Housing Law Practitioners' Association

Minutes of the Meeting held on 19 November 2014
University of Westminster

Housing Law Update

Speakers: **Tessa Buchanan, Garden Court Chambers**
Robert Brown, Arden Chambers

Chair: **Justin Bates, Arden Chambers**

Chair: Thank you all very much for coming. My name is Justin Bates; I am the Vice-Chair of HLPA. Firstly, could I ask if anyone has any corrections to the minutes of the last meeting? If not, I will introduce tonight's speakers. Firstly, Tessa Buchanan, a barrister from Garden Court Chambers. You will recognise her from the excellent anti-social behaviour talk which she gave earlier this year, which had such good feedback we have invited her again to talk about housing law update. Secondly, Robert Brown from Arden Chambers who, among his many other accomplishments, is an editor of the Housing Law Reports

Tessa Buchanan: I will be talking to you in relation to the statutory developments to housing law which have taken place over the last twelve months. Given the time constraints, I am not able to cover everything so what I have decided to do is to focus on what I think are the three most interesting and significant statutory developments as well the most relevant to our daily practice. So I will be looking at the Anti-Social Behaviour, Crime and Policing Act 2014, the Immigration Act 2014 and the Deregulation Bill which is making its way through Parliament. The one thing I would mention that I am not going to cover is the Housing (Wales) Act; that is mainly because we are not in Wales but obviously if you do have a practice in that area that is something that is really important to be up to speed with.

So turning firstly to the Anti-Social Behaviour, Crime and Policing Act, as Justin as flagged up, I did give a talk on this to HLPA earlier this year so I hope no-one feels cheated by the fact that I am covering it again but I think any talk on statutory developments in housing law over the last year has to deal with this area. So the Act received Royal Assent on 13 March of this year. It makes several changes to the law in relation to anti-social behaviour, unsurprisingly, but the two that I want to focus on are the new grounds for possession and injunctions.

As everyone here will know, at the moment you can make a possession order on the basis of anti-social behaviour against secure tenants under grounds 1 and 2 of Schedule 2 of the Housing Act 1985 and against assured tenants under grounds 12 and 14. Obviously all of those grounds are discretionary. What the Act does is to introduce a new mandatory ground for possession against both secure and assured tenants and also new discretionary grounds.

So turning first to the mandatory ground, this is introduced by way of a new Section 84A to the Housing Act 1985 and the new Ground 7A to Schedule 2 of the Housing Act 1988 and it came into force on 20 October in England and 21 October in Wales. Essentially, subject to a defence based on human rights, public law or disability discrimination and subject also to compliance with the relevant notice and review requirements, the court must award possession where one of five conditions is satisfied. The conditions are set out in full in the paper and also on the slides but I will summarise them here. Firstly, condition 1, the tenant or a person residing in or visiting the property has been convicted of a serious offence committed in the locality of the property or committed elsewhere but against a neighbour or employee of the landlord. Condition 2, a court has found that the tenant or a person residing in or visiting the property has breached a provision of an injunction under the new Section 1 of this Act. The breach occurred in the locality of the property or elsewhere and it breached a provision that was intended to prevent conduct capable of causing, in essence, housing related nuisance or annoyance. That condition will not be met where the provision required someone to participate in an activity ie the provision was positive. Condition 3, the tenant or a person residing in or visiting the property has been convicted of a breach of a prohibitory provision of a criminal

behaviour order. The offence involved a breach in the locality of the property or occurred elsewhere but was a breach of a provision intended to prevent behaviour causing harassment, alarm or distress to a neighbour of an employee of the landlord, so quite similar to condition 2. Condition 4, the property is or was subject to a closure order and access has been prohibited under a closure order or closure notice for more than 48 hours. Finally, condition 5, the tenant or someone residing in or visiting the property has been convicted of an offence of potentially statutory noise nuisance under the Environmental Protection Act 1990.

So the first thing for a landlord to do in order to obtain possession on this ground is to make out one of those conditions but, as you will probably have noticed, that is unlikely to prove a problem in most cases because the conditions are all based on a previous finding or judgment by a court. So how can these claims be defended? Well there are some suggestions there in the slide. Firstly, has the landlord complied with the relevant notice requirements? For secure tenants landlords have to serve a notice which complies with the requirements of the new Section 83ZA of the Housing Act 1985. For assured tenants landlords have to comply with Section 8 still but it has been amended by Section 97 of the Anti-Social Behaviour Act. The notice requirements are quite detailed. I will not go into them now but the fact that they are detailed obviously creates traps for landlords to fall into so I would encourage you to check them carefully if you do get a case brought on a mandatory ground. It is worthwhile noting that the court cannot dispense with notice where the landlord is relying on a new, absolute ground. I would certainly be arguing that that means that they cannot subsequently amend the notice to rely on one of the grounds if that is something that comes up. If you have a secure tenant, then their landlord must also comply with the new Section 85ZA. This enshrines the right to a review of the decision to seek possession on the absolute ground. The review process is governed by the Regulations which have come out quite recently; the Absolute Ground for Possession for Anti-Social Behaviour (Review Procedures) (England) Regulations 2014.

I have set out what an application for a review has to include and it is really quite detailed, there are quite a few requirements. Given that the review has to be requested in writing within 7 days, I think a lot of our clients are going to struggle to comply with those requirements. There is not a corresponding statutory right to review for assured tenants. The Home Office has published Statutory Guidance for Front-line Professionals, this states that they would expect housing associations to offer a similar non-statutory review procedure. I hope that that optimism is justified. Another, more substantive, defence which will be available to claims brought on this ground is a defence based on the tenant's convention rights and that is confirmed as available by new Section 84A of the Housing Act 1985 and an amendment to Section 7(3) of the Housing Act 1988.

Robert will address you on case law in relation to public law defences but one thing to be aware of is the Home Office Guidance which I have just mentioned, because that contains quite a useful phrase which is that "the new absolute ground is intended for the most serious cases of anti-social behaviour and the landlord should ensure that the ground is used selectively." So I think if you are drafting a defence in relation to these claims that is a useful quotation to have to hand.

So that is the mandatory ground. Moving on now to the two new discretionary grounds for possession which are based on anti-social behaviour: these apply to both secure and assured tenancies and they came into force on 13 May of this year. So firstly, Section 98 of the Anti-Social Behaviour Act amends Schedule 2 to both Housing Acts to allow for the court to grant permission where the tenant or a person residing in or visiting the property has been guilty of conduct causing or likely to cause housing related nuisance. The second new discretionary ground is in relation to riots because, obviously, as we all know nothing makes for good law like a knee-jerk reaction to some highly charged events. So Section 99 of the new Act amends again Schedule 2 to both Acts to introduce a new ground 2ZA and a new ground 14ZA. This allows for possession to be granted where the tenant or an adult residing in the property has been convicted of a indictable offence which took place during, and at the scene of, a riot in the United Kingdom. Now you should be aware that this applies to England only. A "riot" is defined by Section 1 of the Public Order Act 1986 as "where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety." One thing to be aware of, though, is that the conviction simply has to be for an indictable offence taking place during and at a riot; there is actually no further requirement that the conviction be related to the riot itself.

So what I think we can take from these new grounds is that the Government seems to be of the view that possession proceedings are a way of managing undesirable behaviour generally rather than

simply a means of removing difficult tenants who make their neighbours' lives difficult. You might think rioters have to live somewhere but clearly not in social accommodation.

So turning now to injunctions which are the other important aspect of this Act; the Act introduces a new civil injunction which will replace the current civil or stand alone ASBO and the ASBI. The provisions are not yet in force but they are expected to come in around January of next year. So under Section 1 the court can grant an injunction where two conditions are met; firstly "the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour". Secondly, that it is just and convenient to grant the injunction to prevent such behaviour.

What constitutes anti-social behaviour will differ according to the context, so in relation to anti-social behaviour away from the home - in the street or in the shopping centre - anti-social behaviour is "conduct that has caused, or is likely to cause harassment, alarm or distress to any person". The second definition of anti-social behaviour given by the Act is "conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises" or "conduct that is capable of causing housing-related nuisance or annoyance to any person". "Housing related" is defined as meaning directly or indirectly relating to the housing management functions of a housing provider or local authority so this is the second, more housing focused injunction. Only social landlords, local councils or the police can apply for that type of injunction whereas the first type of injunction with the higher threshold is available more widely, for example, to organisations such at TfL or the Environment Agency.

In relation to the content of injunctions there can be terms prohibiting a respondent from doing something or requiring him to do something. The terms can exclude the respondent from his or her home. Injunctions can be granted against anyone aged 10 or over. In the case of an adult they can last indefinitely; in the case of a youth the maximum duration would be 12 months.

Breach of an injunction is a contempt of court; as you are all aware that can be punished in the case of an adult by up to 2 years in prison or an unlimited fine. For a youth the sentencing options are a little bit more varied, supervision, a curfew, activity requirement, detention. Do not forget, as well, you can always just ask for your client to be given a stern warning. But as we have seen, breach of an injunction can be the basis of an application for possession on the new mandatory ground so it is important to be very alive to that at the stage when the injunction is being, as it were, thrashed out. So always offer undertakings if possible and try to ensure as well that any injunction is framed in the narrowest of terms possible. I had a case, in fact today, where the landlord was seeking an injunction preventing my client from taking drugs, fair enough, in his property, fair enough, and also in any residential accommodation in the London Borough of Tower Hamlets, which to me just seemed incredibly broad and quite wrong and that is something that we have to be particularly alive to with these new injunctions.

Finally, a call to arms, please everybody respond to the LAA consultation which is happening as we speak. This is in relation to how these injunctions will be funded. The proposal is for applications for an appeal against injunctions to be dealt with under civil legal aid and then committals to be dealt with under criminal legal aid. Clearly that does not work because criminal practitioners will not really know much about housing law, perhaps, and in particular they will not know about the new mandatory ground for possession or the implications. Also it means that clients may well not get continuity of representation so it is important that we respond to that and the deadline, as you can see, is 1 December.

Turning now to the Immigration Act, we are moving from people who behave anti-socially to another group which the Government does not think should have housing, namely illegal immigrants. I have just said that in my view housing is increasingly being used as a way of controlling particular behaviour. As a theme that is something that I think continues with the Immigration Act and what tackles the issue of landlords renting to people with no right to be in the UK because, as we all know, the problem with the private rented sector is not housing conditions or dodgy letting agents, it is immigrants coming over here and taking our assured shorthold tenancies. So this Act received royal assent on 14 May and the relevant provisions come into force on 1 December in relation to certain areas only, namely Birmingham, Dudley, Sandwell, Walsall and Wolverhampton.

So firstly, who is precluded from entering into a residential tenancy agreement? That is set out at Section 21 of the Immigration Act which states that "a person is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement" if they are not (a)

a British citizen, an EEA national or a national of Switzerland and (b) they do not have a right to rent in relation to the premises. According to Section 21, sub-section 2 a person will not have a right to rent if they require leave to enter or remain in the UK and they do not have it or their leave is subject to a condition which prevents them from occupying the premises. Residential tenancy agreement is also defined, that is at Section 20, it is an agreement which can include a lease, a licence, a sub-tenancy which grants a right of occupation of premises for residential use, provides for the payment of rent and is not excluded. Agreements which are excluded are set out at Schedule 3 of the Act and they include, in particular, social housing. So who is responsible for preventing the nation's bedsits from being illicitly lived in? Well, that is, essentially, landlords and that is the result of Section 22 sub-section 1. This prohibits a landlord from authorising an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status. That includes not just the tenant but also another adult named in the agreement and another adult not named in the agreement unless it was not and would not have been apparent from reasonable enquiries that they were likely to be an occupier. The landlord can agree in writing with the agent that the agent will be responsible for essentially complying with this legislation if the agent is acting in the course of a business and if there is then a breach then the landlord will be excused from paying a penalty.

However, what is not entirely clear is the situation where the agent complies with the prescribed requirements, discovers that the tenant is disqualified, tells the landlord and the landlord goes ahead anyway. The Government has published a draft Code of Practice on illegal immigrants and private rent accommodation and that suggests that the landlord would be responsible in those circumstances. That seems to make sense but from what I can see there is nothing actually in the Act to confirm that.

So if there is a breach of these provisions then the landlord or agent can be served with a notice requiring payment of a fine up to £3000. However, they will have a "statutory excuse", ie a defence, where they have complied with all the prescribed requirements. So these are set out in the Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014. Firstly, the landlord has to obtain certain documents from all prospective adult occupiers. Now these documents, when you read the Schedule, are actually quite eclectic; they include the obvious like passports and residence cards and immigration documents but they also include, for example, a letter from the Prison Service confirming that the holder has just been released from custody, or a letter from the police confirming that the holder has been a victim of crime, or a current firearms certificate. I have to say that if I were a landlord letting property to someone and the tenant turned up with a firearms certificate and proof that they had just been released from prison I think I would have other worries than immigration status. So once a landlord has received the document he has to take all reasonable steps to verify its authenticity; he must then take and retain a copy of the document.

Now if the occupier's right to remain in the UK is of limited duration and will expire at some point, then the landlord's duty is a continuing one. He has to go on to perform follow up checks at prescribed intervals and then follows what, in my view, is one of the more unappetising parts of probably what is already quite an unappetising Act. If it transpires that the tenant no longer has leave to be in the UK then the landlord has to report him to the Home Office and if he does not he will lose his statutory excuse.

So if the landlord is served with a civil penalty notice then he has 28 days to object to that in writing. If his objection is not upheld then he can appeal to the county court on the grounds that he is not liable to pay or that he has a statutory excuse or that the penalty is too high. Now this Act does not make any formal changes to possession law and in fact the draft Code of Practice that I have referred to very generously confirmed that the landlord does not have to evict a tenant whose leave has expired, but I would suggest that it is not difficult to envisage a rise in unlawful evictions by landlords who have discovered that their once legitimate tenant has become a liability. In addition to the Code of Practice that I have referred to, the Home Office has also produced a Prototype Anti-Discrimination Code. The purpose of this document is to "provide landlords and agents with guidance on how to avoid a civil penalty for renting premises" … by an illegal immigrant ... "in a way that does not result in unlawful race discrimination". If you have to put out specific guidance telling someone how to comply with an Act without being racist I would suggest maybe there is an issue with the Act.

Moving on then to the Deregulation Bill and tenancy deposits, now as everyone here is obviously aware, as of 6 April 2007 landlords have been required to protect their tenants' deposits within initially 14 and then 30 days of receipt. Then in June 2013 the Court of Appeal heard the case of *Superstrike Ltd v Rodrigues* and I have summarised that in the paper. I am sure you are all familiar with it anyway but, essentially, what the Court of Appeal held was that where you have a fixed term tenancy which expires and a statutory periodic tenancy arises out of that, then that periodic tenancy is a new tenancy

and the deposit which the landlord had continued to hold was deemed to have been received again and therefore the landlord had to comply with the requirements of the tenancy deposit legislation. This is of no educational value whatsoever but someone that I know was representing a tenant at a possession hearing and he put forward a defence based on failure to comply with the tenancy deposit requirements and after he had finished his submissions the judge said to him, "Mr Smith, surely this a Superstrike case?" It so happened that this person had not heard of the case of Superstrike and he thought that his submission had been so devastating that the judge was proposing not just a strikeout but a super strikeout! He was obviously agreeing really enthusiastically to his opponent's case being super struckout when it became obvious that was not what was meant. So Superstrike, the actual judgment, was widely interpreted as meaning that when a fixed term tenancy becomes periodic the landlord has to re-serve the prescribed information. Just one example of that principle being applied is the case of *Gardner v McCusker*. That was reported in the July/August 2014 edition of Legal Action and in that case a district judge at Birmingham dismissed the possession claim on the basis that pursuant to Superstrike all the requirements of Section 213 of the Housing Act 2004 arose again when the fixed term tenancy became periodic and they had not been re-complied with.

Now clearly Superstrike was a gift to tenants' representatives but with all respect to the Court of Appeal the effects of it were a little bit strange and so the Government is using the Deregulation Bill, which is currently going through Parliament to, essentially, reverse it. So firstly a new Section 215B of the Housing Act 2004 confirms that where a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy on or after 6 April 2007 where the landlord has complied with the requirements of Section 213 and a statutory periodic tenancy then arises, in those circumstances the requirements of Section 213 are treated as if they have been complied with in relation to the new periodic tenancy. Section 215C achieves the same effect where the fixed term tenancy has been replaced by a new fixed term tenancy or a new periodic tenancy with the same landlord, same tenant and same property. The Act also deals with the situation where a fixed term tenancy was granted before 6 April 2007 and then became periodic on or after that date and that is the proposed new Section 215A. Essentially it states that yes, the landlord does have to comply with the requirements of Section 213 but there is a grace period of 90 days from commencement of the Act in which he has to do so or, alternatively, he has to comply before the first day after commencement on which a court determines a relevant claim.

