to suggest how any estoppel might be satisfied in equity in any event.

However, the failure to consider affordability for Ms C to remain in the property as a sole proprietor in 2008 meant that the review decision had to be quashed, as this was a crucial factor for intentionality.

Matter remitted to the Authority for a fresh review decision, to address affordability.

Comment

I would really like to see the full judgment because there are a number of elements in the note that leave me uneasy.

The finding on foreseeability of breakdown of a turbulent relationship strikes me as odd, not least as the agreement to transfer title to the partner, and the £15,000 payment, were made after the first break up. Ms C then rented the property for nearly two years. Technically Ms C may have retained legal title, but it isn't clear from the note to when the Authority were dating her giving up the property. The suggestion is 2008, but it isn't clear.

The estoppel finding also seems odd, without more. Since when did proprietary

estoppel require a written agreement? Whether the other elements of an estoppel were made out, we can't tell.

So, more information needed – and gratefully received.

Disputed facts, s.204 appeals and Article 6 to the ECtHR?

You may recall Ms Ali of *Ali & Ibrahim v Birmingham CC* (heard in the Supreme Court as *Tomlinson & Ors v Birmingham City Council* [2010] UKSC 8 (our report here)

The issue in Ms Ali's case was a dispute of fact about whether an offer of accommodation letter containing a warning of discharge of duty on refusal had been received by Ms Ali. The case went to the Supreme Court on whether s.204 appeals should have a fact finding jurisdiction, and whether the lack of it was a breach of Article 6. The key question was whether the right to accommodation under s.193 was a civil right such that discharge of the duty was determination of a civil right for the purposes of Article 6. The Supreme Court said it wasn't.

Now it appears that the European Court of Human Rights is preparing to engage with the question. In *ALI v. THE UNITED KINGDOM<* – 40378/10 – HECOM [2012] ECHR 1969, the ECtHR poses questions to the parties:

> 1. Did the determination of the rights and/or entitlements of the applicant in respect of the "main housing duty" owed to her by Birmingham City Council involve the determination of a "civil right" within the meaning of

Article 6 § 1?

2. If so, did the determination of the applicant's civil rights satisfy the requirement of Article 6 § 1 of the Convention?

So, we shall – eventually – see

Deja Vu All Over Again (and again)

In *Samin v Westminster CC* [2012] EWCA Civ 1468 [not on bailii yet - lawtel has a transcript], the Court of Appeal had to decide what was meant by someone being "temporarily unable to work" so as to determine if Mr Samin retained his status as a "worker" under the Immigration (European Economic Area) Regulations 2006.

Mr Samin was an Austrian national. He had, however, formerly lived in Iraq and became an Austrian national in 1993 after he had fled Iraq and claimed asylum.

In 2005, after his marriage had ended, Mr Samin left Austria and travelled to the UK. He obtained a job as a cleaner and worked for approximately 10 months until he was asked to leave. He had not worked in the UK since that date and received welfare benefits (i.e. housing benefit, income support and incapacity benefit). The main reason for him not working since 2006 was that he was in poor physical and mental health. He suffered from long standing clinical depression – which had arisen from his traumatic experiences with the Iraqi army -, diabetes, high blood pressure, kidney stones and he required physiotherapy for one of his legs.

Mr Samin's GP was of the opinion, however, that with a stable home environment his mental health may improve and, with support from a "suitable agency", he would be able to return to some fruitful employment, although this was unlikely in the short-term.

Westminster's reviewing officer, however, took a different view and decided that Mr Samin was not temporarily unable to work; his incapacity was more permanent and he had therefore not retained his worker status. Accordingly, he did not have a right to reside in the UK and was not eligible for assistance under Part 7.

Mr Samin's appeal to the county court was rejected and he appealed to the Court of Appeal. He contended that the reviewing officer's decision was unlawful because European jurisprudence required her to consider, when considering if he was temporarily unable to work, whether there was any chance of Mr Samin returning to work.

Unfortunately for Mr Samin, by the time the appeal was heard the Court of Appeal had already considered the question in two other appeals, namely *De Brito v SSHD* [2012] EWCA Civ 709 and *Konodyba v Royal Borough of Kensington and Chelsea* [2012] EWCA Civ 982 (our recent report of the case here). In both appeals it had decided that the question to be posed was whether the individual had a realistic prospect of returning to work.

Accordingly, Mr Samin also contended, in the alternative, that the reviewing officer had failed to consider this question and, had she done so, the only rational answer would be that he did have a realistic prospect of returning to work.

The Court of Appeal dismissed the appeal. The Court of Appeal was bound by the two earlier cases of *De Brito* and *Konodyba*; the question was, as posed by the regulations, whether Mr Samin was temporarily unable to work. In most cases this question would be answered by considering whether there was a realistic prospect of of a return to work. This was entirely consistent with the European authorities and the European directive 2004/38/EC and it did not require decision makers to consider whether there was "any chance" of a person returning to work.

While the reviewing officer had not considered whether there was a realistic prospect of Mr Samin returning to work, this was because her decision pre-dated the cases of *De Brito* and *Konodyba* and, in any event, she had asked the right question, namely: was Mr Samin temporarily unable to work. This was a question of fact and, on the facts before her, she was more than entitled to reach the decision that she had. The medical showed that Mr Samin's depression had long pre-dated his homelessness and there was little prospect of him obtaining employment even if he did obtain more

settled accommodation.

Comment

I'll be interested to see how county courts interpret this decision. I don't think anyone could argue that whether someone is temporarily unable to work is a question of fact: they either are or they aren't. Yet, I'm not sure that this means that it is for the reviewing officer to decide and his decision can only be challenged as being *Wednesbury* unreasonable. It is surely - like the question whether someone is a child or not under Children Act 1989 – a "jurisdictional fact" and is therefore not capable of being left to the reviewing officer. The court, on a s.204 appeal, must decided the question itself.

This is because the question of whether someone is a "worker", for the purposes of an EU directive, must be the same across the EU and cannot be left to national courts, let alone reviewing officers to decide. I have a feeling, however, that the (county) courts will take a different view and an element of discretion will find its way into eligiblity decisions.

JR, the rule of law, and administrative justice

According to Cameron, there is a need to restrict the right to judicial review to ensure the country's economic competitiveness. As he put it, judicial review should, therefore, cost more, have shorter deadlines, and fewer rights of appeal. This is so that "people think twice about time wasting" . As the MoJ put it:

> The number of [JR] applications has rocketed in the past three decades, from 160 in 1974 to 11,200 last year but the proportion of successful

> applications is very low. In 2011 only one in six applications determined were granted permission to be heard.

Cameron also had a pop at Equality Impact Assessments calling them nothing more than box-ticking.

There has been some fantastic tweeting and blogging and, dare I say it, journalism on the subject. Adam Wagner, on the UKHRB, has effectively dismantled the shaky foundations of Cameron/MoJ rhetoric. Writing in *The Guardian*, Jeffrey Jowell does, well, he does what he does best – a critique from a strong conception of the rule of law. And, in a brilliant intervention, Louise Restell notes that actually 95% of JRs are non-commercial (so what the hell was Cameron doing by linking them together other than for the sake of his audience [the CBI]) and tweeted a fantastic graphic which demonstrated that, in fact, practically all the rise in use of JR is due to asylum and immigration appeals.

Let me offer a perspective of a mundane housing academic. I don't expect my NL colleagues will agree with my comments on JR, but here goes anyway.

Before I get to JR, though, I suspect we will all agree that the comments about EIAs are ill-advised. I think that part of the problem with them is that they have become self-serving to policy-makers – in this sense, they are box-ticking. They are not rational, scientific, objective measures of the impact; rather, they convey limited measures, with seemingly wide variations and margins for error in the numbers of persons to be affected (as we have previously commented). Yet, what they really do, and do wonderfully well, is (a) at least require governments to give some thought to the implications of a policy change on its impact on equalities – that seems like an obvious thing to say, but consider (for example) the inadequate thought given before their invention and the disproportionate impacts that some policies have had on already marginalised groups; and conversely (b) it is their very inadequacy which demonstrates how far we have to go to maintain and promote equalities, particularly in light of section 149 – indeed, how can the government get rid of EIAs without also repealing that section?

So, now JR. I'm not going to repeat what others have said and tweeted. From a housing perspective, we know all about the appalling bad use of statistics about JR.

Puhlhofer is a case in point – any person with a vague interest in housing law will have Lord Brightman's words ringing in their heads, "My Lords, I am trouble at the prolific use of judicial review" in homelessness cases – used to justify a much more severe approach to granting permission and the grounds of challenge. As Maurice Sunkin pointed out, however, JR was not more used in homelessness cases than others at the time of *Puhlhofer* and, in any event, most cases settled at the door of the court (Sunkin's more recent work on JR is also worth looking at, particularly his research on rates of settlement of JRs).

Actually, I want to make a different point. Cameron clearly is asking the wrong question and coming up with the wrong conclusions. My question (as with other administrative justice academics) is, how can we best ensure that decisions are made more accurately and with proper procedures (which facilitate accuracy) in the first place? As others have demonstrated, the impact of judicial review is dependent on the openness of the organisation to challenge, as well as whether the organisation is aware of the challenge in the first place. I recommend, in this context, Simon Halliday's short book *Judicial review and Compliance with Administrative Law* or, if you can't stomach that, his short paper in Public Law in (around 2000). His was a study of three homeless persons units which had been the subject of a volume of JRs. His findings are revealing, partly because of their counter-intuitive nature – the impact of JR can be zero through to being productive of institutional discrimination.

My sense is that, rather than focus on decisions, public authorities tend to try to fire-proof their decisions and approaches (most of the time), so that a JR itself or county court appeal can be made more difficult (indeed, Shirley Porter instructed lawyers with the purpose of fireproofing the Westminster council house sales policy). The audience for a decision-letter seems now rarely to be the household about which the decision is made and which affects their lives in significant ways, but their lawyer. Accuracy and procedural fairness are not best served by a process which has come to be designed in the shadow of the law and it really does not help that household much either.

But, if we are serious about getting the decision right in the first place, then we should be open to challenge; we should make it easier to challenge decisions, not harder; we should use a review or appeals process to reflect on our current procedures and identify training/other needs. That is what a good administrative justice system is

about – it's what the MoJ were telling us in the early 2000s (remember "proportionate dispute resolution" and the Law Commission's take on that?). In theory, lawyers aren't really a necessary part of that feedback loop, assuming the openness of the welfare or other bureaucracy. My hypothesis from Louise Restell's data is this: assuming a quasi-judicial administrative review process within the organisation, immigration and asylum decision-making is made in the shadow of the law, but with a closed mind both/either to the law itself and/or feedback loops within the organisation to improve initial decision-making – it is street-level decision-making in which the internal culture does not support the goals and value/s of administrative justice. This is what Simon Halliday refers to as a system which may in part lack legal conscientiousness; or just a very poor decision-making culture. If that is right, a culture change within the organisation is required; and Cameron's comments are a reflection on the inadequacies of the bureaucracies over which the Coalition government is presiding.

I discount from this analysis one particular cause which one might infer from the MoJ's reference to "ill-conceived cases" – it depends what you mean by "ill-conceived" of course – that it is the fault of those pesky lawyers. Clearly, there are some unmeritorious claims brought (and we blogged about the judicial response to one recently), but I doubt there are many lawyers who bring a claim which they know at the outset will fail – professional reputation and a keen eye on the merits for public funding are significant factors in any decision. Many do fail in any event, so that doesn't really help the MoJ's cause (as Adam Wagner and others point out). And success rates, when the law is stacked against you (particularly in housing and homelessness cases), are not a good indicator of anything frankly (this is where I depart from strong rule of law theorists).

How does housing and homelessness fare as a result? Having seen a paper written by my old muckers, I'd say actually not as bad as we might think. First, if you compare the use of the old JR with the internal review system in homelessness cases, the use of the latter looks to be exponentially greater (although my personal bugbear is its lack of use hitherto in allocations decision-making). Second, the internal review system does seem to be used in some places as a feedback loop. Third, the impact of internal review does seem at least in some organisations to be much greater than JR (although this must be treated with caution as one is not comparing like with like etc). Actually, there are different issues which arise – might the opportunity for an internal review be

used as a lazy alternative for proper initial decision-making? why do some areas have proportionately more reviews than others (even when one is comparing like with like)? what is the success rate and how can we explain differences?