So these new provisions quite interestingly will have effect as of 6 April 2007 except where, effectively, a claim has already been settled or determined so those will not be affected. But if proceedings have been instituted but not settled or determined then they will be dealt with under the new provisions when they come in, with the proviso that if the court makes an order in the landlord's favour then the court must not order the tenant to pay the landlord's costs in so far as they are attributable to this area, so you may want to think carefully about the timing of your actions in relation to when this comes in and whether it would be more favourable for them to be dealt with under the existing provisions or under these new provisions. However, for all those of you looking for an appeal point there is still uncertainty, you will be glad to know. What the Bill does not seem to do is address what happens where a deposit is taken in respect of a tenancy which was granted before 6 April 2007 and became periodic before that date. I have had a case on this point where the court accepted that the Section 213 requirements did apply, but I understand that there may be a case on this going to the Court of Appeal and if anyone else has any experiences or comments in relation to that I would be interested to hear them.

Finally, in relation to tenancy deposits, one interesting case to be aware of is the Administrative Court decision in *R (Tummond) v Reading County Court* and I think the citation is in the paper. So that concerned the issue of whether a landlord can rely on a Section 21 notice which is served at the beginning of the tenancy and before the deposit has been protected, where they then go on to comply with all the requirements. So in that case the tenancy began on 18 December and a Section 21 notice was served on that day and then the deposit was received a few days later and duly protected in the requisite time frame. The landlord brought possession proceedings on the basis of that Section 21 notice and was given a possession order. Permission to appeal was refused and the claimant sought judicial review of that refusal. He was unsuccessful for various reasons but one of them was that the judge hearing the case, Mr Justice Hamblen, held that there was no error of law because the landlord could not be sanctioned for non-compliance because there was no non-compliance; the deposit had been protected in the necessary timeframe. The judge stated that "one can hold the deposit in accordance with an authorised scheme before the deposit is protected" where the landlord was contractually obliged by the tenancy agreement to protect the deposit in an authorised scheme. Now in my view the effect of this could be a bit odd because if the landlord goes on not to comply, should he be held to have complied for the first 30 days and then not thereafter or would he have always

been non-compliant in the light of his subsequent conduct? I do not think that is particularly clear but what does seem to be the case is that a Section 21 notice served prior to protection of the deposit will be valid as long as the landlord goes on to comply with the time limits or within the time limits.

Finally, a brief and slightly wistful look ahead at all the very good private members' Bills currently going through Parliament which probably will never be made law. Firstly is the Tenancies (Reform) Bill, this is Sarah Teather's retaliatory eviction Bill. It was presented to Parliament on 2 July and will have its second reading on 28 November. Essentially what this is tackling is the practice of private sector landlords of evicting tenants as revenge for a report of disrepair. Now the Bill has not yet been published so its exact provisions are not yet clear, although I understand that some privileged members of HLPA may have access to it and therefore are better informed than me on the subject. But, essentially, what it does is it provides that a landlord cannot rely on a Section 21 notice served within 6 months of a report of disrepair. It is not entirely clear whether the reported disrepair can be the tenant simply reporting it or whether it will have to be some sort of council notice but that, I am sure, will be made clear. Sarah wrote a Guardian article on the subject and described it as a small tweak to existing legislation. I am not sure that is how the Residential Landlords Association sees it but in my view it is something to be welcomed. The Government has said it is supporting the Bill so it does stand a chance of being made law.

The Affordable Homes Bill is the first of two attacks on the bedroom tax; this is Andrew George's Bill. Essentially what is seeks to do is introduce three new exemptions to the bedroom tax. Firstly, it would exempt households where an adaptation has been made to the dwelling to provide assistance to meet a disability need of a member of that household and the claimant has provided evidence of the disability need, evidence that an adaptation has been made to meet the need and evidence that the cost of the adaptation is not less than an amount to be prescribed. The second proposed exemption is where an additional bedroom is needed for a member of the household who receives Disability Living Allowance or the Personal Independence Payment and who is not reasonably able to share with their parent or sibling. The third is for households where neither the landlord nor the local authority has made a reasonable offer of alternative accommodation and that may well be the situation that you encounter most in practice where you have a client who is perfectly willing to move; there is just nowhere for them to move to. That Bill had its second reading in September and it was passed but it has since been adjourned for a Money Resolution to be provided.

Finally there is the Carers Bedroom Entitlement (Social Housing Sector) Bill. This is another attack on the bedroom tax and it seeks to exempt households with only one spare bedroom where a member of the household is entitled to carer's allowance or requires overnight care and it will have a second reading on 21 November.

So as you can see there has been a fair amount of change and there is a fair amount of change still to come. I think what is interesting about all these various statutory changes, and this is something that it is really easy to forget in frontline practice when you are doing your fifth rent arrears case of the day, is how political and politicised housing law can be. So from, for example, protecting the disabled to punishing anti-social behaviour to reducing illegal immigration, housing law is used as a tool for achieving that and, obviously, we are the ones that then deal with the fallout from that at Lambeth County Court on a Monday morning. So that is, I hope, a brief and useful update on statutory changes and I will now hand over to Robert who will deal with the case law.

Robert Brown: When Justin asked me to speak on the topic of housing law update I must admit I did stop and think, do I really want to stand in front of a lecture hall full of housing lawyers telling them what they have been doing for the past year? Really, how much could have actually happened in a year? Quite a lot as it turns out. It would be impossible to try and cover all of the cases that I have set out in the notes in 25 minutes so what I have decided, rather arbitrarily really, is just to concentrate on some of the Supreme Court cases, both those that have been to the Supreme Court already, whether decided or awaiting judgement, and those that are on their way there.

It is one of those that is on its way there that we start with. It is a case called *Samin v Westminster City Council*, it is paragraph 6 in my notes. This is a case about eligibility for assistance under Part 7 of the Housing Act 1996. Just to put that in a bit of context with the statutory framework, a person is not eligible for assistance under Part 7 if he is a person from abroad subject to immigration control unless he is of a class prescribed by Regulations made by the Secretary of State. You are subject to immigration control if you require leave to enter or remain in the UK. You do not require leave to enter or remain in the UK if you are doing so by virtue of an enforceable European Community right. The snappily titled Immigration (European Economic Area) Regulations 2006 provide that nationals of the

European Economic Area can enter and reside in the UK without leave to enter or remain. Regulation 14 of those Regulations provides that a person is entitled to do so and reside in the UK so long as he remains a qualified person and that, amongst many other things, is a person who is in the UK, a national of an EEA state and a worker. Now a person who is no longer working can nonetheless be treated as a worker if they are temporarily unable to work as a result of an illness or accident. A case a couple of years ago called *Konodyba v Kensington & Chelsea* tells us that whether someone is temporarily unable to work requires consideration of whether there are realistic prospects of that person being able to return to work and remain engaged in the labour market.

Now I will keep my analysis of the actual case *Samin v Westminster City Council* very brief because the undisputed expert on this case is in the room and I feel the less I say the less I can get wrong and get pulled up on it. So I will take the slightly cowardly way out on that and skip the facts, not least because, as I say, it is in the Supreme Court in March next year and doubtless there will be much to consider at some stage next year when we get that decision. What the Court of Appeal said when this ended up there is that whether a person is temporarily unable to work as a result of illness or accident is a question of fact. Now pause there because we all know that questions of fact are notoriously difficult to challenge on a Section 204 appeal although I will come back later to a possible glimmer of hope in relation to that. The Court of Appeal said that temporary inability to work is to be contrasted with permanent inability, so far that makes sense. It is generally helpful to ask whether there is or is not a realistic prospect of a return to work. An indefinite absence from work may not be temporary but can be.

They gave the example of somebody who is injured, awaiting surgery, that surgery is expected to render them fit for work but the date of the operation is uncertain so there is an element of uncertainly about it. In that case the Review Officer had not specifically asked herself whether the appellant, Mr Samin's, inability to work was permanent or not. She had, so the Court of Appeal said, nonetheless applied the statutory test and from her conclusions they said that, had she asked herself whether there was a realistic prospect of returning to work, her conclusion would have been that there was not and he was ineligible for assistance. The facts, as they saw them, were that he had scarcely worked at all during his time in the UK and it would be wholly unrealistic to categorise him as a worker who is temporarily unable to return to work. Now I understand that for the Supreme Court the issues have moved on slightly and one of the key issues will be whether the right to reside test, as it was applied in this case to Mr Samin's facts, is compatible with EU law. That will certainly be quite a big issue for the Supreme Court to consider and I think it is being heard over 2 days in March next year.

Next, and I am attempting to follow the homelessness scheme through and its structure to an extent, I have a series of priority need cases which I have addressed in the notes at paragraphs 8-10. Again, just to set this in a bit of context; priority need under Part 7 of the Housing Act 1996, there are various categories of people who have a priority need automatically, pregnancy can be one of those. There is also, and this is always the trickiest I think, someone has a priority need if they are vulnerable as a result of old age, mental illness or handicap, physical disability or other special reason. That is Section 189(1)(c) of the 1996 Act. We know from a case called *Crossley v Westminster* that drug addiction does not amount to a special reason but a likelihood of relapse into drug addiction may do so. Now when is someone vulnerable? Well it is said in the relatively well-known case of *Pereira* that someone is vulnerable if they are less able to fend for themselves than an ordinary homeless person, so that injury or detriment to them will result when a less vulnerable person would be able to cope without harmful effects. It is said in *Osmani v Camden* that the application of the *Pereira* test was an imprecise exercise, involving exercising judgment that authorities are best placed to make. Against that, statutory framework, we have these three cases, *Hotak, Johnson* and *Kanu*.

Hotak v Southwark LBC was a case where the appellant received a lot of assistance from his brother in helping meet his day to day needs. In that case the Court of Appeal said that an assessment of whether someone is vulnerable under Section 189(1)(c) is intensely fact sensitive. It is a practical process for the purpose of identifying the priority need for allocation of resources and an important part of that is said to be that it involves a judgement into the harm or detriment that might befall someone when they are homeless; all of the applicant's personal circumstances may be relevant. They went on to say that the effect of a support network while the applicant is not homeless is unlikely to remain the same once he becomes homeless, well that, I think, must be right. But if the authority is satisfied that the support network would remain in place it may not be sufficient to enable that person to fend for themselves; each case will turn on its facts, though, and a fair evaluation of all of the evidence is critical to the decision and in that case it was said that it would be enough.

Johnson v Solihull MBC involved a recovering heroin addict who was a persistent offender in and out of prison. Again he was found not to be vulnerable and therefore not in priority need, again it ended up in the Court of Appeal at which point the Court of Appeal said that the *Pereira* comparator is an "ordinary homeless person", not an ordinary person who is homeless and the sequence of the words is quite important there. That concept is necessarily imprecise and it falls to the local authority to decide what features such a person would have and they have to consider it in relation to real world factors. They said many homeless persons have drug issues and many homelessness services are involved in dealing with those issues. In that particular case, the Reviewing Officer had referred to a survey of needs and provisions which suggested that a lot of homelessness services deal with people who have drug issues and she had been entitled to refer to that to assist in determining the characteristics of an ordinary homeless person. I will come back to that later if I have time.

The third case is *Kanu v Southwark LBC*, here I just want to take a bit of a detour into another Act, the Equality Act 2010, which introduced a public sector equality duty building on other duties in relation to race, sex and disability that went before it. As part of that duty public authorities must in the exercise of their function have due regard to, amongst other things, the need to advance equality of opportunity between disabled persons and persons without a disability. In a case called *Pieretti v Enfield* that was decided under one of the predecessor provisions in the Disability Discrimination Act, where it was said that the determination of an application for assistance under Part 7 was a function for the purposes of the duty so it does come into play. Mr Kanu's case, again involved a support network; it was his wife and his son. Perhaps unsurprisingly following *Hotak*, the Court of Appeal said that the Review Officer, having considered the support from the wife and son and whether that would be sufficient to enable Mr Kanu to fend for himself, had been entitled to do that and that was a decision for the Reviewing Officer that they would not interfere with. There are various other bits but the one other point that I want to draw out of this case is in relation to the public sector equality duty. The Court of Appeal said that when a disabled person applies under Part 7 of the 1996 Act, the public sector equality duty does not require the authority to do anything more than they would do under the 1996 Act. In particular it does not require an authority to secure accommodation for a disabled person in circumstances where his disability would not render him vulnerable.

As I say, I want to come back to one aspect of one of these cases later but other than that it is to note that they are being heard together over 3 days just before Christmas in December. I understand, and I am certain to be corrected if I am wrong on this, that one of the issues there is an attack on the test in *Pereira* as set out and as it has been applied. Given the way that *Pereira* has been applied one has to hope that there might be some sympathy in the Supreme Court or a sympathetic hearing to that argument, because I think that test is increasingly being applied as if it was a statutory test, despite the various warnings against it not being read as a statutory test, and there is far too much discretion one might say to local housing authorities to decide who is and who is not in priority need.

The last homelessness case I want to look at for the time being is one on intentional homelessness, referred to in paragraph 18 of my notes. This is a case called *Haile v Waltham Forest LBC*. A little bit of a history lesson here; Section 17 of the Housing (Homeless Persons) Act 1977 had this concept of becoming homeless intentionally and said that "for the purposes of this Act a person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation which it would have been reasonable for him to continue to occupy". Now under Section 17 the House of Lords in 1981 in a case called *Din v Wandsworth LBC*, it was decided in 1981 but not reported until 1983, they decided by majority of 3 to 2 that a local housing authority had to consider whether an applicant was intentionally homeless at the point that they left their accommodation. Subsequent events which would have rendered them unintentionally homeless anyway were irrelevant. The equivalent of Section 17 is now found in Section 191 of the 1996 Act which is so far as relevant materially identical.

Now, briefly, in the facts of this case, Miss Haile had an assured shorthold tenancy of a bedsit room in a hostel. One of the terms of the tenancy was the maximum occupancy of that room was one person. In June 2011 she became pregnant, in October 2011 she moved out of the hostel and went to stay temporarily somewhere else and then in November she applied to Waltham Forest as homeless. She told them that she had left the hostel because of unpleasant smells there. Then in February the next year she gave birth to a daughter. It took the authority just under a year to get their decision and then their review decision and in January 2013 they decided that she was intentionally homeless because the smells at the hostel had not been a good reason for her to leave and that was the basis for her leaving in October 2011. This ends up in the Court of Appeal, there is a bit of an attack on *Din v Wandsworth* there. Lord Justice Jackson, who gave the judgment in the Court of Appeal, said that *Din* remained good law and accordingly what Waltham Forest had to do was to decide whether she had

become intentionally homeless when she left the hostel. The fact that she would not have been able to remain there a few months later on when she gave birth was irrelevant. This is being heard by the Supreme Court on 29 January next year and the Court will have to consider whether to depart from *Din* and, amongst other things, whether anything other than obtained settled accommodation breaks the chain of causation so far as intentional homelessness is concerned and wipes that away.

Now turning to possession claims, or not really as the first one is concerned because this is a case where what was at issue was whether a possession claim and possession order were even necessary. This is as paragraph 32 in the notes and it is *R (ZH) v Newham & Lewisham LBC*. This turns principally on the Protection from Eviction Act 1977. That provides that where premises have been let under any tenancy or licence an occupier cannot be evicted without a court order. In *Mohammed v Manek & Kensington & Chelsea* the Court of Appeal held that accommodation is provided as interim accommodation as part of Part 7 duties while enquiries are being made was not, as a general rule, within the scope of Section 3; no need to go and get a possession order before you evict someone from it. In *Desnousse v Newham*, which was decided in 2006, it was held by a majority of 2 to 1 in the Court of Appeal that *Manek* was still good law, notwithstanding the Human Rights Act having come into force. Part of the context here, as well, is Article 8 of the European Convention which provides, as I am sure you know, everybody has the right to respect for their home. In *Manchester v Pinnock* the Supreme Court decided that domestic law now needed to follow the jurisprudence of the European Court of Human Rights so that any person at the risk of being dispossessed from their home by a public authority had the right under Article 8 to challenge the proportionality of the eviction.

CN and *ZH* were both in separate units, one in Newham and one in Lewisham, of accommodation provided under the interim powers in Part 7 and both of them were going to be evicted, told that they were going to be removed from that without a possession order being obtained so they issued judicial review proceedings challenging that. Those ended up in the Court of Appeal where the substantive judicial review was heard and dismissed and this then gets appealed to the Supreme Court. The occupiers argued that they occupied this temporary accommodation as a dwelling for the purposes of Section 3 1977 Act or, alternatively, it had become their homes for the purposes of Article 8 and because they were entitled to a proportionality assessment the authorities had to go to court seeking possession orders so that proportionality issue could, in principle, be argued. The local authorities disputed this, as one might expect. The Supreme Court, by a majority of 5 to 2 dismissed the appeal. It has to be said there is some unsatisfactory aspects about the reasoning of the majority who held that the licences granted to the parents of CN and ZH, as it was in these cases, were not licences to occupy premises as a dwelling. They said you need to look at the statutory context which requires short term accommodation for a short and determined period and that it would significantly hamper the operation of Part 7, the homelessness provisions, if such temporary accommodation fell within Section 3. Further, it was not intended to provide a home and they could be required to be transferred to other accommodation at very short notice. They went on to say that when considering Article 8 again the statutory scheme had to be seen as a whole, in particular any applicant for homelessness assistance would be given reasons for an adverse decision, they would have the opportunity to review it in Section 202 and to have it considered on appeal, Section 204. Homeless children and families would additionally be likely to qualify for support from social services.