Here, it seems to me, is where we mainly need lawyers and/or Ombudsmen, not just to counter the odd bad apple (an important element of any challenge) but also to facilitate systemic change. Adversarialism does not, however, breed openness and transparency. And the problem is that we (lawyers) only see individual cases and m'learned friends only see the bad ones; only rarely can we recognise a pattern (I suspect that some of the cases against Birmingham were in this category; and see the comments on gatekeeping below the Andy Gale inspired post). Put simply, there is need for better – well, actually, any – data collection of the numbers of reviews and success rates in the service of administrative justice; and, if we were open to challenge and change, we would publish this data. But I'm personally also in favour of local housing and welfare courts which run an inquisitorial process.

A cautionary tale

In *R(Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) [not on Baili yet, but apparently on Lawtel], the Divisional Court signalled its intention to get much tougher on out of hours administrative court applications to the duty Judge. The (unnamed) solicitor was basically called to explain to the court why the reasons for urgency had not been completed. It's not a housing case, but it is worth repeating what was said by the President of the Divisional Court because it underlines the significance of the new N463 and out of hours form:

> 7. If any firm fails to provide the information required on the [N463]

form and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated and the efforts made to notify the defendant, the court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case but the firm concerned. Non-compliance cannot be allowed to continue.

8. That will not be the only consequence of failing to complete the requirements set out in this form. First, one consequence may be that, if the form is not completed, the judge may simply refuse to consider the application. Second, if reasons are not properly set out or do not explain why there has been delay or the reasons are otherwise inadequate, the court may simply refuse to consider the application for that reason and that reason alone.

9. These remarks apply equally to the form soon to be introduced for out of hours applications and the form for renewals when an application has been refused on the papers.

10. These late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resources of this court and an abuse of a service this court offers. The court therefore intends to take the most vigorous action against any legal representatives who fail to comply with its rules. If people persist in failing to follow the procedural requirements, they must realise that this court will not hesitate to refer those concerned to the Solicitors Regulation Authority.

11. That is a warning for the future. We hope it will be unnecessary to have to have any further hearings of this kind or to refer anyone to the Solicitors Regulation Authority, but we will not hesitate to do so where there is a failure to comply with the court's requirements.

It's fair to say that we've been warned!

Suitability: Of time and distance

With perfect timing, a County Court section 204 appeal judgment reaches us, on the issue of suitability of temporary accommodation. With the context of out of borough placements and the post Localism Act situation, this seemed worth considering and quoting in detail.

Arfon Abdi v LB Waltham Forest. Bow County Court 2 July 2012 [We have a copy of the judgment]

Ms A applied to Waltham Forest as homeless and Waltham accepted the full housing duty in August 2011. Ms A was in temporary accommodation. In October 2011, Ms A, who was employed at Primark in Leytonstone, took maternity leave. Her son was born in November. The leave was for a period up to a maximum of 52 weeks.

In January 2012, Waltham Forest offered Ms A the tenancy of a 2 bed flat in Erith, Kent. She was told to inspect and sign for the property the next day. It was a private sector tenancy with a term of 3 years. Ms A rejected the property, giving a number of reasons, including its location. Her solicitors then requested a review, pointing out that:

> "Our client instructs us that the property is in Kent. Our client instructs us that she is currently on maternity leave and that she is going back to work in October 2012 and that her job is in Leytonstone. Our client instructs us that her mother and her auntie who live in Walthamstow are going to be looking after the baby whilst she is at work. Our client instructs us that it would take her 2 hours each way to get to and from work.
> Our client instructs us that when she starts to work she will have to pay more towards the rent herself and that she would not be able to afford to pay the rent and that she would struggle financially.
> Our client instructs us that she is a single mother and that she does not have a support network in Kent as all of her family and friends are in

> Waltham Forest and that she does not have anyone in Kent who could assist with the baby particularly in an emergency. Our client instructs us that there is also no local mosque in the area or anyone from her community. Our client instructs us that the area she lives in is very isolated, which is very worrying as she is a single woman living on her own with a small baby".

The review upheld the decision that the property was suitable. On paying for the property when Ms A returned to work, the review simply said:

> If she knows [how much she would earn] she can check who much she will have to pay online. Income levels are set by the Government and allow essential expenses (including child care costs) before setting a figure for the amount an individual has to pay. Since she is eligible for Housing Benefit and this is allowable on the full rent of the property, I do not accept that the rent of this property is unaffordable.

On the various concerns about the location of the property, the review letter stated:

> Reviews on the basis of area have to be considered against the availability of properties. There is a considerable shortage of all sorts of property within the borough. The Council has a waiting list of 21,000 applicants, about 1000 of them homeless. Last year only about 1000 permanent properties became available. The Council takes the view that homeless applicants will not jump to the top of the housing queue with the result that people who are overcrowded or badly housed for medical or social reasons move down the list. Therefore the Council finds temporary properties for those on the homeless list and allows them to bid for vacant properties with whatever priority they have.
>
> Temporary accommodation comes in various forms and in different areas. The Council aim is to make offers that are as secure as possible and within the borough. Homeless applicants may start their period of homelessness in a hostel or other nightly paid accommodation whilst

their case is investigated and approved and whilst more permanent accommodation is sought. The PSL scheme involves the Council securing properties on three year renewable tenancies and offering them to homeless applicants in lieu of any more permanent solution being available.

Until recently these PSL tenancies were within the borough. The demand for properties and changes in housing benefit rules has led to the Council having to look outside the borough and properties are now being used in areas like Romford and Luton. Shortly, properties in Birmingham and Margate are to be used. Such areas may seem and are a long way from Waltham Forest but they are an unfortunate result of the lack of affordable accommodation. Applicants have the option of the Rent Deposit Scheme if they wish to remain within the borough. The Council would expect PSL tenants to transfer essential services such as GP and schools to their new address and this is especially necessary for those housed out of the borough.

In this case the Appellant has a job to return to in Leytonstone and child care to support her in doing so. Erith is in the London Borough of Bexleyheath and is about 18 miles by road from this office. The river Thames prevents a direct journey and transport links go either through Stratford or Central London. Erith station is very close to the property. I accept that the journey to Waltham Forest from Erith would take about 2 hours each way and that the Appellant would be liable for the cost of travelling.

The Appellant is on maternity leave from Primark. This is a national store and she can ask to work closer to Erith. For example, there is a store at Bexleyheath that is 31/2 miles from Cricketers Close. This would mean her finding child care in that area. According to the internet there are Islamic Centres 2, 4 and 6 miles from Erith Town Centre, which suggests that there are a number of Muslims in the area.

I need to balance the Appellant's concerns against the shortage of accommodation in Waltham Forest. Given that shortage, I do not

> consider this offer to be unreasonable. The Appellant has several months to discuss her return to work and arrange suitable child care. If she does return to Primark in Leytonstone the travelling involved, though difficult and time-consuming, is not impossible, specially for a part-time job. She can also investigate the Rent Deposit Scheme, without prejudice to her current tenancy which may allow her to find accommodation within the borough, as this scheme allows her to choose the area in which she wishes to live.

The letter omitted any mention of the right to appeal. Ms A's solicitors pointed this out and made further representations, that Ms A was returning to work in July 2012 and that she would be relying on her mother for childcare when she returned, meaning a 1 hour 45 minute trip from the proposed property to her mother's then a further 45 minute trip to work, so a 2 hour 25 minute trip twice a day, mostly with a baby. Ms A had no idea whether a transfer to another branch of Primark would be possible, but she would still be reliant on her mother for childcare, so the travel would remain. The travel costs would be about £119 per month, which she could not afford once she started back at work.

The amended review letter simply stated in response:

> You ask whether the offer will be unsuitable from July when the Appellant is due to return to work. As the review states, the decision is that the offer is suitable now and at the time she returns to work. The shortage of accommodation means that such difficult choices have to be made.

Ms A issued a s.204 appeal on grounds that:

The Respondent failed to make sufficient enquiry and failed to take relevant matters into account;
The Respondent fettered its discretion and/or applied the wrong test; and
The Respondent's decision is Wednesbury unreasonable.

Ms A asked the Court to substitute a decision that the property was not suitable.

Waltham defended and said even if it found for Ms A, the Court should just quash the decision and leave Waltham to make a fresh one.

The Court noted the suitability requirements under s.193 and s.206, noting also that *Ravichandran v Lewisham LBC* [2010] EWCA Civ 755 [our report] upheld that suitability may be quite different depending whether accommodation was intended to be temporary or permanent.

On failure to make sufficient enquiry and failure to take relevant matters into account, Ms A argued:

> that the Respondent failed to take into account the fact that the Appellant would be travelling for about 2 hours each way with a baby and with at least 3 interchanges each way.
>
> She asserts that the housing officer ("HO") failed to make sufficient enquires about: (a) whether employment would be available at a Primark local to Erith; and (b) whether child care would be affordable. It was not reasonable to assume that a different job would be available or that child care would be affordable. The HO made no enquiries about the Appellant's likely income and expenditure when she returned to work.

On the evidence, about 25% of Ms A's monthly earnings when she returned to work would be taken up by travel costs. The review officer had failed to connect finances and location of the property when the two were linked.

Waltham argued:

> the decision does not say that the accommodation would be suitable if the Appellant finds a job in Erith or finds alternative child care." The journey is not too long, and there are alternatives available for the Appellant if she chooses to take them up. The decision about whether the journey is too long is for the authority to take, balancing the Appellant's needs against the local housing situation. In the meantime the Appellant has the safety net which this legislation is intended to provide her.

During the hearing, Waltham made clear that it considered the decision made by the first review letter and had taken no account of the further submissions and did not have to. Ms A submitted that this made the decision even more flawed:

> Homelessness (Suitability of Accommodation) Order 1996 which specifies that in determining whether it would be reasonable for a person to occupy accommodation that is considered suitable for him the authority must take into account whether the accommodation is affordable by her and, in particular, must take account of her financial resources and the costs in respect of the accommodation "including her reasonable living expenses". Plainly, submitted Miss Henderson [for Ms A], those expenses must include the cost of travel and/or childcare.

On the issue of alternatives – work, childcare nearer the property – Ms A argued:

> that whilst it is plain from the case of Sacupima (above) that alternatives can render accommodation suitable, there must be real evidence that the alternatives are available; here there is mere speculation. There really are no alternatives for this Appellant, as she cannot afford them. "She can seek an alternative job" cannot be an answer or every employed applicant would be at risk of being told to look for another job. There is no reference to the affordability of alternative child care.

In response, Waltham

> retreated to the difficulty, for the Appellant, of the test I must apply [the "formidable task" of deciding the authority's decision was Wednesbury unreasonable, R v Islington LBC ex parte Thomas [1997] 30 HLR 111], to the real difficulty of the situation with which the housing authority is faced, and to the fact that an authority is not expected to carry out any or every possible enquiry, only those it considers reasonable [citing R v Royal Borough of Kensington and Chelsea ex p Bayani 22 HLR 406].

On fettering of discretion or applying the wrong test, Ms A argued that the review officer had imposed too high a test on the travel distance and time. The officer had set a test of whether the travel was 'impossible'. THe journey was possible, but no reasonable review officer could consider a journey of 2.25 hours each way a day, with 3 changes, 5 days a week, to mean accommodation was suitable. The question was whether it was reasonable to expect Ms A to make this journey, not whether it was possible to do so. The review letter did not go beyond the possibility of making the journey to consider whether it was reasonable for Ms A to do so.

In response, Waltham argued:

> that this criticism is unfair, and focuses on an isolated phrase when the decision should be looked at as a whole. "It is clear from looking at the decision as a whole that the Respondent had considered whether the accommodation was suitable for the Appellant" and the Respondent emphasises the overwhelming difficulties facing the Respondent in finding affordable accommodation in its own area.
>
> In any event, this is temporary accommodation and the Appellant "can reasonably be expected to put up with a long journey for the short period of time involved if she does not want to move jobs". It is, I note accepted that this is accommodation available for three years. The Appellant submits that this can under no circumstances be considered a "short period of time".