Then we get to paragraph 71 in Lord Justice Hodge's judgement which I think I have quoted at some length in the notes. What Lord Hodge said, and the majority agree with, is that following *Pinnock* and following some subsequent decisions, *Hounslow v Powell* and others, the powers of a county court are extended when hearing applications by local authorities to recover possession in order to comply with Article 8 of the European Convention. It appeared to the Supreme Court that it was necessary then to interpret Section 204 of the 1996 Act, the appeals in homelessness provisions, to empower a county court to assess the issue of proportionality of a proposed eviction following a Section 184 or 202 decision and resolve any relevant dispute of fact in a Section 204 appeal. Pause there to note that Lord Neuberger in *Wandsworth v Bubb* said that is not the role of a court hearing in a Section 204 appeal but that appears to have gone unaddressed in this case. There is no other domestic provision involving the court in the repossession of the accommodation after an adverse decision; the Section 204 appeal is the obvious place for the occupier of the temporary accommodation to raise the issue of the proportionality. Well, I have to say I think there will be a lot of cases in the future as to the extent of that, how it applies and how it works in practice. I am certainly planning on amending a couple of Section 204 grounds of appeal very, very quickly to challenge this as well as my various arguments that I have against the Section 202 decision.

Just as an aside, there are some interesting observations, I say interesting, views may differ, on the approach to be taken to what Francis Bennion in his book on Statutory Construction called tacit legislation, which is when Parliament is said to have approved a decision of the courts by not legislating to change it.

Moving on to a case that was heard by the Supreme Court at the same time as CN and ZH, this is a case about joint tenancy and notice to quit called *Dacorum BC v Sims*, which is referred to in paragraph 33 in my notes. Going back to 1992 the House of Lords in *Hammersmith & Fulham LBC v Monk* decided that where there is a joint tenancy unless the tenancy agreement provides otherwise a notice to quit given by one tenant without the agreement or concurrence of the other, or others if there is more than one, is effective to determine a periodic tenancy with the result that the landlord has an unqualified right to possession. In *Harrow v Qazi* this was said to survive Article 8, albeit *Harrow v Qazi* was before *Pinnock*. The facts of this case were that Dacorum Borough Council granted Mr and Mrs Sims a tenancy, it was actually an introductory tenancy that then became a secure weekly tenancy. It was an express provision of the tenancy agreement that a joint tenant could serve notice to quit and determine it. There were allegations of domestic violence and Mrs Sims left the property taking two of the children with her. There were four children; she took two of them with her. She went to Wycombe District Council and asked them to re-house her. They said, "we won't do that unless you end your tenancy with Dacorum". She told Dacorum this and they suggested that she serve a notice to quit, which she duly did.

Mr Sims asked Dacorum to let him stay in the property and transfer the tenancy to him. They refused and issued possession proceedings which he defended on, amongst other things, the rule in *Monk* being incompatible with Article 8. He also challenged it on the basis of a straightforward proportionality challenge. The Deputy District Judge considered that, dismissed all his arguments and made a possession order. He appealed to the Circuit Judge, who granted permission to appeal and leapfrogged into the Court of Appeal, the Court of Appeal dismissed the appeal and he ends up in the Supreme Court arguing that the rule in *Monk* was incompatible with Article 8 and also Article 1 of the First Protocol. There is only one judgement from the Supreme Court; it is a unanimous decision with Lord Neuberger's judgment, in which he says that the rule in *Monk* was not incompatible with Article 1 of the First Protocol. It had always been the case that the tenancy could be determined by Mrs Sims and he had lost the tenancies in a manner and in circumstances which were specifically provided for in the agreement. The terms of the tenancy and the common law rule in *Monk* were not unreasonable and if *Monk* were reversed then there would be two situations, really. The tenant could be forced to remain against her will or a landlord could be forced to keep his one tenant when previously he had two. There was no violation of Article 8; Mr Sims had been entitled to raise a proportionality defence, he had done so and the District Judge had considered it and dismissed it. It had been proportionate to grant a possession order and the Supreme Court was not going to interfere with that.

Now Article 8 rears its head in a different way in a decision on the Equality Act 2010 which is at paragraphs 36 and 37 in my notes. Having said earlier that I was going to be brief on *Samin v Westminster* because the undisputed expert on that case was in the room, I am going to try and be just as brief on *Aster Communities Ltd v Akerman-Livingstone* because the undisputed expert on that case is also in the room. But I will just draw your attention to Section 15 of the 2010 Act which I have set out at paragraph 36 in the notes. This is the key provision in the 2010 Act so far as this case was concerned and it was a new provision; it was not in the Disability Discrimination Act. It was a reworked version following, partly, the decision in *Malcolm v Lewisham* and what it tries to do is prohibit discrimination arising from disability in the terms that you see there. What happened in this case was the appellant had applied to Mendip District Council under Part 7. They accepted they owed him a full housing duty, Section 193(2) and arranged for Aster Communities Ltd to provide him with accommodation which they did. Mendip then offered him another property which he refused; the authority decided that their duty towards him had come to an end and Aster Communities Ltd commenced possession proceedings. He then applied to the authority again; they accepted another duty and the possession proceedings were put on hold. Mendip made him an offer of another property and at this point he sort of disengages and fails to respond to the authority so they decided yet again their duty has come to an end, Aster Communities Ltd restore their possession proceedings.

Now at this stage the defendant who had prolonged duress stress disorder said that he had not responded to the offer of accommodation because of his disability and that therefore the association was discriminating against him, contrary to Section 15, by seeking to evict him. The Circuit Judge decided that he did not have a seriously arguable case that there had been a breach of Section 15 and he made a possession order rather than give directions for a trial. There was an appeal to the High Court which was dismissed and then it ended up in the Court of Appeal. The Court of Appeal

said that because Section 15 is concerned, partly, with proportionality the approach to be applied is the same as in *Pinnock* and the line of cases that follow that when an Article 8 defence is raised. We know from that line of cases that it is a very high threshold which will succeed in a very small number of cases. In most cases the countervailing interests of a social landlord will outweigh those of the defendant seeking to rely on Section 15 and for such a defence to succeed an occupier needs to show considerable hardship. Now applications for a stay and for permission to go to the Supreme Court were refused by the Court of Appeal but granted the very next day by the Supreme Court.

I just about have time for one more possession case, but I shall be very brief on it in that this is one that I think we could probably take an hour just to go through and explain because the facts are so complicated and the law is so complicated. This case, *Scott v Southern Pacific Mortgages Ltd*, concerns arrangements that arose, became relatively common about 10 years ago I suppose, in a leaseback situation where home owners who got into financial difficulties found themselves in the situation where this entity called North East Property Buyers would put up nominee purchasers who bought the house; there would be a promise that the vendor could stay in it for the duration on an assured shorthold tenancy, surprise, surprise the mortgage payments are not met and the mortgagee then comes to take possession. This is an unsatisfactory decision in some ways, not because of the quality of the decision or the arguments but simply because it is a case about which of two innocent parties, the vendor or the mortgagee, had to bear the consequence of another party's ill-gotten gains. Now I know which one I would instinctively go for in that but the Supreme Court, for perhaps more legally based reasons than that, found unfortunately against the occupiers. Essentially, the promises that had been made that the occupiers could stay there for life on an assured shorthold tenancy, there were various other arrangements made or suggested, did not qualify as overriding interests for the purposes of the Land Registration Act. They were personal in nature, not proprietary, and accordingly *Abbey National* v *Cann* was applied and there was simply nothing there. Any estoppel that there was, was never fed, and you have to feed the estoppel in order for there to be something to rely on. The one positive point to take from *Scott* I suppose is that the sale and leaseback market has been made a regulated activity under the Financial Services Market Act 2000 Section 19 and the consequence of that is that the market has pretty much been regulated into extinction.

The last case that I want to talk about in the Supreme Court, *R (SG) v Secretary of State for Work and Pensions*, is one on the benefit cap or what I call the case of the vanishing judgment. We were told last week by the Supreme Court that they would be handing down judgement today in relation to this challenge to the Welfare Reform Act 2012 and the Regulations thereunder, which introduce the benefit cap which bites on housing benefit payments particularly. That we thought would be the position and we thought we would get judgment this morning. The Supreme Court, presumably as an act of mercy to me, decided to postpone the judgment so I would not need to rewrite my notes, merely saying that they would consider further written submissions from the parties so we will have to wait a little bit longer before we find that out.

But if I can be allowed just one little indulgence, I said I would go back to *Johnson v Solihull* partly, this slide's title ("A misguided statistical foray") comes from a comment that was made by Lord Justice Underhill in a case called *Ajilore v Hackney* which follows on from *Solihull v Johnson*. In *Ajilore* the Reviewing Officer's decision had said, "I am not disputing that there will be a risk of self-harm and suicide if you were street homeless. However this is not anything different to what I would find in ordinary street homeless people. A report published in the British Medical Journal in 2005 confirmed that homeless people do have higher self-harm incidents than the ordinary population. Indeed in this report it was found that it was 7.2% higher." Now what the Reviewing Officer looked at there was not a report, it was a letter in the British Medical Journal, it was not peer reviewed in any way, from a GP in Leeds whose letter stated, "We looked at the incidence of deliberate overdose in our population of homelessness patients... This translated to an incidence of 7.2%, higher than that in the general population". The comma is quite significant. The Review Officer also referred, as in *Johnson v Solihull*, to the Homeless Link's Survey of Needs and Provisions which found that 92% of homelessness services were for people experiencing problems with drugs.

Now my issue with this is that there is a troubling lack of understanding of what statistics show and how to use them properly. As someone who dabbled in maths and as my A level teacher would tell you, dabbled is probably as far as it went, it does seem to be a complete lack of understanding about how this works. The fact that 92% of homelessness services work for people experiencing drug problems does not really tell us much. What we want to know is how many people, how often? That is what tells more about the ordinary homeless person. 100% of primary care trusts will, I imagine, have maternity units. That does not mean that the ordinary person is pregnant or ever will be. The report from the British Medical Journal is even more troubling. First, it is not a report; it is a letter.

Second, it was actually deliberate overdoses rather than self-harm which was the issue being considered. Third, it tells us absolutely nothing about what the level of self-harm in the general population was. Fourth, and I think perhaps because of that, the Reviewing Officer missed that, misread that and missed out the crucial comma and had no idea whether it was 7.2% higher or actually that the 7.2% is higher than the general population but how much higher? It might be 7.19% in the general population, it does not tell us anything.

The other axe that I have to grind about this really is when one goes back to the *Pereira* test, the local authorities being the arbiters of this, they are making it artificially higher and higher and higher because the more you restrict the ability of people to come in and get assistance under Part 7 the more you are putting people with difficult conditions into the homeless population and then say, well there you are, everybody is like that. So my slightly flippant comment is I think this is how statistics are being used here. Most people have two legs, not everyone does so the mean number of legs that a person has is less than two, it is not the modal average or the median average but it is the mean average. Therefore the average person has less than two legs therefore the ordinary person has less than two legs. Now you apply this in the homelessness context; the homeless person with one leg comes along. I am being slightly flippant but I do not think that far away from saying, well the ordinary homeless person also, on average, has less than two legs. And I found this screen shot just yesterday ("Statistics show that teen pregnancy drops off significantly after age 25"). It shows that if you do not understand your data set and what you are looking at just how wrong you can go with statistics. Tessa had her call to arms on the Ministry of Justice's consultation; this is mine if I can be allowed it. Do not just allow bad statistics to go unchallenged, hopefully we may have something from the Supreme Court soon to deal with that.

If I can just sum up, as this year draws to a close it will probably be remembered long into the first week of January as the year that Russell Brand discovered the joys of housing law and the joys of Bow County Court. But I hope that we can remember it for a lot longer than that as a year when a lot more happened and is still to happen and where housing lawyers have tried so far as possible to kick back against the growing politicisation that Tessa talked about in relation to the availability of valuable resources and social services to vulnerable people

Chair: Are there any questions for our speakers?

Sadaf Mir, Deighton Pierce Glynn: My question is around the Immigration Act 2014. If you have, say, an asylum seeker who will be provided with accommodation under the Section 17 duty, could they only ever be offered a licence unless there is this additional clause on their leave saying that they have right to rent? Is that what we need to watch out for now?

Tessa Buchanan: Well, actually I referred to some agreements being excluded and that is set out, I think, at Schedule 3 of the Immigration Act. Accommodations provided pursuant to the immigration provisions is one of those excluded agreements so that might well cover what you are referring to.

Gail Bradford, Harrow Law Centre: I would like to ask a question about one of the cases which was not mentioned in the previous speaker's talk which is the *Nzolameso v Westminster C*ourt of Appeal case. In our local authority area we are sending people to Stoke and we have done research in respect of the fact that there are suitable sized units much closer, however the Court of Appeal has decided that it is not up to the local authority to give its administrative resources to investigating what is available at the time. I was wondering whether or not there is any possibility of an application for permission to appeal this or what we could do about it because we are having long-term residents in our local authority area being sent right up to the north of England.

Robert Brown: I know there was a suggestion soon after that there would be an application made.

Jan Luba QC, Garden Court Chambers: I had the pleasure of appearing for this particular appellant in the Court of Appeal. In answer to the direct question, the solicitors for the applicant have applied for legal aid to seek permission to appeal from the Supreme Court. Obviously that was refused, I say obviously because I do not think anybody at the Legal Aid Agency knows a different answer to an application for legal aid and therefore that is being considered by the Special Cases Review Panel of the Legal Aid Agency on Friday of this week. In relation to what can be done, the key feature of the Westminster case is that nothing was ever put to the Reviewing Officer about the availability of accommodation in the council's own area or nearer so the Court of Appeal was entitled, it felt, to assume that the Reviewing Officer herself would know everything that needed to be known about housing supply and demand in Westminster's area. The situation would have been rather different if

the Reviewing Officer had been provided with the sort of material that our colleague envisages, where there is hard evidence that either there is in borough accommodation available or alternatively that there is accommodation available in nearer boroughs than the borough into which the local authority in question wants to place

Nik Antoniades, Powell & Co: Just on that last point, isn't there one other argument that might be used at the review stage and I ask this as an open question? We still have, although they are shortly to be repealed as I understand it, the duties under Sections 1, 2 and 3 of the Homelessness Act. Isn't one of the purposes of carrying out homelessness reviews and formulating strategies that the local authority should work out where the accommodation is which ought to be available for accommodating homeless people? I have been bashing my head against a brick wall using that argument in my sub judice reviews; I would urge other people to use it until the repeal of the relevant parts of the Homelessness Act which I read just the other day is forthcoming.

Chair: If there are no further questions, could I remind you to book your places at the annual conference on 10 December if you have not already done so. Finally I would like to thank you all for coming and ask you to thank our speakers in the usual way.

HLPA 19th November 2014: Housing Law Update

Statutory Developments in Housing Law

1. The aim of this paper and the accompanying presentation is to discuss some of the most significant and interesting statutory developments in the field of housing law over the last year.

Anti-social Behaviour, Crime and Policing Act 2014

2. The new Anti-social Behaviour, Crime and Policing Act ("ASBCPA 2014") received royal assent on 13th March 2014. The most significant changes in relation to housing law which it introduces relate to new grounds for possession and injunctions. (The Act also amends the law in relation to closure orders: that topic is beyond the scope of this paper.)

Grounds for possession

3. Currently, a possession order can be made on the basis of anti-social behaviour against secure tenants under Grounds 1 and 2 of Schedule 2 to the Housing Act 1985 ("HA 1985") and against assured tenants under Grounds 12 and 14 of Schedule 2 to the Housing Act 1988 ("HA 1988"). All of these grounds are discretionary.

4. This Act introduces a new mandatory ground for possession against both secure and assured tenants in addition to new discretionary grounds.

5. The new mandatory ground: section 94 ASBCPA 2014 introduces a new ground via a new section 84A HA 1985 for secure tenancies. Section 97 ASBCPA 2014 introduces a corresponding new ground for assured tenancies (new Ground 7A of Schedule 2 HA 1988). These provisions came into force on 20th October 2014 in relation to England and on 21st October 2014 in relation to Wales (*Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 7, Saving and Transitional Provisions) Order 2014/2590* and *Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 2 and Transitional Provisions) (Wales) Order 2014/2830* respectively).