On Wednesbury unreasonableness, Ms A argued, considering suitability from the viewpoint of Ms A, as Waltham was bound to do:

> In all the circumstances including the distance from her job, distance from her family and the financial resources available to her no reasonable authority could conclude that this accommodation was suitable.

Waltham argued that:

> The local authority is best placed to know the strains on its resources and rents in the area. It has provided the Appellant with a safety net; it is not required to provide perfection.

Further, Waltham argued, *Williams v Birmingham City Council* [2008] HLR 4 was a case in which the Court of Appeal had considered that a longer journey did not make the property unsuitable. However, Ms A argued that in that case the journey was not before the court, the issue was whether the journey could be avoided by the applicant's daughter changing school where there was a statutory right to a place in a closer school.

The Court held:

On failure to make sufficient enquiries/take relevant matters into account:

> Putting aside for a moment the "softer" issues relied on by the Appellant in her initial representations on suitability, there are three absolutely central "hard" factual issues: can [and should] the Appellant find work near to Erith; if not, just how feasible, realistic or reasonable it is to expect her to undertake the journey to Leytonstone with her baby and can she afford it; if so, can she afford to pay for the child care that her family would have provided in Walthamstow, thereby enabling her to undertake the job closer to the property?
>
> On those issues: the Respondent failed to enquire into the availability of work in a Primark store near Erith; it failed to enquire into the Appellant's earnings; it failed to enquire into the cost of the journey and, if it knew that cost [as Miss Rowlands submitted it did know about the cost of travel since this was public knowledge], whether the Appellant could afford it on her earnings; and it failed to enquire about the availability and cost of childcare near Erith and, therefore, whether the Appellant could afford it. On the issue of availability of work in the Erith area, I find that it is unreasonable for the Respondent simply to assume, in these times of financial hardship nationwide, that the Appellant would be able to find a job in the local branch of Primark "for the asking". Miss

> Rowlands [for Waltham] submitted that the Respondent was not under a duty to look into the cost of childcare as the Appellant had not specifically raised this in the first representations letter. That argument is flawed, however, both because the letter had referred to the fact that the Appellant would struggle financially and because the Respondent had nonetheless asserted positively, in explaining its decision, that the Appellant actually would be able to find [and, it must follow, pay for] child care locally to the property.
>
> I accept the Appellant's submission that the Respondent failed to take relevant matters into account. It failed to take into account the fact that the Appellant would be travelling for two hours each way with a baby and with at least 3 interchanges each way. Had it taken into account the fact that the Appellant would be travelling with her baby or that there were at least 3 interchanges each way then (a) it should have said so and (b) it should have explained how, in those circumstances, the journey remained one that it was reasonable to expect the Appellant to make. Miss Rowlands [for Waltham] submitted that "the decision about whether the journey is too long is for the authority to take" however if that decision appears to be one taken in the face of the evidence then the Respondent must explain the basis of it. There is no such explanation in the Decision letter.

Further, given the failure of its enquiries, the Respondent failed to take into account either the possibility that the Appellant would not be able to find work close to Erith, or that she might be unable to afford the travel or that she might, if she changed jobs, be unable to afford to pay for childcare on her low paid part time income.

Waltham had failed to consider affordability, making a decision that would be a substantial disincentive for Ms A to return to work.

While alternatives can render a property suitable (Work, childcare etc.) there must be some evidence that these alternatives exist, rather than the 'speculation at best' that Waltham had engaged in.

Further "deciding to opt for alternative accommodation in private sector cannot

amount to an alternative on which a local authority under a "full" housing duty could rely to render property suitable. If so, then the legislation would create no meaningful duty on a housing authority in any case."

On fettered discretion, it was right that Waltham had applied the wrong test on the travel time. There was no basis for the review officer deciding the journey was feasible save for finding it was 'not impossible'.

> In this, as in relation to the other grounds of the Appellant's appeal, the Respondent falls back on the "overwhelming difficulties that the Respondent faces in finding affordable accommodation within its own area". That does not explain how or why the Respondent considered this journey to be reasonable or appropriate for this applicant.

Waltham's assertion that the accommodation was temporary did not get them anywhere, it was for a period of 3 years, not a few days or weeks. Any submission that Ms A would only make the journey because she did not want to move jobs was, as with the assertion that another job would be available, based on pure speculation.

On Wednesbury unreasonableness, while the Court fully accepted the overwhelming difficulties facing Waltham in carrying out its duties to those who needed housing:

> the Respondent fell into the error of allowing those difficulties to be determinative of its decision in this case. In so doing it failed to consider the suitability of this property for this applicant.
>
> It was, I find, plainly unreasonable – in the Wednesbury sense of the word – for the Respondent to conclude that this young mother, who will be returning imminently to low paid part time employment, can either undertake this arduous journey 10 times a week for at least three years and pay the travel costs from her earnings or find alternative low paid employment locally and afford to pay commercially, from those earnings, for the childcare which her family would have provided free in Walthamstow. So focussed was the HO on the difficulties facing the authority in finding suitable accommodation locally that it simply did not

> think through the reality of the property for this applicant in this case. In reality its decision was a huge disincentive for this woman to return to work, when the authority should be trying to encourage and support a person who actually wants to work – rather than to claim benefit – to be able to do so.

On relief, while it was unusual to go beyond quashing a decision, to be remade by the Authority, it was significant here that Waltham had had further submissions and more detail in the second letter from Ms A's solicitors and simply re-asserted its decision. Further, as the decision fell not only on a failure to make enquiries, but full Wednesbury unreasonableness. The conclusion had to be that no reasonable Authority could consider this accommodation to be suitable for Ms A.

For that reason the decision was to be varied to a decision that the property was not suitable and there was a continuing s.193 duty.

Deja Vu All Over Again

Konodyba v Royal Borough of Kensington and Chelsea [2012] EWCA Civ 982

This was an appeal against a decision that a homelessness applicant was not eligible for assistance. It's been on my blogging to-do list since July, for which I can only apologise. The appeal raised some unusual and interesting issues.

We've met the applicant, Dr Konodyba, a couple of times before. Most recently, RBKC succeeded in getting an ex parte interim injunction discharged for material non disclosure. More importantly, in the context of this appeal, she has already been to the Court of Appeal once before. It is fair to say that that trip did not end well.

Dr K is from Poland, an A8 country (that is, one of the countries that joined the EU

in 2004 – the others are Estonia, Latvia, Lithuania, Czech Republic, Slovakia, Hungary and Slovenia). It had been argued on Dr K's behalf in a s.204 appeal in Wandsworth CC that, as the mother of a child who had been introduced into a school in the UK while she was temporarily working in the UK (but not for the 12 months required under the UK's transitional provisions for A8 nationals), she was entitled to reside in the UK as the primary carer of that child under the *Baumbaust* doctrine. Dr K lost in the county court and appealed to the Court of Appeal. Rix LJ granted permission to appeal in May 2009. Shortly before the Court of Appeal hearing in June 2009, Dr K parted company with her legal team. She told the Court of Appeal that she no longer wanted to rely on the ground for which Rix LJ had granted permission to appeal, but that she wanted to rely on a different ground and sought an adjournment to prepare properly for that. The Court of Appeal refused that request and dismissed the appeal.

After that appeal Dr K moved into private rented accommodation. In due course she had to leave that accommodation, at which point she made a fresh application to RBKC. She again said that she was eligible because of *Baumbaust*. She also argued that she had retained worker status because she had been employed for 6 months in 2006 in a hotel and she had been self-employed for about 4 months in the same year. Her argument went that she had stopped working because she had become temporarily ill and therefore art.7 of Directive 2004/38 gave her a right to reside, such that she was eligible for assistance. The authority found that Dr K was not eligible for assistance. A review was requested, which upheld the s.184 decision. Dr K appealed to the county court. That appeal was dismissed and so she ended up in the Court of Appeal.

Judgment was given by Longmore LJ, with whom Lord Neuberger and Gross LJ agreed.

RBKC argued that it was not open to Dr K to rely on the *Baumbaust* point as she had expressly abandoned it before the Court of Appeal in 2009. She was therefore barred by *res judicata* / issue estoppel / abuse of process (take your pick). Dr K had two answers to this. First, that *res judicata* and issue estoppel don't apply in public law cases and, secondly, that since the 2009 case there had been the later decisions of the ECJ in *Ibrahim* and *Teixeira*, which should be taken into account.

Longmore LJ considered that the extent to which *res judicata* and issue estoppel applied in public law was a vexed question, referring to part of chapter 7 of *Wade & Forsyth*. However, even in public law proceedings the court could stop an abuse of process and the attempt to relitigate matters which had been disposed of by an unappealed judgment was an obvious form of abuse.

Ibrahim and *Teixeira* did not assist either. The proper course would have been to apply for permission to appeal the 2009 decision, out of time (good luck with that).

RBKC also sought to argue that the retained worker status point could not be entertained as it could have been taken in 2009. Longmore LJ thought that Lord Bingham's well known general approach in *Johnson v Gore Wood & Co* should apply in public law as well, "with the possible qualification that a public body with statutory obligations to provide, for example, housing assistance or a home from, no doubt, scarce housing stock should not be over-protected from addressing points which are truly new, even if they arise on facts which have already been subject to a determination" ([16]).

Based on that approach, it would be right for the Court of Appeal to consider the arguments on retained worker status.

The remaining critical question was, therefore, to apply the Immigration (EEA) Regulations 2006, whether Dr K was "temporarily unable to work as the result of an illness or accident".

The review officer considered the evidence and concluded that there was no realistic prospect of Dr K being able to return to work in the "foreseeable future". That was held to be the correct test – the review officer could not be expected to peer into the unforeseeable future. Whether Dr K was temporarily unable to work was a question of fact. The evidence had been considered by the review officer and there was no flaw in his reasoning.

Appeal dismissed.

It does seem that there is a point missed here though – while I think that the Court of Appeal must be right in relation to self-employment, so far as retained worker status is concerned I don't think Dr K could possibly have qualified. She would have

needed to have worked for 12 months under the worker registration scheme. It appears that she had not done so, so there was no status for her to retain.

Costs and s.204 Appeals

None of us I think can be blamed for presuming that in statutory homelessness appeals, costs ought to follow the event. It seems, though, that not all judges view appeals in this way and the Court of Appeal will shortly be looking at this issue in the case of *Lu v LB Southwark B5/2012/2107*.

The case in summary concerns a finding of intentional homelessness against an applicant and a misdirection on the question of whether it was reasonable for the applicant (and her as yet unborn child) to continue to occupy their accommodation. The first instance judge allowed the appeal and, having heard argument that the applicant had not raised the issue of reasonableness in her review representations, made no order for costs because the outcome of the appeal was not obvious.

Permission to bring a second appeal was granted by Lewison LJ on 16/10/12 on the ground that whether costs should follow the event in homelessness appeals raised an important point of principle. The Judge also observed that this was strictly a first appeal on the question of costs and that in addition, the appeal had a real prospect of success.

The appeal is due to be heard in May 2013.

Homelessness post Localism Act – Statutory Guidance

The DCLG has released statutory guidance on:

> the changes that the Localism Act 2011 makes to the homelessness legislation.
>
> It also provides guidance on the Homelessness (Suitability of Accommodation) (England) Order 2012.
>
> This supplements parts of the *Homelessness Code of Guidance for Local Authorities* published in July 2006.

The guidance can be found here. [Link updated to new gov.uk site]

New Regulations 2 – Private Sector Suitability

The Government has today laid The Homelessness (Suitability of Accommodation) (England) Order 2012 SI 2012 No. 2601. It comes into force on 9 November 2012

This sets out the issues for determining suitability (or the lack thereof) of accommodation for discharge of the full homeless duty by offer of private sector accommodation.

This is going to be a regulation we will probably be spending a lot of time on. Certainly 3. will be pored over in detail and given the 9 November 2012 commencement, sooner rather than later.

But only for those of us in England. The SI doesn't extend to Wales. Where we are all moving (posts passim).

New Regulations 1 – 'Zambrano' eligibility

In response to *Zambrano* (C-34/09) the Government has laid new regulations today, to come into force on ~~9~~ 8 November 2012.

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 http://www.legislation.gov.uk/uksi/2012/2588/introduction/made

The Social Security (Habitual Residence) (Amendment) Regulations 2012 http://www.legislation.gov.uk/uksi/2012/2587/contents/made

The effect of these regulations is that, while the right of residence of 'Zambrano Carers' (third country nationals caring for an EU national in their own nation) is confirmed, the carer is excluded from housing assistance and welfare benefits.

This would appear to mean that the outcome of *Pryce v Southwark LBC* in the Court of Appeal (our note here) will be largely meaningless. However, whether these Regulations will face further challenge, perhaps in the European Court, will remain to be seen.

Housing eligibility via a child?

Not sure how this one didn't make it on to the blog before

Back in March 2011, the Court of Justice of the European Union gave judgment in *Zambrano* (C-34/09) [For a report on that judgment, see Free Movement, here]

The upshot of *Zambrano* was that where a child (or dependant adult) who is a citizen of an EU country depends on a third country national to live in that country, the third party national must be given a right of residence and work to preserve the child's (or dependent adult's) 'enjoyment of the rights conferred on them as a citizen of the Union'. This is substantially different to *Ibrahim* and *Texeira* (our note), which concerned the Art 12 rights of EU national children residing in another EU country. This case concerns EU national children in their 'home' country and third party national carers.

So, if a 'right of residence' and permission to work must be given, what of eligibility for homeless assistance?

On the one hand is the argument that a 'Zambrano' carer has a right to reside, for the purposes of Regulation 6 of the Eligibility Regulations, which is an enforceable right under s.2(1) European Communities Act and article 20 Treaty on the Functioning of the European Union. 'Zambrano' carers are therefore not subject to immigration control, s.7 Immigration Act 1988. The Regulation 6 right to reside confers eligibility for homeless assistance under Part VII.

On the other hand, the argument is that the 'right' vests in the child, not the 'Zambrano' carer, such that the carer him/herself does not have an enforceable right, remains 'subject to immigration control' and are not eligible for Part VII assistance.

Further muddying the waters is the Court of Justice of the European Union decision in McCarthy [2011] EUECJ C-434/09 which seems to decide the issue of whether EU rights are applicable for a national in his/her own country in the opposite direction, so Article 21 TFEU does not apply (but doesn't explain the difference between Art 20

TFEU and Art 21).

The Court of Appeal will be hearing *Pryce v Southwark LBC* (on appeal from a s.204 appeal in Central London County Court and *R (TJ) v Birmingham CC* (a refusal of interim accommodation pending review of a decision that the applicant was not eligible) on 7 or 8 November 2012. We'll have the update as soon as possible.

Anyone with a similar case should consider staying pending the outcome.

New Practice Direction for s.204 appeals

The 59th update to the CPR comes into force on October 1, 2012 and, importantly, it brings in a raft of new practice directions for appeals. For we housing lawyers, page 81 of this document sets out the position for s.204 appeals. The appellant should now file proposed directions with the appellants notice. Those should be agreed (or alternatives proposed) within 14 days. Disclosure (in effect, of the housing file) must take place within 14 days of the filing of the appellants notice and the appellant then has a 14 day period to amend his notice.

They kept that change quiet. From memory, this looks pretty similar to something that HLPA were urging the Rules Committee to adopt.

Injunctions for accommodation, judicial review and prospects of success

This is case that highlights the benchmark for seeking an injunction for accommodation on a judicial review claim

R (on the application of Bates) v Barking & Dagenham LBC (2012) QBD (Admin) 17 August 2012 [Note of extempore judgment on Lawtel]

Ms B had obtained an ex parte interim order that Barking provide temporary accommodation for her and her two children. This was the continuation hearing.

It appears that MS B had sought a Social Services assessment on being evicted from temporary accommodation provided by another local authority in Barking's area (apparently following a fining of intentional homelessness). She was seeking accommodation and support under s.17 Children Act.

Barking's assessment concluded that Ms B was intentionally making herself homeless, having failed to co-operate with other local authorities or accept an offer of accommodation. She hadn't taken appropriate actions to stop becoming homeless, although she had been professionally advised. Unless Ms B changed her approach, s.20 Children Act accommodation could be provided to the children alone as a last resort. S.17 accommodation was not appropriate as Ms B was wholly reliant on the local authority, had not sought a crisis loan or support from friends and family, despite a support network being in place through her church. Ms B was the 'author of her own misfortune'.

Ms B applied for judicial review of this decision, with an urgent ex parte application for a mandatory order for accommodation to be provided pending the judicial review. This was granted on the papers. Barking opposed the order at the continuation hearing.

Held:

The interim order was made in the absence of any grant of permission for judicial review. It would therefore be inappropriate to grant the mandatory order if the court was of the view that permission would not be given.

Permission in this case would depend on consideration of *R (on the application of G) v Barnet LBC* [2003] UKHL 57, [2004] 2 A.C. 208. *R(G)* made clear that there was no mandatory duty under s.17 and that it was lawful for the local authority to have a policy, such as the present one, aimed "at the very least to provide a strong prompt to the parent, particularly the parent considered to be intentionally homeless, to organise themself better". The policy did not prevent an assessment taking place, which would have been unlawful, and did not prevent s.20 duties arising.

The hurdle the claimant in this case had to clear was therefore high, as Ms B would have to show irrationality or impropriety in the decision, or some misunderstanding of law. It was hard to see that any of these actually arose in this case. The grant of permission therefore appeared to be unlikely.

Before granting mandatory relief, it was necessary to consider whether there was a real prospect of success at trial, the balance of convenience between the parties and the wider public interest.

Here, there was no real prospect of success for the reasons given above. While Ms B and her children were in difficult circumstances, it was proper for Barking's assessment to have considered Ms B's circumstances, finances, the other options open to her and her previous refusal of an offer of accommodation. It was not appropriate to grant a mandatory order.

Suitability. On expired beds and shared

bathrooms

Just how bad and inappropriate does temporary accommodation have to be to be unsuitable? There is an interesting post by David Thomas on the Anthony Gold 'Housing and Public Law' blog about a settled Judicial Review that highlights this issue.

The challenge was to the suitability of temporary accommodation provided as interim accommodation and then provided after acceptance of the full housing duty, so under both s.188 and s.93 Housing Act 1996. The principles would also apply to all pre-decision accommodation or pending review or appeal, as it must also be suitable under Housing Act 1996 s.205 and s.206(1)

As David notes, Lady Hale's comments in *Birmingham City Council v Ali; Moran v Manchester City Council* [2009] UKHL 36 (our note here) to the effect that that accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period, gave Local Authorities a considerable apparent leeway over the suitability (and indeed standard) of interim and temporary accommodation secured for homeless applicants, as there was always the fall back position that it was only for a (relatively) short period.

Mr A was a homeless applicant with two sons, aged 14 and 4. He applied as homeless to Southwark and was placed in a hostel owned by Southwark. The initial decision was negative, as was the review. However, after a s.204 appeal was issued, Southwark settled and accepted the full housing duty.

Mr A and his sons were accommodated in the same hostel pending the appeal, which was when the Judicial Review was issued, and after Southwark accepted the full duty.

The hostel accommodation was a single bedsitting room, a small attached kitchen and shared use of a bathroom. According to the independent EHO sent to inspect by Mr A's solicitor, the double bed was 'far past the end of its useful life', the single bed in very poor condition, the wardrobe swayed, the cooker was faulty, the heating unit inadequate for the space. There were two shared bathrooms for 13 people and most of

the time Mr A was there, only one had hot water. Rainwater leaked through the bathroom light fittings. The only WCs were in the bathrooms. Mr A's room had severe condensation damp. Unsurprisingly, these conditions had a bad effect on Mr A's children, who had difficulty sleeping or studying.

The property was overcrowded under both the old statutory limits and Housing Act 2004 provisions. The use of the hostel accommodation was also in breach of Southwark's own guidance on accommodation with shared bathrooms being suitable for families with children at least for longer than 6 weeks.

Southwark's initial response was to assert that the property was suitable. A Judicial Review application was issued and, although interim relief was refused, expedition was ordered. A month later, permission was granted, and a full hearing listed for three weeks time. In the week before the hearing, Southwark offered no less than 4 other properties as temporary accommodation, one of which was accepted as suitable. The JR was discontinued save on the issue of costs, which has gone to written representations.

Comment

While the principles of suitability have not changed, and to that extent, there is no new law here per se, it is true that Lady Hale's view in *Birmingham CC v Ali* made challenges to temporary accommodation more difficult, as the counter-argument that a property was suitable when viewed as short term accommodation would be raised. It is good to see a challenge made to what was on any measure atrocious accommodation and a successful outcome for the applicant.

Thanks to David Thomas of Anthony Gold for bringing it to our attention and for letting us adapt his post.

Refusing irrationally

May, R (on the application of) v Birmingham City Council [2012] EWHC 1399 (Admin)

When can a Local Authority refuse to accept an application as homeless? This was a judicial review of Birmingham City Council's refusal to accept a homeless application by the Claimant, Ms May, ostensibly on the basis that there was no change in facts from her previous application(s).

Ms May had applied to Birmingham as homeless after arriving from Slough. She had left her home in Slough because of domestic violence and had family in Birmingham. In January 2010, Birmingham accepted the full housing duty. Ms May was offered a permanent property on the 12th floor of a tower block. Ms May refused it as unsuitable for her young children. Birmingham upheld the suitability on review and discharged duty in February 2010. During the review period and after the decision, Ms May had been living with her grandmother. Her evidence was that:

> Throughout the period of the review I continued to reside with my children at my grandmother's house. I had applied to go onto the Council's waiting list for accommodation and an agreement was reached between myself and my grandmother that myself and my two children could stay with her in her three bedroomed property for an indefinite period – until I was offered accommodation from the Council's waiting list. I did not consider myself to be homeless during the time spent with my grandma as the living situation was fine.
>
> However, in November 2010 there was an unexpected breakdown in the relationship between myself and my grandmother which led to my grandmother requesting me to leave her home. This led me to apply as homeless to the Council.

Ms May applied again as homeless on 25 November 2010, giving the reason for homelessness as being unable to stay at her grandmother's house any longer and saying she had nowhere to stay that night. She was given temporary accommodation, but her application was rejected on 14 December 2010, on the stated basis that there had been no relevant change in her circumstances since the review decision of February 2010 and that she had only been staying with her grandmother 'on a temporary basis'.

Ms May requested a review and in her submissions, said, repeatedly that while the reason for her first application was that she was fleeing domestic violence, her grandmother had then agreed to accommodate her and her children. This situation had then changed in November 2010, when her grandmother had said she had to leave after arguments.

The review decision of 15 March 2011 upheld the decision that there were no new facts. It said in part:

> You have stated in your review submitted on 7 January 2011, that your Grandmother agreed she would accommodate you when you came to Birmingham. I do not consider this a relevant fact. You came to Birmingham on 5 October 2009, and approached your local Neighbourhood Office 10 days later as homeless. An appointment for you to complete a homeless application was then made for 27 October 2009. I am satisfied from the above information that your move to Birmingham, and the arrangement to stay with your Grandmother was only temporary. Your extended stay with your Grandmother was then enforced following Birmingham City Council's discharge of duty once you refused an offer of accommodation. You remained with your grandmother for a further 9 months, were the relationship had reached a point where she no longer willing to accommodate and consequently asked you to leave, prompting a second homeless application form.
>
> [...] The facts of your circumstances are that you and your two children were homeless from your Grandmother's at the time of your previous review decision, and on your most recent homeless application, you are still homeless from your Grandmother's where you have been residing

temporary.