6. Subject to a human rights, disability discrimination, or public law defence, and subject to the landlord's compliance with the notice and any review requirements, the court must award possession where one of five conditions is satisfied. The conditions are as follows:

   Condition 1 is that-

   (a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and

(b) the serious offence—

(i) was committed (wholly or partly) in, or in the locality of, the dwelling-house,

(ii) was committed elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(iii) was committed elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and directly or indirectly related to or affected those functions.

Condition 2 is that a court has found in relevant proceedings that the tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, other than a provision requiring a person to participate in a particular activity, and—

(a) the breach occurred in, or in the locality of, the dwelling-house, or

(b) the breach occurred elsewhere and the provision breached was a provision intended to prevent—

(i) conduct that is capable of causing nuisance or annoyance to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) conduct that is capable of causing nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 3 is that the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 consisting of a breach of a provision of a criminal behaviour order prohibiting a person from doing anything described in the order, and the offence involved—

(a) a breach that occurred in, or in the locality of, the dwelling-house, or

(b) a breach that occurred elsewhere of a provision intended to prevent—

(i) behaviour that causes or is likely to cause harassment, alarm or distress to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) behaviour that causes or is likely to cause harassment, alarm or distress to the landlord of the dwelling-house, or a person employed (whether or not by the

landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 4 is that—
(a) the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and
(b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.

(7) Condition 5 is that—
(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under—
(i) section 80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or
(ii) section 82(8) of that Act (breach of court order to abate statutory nuisance etc.), and
(b) the nuisance concerned was noise emitted from the dwelling-house which was a statutory nuisance for the purposes of Part 3 of that Act by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance).

7. In order to obtain possession on this ground, the landlord must have complied with the relevant notice requirements. The court cannot dispense with notice where the landlord is relying on this ground. Landlords of secure tenants must serve a notice complying with the requirements of the new section 83ZA HA 1985, which is introduced by section 95 ASBCPA 2014. Landlords of assured tenants must serve a notice in accordance with section 8 HA 1988, which has been amended by section 97 ASBCPA 2014.

8. Landlords of secure tenants must also comply with the new section 85ZA, which enshrines the right to a review of the decision to seek possession on the new ground. The review process is governed by the *Absolute Ground for Possession for Anti-Social Behaviour (Review Procedures) (England) Regulations 2014 SI 2554*. These set out what information an application for a review must include (regulation 2). The tenant has the right to an oral hearing (regulation 3). The review can be conducted by an officer or employee of the landlord but they must be *"of greater seniority than the person who made the original decision"* (regulation 5). There is no corresponding statutory right to review for assured tenants although the Home Office's *Statutory Guidance for*

Frontline Professionals, issued in July 2014, states that *"we would expect housing associations to offer a similar non-statutory review procedure"*.

9. The Act also confirms that the new ground is *"subject to any available defence based on the tenant's Convention rights"* (section 94 ASBCPA 2014). In the author's view, it must also be subject to a public law and/or disability discrimination defence. When considering or presenting any such defence, it is useful to be aware of the Home Office guidance which emphasises that *"the new absolute ground is intended for the most serious cases of anti-social behaviour and landlords should ensure that the ground is used selectively"*.

10. Discretionary grounds: the Act also introduces two new discretionary grounds for possession based on anti-social behaviour. These apply to both secure and assured tenancies and came into force on 13th May 2014 (*Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 2, Transitional and Transitory Provisions) Order 2014/949* and *Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 1 and Transitory Provisions) (Wales) Order 2014/1241*).

11. Firstly, section 98 of the new Act amends Schedule 2 to both HA 1985 and HA 1988 to enlarge the current Grounds 2 and 14 so as to allow for the court to grant possession, if it would be reasonable to do so, where the tenant or a person residing in or visiting the property:

    ...has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

12. Secondly, section 99 of the new Act amends Schedule 2 to both HA 1985 and HA 1988 to introduce a new Ground 2ZA and Ground 14ZA respectively. This applies to England only. It allows for possession to be granted where:

    The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the United Kingdom.

13. A "riot" is defined by section 1 of the Public Order Act 1986 as *"where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of*

them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety".[1]

Injunctions

14. The other aspect of this Act which is particularly important to housing practitioners concerns injunctions. The new civil injunction will replace the current "civil" or stand-alone ASBOs and the ASBI. The provisions are not yet in force but are expected to be introduced in around January 2015.

15. The county court or High Court (or, in the case of a youth, the Youth Court) may grant an injunction under section 1 ASBCPA 2014 where two conditions are met:

    […]

    (2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.

    (3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.

16. What constitutes anti-social behaviour will depend on the context:

    i. In a non-housing context, such as in the street or in a shopping centre, anti-social behaviour means *"conduct that has caused, or is likely to cause harassment, alarm or distress to any person"* (section 2(1)(a) ASBCPA 2014).

    ii. In a housing context, anti-social behaviour means *"conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises"* (section 2(1)(b) ASBCPA 2014) or *"conduct capable of causing housing-related nuisance or annoyance to any person* (section 2(1)(c) ASBCPA 2014). *"Housing-related"* means *"directly or indirectly relating to the housing management functions of (a) a housing provider, or (b) a local authority"* (section 2(3) ASBCPA 2014). Only social landlords, local councils, or the police can apply for this second type of injunction whereas organisations such as Transport for London and the Environment Agency (as well as social landlords, councils, and the police) can apply for the first.

[1] For further discussion of the new grounds, see Jan Luba QC, *"The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants: Part 1"*, (2014), 18(3) *Landlord & Tenant Review* 87 and *"The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants: Part 2"*, (2014), 18(5) *Landlord & Tenant Review* 165.

17. The terms of the injunction can prohibit the respondent from doing something and/or require him or her to do something (section 1(4) ASBCPA 2014). They can exclude the respondent from his or her home (section 13 ASBCPA 2014). They can be granted against anyone aged 10 or over (section 1(1) ASBCPA 2014). They can last indefinitely, in the case of an adult, or for up to 12 months in the case of a youth (section 1(6) ASBCPA 2014).

18. Breach of an injunction will be a contempt of court. An adult can be punished by up to 2 years in prison or an unlimited fine. The sentencing options for a youth are more varied, and include supervision, a curfew, an activity requirement, or detention. The court can also simply give the respondent a warning.

19. Breach of an injunction can also be the basis of an application for possession on the new mandatory ground, as set out above.

20. A Ministry of Justice consultation on legal aid for injunctions is happening now. The proposal is that applications for and appeals against injunctions will be dealt with under civil legal aid but committals will fall under criminal legal aid. This is clearly problematic, in the author's view, as it means that criminal practitioners who may well not know much about housing law – and in particular the new mandatory ground for possession – will be dealing with breaches. It also means that clients are likely to be denied continuity of representation. The deadline for responding is 1st December 2014. The link is provided in the slides accompanying this paper.

Immigration Act 2014

21. The Immigration Act 2014 ("IA 2014") received royal assent on 14th May 2014.

22. The provisions relevant to housing come into force on 1st December 2014 in the following areas: Birmingham, Dudley, Sandwell, Walsall, and Wolverhampton.

23. The Act prohibits persons with no leave to be in the UK from entering into residential tenancy agreements.

24. Section 21 IA 2014 stipulates who will be forbidden from entering into such an agreement:

> *(1) For the purposes of this Chapter, a person (P) is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement if-*
>
> *(a) P is not a relevant national, and*
>
> *(b) P does not have a right to rent in relation to the premises.*

(2) P does not have a 'right to rent' in relation to premises if-

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P's leave to enter or remain in the United Kingdom is subject to a condition preventing P from occupying the premises.

(3) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement.

[…]

(5) In this section, 'relevant national' means

(a) a British citizen,

(b) a national of an EEA state other than the United Kingdom, or

(c) a national of Switzerland.

25. A residential tenancy agreement is defined at section 20 IA 2014:

[…]

(2) 'Residential tenancy agreement' means a tenancy which-

(a) grants a right of occupation of premises for residential use,

(b) provides for payment of rent (whether or not a market rent), and

(c) is not an excluded agreement.

26. *"Excluded agreements"* are specified at Schedule 3 IA 2014. They include:

i. Social housing. This includes accommodation provided pursuant to Part 6 or 7 of the Housing Act 1996.
ii. Care homes.
iii. Hospitals, hospices, and other accommodation relating to healthcare provision.
iv. Hostels and refuges.
v. Accommodation from or involving local authorities.
vi. Accommodation provided by virtue of immigration provisions.
vii. Mobile homes.
viii. Tied accommodation.
ix. Student accommodation.
x. Long leases.

27. Section 22 IA 2014 prohibits the letting of premises to disqualified persons:

(1) A landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status.

[...]

(3) There is a contravention of this section in either of the following cases.

(4) The first case is where a residential tenancy agreement is entered into that, at the time of entry, grants a right to occupy premises to-

(a) a tenant who is disqualified as a result of their immigration status,

(b) another adult named in the agreement who is disqualified as a result of their immigration status, or

(c) another adult not named in the agreement who is disqualified as a result of their immigration status (subject to subsection (6)).

(5) The second case is where-

(a) a residential tenancy agreement is entered into that grants a right to occupy premises on an adult with a limited right to rent,

(b) the adult later becomes a person disqualified as a result of their immigration status, and

(c) the adult continues to occupy the premises after becoming disqualified.

(6) There is a contravention as a result of subsection (4)(c) only if-

(a) reasonable enquiries were not made of the tenant before entering into the agreement as to relevant occupiers, or

(c) reasonable enquiries were so made and it was, or should have been, apparent from the enquiries that the adult in question was likely to be a relevant occupier.

28. The responsibility of preventing such lettings falls prima facie on the landlord. However, the landlord can agree in writing with an agent that the agent will come under the obligation to comply with the prescribed requirements, where the agent is acting in the course of a business. In such a case, the agent will be responsible for any contravention (section 25 IA 2014) and the landlord will be excused from paying any penalty (section 24(2)(b) IA 2014). It appears though that the landlord will still be responsible where the agent has complied with the prescribed requirements and properly advised the landlord of the outcome in a reasonable time (section 26 IA 2014 and *Draft Code of Practice on illegal immigrants and private rent accommodation* (October 2014)).

29. If a landlord (or agent) breaches this provision then they can be served with a notice requiring payment of a fine up to £3000 (sections 23 and 25 IA 2014).

30. However, landlords or agents will have a *"statutory excuse"* where they have complied with all the prescribed requirements (section 24(2)(a) and section 26(2) IA 2014). These are set out in the *Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014*. The landlord (or, if responsible, the agent) must:

i. Obtain certain documents from all prospective adult occupiers or, if the occupier has an outstanding application with the Home Office, obtain a *"Positive Right to Rent Notice"* from the Landlord Checking Service.
ii. Take all reasonable steps to verify the authenticity of the document.
iii. Take a copy of the document and record the date on which the copy was taken.
iv. Retain the copy for not less than one year after the tenancy agreement ends.
v. Take all reasonable steps to identify any additional occupants of the property at the time that the occupier or prospective occupier enters into the tenancy agreement.

31. If the occupier's right to remain in the UK is of limited duration, then the landlord's duty does not end there: he must go on to perform follow up checks at prescribed intervals, which will be the longer of one year from the time the prescribed requirements were last complied with or the remainder of the tenant's leave or validity period (section 27 IA 2014). If it transpires that the tenant no longer has leave to be in the UK, then the landlord has to report him to the Home Office. If he doesn't, he will lose his statutory excuse (section 24(6) IA 2014).

32. If the landlord is served with a civil penalty notice, then he has 28 days to object to it in writing (section 29 IA 2014). If the notice is upheld, the landlord can appeal to the county court on the grounds that he is not liable to pay the penalty; he has a statutory excuse; or the penalty is too high (section 30 IA 2014).

33. No formal changes are made to possession law by this Act: the *Draft Code of Practice on illegal immigrants and private rented accommodation* (October 2014) confirms that *"the landlord is not required to take any steps to remove the occupier, even if checks reveal that a sitting occupier no longer has a right to rent"*. Indeed, the landlord may not be able to take steps to evict the tenant if, for example, any fixed term tenancy has not elapsed.

34. In addition to the Code of Practice referred to above, the Home Office has also produced a *Prototype Anti-Discrimination Code* (31 October 2013). The purpose of this document is to "*provide landlords and agents with guidance on how to avoid a civil penalty for renting premises for the use as their only or main home by an illegal migrant, in a way that does not result in unlawful race discrimination"*. The fact that such guidance is necessary is, it is suggested, something of a reflection on the nature of the Act itself.

Deregulation Bill

35. As of 6th April 2007 landlords have been required to protect their tenants' deposits within initially 14, subsequently amended by the Localism Act 2011 to 30, days of receipt. Section 213 of the Housing Act 2004 (as amended) ("HA 2004") details the way in which deposits must be protected. Section 215 HA 2004 sets out the sanctions for non-compliance with those requirements.

36. In June 2013, the Court of Appeal decided the case of Superstrike Ltd v Rodrigues [2013] EWCA Civ 669. This concerned a fixed-term assured shorthold tenancy which had been entered into before 6th April 2007 but which had become a statutory periodic assured shorthold tenancy after 6th April 2007 (in January 2008). The landlord had received a deposit from the tenant at the beginning of the original fixed-term tenancy and had never protected it. In June 2011 the landlord sought possession on the basis of a section 21 notice. The Court of Appeal held that the statutory periodic tenancy which arose in January 2008 was a new tenancy and that the deposit had been "received" again upon the commencement of this new tenancy. The requirements of the Housing Act 2004 therefore applied to it. As it had not been protected, the section 21 notice was of no effect.

37. This judgment was interpreted by many as meaning that when a fixed-term tenancy became periodic, the landlord had to re-serve the prescribed information. An example of that principle being applied is the case of Gardner v McCusker, which was reported in the July/August 2014 edition of Legal Action. In that case, a Deputy DJ at Birmingham County Court dismissed the possession claim on the basis that, pursuant to Superstrike, all the requirements of section 213 HA 2004 arose again when the fixed-term tenancy became periodic. There had been no repeat compliance and therefore the landlord could not rely on the section 21 notice.

38. The government is using the Deregulation Bill, which is currently going through Parliament, to reverse the effect of the Superstrike decision. Firstly, a proposed new section 215B HA 2004 stipulates that where a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy on or after 6th April 2007, the landlord has complied with the requirements of section 213 HA 2004, and a statutory periodic tenancy arises, then the requirements of section 213 HA 2004 are treated as if they have been complied with in relation to the new statutory periodic tenancy. The effect will be the same where the fixed term tenancy has been replaced by a new fixed term or periodic tenancy with the same landlord, tenant, and property (proposed section 215B).

39. The amendment to the bill also clarifies the situation in relation to tenancies where a fixed-term tenancy began prior to 6th April 2007 and a periodic shorthold tenancy arose on or after that date. Landlords must comply with the section 213 HA 2004 requirements, but will have 90 days from the commencement date of the Deregulation Act to do so (proposed section 215A).

40. Pursuant to the proposed new section 215D HA 2004, these new provisions, if enacted, are to be treated as having had effect since 6th April 2007 except where a claim under section 214 HA 2004 or section 21 HA 1988 has settled or been finally determined before the commencement date. If proceedings have been instituted, but not settled or determined, before the commencement date, and the court makes an order in the landlord's favour, then the court must not order the tenant to pay the landlord's costs in so far as they are attributable to the proceedings under section 214 HA 2004 or section 21 HA 1988.

41. However, uncertainty remains. The Act still does not address what happens where a deposit is taken in respect of a tenancy which was granted before 6th April 2007 and became periodic before that date. The author has had a case on this point where the court held that the section 213 requirements did apply but the amendments proposed by the Deregulation Bill might be seen to lean against such an interpretation.

42. Finally, one case to be aware of in relation to tenancy deposits is the Administrative Court decision in R (Tummond) v Reading County Court [2014] EWHC 1039 (Admin). This concerned the issue of whether the landlord can rely on a section 21 notice which is served at the commencement of the tenancy and before the deposit has been protected. In that case, the tenancy commenced on 18th December 2012 and a section 21 notice was served on the same day. The deposit was received on 22nd December 2012 and protected on 2nd January 2012. The landlord brought possession proceedings on the basis of the section 21 notice served on 18th December 2012. A possession order was made. Permission to appeal was refused and the claimant brought a claim for judicial review of that refusal. The claim was dismissed. Hamblen J held that the case did not fall within the exceptional circumstances required for the Administrative Court to judicially review a circuit judge's refusal of permission to appeal. In any event, it was found that there was no error of law. The landlord could not be sanctioned for non-compliance as there had been no non-compliance: the deposit had been protected in the requisite timeframe. Hamblen J stated that *"one can 'hold' the deposit 'in accordance with an authorised scheme' before the deposit is protected'* where the landlord was contractually obliged by the tenancy agreement to protect the deposit in an authorised scheme.