A s.204 appeal was made 'for protective reasons', but Ms May made a further homeless application on 12 May 2011.This application was stated to be based on new facts or facts which the authority had failed to consider in the course of the previous homeless 'investigation', and said

> The Authority has failed to investigate, to date, our client's occupation at her grandmother's house and in particular whether that period of occupation was sufficient to give rise to a new incidence of homelessness. No consideration was given as to the nature of our client's occupation or of the agreement entered into with our client and her grandmother sufficient to assess whether Mrs May had occupied premises at William Cook Road as settled intervening accommodation. Similarly, our client is plainly asserting that her eviction from her grandmother's was not anticipated. Our client's occupation of William Cook Road did not come to an end at the end of any agreed term but due to sudden and unforeseen circumstances. No investigation has been made in relation to these facts and in relation to whether our clients eviction from her grandmother's constitutes a supervening element sufficient in itself to create a new incidence of homelessness. Your further investigations are required to encompass these issues and also deal with any new facts arising from the current homelessness.

On 31 May 2011, Birmingham rejected this application as not being valid:

> I asked Mrs May about her reason for homelessness. Mrs May stated that it was the same reason as highlighted on her previous homelessness application. To clarify this important point, I asked Mrs May if anything had changed, or whether her circumstances and the facts of her case were exactly the same. Mrs May stated her reason for homelessness was the same as before, and that her circumstances were exactly the same. This information clearly contradicts the contents of your letter dated 12 May

2011.

And continuing:

> After considering both of Mrs May's homelessness applications, and after confirming with Mrs May that the application dated 12 May 2011 is based on exactly the same facts as her first homeless application dated 27 October 2009 (and the subsequent application dated 25 November 2010), I must advise you that we do not consider there has been any change in the facts of your client's case, and we will not be accepting the homeless application dated 12 May 2011.

This decision was the subject of the judicial review.

Rather surprisingly, there was no evidence submitted by the officer who wrote the decision letter. The factual account in the decision letter was clearly disputed, but there was no witness statement addressing how the decision had been reached.

The principles for successive applications were considered in *R (Harrow London Borough Council) ex parte Fahia* [1998] 1 WLR 1396 and *Rikha Begum v Tower Hamlets London Borough Council* [2005] 1 WLR 2103

In *Fahia*, the principle was set out by the House of Lords that the only exceptions to the (then equivalent of) the duty to accept an application under s.184 HA 1996 were is a) a person lacked capacity to make an application or b) a person had been found intentionally homeless but made a further application on exactly the same facts. So at best there was a condition that the application should not be 'on exactly the same facts' (which was not the same as 'a material change in circumstances). Moreover, in *Fahia*, the applicant had been occupying a guest house as a licencee for a year between her applications and for that reason "it was impossible to say there had been no relevant change in circumstances at all".

In *Rikha Begum*, the Court of Appeal found, in Lord Neuberger's judgment, that

> I consider that there is no room to imply a further requirement which has to be satisfied, such as establishing a material change of circumstances since the refusal of an offer of accommodation pursuant to an earlier application, before the clear words of sections 183 and 184 can take effect. Any such implication faces insuperable difficulties in light of the decision, but also the reasoning, in Fahia. A person seeking to imply words into a statutory faces a difficult task: it is a course which can only be justified in clear and unusual circumstances. Where the implication involves imposing a further requirements, over and above express requirements imposed by the legislature, the task is, in my view, particularly difficult

and

> I do not consider that in such a case the authority would be entitled to investigate the accuracy of the alleged new facts before deciding whether to treat the application as valid, even where there may be reason to suspect the accuracy of the allegations. Such an investigation would in my view, fall foul of the manifest disapproval in Fahia of non-statutory inquiries. Even if an investigation to decide whether the application is valid is expected to be short and simple, it seems to me that it would transgress that disapproval, as well as running into the other difficulties I have referred to, based on the wording and structure of Part VII of the 1996 Act.

In its defence, Birmingham argued that the test in this claim was irrationality. This was a stringent test, on the *Wednesbury* principle of whether the decision was "so absurd that no sensible person could ever dream that it lay within the powers of the authority".

The Claimant's argument, simply put was that:

> No authority acting rationally and properly directed in law could decide that the Claimant's further application for assistance, precipitated by

> homelessness caused by the breakdown by the Claimant's relationship with her grandmother, was identical to her first application which was precipitated by her fleeing Slough as a victim of domestic violence.

Birmingham argued that:

> At the date of a third application as homeless the claimant was asserting that she could no longer occupy her grandmother's home and was therefore homeless. That was the precise same reason for homelessness as was asserted at the date of her first application although the claimant had fled domestic violence in Slough. She was living temporarily with her grandmother but asserted she could not continue to do so. Likewise, at the date of the second application the reason for homelessness was the same. There is simply no change of the fact.

Further

> If in so far as the claimant asserts that the date of her first application she was 'homeless at home' at her grandmother's but made actually homeless by the date of her second application, it is submitted being homeless in a unit of accommodation is identical to being homeless from that same unit. This is a conclusion which on any sensible analysis cannot be said to be perverse.

Birmingham argued that "there is no difference, or at least that the local authority was entitled reasonably to come to the view that there is no difference between housing being temporary, in the sense that it may come to an end at some point in the future and it being temporary in the sense that that has in fact now come about."

These arguments from Birmingham got short shrift:

> 39. I do not accept that submission on behalf of the defendant. I have come to the clear conclusion that it was irrational for the defendant

authority to take the view that the circumstances of the claimant when she made her further application were exactly the same as when she first made an application as a homeless person.

40. On behalf of the defendant, no issue was taken with the the factual assertion made on behalf of the claimant that after the defendant authority's decision that it had discharged its duty to the claimant, on 12 February 2010 an agreement was reached whereby the claimant's grandmother told her that she and her children could stay at the grandmother's house, pending the outcome of the claimant's application for housing on the defendant authority's ordinary waiting list; in other words, outside the context of homelessness applications.

41. That was, as has been submitted on behalf of the claimant, an open-ended commitment. Although the accommodation can be described as temporary, the claimant had a licence from her grandmother. It was temporary, in the sense that it was not permanent. No doubt, both the claimant and her grandmother were hoping and expecting her application for housing in the ordinary way to bear fruit from the defendant authority in due course.

42. However, on any reasonable view, in my judgment, there plainly was an important change in the facts in around November 2010, as the claimant has described in her witness statement in these proceedings. There was a breakdown in the relationship between the claimant and her grandmother. There is all the difference in the world, in my view, between a person knowing that at some point in the future they may have to leave accommodation and a person being told that they will not have somewhere to sleep that night. No reasonable public authority, in my judgment, could come to a different conclusion when asked: are those two scenarios exactly the same or are they different?

Decision quashed. Costs to the Claimant.

Comment

The test in *Fahia* and confirmed in *Rikha Begum* was clear. It is a little surprising

that Birmingham fought this one all the way to final hearing. Where the applicant had submitted a different reason for homelessness to a previous application, any inquiries into that new reason properly fall under s.184 and are not 'extra statutory' inquiries. Reading between the lines of the argument and documents referred to in the judgment, there also appears to have been some *post facto* reasoning in the response to the JR claim over the refusal of the third application, an impression not helped by the absence of evidence from the review officer.

However, the judgment serves to confirm that a Local Authority cannot simply decide that there an application is being made on the same facts as a previous one when the application itself suggests otherwise.It may well be the case that there are no relevant new facts (though no view intended on Ms Mays's case), but where there are *prima facie* new facts, this is a matter for inquiries under s.184.

The Only Way in Essex

[amended on 4/7/12]

This is a note of a homelessness appeal which was heard on 9/3/2012 by HHJ Worster in Birmingham County Court. The case was run by the Community Law Partnership and by counsel, James Stark, who kindly provided a transcript of the judgement.

Essex v Birmingham CC concerns the exercise of a court's power to vary a finding of intentional homelessness in a s.202 review decision. Mr E was the assured tenant of a property let by Midland Heart and he was admitted to hospital in October 2010 having suffered an abscess in his foot, which prevented him from signing-on at the Jobcentre, with the result that his JSA claim stopped. Once he was discharged from hospital, Mr E went to convalesce at his mother's address, where he stayed until February 2011.

Mr E believed that despite the stoppage of his JSA claim, his housing benefit would continue. Unfortunately, he was wrong about this and with remarkable swiftness, Midland Heart served a s.8 Notice, commenced possession proceedings and obtained an outright possession order on 31/1/11. Mr E returned home to find a letter from the landlord telling him he had to be out by the 15/2/11 and that he ought to apply to the council as homeless.

Mr E accordingly surrendered the tenancy and applied to BCC as homeless with his 9 year old son daughter. BCC found Mr E intentionally homeless, Mr E requested a review and the decision was upheld on review. The review decision contained the following finding: "*I do not accept that it was reasonable for you to assume that your housing benefit would continue to be paid despite the fact that you were not resident at the property for 3 months*".

On appeal to the County Court, Mr E argued that the reviewer had applied the wrong test to the issue of good faith and that it was irrelevant that the council considered his belief that HB would continue unreasonable, so long as it was honestly held.

BCC conceded in advance of the hearing that the decision was flawed but disagreed with Mr E that the Court ought to vary the decision to record that he was not intentionally homeless. BCC did not concede that Mr E assumed that HB would continue and argued that the review decision was ambiguous on this issue. This meant there were lines of enquiry open to the council and the decision ought to be quashed.

The judge disagreed and, applying *LBTH v Deugi*, concluded that there was no real prospect that any further enquiry might satisfy the council that Mr E was intentionally homeless. Interestingly, the judge found that BCC was not entitled to the benefit of the doubt in the review decision (in a *Holmes-Moorhouse* sense). The finding that Mr E assumed that HB would continue was carefully reasoned, it was not ambiguous and there was no suggestion of any impropriety on Mr E's part. The judge therefore varied the review decision.

Housing and Human Rights Round-up Part II

Three more housing-related cases have been decided recently by the ECHR:

Bjedov v Croatia (29/5/12)

Mrs Bjedov was granted a joint tenancy of a 'specially protected' flat in Zadar, Croatia in 1975 and she became the sole tenant after the death of her husband in 1994. Since 1991, Mrs B had been living with her husband in another property and she moved to Switzerland after her husband's death, returning to Croatia in 1998. Mrs B was unable to return to her flat as it had been occupied by trespassers from 1991 onwards.

Mrs B was eventually able to move back in July 2001 and she then applied to purchase the flat from the Municipal Authorities. The Authorities counterclaimed for her eviction from the flat and the Municipal Court dismissed the claim and allowed the counterclaim on 28/4/06. The Court held that her absence from the flat for over 6 months was unjustified and that the absence of any legal proceedings against the trespassers demonstrated a lack of an intention to return. Mrs B's appeal was unsuccessful but she argued before the Court (at the enforcement stage) that her eviction would be both inhumane and degrading as she could not afford to live anywhere else, she was frail, elderly (she was in her seventies), in poor health and death would result from the eviction (supportive medical evidence was provided).

Nevertheless, the Municipal Court decided on 11/5/11 to proceed with enforcement but the warrant had yet to be executed when the ECHR heard the case. Mrs B argued before this Court that Croatia had breached her rights under Art 8.

The Government argued before the ECHR that notwithstanding Mrs B's claims of infirmity, she had never approached the local welfare centre, which was prepared to arrange a nursing home for Mrs B if she were evicted from her flat. Mrs B pointed out in response that the costs of a nursing home would be prohibitive, both for her and for her children, who would be expected to support her.

The ECHR concluded (at para.68) that the Municipal Court in the course of the enforcement proceedings had ordered her eviction without determining whether her eviction was proportionate or necessary in a democratic society, particularly when there was a real possibility of irreparable harm to Mrs B's health. The Court also found that the offer of nursing care was speculative rather than real.

The enforcement process was an inadequate mechanism for the adversarial examination of complex legal issues and the Court held that Mrs B's Article 8 rights had been breached.

The ECHR also made this interesting comment (para 70):

> Another element of importance is the following. In circumstances where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the State's legitimate interest in being able to control its property comes second to the applicant's right to respect for her home. Moreover, where the State has not shown the necessity of the applicant's eviction in order to protect its own property rights, the Court places a strong emphasis on the fact that no interests of other private parties are likewise at stake.

Damages of EUR 2000 and costs were awarded.