A look ahead

43. There are three private members' bills currently making their way through Parliament which are of particular interest to housing practitioners.

Tenancies (Reform) Bill

44. Sarah Teather's Tenancies (Reform) Bill was presented to Parliament on 2nd July 2014 and is due to have its second reading on 28th November 2014.

45. This seeks to tackle the practice of private sector landlords evicting tenants in response to a report of disrepair. The bill has not yet been published so its exact provisions are not yet clear. In her Guardian article on the subject (*Guardian Professional*, 27th October 2014), Sarah Teather says that it will prevent a landlord from relying on a section 21 notice *"within six months of receiving an improvement or hazard awareness notice"*. However, the briefing notice issued by the House of Commons library (*Retaliatory eviction (England)*, 7th November 2014) suggests that the restriction could be triggered not just by action by the council but also where the tenant complains in writing of a defect which would give rise to the repairing duty under section 11 of the Landlord and Tenant Act 1985.

Affordable Homes Bill

46. Secondly, there is Andrew George's Affordable Homes Bill. This has two primary provisions.

47. Firstly, it seeks to introduce three new exemptions to the bedroom tax:
    i. For households where an adaptation has been made to the dwelling to provide assistance to meet a disability need of a member of the household and the claimant has provided evidence: of the disability need; that an adaptation has been made to meet the need; and that the cost of the adaption is not less than an amount that would be prescribed by regulations.
    ii. Where an additional bedroom is needed for a member of the household who receives Disability Living Allowance or the Personal Independence Payment and who is not reasonably able to share with their partner or sibling.
    iii. For households where neither the landlord nor the local authority has made a reasonable offer of alternative accommodation.

48. The second main provision is for a review to be undertaken of the availability of affordable homes and intermediate housing.

49. This bill had its second reading in September 2014, when it was passed by 306 votes to 231. However, much to its sponsor's chagrin, it has since been adjourned for a Money Resolution to be provided.

Carers Bedroom Entitlement (Social Housing Sector) Bill

50. This bill is sponsored by Barbara Keeley. It is another attack on the bedroom tax. It seeks to exempt from the tax households with only one spare bedroom where a member of the household is entitled to carer's allowance or requires overnight care.

51. The bill will receive a second reading on 21st November 2014.

TESSA BUCHANAN
GARDEN COURT CHAMBERS
18TH NOVEMBER 2014

HLPA 19TH NOVEMBER 2014: HOUSING LAW UPDATE

STATUTORY DEVELOPMENTS IN HOUSING LAW

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

The Anti-social Behaviour, Crime and Policing Act 2014

- Received Royal Assent on 13th March 2014

- Contains important changes in the law relating to housing and anti-social behaviour
  - New mandatory ground for possession for secure and assured tenancies
  - New discretionary grounds for possession for secure and assured tenancies
  - New civil injunctions

GROUNDS FOR POSSESSION

Mandatory Grounds

- The Anti-social Behaviour, Crime and Policing Act 2014 introduces a mandatory ground for both secure and assured tenancies:
  - Secure: section 94 ASBCPA 2014 introduces a new section 84A Housing Act 1985
  - Assured: section 97 ASBCPA 2014 introduces a new Ground 7A in Schedule 2, Housing Act 1988

- The court must award possession where one of five conditions is met (subject to a human rights/public law/disability discrimination defence and compliance with the notice and review requirements)

- Came into force on 20th October 2014 in England and 21st October 2014 in Wales

Condition 1

- New section 84A(3) HA 1985 / Ground 7A HA 1988:

Condition 1 is that—

(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and

(b) the serious offence—

(i) was committed (wholly or partly) in, or in the locality of, the dwelling-house,

(ii) was committed elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(iii) was committed elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and directly or indirectly related to or affected those functions.

What is a “serious offence”?

- New section 84A(9) HA 1985 / Ground 7A HA 1988:

  “serious offence” means an offence which—

  (a) was committed on or after the day on which subsection (3) comes into force,

  (b) is specified, or falls within a description specified, in Schedule 2A at the time the offence was committed and at the time the court is considering the matter, and

  (c) is not an offence that is triable only summarily by virtue of section 22 of the Magistrates’ Courts Act 1980 (either-way offences where value involved is small).

Condition 2

- New section 84A(4) HA 1985 / Ground 7A HA 1988:

Condition 2 is that a court has found in relevant proceedings that the tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, other than a provision requiring a person to participate in a particular activity, and—

(a) the breach occurred in, or in the locality of, the dwelling-house, or

(b) the breach occurred elsewhere and the provision breached was a provision intended to prevent—

(i) conduct that is capable of causing nuisance or annoyance to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) conduct that is capable of causing nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 3

- New section 84A (5) HA 1985 / Ground 7A HA 1988:

Condition 3 is that the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 consisting of a breach of a provision of a criminal behaviour order prohibiting a person from doing anything described in the order, and the offence involved—

(a) a breach that occurred in, or in the locality of, the dwelling-house, or

(b) a breach that occurred elsewhere of a provision intended to prevent—

(i) behaviour that causes or is likely to cause harassment, alarm or distress to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) behaviour that causes or is likely to cause harassment, alarm or distress to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 4

- New section 84A(6) HA 1985 / Ground 7A HA 1988:

Condition 4 is that—

(a) the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and

(b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.

Condition 5

- New section 84A(7) HA 1985 / Ground 7A HA 1988:

Condition 5 is that—

(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under—

(i) section 80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or

(ii) section 82(8) of that Act (breach of court order to abate statutory nuisance etc.), and

(b) the nuisance concerned was noise emitted from the dwelling-house which was a statutory nuisance for the purposes of Part 3 of that Act by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance).

Qualifications and defences

- Landlord must have complied with the relevant notice requirements
  - Section 95 ASBCPA 2014 introduces a new section 83ZA HA 1985
  - Section 97 ASBCPA 2014 amends section 8 HA 1988
- Landlord must have complied with any obligation to review the decision
  - Section 85ZA ASBCPA 2014 enshrines a right to a review of the decision to seek possession on the absolute ground for secure tenants
  - Home Office guidance anticipates housing associations will offer a similar procedure
- Defence based on Convention rights
  - New section 84A(1) HA 1985
  - Amended section 7(3) HA 1988
- Public law defence
- Disability discrimination defence

Discretionary ground (1): nuisance or annoyance

- Causing nuisance or annoyance to landlord
  - Amended Ground 2 of Schedule 2 to HA 1985
  - Amended Ground 14 of Schedule 2 to HA 1988

  [The tenant or a person residing in or visiting the property]...has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

- Came into force 13th May 2014 (England and Wales)

Discretionary ground (2): riot-related offence

- Conviction for indictable offence during and at the scene of a riot
  - New Ground 2ZA of Schedule 2 to HA 1985
  - New Ground 14ZA of Schedule 2 to HA 1988

  The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the United Kingdom.

- Came into force 13th May 2014 (England only)

What is a “riot”?

In this Ground-

...“riot” is to be construed in accordance with section 1 of the Public Order Act 1986.

- Public Order Act 1986, s1:

(1)Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.

(2)It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.

(3)The common purpose may be inferred from conduct.

(4)No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5)Riot may be committed in private as well as in public places.

INJUNCTIONS

Section 1 ASBCPA 2014: Power to Grant Injunctions

(1) A court may grant an injunction under this section against a person aged 10 or over ("the respondent") if two conditions are met.

(2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.

(3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.

Section 2 ASBCPA 2014: Meaning of Anti-Social Behaviour

- *Conduct that has caused, or is likely to cause, harassment, alarm or distress to any person*

- *Conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises*

- *Conduct capable of causing housing-related nuisance or annoyance to any person*

Power to grant injunctions: key points

- Terms may
  - Prohibit Respondent from doing something
  - Require Respondent to do something
  - Include an ouster clause

- Can be granted against anyone aged 10 or over

- Maximum duration
  - Adult: indefinite
  - Youth: 12 months

Applications in relation to injunctions

- S1 ASBCPA 2014: application is to
  - County Court or High Court for an injunction against an adult
  - Youth Court for an injunction against a youth
- S5(1): sets out who can apply
- S6: can apply without notice
- S7: interim injunctions
- S8: applications to vary/discharge

Powers of arrest

- S4(1) ASBCPA 2014:

  A court granting an injunction under section 1 may attach a power of arrest to a prohibition or requirement of the injunction if the court thinks that:

  > *(a) the anti-social behaviour in which the respondent has engaged or threatens to engage consists of or includes the use or threatened use of violence against other persons, or*
  >
  > *(b) there is a significant risk of harm to other persons from the respondent.*

- S9: may arrest without warrant where there is a power of arrest

- S10: may apply for warrant where there is no power of arrest

Breach

- Schedule 1 ASBCPA 2014: remand
- Schedule 2: breach by youth
- Breach by adult
- Willoughby v Solihull MBC [2013] EWCA Civ 699:

  "...deprivation of liberty is the most serious sanction available to the court, and the appropriate period of custody is the least period which the seriousness of the offender's breaches can properly justify."

MOJ consultation

- https://consult.justice.gov.uk/digital-communications/changes-to-remuneration-for-legal-aid-services/consult_view

- Deadline: 1st December 2014

IMMIGRATION ACT 2014

Immigration Act 2014

- Received Royal Assent 14th May 2014.
- Housing-related provisions come into force on 1st December 2014 for certain areas only
- Prohibits persons with no leave to be in the UK from entering residential tenancy agreements

The prohibition

- Section 21 sets out who will be *"disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement"*

- Section 20 and Schedule 3 stipulate what will constitute a *"residential tenancy agreement"*

- Section 22 sets out the prohibition on landlords authorising lettings to disqualified adults

Breach and *"statutory excuse"*

- Sections 23 and 25: Breach can be punished with fine up to £3,000
- Section 25(2) sets out when the agent will be responsible for the landlord's contravention
- Sections 24(2) and 26(2) provide a statutory excuse where the landlord/agent has complied with prescribed requirements
  - The requirements are set out in *Immigration (Residential Accommodation) (Prescribed Requirements and Code of Practice) Order 2014*
- Sections 24(6) and 26(6) provide a further statutory excuse where the landlord or agent reports to the Secretary of State a tenant who originally had leave but has subsequently become disqualified

Challenging a penalty notice

- Section 29: right to object
- Section 30: right to appeal to the county court

DEREGULATION BILL: TENANCY DEPOSITS

Tenancy deposits

- Section 213 Housing Act 2004: requirement to protect tenancy deposits

- Superstrike Ltd v Rodrigues [2013] EWCA Civ 669

Deregulation Bill amendments

- New section 215A: deposits of tenancies where fixed term began pre-6th April 2007 and periodic tenancy arose on or after 6th April 2007 must be protected but landlord has 90 days to do so.

- New section 215B: deposit which has been protected at start of fixed-term tenancy will be treated as if still protected if tenancy becomes periodic.

- New section 215C: deposit which has been protected at start of tenancy will be treated as if still protected if tenancy is replaced with another tenancy with same parties and premises.

- New section 215D: provisions will have effect as of 6th April 2007 except for claims which have already settled or been determined.

(Proposed) Section 215B:- Statutory periodic tenancies: deposit received on or after 6 April 2007

(1) This section applies where—

(a) on or after 6 April 2007, a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy,

(b) the requirements of section 213(3), (5) and (6) have been complied with by the landlord in respect of the deposit held in connection with the fixed term tenancy,

(c) a periodic shorthold tenancy is deemed to arise under section 5 of the Housing Act 1988 on the coming to an end of the fixed term tenancy, and

(d) when the periodic tenancy arises, the deposit paid in connection with the fixed term tenancy continues to be held—

(i) in connection with the periodic tenancy, and

(ii) in accordance with the same authorised scheme as when the requirements of section 213(3), (5) and (6) were last complied with in respect of it.

(2) The requirements of section 213(3), (5) and (6) are treated as if they had been complied with by the landlord in respect of the deposit held in connection with the periodic tenancy.

(Proposed) Section 215A:-
Statutory periodic tenancies: deposit received before 6 April 2007

(1) This section applies where—

(a) before 6 April 2007, a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy, and

(b) on or after that date, a periodic shorthold tenancy is deemed to arise under section 5 of the Housing Act 1988 on the coming to an end of the fixed term tenancy.

(2) If, on the commencement date—

(a) the periodic tenancy is in existence, and

(b) all or part of the deposit paid in connection with the fixed term tenancy continues to be held in connection with the periodic tenancy,

section 213 applies in respect of the deposit that continues to be held in connection with the periodic tenancy, and any additional deposit held in connection with that tenancy, with the modifications set out in subsection (3).

(3) The modifications are that, instead of the things referred to in section 213(3) and (5) being required to be done within the time periods set out in section 213(3) and (6)(b), those things are required to be done—

(a) before the end of the period of 90 days beginning with the commencement date, or

(b) (if earlier) before the first day after the commencement date on which a court does any of the following in respect of the periodic tenancy—

(i)determines an application under section 214 or decides an appeal against a determination under that section;

(ii) makes a determination as to whether to make an order for possession in proceedings under section 21 of the Housing Act 1988 or decides an appeal against such a determination.

[...]

Looking Ahead

- Tenancies (Reform) Bill
- Affordable Homes Bill
- Carers Bedroom Entitlement (Social Housing Sector) Bill

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Housing Law Update 2014

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Introduction

1. These notes address developments in the last twelve months in the following areas:

    i. Homelessness;
        a. Eligibility;
        b. Priority need;
        c. Intentionality;
        d. Suitability;
        e. Review process;
    ii. Allocations;
    iii. Possession claims;
        a. Notices;
        b. Article 8;
        c. Public law;
        d. Equality Act 2010;
        e. Other;
    iv. Housing benefit & welfare reform;
    v. A miscellany-at-law, of sorts;
        a. Public sector equality duty;
        b. Nuisance;
        c. Unlawful eviction;
        d. Adverse possession.

Homelessness

2. As is well known, the extent of the duty owed by a local housing authority to a homeless person under Housing Act 1996, Pt 7, depends on whether they are eligible for assistance, in priority need, and homeless intentionally.[1]

Eligibility

3. *Hines v Southwark LBC* [2014] EWCA Civ 660; [2014] HLR 32:
   3.1 H was a Jamaican citizen. She arrived in the UK in 2002. In October 2008, she gave birth to a son. The father had a permanent right of residence in the UK. In January 2009, H's permission to remain in the UK expired. Her relationship with the child's father broke down. The child lived with her but spent two nights a week with his father.
   3.2 H applied to Southwark. Southwark decided that H was not eligible for assistance, because if she had to leave the UK, the child's father could be expected to look after the child. She therefore did not have a right of residence under *Ruiz Zambrano v Office National de l'Emploi (ONEm) (C-34/09)* [2012] QB 265.
   3.3 H appealed to the county court and Court of Appeal (Sullivan, Patten & Vos LJJ), arguing that Southwark's decision should be subject to greater scrutiny than normally applies in s.204 appeals, because EU rights were engaged, and that Southwark had to consider whether it was in the child's best interests for H to remain in the UK.
   3.4 Vos LJ gave the only judgment in the Court of Appeal. He held that Southwark's decision did not need to be subjected to any more intensive degree of scrutiny than normally applies in s.204 appeals (applying *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] AC 430; [2003] HLR 32).
   3.5 Vos LJ also held that H only came within *Zambrano* if her child would be compelled to leave the country with her, which was not the position.

[1] Assuming, for present purposes, that the applicant is actually homeless. The "full" housing duty is only owed to those who are eligible, in priority need and not homeless intentionally: s.193(2).

3.6 This case was therefore a challenge to the authority's decision that someone was not a *Zambrano* carer. Accordingly it did not address the next problem, which is that even if someone is a *Zambrano* carer (as implemented in domestic law by Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), reg.15A(4A)) they are nonetheless excluded from assistance under Pt 7, 1996 Act by Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294), reg.6(1)(b).

4. The concept of *Zambrano* carers and the domestic regulations dealing with them have recently been the subject of argument before the Court of Appeal in the context of homelessness in the cases of *Sanneh v Secretary of State for Work and Pensions*; *R (HC) v Secretary of State for Work and Pensions* [2013] EWHC 3874 (Admin); *Merali v Birmingham CC*; *Scott v Croydon LBC*; *Sindimo v Nottingham CC*.

5. *Saint Prix v Secretary of State for Work and Pensions* Case C-507/12: In this case referred to the ECJ (by the Supreme Court: [2012] UKSC 49; [2013] 1 All ER 752; [2013] 1 CMLR 38), it was decided by the ECJ that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of 'worker' under EU law.