Comment: *Bjedov* is potentially a very useful case in the context of applications to suspend warrants when new evidence is presented to a Court that raises fresh Article 8 issues. It is difficult to tell from this judgement whether Mrs B argued in 2006 that it would be disproportionate to evict and whether the Court at that stage considered, for instance, the overall length of the tenancy. However, it would appear to be insufficient on the strength of this judgement for a Court to ignore new evidence at the warrant stage and to state, for example, that the main proportionality issues had been dealt with in the course of the possession claim.

Jarnea and others v Romania (31/5/12)

The applicants were owners of properties which had been let to tenants under

agreements concluded with the State. The applicants complained that they were unable to receive the rent that was due to them and they commenced proceedings in the local courts for the tenants' eviction. The courts refused to allow the evictions as they considered themselves bound by legislation which provided for a 5-year extension to the tenants' agreements.The applicants petitioned the ECHR for compensation for breach of their rights under Art 1 Protocol 1.

The ECHR rejected the government's argument that because the extension of the agreements was in the tenants' interests, it was therefore in the public interest for the applicants to be deprived of their possessions. It found there to be a breach of Art 1 Protocol 1 and awarded EUR 5000 compensation to each applicant.

Costache v Romania (27/3/12)

Mr C petitioned the ECHR for breach of his rights under Articles 3 and 8 of the Convention by reason of the State's failure to remedy his inadequate housing situation and to allow him to remain in living conditions which were, on Mr C's case, inhuman.

Mr C struggled to find his own accommodation following the death of his father in 2001 and he moved into a deserted stable with his partner (in either 2003 or 2005). Mr C suffered from hepatitis and brain damage resulting from a stroke and visits conducted by Social Services inspectors to the stable confirmed that it lacked sanitation and functioning utilities and that it was unsuitable for habitation. The couple were placed on the waiting list for rehousing and they were eventually relocated to suitable accommodation at the end of 2007.

The Court noted that there was no right under Article 8 to be provided with a home (*Chapman v UK*) except in the limited circumstances where an applicant's serious personal circumstances created a positive obligation on the State to act. Notwithstanding the applicant's serious health problems, the Court found that the State had not authorised or arranged for Mr C to occupy the stable by way of social housing. It merely allowed him to live there until his housing situation was resolved. Mr C was eventually prioritised for a tenancy in 2007 and the Court concluded that the State had acted within the correct margin of appreciation for the distribution of its housing resources.

The application was found to be inadmissible.

Part VII and Procedure

Two very recent Court of Appeal judgements have looked at the extent of a Local Authority's obligations under Reg 6(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999: *Maswaku v Westminster CC* and *El Goure v RB Kensington & Chelsea*.

In brief, the Regulation provides that once a request for a s.202 review has been made, the Authority is obliged to notify the applicant of their right to make further representations on review, either personally or by somebody on their behalf.

In both *El Goure* and *Maswaku*, the Authorities were criticised for failing to notify the Appellants or their solicitors once the requests had been made that the Appellants themselves, or somebody else on their behalf, might make review representations. Mummery LJ gave the lead judgement in both cases and remarked that the point was an empty one. The purpose of the Regulation was to protect unrepresented applicants, not those who already had the benefit of legal representation. There was

no suggestion that the applicants failed to make the desired representations because of the lack of notification and it did not follow that the review decision ought to be quashed, even if the duty to notify was mandatory. There was nothing further that the Authority could reasonably have been expected to do as the underlying purpose of the Regulation had been achieved.

(Comment: it would be interesting to see how the Court would deal with this issue if an applicant, in ignorance of their rights, made their own representations on review)

The additional issue in *Maswaku* concerned the duty under s.193(5) of the Housing Act 1996 to notify the applicant of the 'possible consequence' of refusal of temporary accommodation. The applicant refused a placement in Dagenham because of the difficulties involved in attending training in Hackney. The Appellant complained on appeal that she had not been informed, inter alia, of her right to make a fresh application as homeless, the risk that she might be found intentionally homeless and the risk that she might lose priority on the waiting list.

The judge rejected this ground of appeal. The 'possible consequence' of refusal of temporary accommodation was the discharge of housing duty, which *had* been communicated. It was not incumbent on the council to spell out all the potential consequences of refusal of temporary accommodation.

The main issue in *El Goure* was the test that the Authority applied under s.189(1)(b) where the children's residence was shared. The Appellant complained that the council had applied an 'exceptionality' test and had misdirected itself, whereas the statutory question was whether it was reasonable for the children to reside with the Appellant. The Court noted the use of the word 'exceptional' in the review decision but found that the way the reviewer reasoned the decision showed that the correct test had been applied. The reference to 'exceptionality ' in *Holmes-Moorhouse* was intended (as in *Pinnock*) as an outcome and not a guide. The appeal was dismissed.

Outside the Boxall

This is an important case on costs on settled Judicial Reviews. Following on *Bahta & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2011] EWCA Civ 895 [Our report] and Lord Jackson's view on JR costs, the Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595 has given general guidance for awarding costs. The principles should also apply to the equally troublesome area of costs in settled s.204 Housing Act 1996 Homeless appeals.

The actual judicial review that gave rise to this hearing was an age assessment case which was conceded by the Local Authority following a second expert's report. A consent order was agreed, but no agreement on costs. Submissions on paper resulted in a first instance order that:

> 'Having considered the submissions on costs made by both parties and having regard to the principles referred to by the court in R (Boxall) v Waltham Forest LBC (2001) 4 CCLR 258 and to the caveat added by Hallett LJ in R (Scott) v Hackney LBC [2009] EWCA Civ 217 at 51 – to the effect that a judge must not be tempted too readily to adopt the default position of making no order for costs – I accept that this is the just outcome here. As has been submitted for the defendant this is not a case where the case was obvious from the outset. And in view of the dynamic development of this area of the law while the claim was live and the burdens on the defendant which are referred to in paragraph 12 of its submissions I do not consider the defendant's conduct in the proceedings has been such as to justify an award of costs being made against it.'

The Claimant appealed, arguing that:
(i) The judge failed to address the appellant's primary argument that costs should follow the event.
(ii) The judge misdirected himself in refusing to award costs because the outcome was not obvious from the outset.

Permission to appeal was given in light of Bahta.

I'll turn to the specific points on this case at the end of this note, including the basis of the arguments. However, the primary interest is in what amounts to guidance set out by the Court of Appeal on costs in settled Judicial Reviews.

The Master of Rolls at paras 60 to 63, says:

> 60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.
>
> 61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.
>
> 62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim.

> Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in Scott. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. Boxall appears to have been such case.
>
> 63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

And Stanley Burnton LJ states at paras 75 to 77:

> 75. The consequence of our decision should be a greater willingness on the part of the parties to judicial review proceedings, at first instance and on appeal, to agree not only the substantive provision of the order to be made by the Court, but also the issue of costs. Settlements in which the question of costs is left to be determined by the Court at a later date are common, and perhaps too common. Parties can no longer assume that

> the likely order is no order as to costs, even where one party or another has conceded the whole, or substantially the whole, of the other side's case.
>
> 76. A successful negotiation of costs issues is likely to be cost effective, saving the costs of subsequent written submissions and saving the time of the judge who is required to determine costs. It is in both parties' interests to address the question of comprehensive settlement as early as possible.
>
> 77. Where the parties are unable to agree costs, and they are left to be determined by the Court, it is important that both the work and costs involved in preparing the parties' submissions on costs, and the material the judge is asked to consider, are proportionate to the amount at stake. No order for costs will be the default order when the judge cannot without disproportionate expenditure of judicial time, if at all, fairly and sensibly make an order in favour of either party. This is not to say that there are not cases where the merits can be determined and no order for costs can be seen to be the appropriate order; but in such cases that order is not a default order, but an order made on the merits.

In this particular case, with quite a complex history, the Defendant had argued that
i) the respondents settled on the assumption that there would be no order for costs.
ii) There had been a change in the perceived legal position as a result of the Supreme Court's decision in R (A) v Croydon in November 2009.
ii) There was a substantial amount of evidence and the issue was diffcult, including the change in the weight to be given to Dr Birch's views, following the judgment in R (A) v Croydon and R (WK) v Kent County Council [2009] EWHC 939 (Admin).

This being in effect a restatement of the Boxall based arguments that had been successful at first instance.

The Court of Appeal's view was summed up by Stanley Burton LJ as follows:

> The respondents' maintenance of their position was entirely reasonable

> while the law was as it was generally thought to be before the decision of the Supreme Court in R (A) v Croydon. That decision led eventually to the order His Honour Judge McMullen QC of 26 July 2010. The respondents then had to reconsider their case, if they had not already done so. The appellant's reliance on the evidence of Dr Birch may have been ill-advised, but ultimately it was his case, based on his account of his age, that prevailed. The respondent agreed not merely to re-assess his age, but that his age was as he contended it to be: i.e., they conceded the entirety of his claim.

Costs to the Claimant.

Comment

The judgment refers to Sir Rupert Jackson's cost review, where he states

> 'The Boxall approach made eminently good sense at the time that case was decided. However, now that there is an extremely sensible protocol in place for judicial review claims, I consider the Boxall approach needs modification, essentially for the reasons which have been urged upon me .
> . . . in any judicial review case where the claimant has complied with the protocol, if the defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the normal order should be that the defendant pays the claimant's costs. A rule along these lines would not prevent the court from making a different order in those cases where particular circumstances warranted a different costs order.'

The Judgment also highlights the increasing number of cases settled save for costs, where the courts have had to deal with written submissions on costs. This increase was clearly something of which the Court of Appeal disapproved.

The result, being an extension of *Bahta* but falling perhaps just a little short of the Jackson proposals, is very useful for claimants. It makes clear that the usual Defendant arguments (e.g. that settlement was a practical or commercial decision, that

it had nothing to do with the merits of the claim and that it was not at all clear that the Claimant would win), will not be sufficient to result in no order as to costs. The usual principles of civil litigation costs will apply. *Boxall* is effectively distinguished as being a case where the Claimant had only succeeded on a lesser part of the Claim.

The Defendant's frequent tactic offer of a settlement on the basis of no order as to costs was always difficult for the Claimant's solicitors to resist, given the client's interests. However, this judgment now puts any settlement negotiations on the basis that the default position is that the Claimant should have their costs and that the Defendant will have to have a very strong reason to seek to depart from that.

The same principle should apply to s.204 appeals, as they are based on judicial review principles. There seems to be no good argument why a s.204 appeal should not have the 'ordinary civil litigation principles' apply equally.

Congratulations to Robert Latham and Hansen Palomares for the appellant on this result and for finally bringing some sanity to this costs issue.

Stick or Twist

R (MD)(Afghanistan) v Secretary of State [2012] EWCA Civ 194 is an immigration case but merits wider attention because of what it has to say about the interplay between renewing a judicial review claim and appeals.

MD was an asylum seeker. The Secretary of State rejected his application, as did the Asylum and Immigration Tribunal and the High Court. Some 10 days before he was due to be deported, his solicitors submitted a considerable amount of fresh material and sought to bring a new claim for asylum. The Secretary of State refused to accept the new claim and JR proceedings were issued (on the day set for his deportation).

Sales J refused permission to apply for JR and refused interim relief. Now, normally, you'd expect a refusal of permission to apply for JR to be followed by an oral renewal (CPR 54.12(3). MD did not do that, but appealed to the Court of Appeal instead. Carnwarth LJ granted a stay on the deportation pending a "hearing to determine the application for permission to appeal, on notice to the Secretary of State."

The appeal itself was compromised, but a very important procedural point was identified by the Court of Appeal. Was there any power for the CA to hear an appeal against a refusal to grant permission for JR? CPR 54.12(3) clearly prohibits a party from seeking to appeal a refusal of permission to bring a JR claim.

The appellant submitted that CPR 54.12(3) was ultra vires. The governing law was s.16(1), Senior Courts Act 1981, which provides that any judgment or order of the High Court can be appealed to the Court of Appeal, unless excluded by an order made by the Lord Chancellor. As no such order had been made by the Lord Chancellor, it follows that there was a right of appeal against the refusal to grant permission.

The Court was prepared to assume that there was jurisdiction to hear an appeal in these circumstances. It noted that the effect of this would be – potentially – quite wide, in that it would mean that a party could appeal against a decision to grant permission to proceed with a JR claim.