6. *Samin v Westminster CC* [2012] EWCA Civ 1468; [2013] HLR 7; [2013] 2 CMLR 6; [2013] Imm AR 375:
   6.1 This case concerned an Austrian citizen who had travelled to England in 2005 and not worked since 2006. He had been diagnosed with clinical depression and chronic PTSD.
   6.2 Westminster decided that S was not eligible for assistance because he was not temporarily unable to work as the result of an illness or accident and was therefore not a qualified person for the purposes of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Westminster's review officer considered whether the appellant's inability to work was or was not temporary. She decided that it was not temporary and S was therefore not eligible for assistance.

6.3 An appeal to the county court was dismissed, as was a further appeal to Court of Appeal (Hughes, Etherton & Tomlinson LJJ) dismissed the appeal.

6.4 The Court of Appeal said that, in considering whether a person is temporarily unable to work as the result of an illness or accident, it is generally helpful to ask whether there is or is not a realistic prospect of a return to work. This would be a question of fact in every case.

6.5 Westminster's review officer had asked herself the right question. S had scarcely worked at all during his time in the UK and it was wholly unrealistic to categorise him as a worker who was temporarily unable to work as the result of an illness.

6.6 An appeal from the Court of Appeal's decision is to be heard by the Supreme Court in March 2015.[2]

7. *R (Yekini) v Southwark LBC* [2014] EWHC 2096 (Admin):

7.1 Y was a *Zambrano* carer.[3] Southwark accepted that she was owed the full housing duty. Y was provided with hostel accommodation, but she was evicted from that due to rent arrears, which arose because she was not eligible for housing benefit.

7.2 Y asked Southwark to provide her with housing on the basis of a nil or peppercorn rent, relying on s.206(2)(a).[4] Southwark did not accept that s.206(2)(a) could be read so broadly.

7.3 Michael Fordham QC, sitting as a deputy High Court Judge, allowed Y's claim for judicial review. It was within the power conferred by s.206(2)(a) for a housing authority to charge a nil or peppercorn rent. However, a housing authority should only do so if it was satisfied that it was appropriate in the exercise of its discretion and judgment in the individual case.

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[2] Along with *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952.

[3] She was not excluded assistance under Pt 7 by Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294), reg.6(1)(b), because her application was made before the 2006 Regulations were amended.

[4] "(2) A local housing authority may require a person in relation to whom they are discharging such functions— (a) to pay such reasonable charges as they may determine in respect of accommodation which they secure for his occupation (either by making it available themselves or otherwise …"

7.4 Permission to appeal was granted by the Court of Appeal on 14 October 2014, but the case is, apparently, currently stood out awaiting the decision in *Sanneh*, *et al*.

Priority need

8. *Hotak v Southwark LBC* [2013] EWCA Civ 515; [2013] HLR 32; [2013] PTSR 1338; [2013] BLGR 781:
   8.1 H suffered learning difficulties which affected his ability to cope with daily living. He had self-harmed during a period spent in custody and had suffered symptoms of depression and post-traumatic stress disorder. H's brother gave him personal support on a daily basis, including prompting him in relation to personal hygiene and changing his clothes, and helping to organise health appointments, meals and finances, etc.
   8.2 Southwark decided that H was not in priority need as his brother provided support and assistance which was sufficient to overcome his various health problems.
   8.3 H's appeals to the county court and the Court of Appeal (Moore-Bick, Richards & Pitchford LJJ) were dismissed.
   8.4 The Court of Appeal said that the assessment process under s.189(1)(c) is not purely theoretical, but was an intensely fact sensitive and practical process. If the support provided by H's brother was ignored, the assessment would be conducted on a factual premise which was known to be untrue, which was not what was required by s.189(1)(c) required.

9. *Johnson v Solihull MBC* [2013] EWVA Civ 752; [2013] HLR 39:
   9.1 J was a recovering heroin addict and a persistent offender. Following an application as homeless, Solihull decided that he was not in priority need. In the reviewing officer's decision letter, she referred to Homeless Link's *Survey of Needs and Provision* 2010, which found that 92% of homelessness services worked with people experiencing problems with drugs. She concluded that J was not vulnerable as a result of his drug use.

9.2 After an unsuccessful appeal to the county court, J appealed to the Court of Appeal (Arden, Jackson & McCombe LJJ), who dismissed the appeal.

9.3 The comparator used in *R v Camden LBC ex p Pereira* (1998) 31 HLR 317 CA , is an "ordinary homeless person" not an ordinary person who is homeless, which was a necessarily imprecise concept.

9.4 The question of who is an ordinary homeless person and what characteristics they have is to be assessed in the real world. It was said to be unsurprising that many homeless persons have drug issues or that many homelessness services are involved with dealing with those issues.

9.5 Furthermore, Solihull's reviewing officer had been entitled to refer to the *Survey of Needs and Provision* to assist in determining the characteristics of an ordinary homeless person.

10. In *Kanu v Southwark LBC* [2014] EWCA Civ 1085; [2014] HLR 40, the Court of Appeal (Aikens, Kitchin & Underhill LJJ) allowed an appeal by the local housing authority, holding that where a disabled person applies for assistance under Pt 7, the authority are not required by the public sector equality duty (Equality Act 2010, s.149) to do more than they are required to do under 1996 Act. In particular, the PSED does not require an authority to secure accommodation for a disabled person in circumstances where his disability does not render him vulnerable.

11. *Hotak*, *Johnson* and *Kanu* are all to be heard by the Supreme Court on 15-17 December (by Lord Neuberger, Lady Hale, Lords Kerr, Clarke & Hughes).

12. *Ajilore v Hackney LBC* [2014] EWCA Civ 1273:

12.1 A had experienced a troubled childhood and youth. He had become involved with criminal gangs and was addicted to Class A drugs. He applied as homeless to Hackney and asserted that he was vulnerable because, if he were to be made street homeless, he would be at risk of committing suicide because he had suffered from depression. He also said that he would be at risk of relapsing to cocaine use. On the same day, Hackney decided that he was not in priority need.

12.2 Hackney's review officer upheld this decision, concluding that (a) there would be a risk of self-harm and suicide if A became street homeless but that was not anything different from that which ordinary street homeless people might suffer from, and that (b) A would be at risk of relapsing to the use of drugs, if he were made street homeless but that did not necessarily differentiate him from the other ordinary street homeless. In relation to (a), the review officer relied, in part, on a report in the British Medical Journal, but the officer misunderstood the statistics in it. In relation to (b), the officer relied in part on the *Survey of Needs and Provision*.

12.3 A's appeals were dismissed by the county court and by the Court of Appeal (Gloster, Underhill & Floyd LJJ). Before the Court of Appeal it was common ground that the reviewing officer had misunderstood the statistical evidence relating to self-harm in the homeless population. The Court of Appeal held that this did not, however, undermine Hackney's decision, which was not based wholly or principally on the statistics.

Homeless intentionally

13. *Noel v Hillingdon LBC* [2013] EWCA Civ 1602; [2014] HLR 10:

13.1 N rented a three-bedroom property at a monthly rent of £1,350. He was unemployed and received benefits of just over £1,000 per month. Although his benefits included housing benefit, he did not pass this on to the landlord and fell into substantial rent arrears. The landlord proposed a payment plan but N did not comply with this, so the landlord commenced possession proceedings.

13.2 N's partner moved in with him, but he did not apply for an increase in HB. In due course he was evicted. His rent arrears at that time were in excess of £14,000.

13.3 Hillingdon decided that N was homeless intentionally. The Court of Appeal. (Richards & Lewison LJJ & Coleridge J) dismissed an appeal. There had been two causes ofN's homelessness, one of which was his failure to apply for an increase in housing benefit when his partner moved in with him. There was no challenge to Hillingdon's conclusion that if he had done so he would

have been able to resolve the problem of his arrears, so Hillingdon had been entitled to conclude that the property was reasonable for him to continue to occupy and that he was intentionally homeless from it.

14. *Viackiene v Tower Hamlets LBC* [2013] EWCA Civ 1764; [2014] HLR 13:
    14.1 V held a joint AST. The rent was initially £1,560 per month, which was subsequently reduced by the landlord to £1,408 per month. V's arrangement with the other tenant was that she would pay £1,000 per month and he would pay the remainder. The other tenant lost his job and stopped paying his share of the rent. The landlord's agent suggested to V that they could help her find a replacement tenant to share the property with her, but she declined this offer. In due course she was evicted for rent arrears.
    14.2 Tower Hamlets decided that she was intentionally homeless because rent arrears had accrued and she had rejected the landlord's offer of assistance to find a new joint tenant. The Court of Appeal (Hallett & Sullivan LJJ & Arnold J) dismissed an appeal against this decision, holding that there was no reason to doubt the genuineness of the landlord's offer to assist V. Her conduct had been deliberate, irrespective of whether it was categorised as an act, in that she refused that offer, or an omission, in that she failed to accept it.
    14.3 Permission to appeal was refused by the Supreme Court on 30 October 2014, because the "decision ultimately turned on the facts as found by the officers".

15. *Balog v Birmingham CC* [2013] EWCA Civ 1582; [2014] HLR 14:
    15.1 B had lived in privately rented accommodation in Margate. He left that and applied to Birmingham as homeless. He said that he had left the Margate property because the landlord had told that he had to and because the property was in disrepair. Birmingham decided that he was homeless intentionally as their enquiries suggested that he had not been asked to leave and that any repairs that needed to be carried out were of a minor nature.

15.2 B requested a review. The review officer considered, amongst other things, that the property had been affordable for the appellant. Although the decision letter referred to various parts of the *Homelessness Code of Guidance for Local Authorities* (July 2006), it did not expressly refer to para.17.40.[5]

15.3 An appeal to the county court was allowed, on the basis that that the reviewing officer had failed to have regard to para.17.40 of the Code of Guidance, because there was no express reference to it, and had failed to consider whether paying his housing costs would leave B with less than the amount that would be payable in respect of income-based job seekers' allowance. Birmingham appealed to

15.4 The Court of Appeal (Sullivan, Kitchin & Briggs LJJ) allowed an appeal by Birmingham. The issue of affordability had been raised by the reviewing officer himself and it was reasonable to infer he had it at the forefront of his mind throughout the review. He had plainly had regard to the *Homelessness Code of Guidance for Local Authorities*. it was not surprising there was no express reference to para.17.40 of the Code of Guidance, given that B had never raised the issue of affordability.

15.5 Reviewing officers were not obliged to identify each and every paragraph of the Code of Guidance which had a bearing on their decision as that would impose a wholly unreasonable and unnecessary burden.

16. *Huzrat v Hounslow LBC* [2013] EWCA Civ 1865; [2014] HLR 17:

16.1 H lived with her husband and their two young children in privately rented accommodation. She received housing benefit, which left a shortfall of around £71.50 every four weeks. H failed to pay this shortfall and she was evicted when rent arrears accrued. She applied to Hounslow as homeless, but they decided that she was intentionally homeless, because she had not paid her rent.

16.2 H appealed to the county court, arguing that Hounslow had not discharged its duty under s.11, Children Act 2004, when deciding that she was

[5] Paragraph 17.40 recommends that authorities should "… 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".

intentionally homeless. That appeal was dismissed and she appealed to the Court of Appeal.

16.3. Moses, Beatson & Briggs LJJ dismissed the appeal, holding that the question that Hounslow had had to consider was whether anything was left for H to pay the rent after looking after her children reasonably. They had considered that question. Children Act 2004, s.11 did not add fresh criteria for determining whether an applicant was intentionally homeless.

17. *Farah v Hillingdon LBC* [2014] EWCA Civ 359; [2014] HLR 24.

17.1 F was was disabled and had three children. She received housing benefit and other welfare benefits. She fell into rent arrears and was evicted. She applied to Hillingdon. She completed an income and expenditure form which showed a weekly shortfall.

17.2 Hillingdon decided that F had become homeless intentionally. The decision letter acknowledged that her income did not meet her expenditure but stated that this included items which were not considered to be necessities, such as payments to a credit card and taking her children swimming. The decision letter also stated that some items in her expenditure were exaggerated but did not specify which items.

17.3 F asked for a review, which upheld the decision. An appeal to the county court was dismissed, but an appeal to the Court of Appeal was allowed by Longmore, Patten and Christopher Clarke LJJ, on the basis that Hillingdon's review decision simply adopted the analysis in the original decision. It did not review any of the conclusions in that decision, nor did it give any reasons for reaching the same conclusion.

18. *Haile v Waltham Forest LBC* [2014] EWCA Civ 792; [2014] HLR 37.

18.1 The concept of "becoming homeless intentionally" is defined in s.191, 1996 Act. It has its origins in Housing (Homeless Persons) Act 1977, s.17. In *Din v Wandsworth LBC* [1983] 1 AC 657; (1981) 1 HLR 73, a majority of the House of Lords held that, for the purposes of s.17, 1977 Act, the relevant time for considering whether it was reasonable to continue to occupy accommodation

was the moment when the applicant became homeless, even if they would have been unintentionally homeless later on in any event.

18.2 H had an AST of a bedsit in a hostel. It was a term of the tenancy agreement that only one person could occupy the room. H became pregnant. In October 2011, she moved out of the hostel, complaining about smells there. She applied to Waltham Forest as homeless.

18.3 In February 2012, H gave birth to a daughter. In August 2012, and then in January 2013 on review, Waltham Forest decided that H was intentionally homeless, as the smells had not been such that she had been justified in leaving the hostel.

18.4 An appeal to the county court was dismissed. H appealed again, arguing that *Din* should not be applied to the 1996 Act. The Court of Appeal (Jackson, Fulford & Christopher Clarke LJJ) disagreed. Jackson LJ gave the only judgment, in which he considered that *Din* remained binding. Waltham Forest had therefore been required to consider whether homelessness was intentional at the time that H left the bedsit, not at the date of either the s.184 or s.202 decisions.

18.5 Permission to appeal has been granted by the Supreme Court in *Haile*. The appeal is to be heard on 29 January 2014.

<u>Suitability</u>

19. *Slattery v Basildon BC* [2014] EWCA Civ 30; [2014] HLR 16.

19.1 In *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925; [2005] HLR 1, it was held that in deciding whether accommodation is suitable for an applicant who is a gypsy or traveller, an authority must give special consideration to securing accommodation that will facilitate his traditional way of life.

19.2 In *Sheridan v Basildon BC* [2012] EWCA Civ 335; [2012] HLR 29, the Court of Appeal held that a suitability review does not require a general inquiry into the adequacy of provision of sites for gypsies and travellers in the authority's district. Instead, a review of the suitability of an offer of accommodation is only concerned with whether the offer from within the authority's resources adequately meets that applicant's needs.

19.2 S was an Irish traveller who was lived with her son on an unauthorised caravan site in Basildon's area. She applied as homeless and was offered a tenancy of a three-bedroom house. She rejected the offer and requested a review of the suitability of the accommodation. The review upheld the decision and S then appealed to the county court.

19.3 In the county court, the circuit judge held that he was bound by *Sheridan* to conclude that the Basildon were not prevented from relying on the absence of caravan sites in their area by their alleged failure to exercise their powers to provide sites for caravans under Caravan Sites and Control of Development Act 1960, s.24. He dismissed the appeal.

19.4 S appealed to the Court of Appeal, arguing that *Sheridan* was inconsistent with *Codona*.

19.5 The Court of Appeal (Sullivan & Briggs LJJ & Arnold J) dismissed her appeal. The decision in *Codona* was concerned with the situation where there was no accommodation available that could be considered to be suitable, applying a *Wednesbury* standard of reasonableness. It was not concerned with the prior question of whether any available accommodation met that standard. There was no inconsistency between *Codona* and *Sheridan*.

20. *Khan v Solihull MBC* [2014] EWCA Civ 41; [2014] HLR 33:

20.1 K applied to Solihull as homeless, saying that she was not able to live in certain parts of their area, including Chelmsley Wood, due to fear of reprisals from her husband and a gang with which he was associated. Solihull accepted that they owed the full housing duty. They investigated K's claims that she was at risk from a gang but concluded that she was not at risk, because their community housing officers had no information about the alleged gang and she had not provided any details of any people associated with the gang. It was also noted that she had made unsuccessful bids for two different properties in Chelmsley Wood.

20.2 Solihull then offered K a property in Chelmsley Wood. She rejected the offer without viewing the property. Solihull then told her that the housing duty towards her had ceased. K requested a review, but the reviewing officer upheld the decision, concluding that the alleged gang did not exist.

20.3 An appeal to the county court did succeed, on the basis that Solihull should have told K that they were unable to find any evidence that the gang existed and that they had not accepted her reasons as to why parts of their area were unsafe for her before they made the offer of accommodation.

20.4 Solihull appealed to the Court of Appeal. K did not resist the appeal, as she had obtained accommodation elsewhere. Rafferty & Beatson LJJ & Sir Robin Jacob allowed Solihull's appeal. They were not required to give reasons in the offer letter stating why they considered that the accommodation was suitable and that the offer was reasonable for the appellant to accept. If K considered that the offer had been made in error, the onus was on her to raise the point with the authority rather than simply to refuse the offer.

21. In *Nzolameso v Westminster CC* [2014] EWCA Civ 1383, N challenged an offer of out-of-borough accommodation. The Court of Appeal said that a housing authority was not obliged to consider only those factors relating to the particular applicant when deciding whether it was reasonably practicable to make an offer of accommodation within its own district, but was entitled to have regard to all factors that had a bearing on its ability to provide accommodation to an applicant person, including the demands made upon it and the pressures on its resources, whether of a financial or administrative nature.

Reviews

22. In *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB); [2014] PTSR 662; [2014] BLGR 100, Jay J held that held that the authority did not lawfully contract out its homelessness review decisions because the relevant authorisation should have been given by the Cabinet and not the Council. Welwyn Hatfield, however, retrospectively ratified the authorisation so that its review decisions were not unlawful. A permission hearing in the Court of Appeal has been listed for 27 November.

23. *Mohamoud v Birmingham CC* [2014] EWCA Civ 227; [2014] HLR 22:

23.1 M applied to Birmingham for assistance. The authority accepted that they owed the full homelessness duty, and informed her that they would make one offer of accommodation in order to discharge that duty. It was explained that properties were advertised each week and that she would be able to bid for a maximum of three properties each week; alternatively, the authority could bid on her behalf. At the end of each week, the property would be offered to the person with the highest priority, which may or may not be her.

23.2 In due course, a final offer was made to her. She declined the offer because the flat was too small and she did not want to live in a high-rise flat. Birmingham decided that it was suitable and that, as a result, they had discharged their duty under s.193.

23.3 M requested a review. She said that she had misunderstood what she had originally been told by Birmingham and that she had thought that she would receive up to three offers of accommodation. She suggested that the confusion could have arisen because English was not her first language. The review officer upheld the original decision.

23.4 M appealed to the county court, contending that the authority's knowledge of her confusion and limited command of English comprised matters which should have engaged Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71), reg.8(2). That argument failed in the county court, but succeeded on a further appeal to the Court of Appeal (Moore-Bick & McFarlane LJJ & Proudman J).

23.5 The Court of Appeal held that the essence of M's case was that she had been confused and rejected the offer under a misapprehension. If that was true, and if it had been drawn to the attention of the original decision maker, it might have led to a different conclusion; the review officer should have accepted that there was a deficiency in the original decision and that reg.8(2) was engaged.

24. In *Temur v Hackney LBC* [2014] EWCA Civ 877; [2014] HLR 39, the Court of Appeal held that there was nothing in the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71) preventing a reviewing officer from making a decision which was less favourable to an applicant than the original

decision, even if circumstances have changed between the date of the original decision and the date of the review.

Allocations

25. *R (Alansi) v Newham LBC* [2013] EWHC 3722 (Admin); [2014] HLR 25; [2014] PTSR 948:
    25.1 Newham operated an allocations scheme, which included a system of priorities comprising three groups of applicant and a system of bidding for properties by way of choice-based lettings. The Priority Homeseeker group, which included homeless applicants, had the highest level of preference. The lowest level of preference was afforded to those in the Homeseeker group.
    25.2 Newham also administered a Bond Scheme, under which they secured the provision of accommodation from private sector landlords, facilitated by the authority providing a bond to the landlord to secure the payment of rent and performance of the tenant's covenants. The allocations scheme did not include any provision for retention of Priority Homeseeker status by applicants housed under the Bond Scheme who thereby had ceased to be homeless.
    25.3 In January 2005, A applied to Newham as a homeless person. Newham accepted that she was owed the full duty under s.193(2), 1996 Act. She was provided with temporary accommodation and registered on the waiting list for an allocation of housing accommodation under Pt 6.
    25.4 In January 2009, Newham told A that she would be nominated for a move to alternative temporary accommodation. She was also informed that, because there was a long waiting list for accommodation, she would be rehoused more quickly if she opted for the Bond Scheme, but that she would still retain the right to bid for permanent council accommodation and her Priority Homeseeker status.
    25.5 A then accepted a tenancy of a house provided under the Bond Scheme. Newham subsequently told her that its duty under s.193(2) had come to an end, but that she retained her Priority Homeseeker status.
    25.6 In 2012 Newham consulted on the introduction of a new allocations scheme. It was proposed that the circumstances of existing waiting list applicants housed under the Bond Scheme would be re-assessed. Newham said that

this might mean the loss of their priority and that there were around 400 applicants in this category.

25.7 Newham's Cabinet approved the adoption of a new allocations scheme, which contained seven categories of priority. Members or former members of the Armed Forces, who satisfied certain criteria, were given the highest priority, while those applicants in the Priority Homeseeker or Transfer groups who were in employment were given priority over other applicants, including those in the Homeseeker group.

25.8 Newham told A that, following the adoption of the new allocations scheme, she had been assessed as being in the Homeseeker group and no longer had a reasonable preference. A brought judicial review proceedings alleging that the authority had breached her legitimate expectation that she would retain Priority Homeseeker status.

25.9 Stuart-Smith J dismissed the claim for judicial review.

25.10 Contrary to Newham's argument, the approach, set out in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, HL, to the interpretation of contractual documents prepared by persons who are intent on entering into contractual relations is not directly transferrable to the interpretation of statements by public bodies said to give rise to a legitimate expectation. Instead, the court should ascertain the meaning which a public body's statements would reasonably convey to a claimant in the light of all of the background knowledge which they had in the situation that they were in at the time that the statements were made.

25.11 The representations and assurances made by Newham to A were clear and unambiguous, to the effect she would retain Priority Homeseeker status and would be entitled to bid for permanent accommodation. There was however, no assurance that Newham would not change A's level of priority within the Priority Homeseekers category so that her prospects of obtaining permanent housing were significantly reduced.

25.12 Newham's action had not bee an unlawful abuse of power. It was a proportionate response to a pressing and widespread social problem, which struck a proper balance between the competing claims of many different interests

25.13 Permission to appeal to the Court of Appeal was refused by Fulford LJ on 12 May 2014: [2014] EWCA Civ 786.

26. *R (Jakimaviciute) v Hammersmith & Fulham LBC* [2014] EWCA Civ 1438:

26.1 Hammersmith & Fulham adopted a new allocation scheme in April 2013. Under the scheme, only those who fell within s.166A(3), 1996 Act qualified for an allocation. Among the people who did not qualify for an allocation was a class under para.2.14(d) of the scheme, which included those who were in long-term suitable temporary accommodation under the main homelessness duty.

26.2 Hammersmith & Fulham introduced this class because such applicants were not in such high housing need as others by reason of the accommodation provided to them. After the scheme was adopted, an updated equality impact assessment by the local authority indicated that the majority of applicants falling within s.166A(3)(b) had been excluded under para.2.14(d) because they were in long-term suitable temporary accommodation.

26.3 J issued judicial review proceedings, arguing that para.2.14(d) of the scheme was unlawful because it was in breach of s.166A(3)(b). Permission to bring the claim was refused by the Administrative Court, but was granted by the Court of Appeal which also directed that it should hear the claim because of the importance of the issues.

26.4 At the substantive hearing, the Court of Appeal (Richards, Tomlinson & Bean LJJ) allowed the claim for judicial review. The discretion under s.160ZA(7) to decide what classes of person were, or were not, qualifying persons was subject to the duty under s.166A(3). Although the objectives of the scheme had not been subject to a rationality challenge, there had been a breach of the duty because para.2.14(d) was fundamentally at odds with it and the exclusion of the great majority of people within s.166A(3)(b) did not sit with Parliament's decision to define the s.166A(3)(b) class as it did.

Possession claims

Notices

27. *Spencer v Taylor* [2013] EWCA Civ 1600; [2014] HLR 9; [2014] L&TR 21:
    27.1 In this case, the Court of Appeal decided that there are three requirements for a valid notice under Housing Act 1988, s.21(1).
    27.2 First, that the fixed-term assured shorthold tenancy had come to an end.
    27.3 Secondly, that no further assured tenancy, other than a periodic assured shorthold tenancy was in existence.
    27.4 Thirdly, that the landlord had given two months' notice.
    27.5 Although s.21(2) provides that a notice under s.21(1) may be given before or on the day on which the fixed-term tenancy comes to an end, the permissive terms of s.21(2) could not be read as prohibiting a notice under s.21(1) from being given after the fixed-term tenancy has come to an end.
    27.6 The Supreme Court has refused permission to appeal.

28. *Masih v Yousaf* [2014] EWCA Civ 234; [2014] HLR 27; [2014] L&TR 18:
    28.1 Y granted M an AST. M fell into rent arrears and Y served a notice under Housing Act 1988, s.8. Y's notice relied on Ground 8 and set out the amount of rent said to be owed, but failed to state that for the purpose of ground 8 rent meant "rent lawfully due from the tenant".
    28.2 A DJ made a possession order. An application to set aside the order was dismissed. A CJ dismissed an appeal. M appealed to the Court of Appeal, arguing that a strict approach to the validity of notices had to be taken in cases where a mandatory ground was relied on.
    28.3 The Court of Appeal (Hallet, Davis & Floyd LJJ) disagreed and dismissed the appeal.

28.4 First, they considered that there were no circumstances where rent is owed but is not lawfully due. A s.8 notice which stated that rent was owed was sufficient notice to enable a recipient to appreciate that it would be an answer to the claim to show that the rent was not lawfully due.

28.5 Secondly, there was no reason to take a stricter approach to the validity of the notice where a mandatory ground was relied upon than where a discretionary ground was relied upon.

Article 8

29. *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231; [2014] HLR 23, concerned a second appeal against the dismissal of a possession claim against an Introductory Tenant. The Court of Appeal dismissed the appeal, saying that the question for an appellate court was not whether it would have reached the same decision as the trial judge but whether the decision was one that had been open to her. Where (as happened in this case) an introductory tenant's behaviour improves over time, that improvement is capable of being a factor in deciding whether it is disproportionate for their landlord to continue to insist on recovering possession. The trial judge had therefore been entitled to come to the conclusion that it had become disproportionate to make a possession order.

30. In *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch), the High Court accepted that an Art.8 defence was in principle available in a possession claim brought by a private landowner.

31. In *McDonald v McDonald* [2014] EWCA Civ 1049; [2014] 2 P&CR 20, however, the Court of Appeal disagreed. There was no line of clear and consistent jurisprudence from the ECtHR that the right to raise an Art.8 proportionality defence extended to tenants of private landlords. In particular, there was no Grand Chamber authority in support of this proposition.

32. *R (CN) v Lewisham LBC; R (ZH) v Newham LBC* [2014] UKSC 62:

32.1 This is not a pure Art.8 case – the first issue was whether the temporary accommodation occupied by the homeless applicants came within the remit of the Protection from Eviction Act 1977 because they occupied it as a dwelling for the purposes of s.3. On this point, the Supreme Court split 5-2.

32.2 Lord Hodge (with whom Lords Clarke, Wilson, Carnwath & Toulson agreed) held that the licences granted to ZH and CN were not licences to occupy premises as a dwelling. The statutory context required short term accommodation for a short and determined period. It would significantly hamper the operation of Pt 7, 1996 Act, if such temporary accommodation was within the terms of s.3, 1977 Act.

32.3 Lord Neuberger & Lady Hale dissented on this issue, holding that s.3, 1977 Act was provision was aimed at protecting anyone who had been lawfully living in premises which had been let as a dwelling. The words should be given a wide, rather than narrow meaning. Temporary accommodation under Pt 7 was a short term dwelling, but a dwelling nonetheless.

32.4 There was less disagreement on the second issue, Art.8. Contrary to the appellants' arguments, Art.8 did not always require a public authority to obtain a possession order. Lord Hodge (with whom Lords Neuberger, Clarke, Wilson, Carnwath & Toulson agreed) considered that the statutory scheme had to be seen as a whole. In particular, an applicant would have been given reasons for an adverse decision and the opportunity for it to be reviewed and considered on appeal. Homeless children and families would additionally be likely to qualify for support from social services.

32.5 At [71] it was said that "it is necessary … to interpret section 204 of the 1996 Act as empowering that court to assess the issue of proportionality of a proposed eviction following an adverse section 184 or 202 decision (if the issue is raised) and resolve any relevant

dispute of fact in a section 204 appeal. As there is no other domestic provision involving the court in the repossession of the accommodation after an adverse decision, the section 204 appeal, which reviews the authority's decision on eligibility for assistance, is the obvious place for the occupier of the temporary accommodation to raise the issue of the proportionality of the withdrawal of the accommodation."[6]

32.6 Lady Hale considered that it was not necessary to reach a conclusion on Art.8.

33. *Dacorum BC v Sims* [2014] UKSC 63:

33.1 Dacorum BC granted a joint tenancy of a three-bedroom house to Mr & Mrs S. The tenancy agreement permitted a joint tenant to serve notice to quit and determine it.

33.2 After alleged domestic violence, Mrs S left the property in 2010 with two of their four children. She sought to be re-housed by another authority, who told her that she would not be re-housed whilst she held a tenancy with Dacorum. She told Dacorum that she wanted to give up her tenancy and Dacorum suggested that she serve notice to quit, which she did.

33.3 Mr S asked Dacorum to let him stay in the property and transfer the tenancy into his sole name. They refused and subsequently issued possession proceedings. These were defended on the basis that the rule in *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478; (1991) 24 HLR 206, HL was incompatible with Art.8. A possession order was made by a Deputy District Judge. Mr S appealed to the Circuit Judge who granted permission for a leapfrog appeal to the Court of Appeal. That appeal was dismissed: [2013] EWCA Civ 12; [2013] H.L.R. 14.

[6] This point is of considerable potential significance; so much so, that one comment on the Supreme Court decision was simply called *Paragraph 71*: http://nearlylegal.co.uk/blog/2014/11/paragraph-71/. The only arguable improvement to that would have been to simply title it *[71]*.

33.4 Mr S appealed to the Supreme Court, contending that the rule in Monk was incompatible with Art.8 and/or A1/P1.

33.5 The Supreme Court (Lord Neuberger, Lady Hale, Lords Clarke, Wilson, Carnwath, Toulson & Hodge) dismissed the appeal. Lord Neuberger gave the only judgment.

33.6 The rule in I was not incompatible with A1/P1. It had always been the case that the tenancy could be determined by his wife giving notice to quit and Mr S had therefore lost his tenancy in circumstances and in a manner which was specifically provided for in the agreement.

33.7 There was also no violation of Art.8. Mr S had been entitled to raise a proportionality defence in the county court and had done so. The Deputy District Judge had considered all relevant factors and found it proportionate to grant a possession order.

34. Finally, in *JL v UK* App no 66387/10, the ECtHR has ruled inadmissible a challenge to the decision in *R (JL) v Secretary of State for Defence* [2013] EWCA Civ 449; [2013] HLR 27; [2013] PTSR 1014 (a case where the occupier had not been able to raise a proportionality defence to the claim for possession due to the state of domestic law prior to *Pinnock*, but had been allowed to raise issues of proportionality in judicial review proceedings before the order was enforced (although on the facts it did not assist her)).

Public law defences

35. *Leicester v Shearer* [2013] EWCA Civ 1467; [2014] HLR 8.[7]

35.1 S's husband was Leicester's secure tenant. He had acquired the secure tenancy by succession (so there could not be a further statutory succession). S and her two children subsequently left the property due to domestic violence. Her husband later committed suicide. She moved back into the property with her children and told Leicester that she would like to stay there

[7] The Court of Appeal's decision was handed down on 19 November 2013 and therefore this case only qualifies for inclusion here by application of some sort of a year-and-a-day rule.

as a tenant. She also submitted an application to be accommodated by Leicester. Leicester's allocations policy contained provision for direct lets to made to applicants in exceptional circumstances.

35.2 S was told, wrongly, that she could not be granted a tenancy of the property. She therefore did not provide the necessary documentation in support of her application.

35.3 Leicester issued possession proceedings, which were dismissed at trial. The Court of Appeal (Jackson & Floyd LJJ & Sir David Keene) dismissed Leicester's appeal. S had been prevented from providing the necessary supporting evidence by the misleading advice that she had been given. It was not open to a public authority to rely upon an applicant's non-compliance with procedural requirements, when the authority has caused that non-compliance.

35.4 Furthermore, the facts of the case constituted exceptional circumstances which merited consideration under Leicester's allocations scheme, so that Leicester had acted unlawfully in commencing the possession proceedings without giving any proper consideration to the option of making a direct let to S.

Equality Act 2010

36. Equality Act 2010, s.15 introduced a new form of protection for disabled persons, discrimination arising from disability:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

37. The role of s.15 in possession proceedings has now been considered by the Court of Appeal in *Aster Communities Ltd v Akerman-Livingstone* [2014] EWCA Civ 1081; [2014] 1 WLR 3980.