It would, however, generally be inappropriate for the CA to hear such cases. It would mean that the CA was deciding a case as, in effect, the first instance court, without there being a full judgment below. It would also mean that there would be prejudice to the parties in exercising any further appeal routes.

The correct approach was as follows. First, the application for interim relief and permission for JR should be dealt with by a judge on the papers. If either were refused, there should be an oral renewal, if necessary to the duty judge. At that stage, if refused again, permission to appeal could be sought from the CA. The Court went on to give guidance as to the form of order that should be sought in such cases.

Why is this relevant for housing lawyers? Well, JRs with request for interim accommodation are, shall we say, hardly unknown. It's helpful to have the CA say that (i) there might be jurisdiction to hear an appeal against that decision; and, (ii) the preferable route is to renew to the duty judge.

Doomed, Doomed I tell you.

As an illustration of how complex housing law has become, and how difficult for a litigant in person, comes *Sheppard v London Borough of Richmond-Upon-Thames* [2012] EWCA Civ 302.

This was a failed permission for second appeal to the Court of Appeal, following a failed s.204 appeal to the County Court. Ms Sheppard acted in person. She had applied as homeless to LB Richmond following her eviction from a private tenancy. A month later Richmond found her intentionally homeless on the basis that her eviction was due to persistent refusal to allow gas safety checks.

After a failed review, Ms S appealed to the County Court. Her stated grounds were:

(1) Breach of Statutory Duty
(2) Inadequate Enquiries
(3) Inadequate Statutory Review
(4) Breach of Article 3 & 8(2), Human Rights Act 1998
(5) Breach of S.21 of the Race Relations Act 1976
(6) Made no assessment
(7) Failed to provide suitable accommodation

The Circuit Judge summarised, or translated, this as follows:

> First, whether the council had failed to carry out its statutory duty to provide emergency accommodation under section 188. Second, whether the council made sufficient inquiries given that their decision was made in a time period shorter than the maximum allowed, 56 days. Third, whether the council had failed to comply with Regulation 8(2) of the Review Procedures Regulations. Fourth, whether the council had acted in breach of Article 3 and/or 8 of the European Convention on Human Rights. Fifth, whether the council was in breach of section 21 of the Race Relations Act 1976. Sixth, whether the council failed to make a proper assessment of Ms Sheppard's circumstances. And seventh, whether the council should have provided suitable interim accommodation.

The Circuit Judge found against her on all grounds. Ms S applied for permission to appeal to the Court of Appeal.

Upholding the Circuit Judge's decision, Lewison LJ held:

1. Provision of interim accommodation under s.188 was a discretion not a duty and the court did not have jurisdiction to make decisions on this, save for limited judicial review grounds

2. The 8 weeks for a s.202 review decision (under Review Regulation 9) was clearly a maximum, a quicker decision per se was perfectly reasonable.

3. Regulation 8(2) 'minded to' notices were only required where there was a deficiency or flaw in the original s.184 decision found by the reviewing officer. That was not the case here, so reg 8(2) did not apply.

4. "The fourth ground related to alleged breaches of Articles 3 and 8 of the Convention. Article 3 prohibits torture and Article 8 requires respect for a person's home. Ms Sheppard's argument is that the combination of these two articles means that she is entitled to be housed by the council, and that any order of the court requiring a person to leave accommodation where there is nowhere else for her to go is unlawful because of the provisions of the Vagrancy Act and the laws of trespass. However, the courts have consistently held that Article 8, even combined with Article 3, does not require the state to provide a person with a home. In my judgment,

therefore, the judge was right in rejecting that ground of appeal."

5. There was no evidence of discrimination and, although Ms S alleged that the Judge had discriminated against her too, there was no evidence of that either.

6. On the assessment of need, this was a matter for the Council. Ms S asserted that she had been unlawfully evicted, but the Council "does not perform the function of an appeal court, scrutinising judgments of the county court. The local authority must act on what the court has done. It is entitled to rely on the court order, and is not required to go behind it." If Ms S was unlawfully evicted, then she could have claimed for re-entry.

Ms S asked for a stay of eviction, but the warrant had already been executed. While a setting aside of the possession order was within the court's powers that would be on the rare grounds of fraud or oppression.

And finally, the appeal was in any event academic, as Ms S now had a private sector tenancy as was no longer homeless.

Comment

Ms S clearly considered she had grounds based on her reading (and indeed a straightforward reading) of relevant statute, but any housing solicitor or advisor could tell her that none of them would stand up. There is a gulf between a 'common sense' lay reading of much housing statute, let alone human rights law, and what the lawyers know that is very wide and will probably remain so. But there will be more and more litigants in person in such doomed appeals.

That said, Lewison LJ and presumably the Circuit Judge, might have been on shaky ground in asserting that the council could rely on the possession order in 6. above. If it was a s.21 possession process, then the Council would be very much required to go behind the possession order in any assessment of intentionality.

Costs on settled appeals

A quick note on a useful case on costs where an appeal has been settled. *Harripaul v London Borough of Lewisham* [2012] EWCA Civ 266 was an appeal to the Court of Appeal from a failed S.204 appeal to the County Court on a homeless matter.

The appeal was given permission, and Rimer LJ

> expressed the view that the appellant had a real prospect of showing that the reviewing officer's decision was materially deficient and that the judge's upholding of it reflected unjustified benevolence. I regarded the appeal as having merit and I also considered that it would give this court the opportunity to give any necessary guidance as to the limits of the application of the observations of Lord Neuberger in *Holmes-Moorhouse v. Richmond upon Thames London Borough Council* [2009] 1 WLR 413, at [50] and [51].

Soon after, Lewisham decided not to contest the appeal, on the stated (and very familiar) grounds that the decision was "based on the taking of an economic view of the likely costs of resisting the appeal". The matter was compromised by a consent order that, after providing for the carrying out of a fresh review, dismissed the appeal and varied the costs order in the county court to 'no order as to costs'. There was provision for detailed assessment of the public funding costs of the appeal to the Court of Appeal, but there was no agreement on the costs of the appeal to the COurt of Appeal. Instead the parties made written submissions.

The appellant argued, quite simply, that they had obtained the relief sought (a fresh review decision) and so was the successful party for the purposes of CPR Part 44.3.

The appellant raised the guidance in *R (Boxall) v. LB of Waltham Forest* (2001) 4 CCL Rep 258, accepted as relevant by the Court as the appeal was on judicial review grounds as an appeal from s s.204 appeal. That guidance, by Scott Baker J states:

(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
(ii) it will ordinarily be irrelevant that the Claimant is legally aided.
(iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;
(iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
(v) in the absence of a good reason to make any other order the fall back is to make no order as to costs.
(vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.

The Appellant also referred to *R (on the application of Scott) v London Borough of Hackney* [2009] EWCA Civ 217

> including Hallett LJ's statement at [51] that a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate and that a judge must not be too ready to adopt the fall back position of no order as to costs

And raised the Court of Appeal decision in *R (on the application of Bahta and Others v. Secretary of State for the Home Department and Others* [2011] EWCA Civ 895, in which Pill LJ said:

> 64. In addition to those general statements, what needs to be underlined is the starting point in the CPR that a successful claimant is entitled to

his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings, including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in Boxall principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke Boxall principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them.

65. When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in paragraph 4.13 of the Jackson Report.

In this case there was no relevant pre-action protocol and Lewisham's concession was only made after permission was given for a second appeal. The burden was therefore on the Respondent to show why the Appellant should not have her costs. "The costs are anyway modest, being limited to the appellant's costs in the Court of Appeal (and specifically not including her costs wasted in initially pursuing the appeal in the High Court and in obtaining a necessary time extension for appealing to the Court of Appeal)."

Lewisham argued that no order was the right order.

Compromise of a claim for judicial review (or similar as here) "should not be regarded as an indication that the public body accepts the merits of the claim". Lewisham relied on Simon Brown J (as he was) in *R v. Liverpool City Council, ex parte Newman* (1992) 5 Admin LR 669, where he stated:

> On the other hand, it may be that the challenge has become academic merely through the respondent sensibly deciding to short-circuit the proceedings, to avoid their expense or inconvenience or uncertainty without in any way accepting the likelihood of their succeeding against him. He should not be deterred from such a course by the thought that he would then be liable for the applicant's costs. Rather, in those circumstances, it would seem appropriate that the costs should lie where they fall and there should accordingly be no order

The Boxall guidelines, Lewisham argued, meant that "it is for the Appellant to establish a good reason why Lewisham should pay the Appellant's costs, and that in the instant case such good reason could only be that: it is "obvious" that the Appellant would have won the substantive appeal". It was not obvious in this case, and if it had been, why did the Appellant settle the County Court appeal costs on no order. In any event, as the appellant was legally aided, her solicitors would get their costs.

Rimer LJ held that Lewisham's arguments were misdirected in three respects:

> First, the thrust of Pill LJ's quoted observations in Bahta's case is to the effect that, in events such as have happened here, the starting point is that the appellant is entitled to her costs and the burden of showing otherwise falls on the respondent. Mr Grundy's submissions amount to an unjustified attempt to reverse that position. Second, his suggestion that it is relevant that, because the appellant is publicly funded, her solicitors will be paid is out of line with what Pill LJ said in paragraph [61] of his judgment in Bahta's case:
>
> > 'In the case of publicly funded parties, it is not a good reason to decline to make an order for costs against a defendant that those acting for the publicly funded claimant will obtain some remuneration even if no order for costs is made against the defendant .'

> Third, whilst the court in Bahta's case was referred to ex parte Newman, and was concerned with the impact of concessions upon costs orders, it did not cite the passage from Simon Brown J's judgment upon which Mr Grundy relies. I do not regard Bahta's case as providing any general endorsement of the approach suggested in that passage.

While it was not obvious that the appellant would have won the appeal, she did have a good arguable case.

The respondent is keen to suggest that the appellant must have regarded her case as less than gilt edged, else she would not have agreed to the compromise of the county court costs order that she did. There may well be something in that. Equally, I find it difficult to believe that the respondent's wish to halt the appeal process was not in part motivated by the consideration that it could not be sure of victory; and by a recognition that, had it fought it and lost, it would be likely to face an order for the costs of both appeals. An early settlement of the appeal would, on that basis, make good practical sense.

The Court would approach the present case on the basis that the appellant had been successful on appeal and the starting point was that she was entitled to her costs. Although the respond had made the concession and this was a factor to be considered, it did not carry the day in favour of the respondent. "If the respondent has come to the view that the issue as to the soundness of the reviewing officer's decision does not merit the incurring of legal costs in arguing about it, it could well have taken that decision before, ideally at an early stage of the county court appeal."

There were not sufficient reasons to depart from the general rule that the appellant was entitled to her costs as the successful party.

Comment

As anyone dealing with s.204 appeals and judicial reviews as appellant/claimant knows, many are settled after issue by the Local Authority opponent offering to settle by withdrawing and re-making the decision at issue, but insisting on no order as to costs. The principles and approach set out in this case by the Court of Appeal are equally applicable to s.204 appeals and judicial reviews, based as it is on *Boxall*. This case, and its interpretation of Boxall and Bahta, should help in making clear that a

concession by the Defendant/Respondent amounting to the equivalent of the relief sought will normally give rise to a costs order for the Claimant/appellant. In my view, the practice by councils of offering post issue/permission settlement on terms of no order as to costs should be resisted on that basis and written submissions sought instead, if a costs award can't be agreed.

More than a minor problem

We have news of a recent, and rather important, county court case concerning the termination of a tenancy which had been purported to have been granted to a minor, but who had since turned 18. The case in question is Croydon LBC v Tando.

You may recall that in *Alexander-David v Hammersmith & Fulham LBC* [2009] EWCA Civ 259 the Court of Appeal held that a landlord is unable to determine a tenancy held by a minor, because, by way of Sch.1, para.1, Trusts of Land and Appointment of Trustees Act 1996 ("TLATA"), the landlord holds the tenancy on the trust for the minor (the minor not being able to hold an estate in land by way of s.1(6), Law of Property Act 1925) and the landlord is therefore unable to serve a notice to quit to determine the tenancy as that would amount to a breach of trust.

In *Alexander-David* the tenant was still a minor at the time the landlord served the notice to quit and so the Court of Appeal did not address the question of what the status of the trust was after the tenant turned 18. Indeed, it has been presumed (perhaps even hoped) by some local authorities that the trust simply came to an end automatically upon the occupier turning 18.

Facts

Croydon LBC brought a claim for possession against Ms Rozita Tando. On 11 April 2011, Croydon had granted Ms Tando a weekly periodic tenancy in respect of a

property after they had decided that they owed her a duty under Part VII, Housing Act 1996. Three weeks later Ms Tando became an adult. On 20 May 2011, Croydon served a notice to quit on Ms Tando on the basis that Ms Tando was not occupying the property as her only or principal home, which was a requirement of her tenancy agreement.

Ms Tando sought to defend the claim on four grounds: (1) Croydon held the property on trust for Ms Tando and were therefore incapable of serving a notice to quit to determine the tenancy while the trust subsisted, (2) the tenancy was secure and could not be determined by the service of a notice to quit, (3) the decision to seek possession was one that no reasonable authority would take and, (4) Ms Tando's eviction would be a disproportionate interference with her Article 8 rights.

HHJ Ellis, hearing the claim, accepted that if Ms Tando's was successful on her first point the claim must be dismissed and so treated it as a preliminary issue.

Croydon argued, contrary to what had been held in *Alexander-David,* that Ms Tando held the tenancy in equity or, alternatively, that the trust came to an end automatically when she became an adult.

Decision

The claim for possession was dismissed. Ms Tando did not hold the tenancy in equity; this point had been resolved in *Alexander-David*; she was the beneficiary of a trust of land. Schedule 1, para.1, TLATA, does not specify that the trust of land comes to an end when the minor became an adult. The trust therefore continued until it was either brought to an end by Ms Tando or Croydon. It had been open to Croydon to apply to the court to bring the trust to an end but they had failed to do so. It followed that the trust continued and Croydon's decision to serve a notice to quit was a breach of trust and did not therefore operate to determine the tenancy.

The court was reminded of the fact that Croydon could have escaped these problems had they followed the guidance of the Court of Appeal in *Alexander-David* (i.e. they should have granted Ms Tando a licence rather than purported to grant a tenancy or they should, having done what they did, applied to the court to be removed as trustee).

Permission to appeal was refused. However, at Croydon's behest, HHJ Ellis ordered that the trust be terminated so that Ms Tando became the tenant of the property.

Comment

If *Alexander-David* (and indeed the excellent article by Emily Orme from as far back as 2005 – see (2005) 155 NLJ 1522—1523) was not warning enough, this case should finally ram home the message to authorities that they can't discharge their Part VII functions by granting tenancies to minors. Yes 16-17 years old are owed a priority need (if they aren't owed a duty by social services under s.20, Children Act 1989) and yes that means accommodation will need to be found. However, there are other ways of providing accommodation and the Housing Act 1996 does not require a tenancy to be granted.

However, even if a tenancy is granted (so that in actual fact a trust is created) before seeking a claim for possession the authority must either end the trust (if the occupier has turned 18) or apply to cease to be a trustee (if the occupier remains 18). As this case shows, this isn't a terribly difficult application to make.

Hat tip, and congratulations, to Richard Fielding and Alexa Mills of Streeter Marshall for alerting us to this case and David Cowan for successfully arguing this point before HHJ Ellis. We will wait to see if this goes any further.

Vulnerability permissions to appeal

The *Pereira* test is not exactly easy to apply and equally difficult to challenge on a first appeal. In *Kata v Westminster CC* [2011] EWCA Civ 1456 and *Simpson-Lowe v Croydon BC* [2012] EWCA Civ 131 (neither are on baili or westlaw, but are on Lexis; *Kata* is noted in February's *Legal Action* at p 13), permissions to appeal not vulnerable s 202 homelessness reviews, upheld by the county court, were refused by

the CA. Both may well have had an arguable case at an early stage in the appellate process, but, of course, these are second appeals and, therefore, governed by the (baleful) CPR 52.13. The court will only grant permission if the appeal would raise an important point of principle or practice; and/or there is some other compelling reason for the CA to hear it. The bar is set incredibly high. [My friend is thinking of doing a research project about permissions to appeal but not including second appeals; I hope that these cases persuade her that these pta applications are significant.]

Kata

We've known about this one for some time and forgive me for not having got round to it before. The subject-matter forms part of my first (not particularly well-conceived) empirical research project many moons ago. The question for the reviewing officer was whether Mr Kata, who had "a symptomatic HIV infection, his previous diagnosis of TB gives him an AIDS defining diagnosis", was vulnerable for the purposes of section 189(1)(c), 1996 Act. The review officer found him not vulnerable – the Code of Guidance at para 10.32 says that applicants with AIDS and HIV related illnesses *may* be vulnerable. It became clear that Mr Kata did in fact have full AIDS. Macfarlane LJ found that the reviewing officer and county court judge had applied the right tests and, although there was now grater clarity that Mr Kata had full AIDS, the question was "what is the difference" between the review officer and judge's view of the medical evidence, and that clearer diagnosis. He did not see that there was a material error in the way the case had been dealt with; and was not posible reasonably to argue that the judge was plainly wrong in endorsing the review officer's decision.

On the more specific application of the *Pereira* test, the review officer and judge had considered the detailed evidence about how the diagnosis had not "compromised" Mr Kata's ability to move around and his day-to-day life. There was a care report which supported the authority's decision on the *Pereira* street homelessness test (despite Mr Kata suffering from anxiety, depression and low mood, together with references to self-neglect in the paperwork). It was open to the reviewing officer to come to the decision he did and the judge to uphold the decision.

Simpson-Lowe

Mr Simpson-Lowe was involved in a medical accident and suffered a fractured femur, and continues to suffer from mobility problems, headaches, depression and asthma. He is in receipt of disability living allowance at the higher rate because he is "unable or virtually unable to walk" (an outcome in the teeth of the medical evidence which suggested that his mobility was good, as noted by Jackson LJ). Croydon found him not vulnerable.

To persuade the court on the first limb of CPR 52.13, Simpson-Lowe raised a point of law as to the inconsistency between, on the one hand, Shala and, on the other, Allison, in the way in which the Court of Appeal has dealt with the local authority internal (well, Dr Keen) medical advisor's opinion. It was argued that, on the one hand, Shala says that Dr Keen is a gp who is not qualified to comment dismissively on specialist psychiatric evidence, and, absent an examination, cannot constitute expert evidence. His advice "has the function of enabling the authority to understand the medical issues and to evaluate for itself the expert evidence placed before it". On the other hand (as it was put to the Court), *Allison* distinguishes *Shala*, even though Dr Keen had not examined Allison, because Keen's advice was "well founded in his medical expertise" and he was fully entitled to advise Wandsworth on the way in which the medical difficulties would be likely to affect Allison. Not surprisingly Jackson LJ follows NL's comment on *Allison* (well, not literally) saying that there was no inconsistency between the two decisions: Shala concerned where Dr Keen sought to offer an expert opinion in conflict with a (proper) expert's opinion; Allison was where Dr Keen offered proper advice to the local authority on the medical evidence. The further ground of appeal concerned the apparent difference between the homelessness review and the DLA award. But that was met with *Mangion v Lewisham LBC* [2008] EWCA Civ 1642 (assessment for incapacity benefit different from assessment for housing).

Homelessness, proportionality and children

A very welcome guest report on this s.204 Housing Act 1996 Appeal by Alice Hilken of 1 Pump Court, who acted for the appellant, instructed by Rahman & Co.

Kumaning v London Borough of Haringey December 2011, Central London County Court, HHJ Saggerson

The Appellant (A) was a British Citizen of Ghanaian origin who had lived in the U.K for over 15 years. He applied to the council (C) as homeless together with his wife, adult daughter and seven year old son, K. A's wife & daughter had come from Ghana to join A in the UK in the UK in 2009, whereas K (who was seven years old at the time of A's application and had a different birth mother) had been born in the UK and was therefore a British Citizen. A had separated from K's mother in 2004 and K had lived with him ever since.

A told C during the course of their enquiries that he owned an 8 bedroomed property in Ghana, which was occupied by his four adult sons, their wives and children.

C then informed A that it considered him not to be homeless because there was accommodation in Ghana which was available to him and which it was reasonable for him and his family to occupy.

A applied for a review and instructed a solicitor, who wrote to C informing it that (a) A had no intention of returning to Ghana as he had no likely source of employment there and wished to exercise his right to remain in the UK as a British Citizen and to settle his family here; (b) he was receiving benefits in the UK (including Child Benefit in respect of K's upbringing) which he would not receive were he to return to Ghana; (c) K's upbringing had been in the UK and he was established at primary school here and (d) although neither he nor K were currently in contact with K's birth mother, it was possible that contact might resume in the future. It was also stated that C's decision represented a disproportionate interference with A's and K's Article 8 rights,

given their status as British Citizens.

C upheld its decision on review, maintaining that Article 8 had no application to the case. It refused to accept that its decision impacted on A's and K's rights as British Citizens, on the basis that A the choice of remaining in the UK with his family rather than removing them to Ghana, if he wished. The letter stated: "You may continue to live in this country and you may exercise your rights as a British Citizen to claim housing benefit to rent a new home for yourself and your family .it is not the purpose of the Housing Act, however, to assist you to enjoy the "benefits of citizenship".

A appealed. It was argued, citing the cases of *ZH v Tanzania* [2011] UKSC 4 and *Birmingham CC v Clue (1) Secretary of State for the Home Department (Interested Party) (2) and Shelter (Intervener) (3)*[2010] EWCA Civ, that C's decision that it was reasonable for A and his family to take up occupation in accommodation in Ghana necessarily represented an unlawful interference with A's and K's rights to private and family life, since it was a necessary implication of that decision that A and his family should remove to Ghana to take up occupation there. C had misdirected itself in finding that Article 8 was of no application to the case, and accordingly, had failed to consider the proportionality of its decision or give sufficient weight to the intrinsic value of A and K's British Citizenship. Further, it had failed to consider K's best interests as a child to be of primary importance, as it was required to do under Article 3 of the United Nations Convention on the Rights of the Child (UNCRC). It was also argued that the decision was irrational and that, applying a proportionality analysis, it could never be said that the manner in which A and K's life would be impacted by their removal to Ghana could be outweighed by any legitimate aim on the part of C.

C argued that Article 8 was not engaged. *ZH v Tanzania* and *Birmingham v Clue* were distinguishable because they were cases concerning potential deportation, whereas in the present case A had the option of remaining in the UK if he chose to seek housing in the private sector (a consideration which A argued was unlawful).

Held: The appeal was allowed. It was simply unrealistic for the council to state that it was not an inevitable implication of its decision that A and his family would have to remove to Ghana to take up occupation there. Consequently C had an obligation to (a) carry out a proportionality analysis of the impact of its decision on A's and K's

Article 8 rights, and (b) consider whether taking up occupation in Ghana was in A's son's best interests, which were to be given primacy, following Lady Hale's judgment in *ZH v Tanzania*. The decision was remitted for reconsideration.

No comparing

When considering 'general housing circumstances in the area' under Housing Act 1996 s.177(2) on a s.202 review, can the review officer conduct a comparative exercise?

A s.204 appeal decision in *Chawa v Kensington and Chelsea RLBC* (Central WLondon County Court 19 July 2011), suggests that the answer is no.

MS C and her 11 year old son were living in a private rental studio flat. She applied as homeless, but K&C decided that despite the overcrowding it was reasonable for her to continue to occupy the flat. On review, the review officer upheld the decision. The review decision took into account general housing circumstances in the area, and described this as being in particular with regard to the number of households on the Council's waiting list with even more acute overcrowding.

On s.204 appeal, the CJ held that while it was open to the reviewing officer to draw on their experience of overcrowding in the borough as part of the 'general housing circumstances', the officer could not conduct a comparative exercise and decide that the current property was reasonable for the applicant to remain in on the basis that 'there are others worse off than you'. This was all the more so when the comparison was with those on the housing register, who by definition were in most need of housing.

Hat tip to Legal Action January Housing update for the case.

Appeal allowed.

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