    37.1 The defendant suffered from prolonged duress stress disorder. In 2010, he applied to Mendip DC as homeless. They arranged for a housing association to provide him with temporary accommodation.

    37.2 In 2011, Mendip offered A-L another property. He refused that property and Mendip decided that their duty towards him had ended. Aster commenced proceedings for possession. A-L applied to Mendip again and the possession proceedings were adjourned. Mendip made him an offer of another property. He failed to respond and Mendip decided that their duty towards him had come to an end again.

    37.3 The possession proceedings were restored. A-L contended that he had not responded to Mendip's offer of accommodation because of his disability and that Aster were unlawfully discriminating against him, contrary to Equality Act 2010, s.15, by seeking to evict him.

    37.4 A circuit judge decided that the defendant did not have a seriously arguable case that A-L had breached s.15, 2010 Act, and made a possession order rather than give directions for a trial. An appeal to the High Court was dismissed. A-L appealed again. The Court of Appeal (Arden, Black & Briggs LJJ) dismissed the appeal.

    37.5 In a claim for possession, the approach to a defence based on s.15, 2010 Act, is the same as that applied to a defence based on Art.8, ECHR. In most cases, the countervailing interests of a social landlord in obtaining possession will outweigh those of a defendant seeking to rely on s.15. The Court of Appeal considered that for such a defence to succeed, an occupier will need to show some considerable hardship which they cannot fairly be asked to bear.

    37.6 Permission to appeal to the Supreme Court was refused by the Court of Appeal, but granted within a matter of hours by the Supreme Court. That appeal is now listed to be heard on 10 December 2014 (by Lord Neuberger, Lady Hale, Lords Ker, Clarke & Hughes).

Others

38. In *Northumberland & Durham Property Trust Ltd v Ouaha* [2014] EWCA Civ 571; [2014] HLR 31, the Court of Appeal held that the phrase "the surviving spouse" in Rent Act 1977, Sch.1, para.2, contemplated a person relying on a marriage ceremony that was valid in the country in which it took place. On the facts of the case, the evidence showed that there had not been a formal marriage ceremony recognised in England so the appellant was not the deceased tenant's surviving spouse.

39. In *Birmingham CC v Beech* [2014] EWCA Civ 830; [2014] HLR 38, the Court of Appeal held that the relationship between the authority, through its housing officer, and one of its tenant was not inherently a relationship of trust and confidence so as to give rise to a presumption of undue influence (nor did any such relationship arise on the facts of the case). Instead, there was a contractual and property relationship under which each party had separate and distinct rights and obligations in relation to the other. In that context, the signing of a notice to quit by a former secure tenant, who was no longer able to reside in the property was not an unusual or unexpected transaction which, under the doctrine of presumed undue influence, called for an explanation.

40. *Scott v Southern Pacific Mortgages* [2014] UKSC 52 concerned the sale-and-leaseback scheme run by North East Property Buyers. The Supreme Court held that the vendor/occupier had acquired no more than personal rights against the nominee purchaser when she agreed to sell her house on the basis of promises that she would be entitled to remain in occupation. Her personal rights would only become proprietary and capable of taking priority over a mortgage when the purchaser acquired the legal estate. Applying *Abbey National Building Society v Cann* [1991] AC 56, HL, an interest that only arose on completion could not be asserted by the vendor/occupier against the purchaser's mortgagee.

41. *Telchadder v Wickland (Holdings) Ltd* [2014] UKSC 57; [2014] 1 WLR 4004:

41.1 W owned a mobile home site known, which was a protected site for the purposes of the Mobile Homes Act 1983. In June 2006, T was granted a licence to site his mobile home on a plot on at that site. The terms of the licence agreement provided that he would not be a nuisance or cause annoyance, inconvenience or disturbance to the claimant, or other occupiers of the site.

41.2 T had a strong interest in martial arts and weapons, and liked to dress in camouflage clothing and wander in the woods near the site. While dressed in camouflage clothing the defendant approached other residents of the site and caused them alarm or distress.

41.3 Between July 2006 and August 2008, W sent a number of warning letters to T, including one in August 2006 which said W would apply to the court to have his licence terminated and his mobile home removed from the site.

41.4 In July 2009, T approached a resident and made threats to kill him and two other residents. W issued proceedings in September 2009.

41.5 The Supreme Court held that where an application to court to terminate a licence agreement with an occupier of a mobile home protected under the 1983 Act was based on an alleged failure to remedy a breach of a covenant against anti-social behaviour within a reasonable time and the mischief resulting from the breach was of a type which could be redressed by the person desisting from any repeat of the behaviour for a reasonable time, it was open to the court to find that the notice to remedy had lapsed once a reasonable time had passed without further incident. In this case, T redressed the mischief resulting from the 2006 breach by not committing a further breach prior to 2009.

42. Finally under this heading, the Court of Appeal is to consider the correct approach to discretionary possession orders where the tenant has not been responsible for anti-social behaviour in *Greenwich RLBC v Tuitt*, to be heard on 24 or 25 November.

Housing benefit & welfare reform

43. The two key welfare reforms affecting housing are the bedroom tax and the benefit cap. One challenge to the benefit cap (*R (SG) v SSWP*) has been heard by the Supreme Court and is awaiting judgment (to be handed down on 19 November). Numerous challenges to the bedroom tax have been launched and are at different stages (*R (MA) v SSWP*; *Rutherford v SSWP*; *R (Cotton) v SSWP*; and, *R (A) v SSWP*).[8]

Benefit cap

44. Power to a "benefit cap" is contained in Welfare Reform Act 2012, s.96. In exercise of the power contained in 2012 Act, s.96. In exercise of that power the Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994) were made on 29 November 2012, coming into force on 15 April 2013.

45. The 2012 Regulations amended the Housing Benefit Regulations 2006 (SI 2006/213) to implement the benefit cap by reducing the housing benefit payable to a claimant if their total entitlement to welfare benefits exceeds the relevant amount so that the amount paid to them does not exceed that amount: reg.75D, 2006 Regulations. The relevant amount is £350 per week for single claimants and £500 per week for all other claimants: reg.75G.

46. *R (SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156; [2014] HLR 20; [2014] PTSR 619; [2014] HRLR 10.
    46.1 In each case, the claimants were a mother and child from a lone parent family. The mothers all received HB. Their HB payments were reduced when the benefit cap came into force.

[8] There is no space or time here for the many First-tier Tribunal decisions on the application of the bedroom tax to an individual case. Many of them have been collated at http://nearlylegal.co.uk/blog/bedroom-tax-ftt-decisions/.

46.2 For different reasons, each of the claimants said that they could not mitigate the effects of the cap by finding work or moving home. The claimants issued judicial review proceedings, arguing that the benefit cap was unlawful.

46.3 Their claim for judicial review was dismissed by the Divisional Court (Elias LJ & Bean J): [2013] EWHC 3350 (QB); [2014] PTSR 23.

46.4 On an appeal to the Court of Appeal, the Secretary of State conceded that the benefit cap had a disproportionately adverse effect on women, as women were more likely than men to be in receipt of benefits.

46.5 The Court of Appeal (Lord Dyson, Longmore & Lloyd Jones LJJ) nonetheless dismissed the claimants' appeal.

46.6 The benefit cap discriminated against women when Art.14, ECHR was read with A1P1. The issue was whether that discrimination was justified. In that regard the cap was an aspect of social policy on the distribution of state benefits. The essential controversial issues were said to have been debated in Parliament. The 2012 Regulations had been approved by affirmative resolutions of both Houses. All of this pointed to the discrimination being justified as it was not manifestly without reasonable foundation.

46.7 Art.8 was engaged, but there was no breach of Art.8 taken with Art.14 for the same reasons. Nor, in the claimants' circumstances, was there any breach of Art.8 taken on its own.

46.8 There had been no breach of Art.3(1), UNCRC as the rights of the child had been forefront of the decision-maker's mind.

46.9 The principle of the cap, the detailed policy, and the level of the cap had all been subject to detailed Parliamentary scrutiny. It could not be said that the Secretary of State had failed to gather sufficient information to ensure that his decision was properly informed so as to render the scheme irrational.

46.10 An appeal has been heard by the Supreme Court. Judgment was to be handed down on 19 November. On 18 November, however, the Supreme Court announced that this was being postponed to allow further written submissions to be conceded.

Bedroom tax

47. On 1 April 2013, the Housing Benefit Regulations 2006 (SI 2006/213) were amended to introduce new regs A13 & B13. The effect of those is that a "maximum rent (social sector)" has to be determined for HB claimants in social housing. The maximum rent (social sector) is fixed by reducing a claimant's eligible rent by 14% if they are under-occupying one bedroom and 25% if they are under-occupying two or more bedrooms: reg.B13.

48. *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13; [2014] HLR 19; [2014] PTSR 584:
    48.1 All of the claimants had had their HB reduced following the application of reg.B13. All but one of them argued that they needed an extra bedroom because another member of their household was disabled. In the other case, the claimant suffered from obsessive compulsive disorder and had filled two rooms with papers. He argued that this meant that he could not move to smaller accommodation.
    48.2 It was argued that reg.B13 constituted to unlawful discrimination contrary to art.14, ECHR, when read with A1P1 and that there had been a breach of the public sector equality duty (Equality Act 2010, s.149) when reg.B13 had been introduced.
    48.3 The Divisional Court (Laws LJ & Cranston J) rejected these arguments: [2013] EWHC 2213 (QB); [2013] PTSR 1521.
    48.4 The Court of Appeal (Lord Dyson, Longmore & Ryder LJJ) dismissed the claimants' appeal.
    48.5 First, when considered as part of a scheme, including the availability of discretionary housing payments, reg.B13 plainly discriminates against those disabled persons who have a need for an additional bedroom by reason of their disability as compared with non-disabled persons who do not have such a need. The central question, however, is whether that discrimination is justified; in that regard the test is whether it is manifestly without reasonable foundation (see *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545).

48.6 On that point, the discriminatory effect had been justified. The Secretary of State had been entitled to take the view that it was not practicable to add an imprecise class of persons - those who need extra bedroom space by reason of disability - to whom the bedroom criteria would not apply.

48.7 Furthermore, the nature of a person's disability and disability-related needs may change over time (even over a period of a few weeks), which meant that, if disability-related needs for more accommodation were to be dealt with by additional housing benefit, this would increase the administrative time and costs significantly, while the greater flexibility of DHPs was more appropriate in some cases.

48.8 Secondly, while it is insufficient for a decision-maker to have a vague awareness of his legal duties in order to comply with the PSED, the history of the evolution of the policy behind reg.B13, including detailed memoranda and an Equality Impact Assessment, showed that the Secretary of State understood that there were some disabled persons who, by reason of their disabilities, had a need for more space than was deemed to be required by their non-disabled peers. The question of how this special need should be accommodated in the proposed new scheme had been the subject of wide consultation of interested parties and considered in great detail by the Secretary of State and Parliament. There had therefore not been a breach of the PSED.

48.9 An application for permission to appeal has been made to the Supreme Court. No decision has yet been made on that application, which is presumably awaiting the outcome of *R (SG)*.

49. In *Rutherford v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin),[9] Stuart-Smith J held that the bedroom tax scheme did not unlawfully discriminate against a family with a disabled child who required an additional

[9] The transcript records the neutral citation as [2014] EWHC 1613 (Admin), although this appears to have been subsequently corrected to [2014] EWHC 1631 (Admin). Something clearly went wrong, as there is another case with the citation [2014] EWHC 1613 (Admin) (*Sohal v Solicitors Regulation Authority*), in addition to a case with the citation [2014] EWHC 1613 (Ch) (*Lindum Construction Co Ltd v Office of Fair Trading*), contrary to *Practice Direction (Judgments: Neutral Citations)* [2002] 1 WLR 346.

bedroom where the shortfall between rent and housing benefit was covered by discretionary housing payments.

50. In *R (Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin), Males J held that the bedroom tax scheme also did not breach the Art.8 rights of single parents who looked after their children under shared care arrangements where they received discretionary housing payments to make up the shortfall.

51. Finally, *R (A) v Secretary of State for Work and Pensions*, on whether the bedroom tax has a disproportionate impact upon victims of domestic violence living in Sanctuary Schemes,[10] is to be heard on 19 & 20 November.

[10] See, *e.g.*, DCLG, *Sanctuary Schemes for Households at Risk of Domestic Violence: Practice Guide for Agencies Developing and Delivering Sanctuary Schemes* (2010).

Miscellaneous

Public sector equality duty

52. *Swan Housing Association v Gill* [2013] EWCA Civ 1566; [2014] HLR 18:

52.1 G was Swan's tenant of a ground-floor flat in a converted house. Swan issued proceedings for an ASBI. G said in a witness statement that he had Asperger syndrome but did not file any evidence to support that claim. When giving his oral evidence, he said that his Asperger syndrome did not affect any of the issues in the case.

52.2 The District Judge raised the possibility that Swan might have breached the public sector equality duty in Equality Act 2010, s.149. Although the judge found that G had had been guilty of conduct capable of causing a nuisance and annoyance to others, he dismissed the claim for an ASBI because he was satisfied, however, that G had a disability and that, after Swan had received G's witness statement, it should have reviewed its claim to see whether a different option was available.

52.3 Swan appealed to the Court of Appeal. G conceded that, in the absence of medical evidence, the judge had not been entitled to conclude that G had a disability. The judge's decision was, nonetheless, said to be correct because Swan had been aware that it was likely that G had a disability and that likelihood was sufficient to engage the PSED.

52.4 The Court of Appeal allowed the appeal. Coleridge J said that, in light of G's evidence of the limited effects of his Asperger syndrome and assuming that the likelihood of G having a disability did engage the PSED, it would have been a very brief exercise for Swan to comply with the PSED, which had no material bearing on the facts of the case.

52.5 Lewison LJ (with whom Richards LJ agreed on this point) said that the mere likelihood of having a disability did not engage the PSED and as there was no evidence to support the conclusion that G had a disability, Swan had not breached the PSED.

52.6 The Supreme Court refused permission to appeal on 30 October 2014, saying that "Coleridge J was right"[11] and that G's "own evidence was that his condition had no effect on his conduct".

Nuisance

53. *Coventry v Lawrence* is not a typical housing law case, but across two judgments ([2014] UKSC 13; [2014] AC 822; [2014] HLR 21; [2014] PTSR 384; [2014] UKSC 46; [2014] 3 WLR 555; [2014] PSTR 1014), the Supreme Court made a number of important points regarding nuisance.

53.1 It is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise.

53.2 Where a claimant in nuisance uses his property for essentially the same purpose as that for which it has been used by his predecessors since before the alleged nuisance started, it is no defence to the nuisance claim to say that the claimant came to the nuisance. A defence may, however, arise if it is only because the claimant has changed the use of his land that the defendant's pre-existing activity is claimed to have become a nuisance.

53.4 The fact that a landlord does nothing to stop a tenant from causing nuisance cannot amount to participating in the nuisance. Absent very unusual circumstances, the fact that a landlord takes steps to mitigate a nuisance cannot give rise to an inference that he has authorised it.

53.5 A landlord cannot be said to be participating in or authorising a nuisance by trying to fight off allegations of nuisance against his tenants

[11] Without commenting on whether this meant that Lewison & Richards LJJ were wrong insofar as their reasoning was slightly different.

Unlawful eviction

54. *Loveridge v Lambeth LBC* [2013] EWCA Civ 494; [2013] 1 WLR 3390; [2013] HLR 31:

54.1 L was a secure tenant of Lambeth. In July 2009, L went to Ghana. In September 2009, Lambeth forced entry to the flat because they were concerned that he may have died. L's possessions were then cleared out and the flat was prepared for re-letting. In December 2009, L returned from Ghana, three days before Lambeth let the flat to a new tenant. L attempted to contact Lambeth to let them know he had returned, but his message did not get through before the property was re-let.

54.2 L issued a claim for damages under Housing Act 1988, ss.27 & 28. Both parties obtained expert evidence on the amount of statutory damages under s.28.

54.3 Lambeth's expert considered that a notional open market sale would result in the occupier becoming an assured tenant. In his view, a private purchaser would pay the same for the building with an assured tenant in the flat as he would pay for it with the flat vacant. He considered that there was therefore no difference in value.

54.4 L's expert considered that the purchaser should be deemed to take the building subject to an on-going secure tenancy of the flat. In his opinion, the difference in value was therefore £90,500.

54.5 The trial judge held that L's expert had valued the property on the correct basis and awarded him £90,500 pursuant to s.28.

54.6 The Court of Appeal (Arden & Briggs LJJ & Sir Stanley Burnton) allowed Lambeth's appeal.

54.7 Two valuations of the landlord's interest in the building, by reference to the date immediately prior to the eviction, were required by s.28. By virtue of s.28(3), both valuations must assume that the landlord is selling his interest on the open market to a willing buyer. Any prohibitions on the landlord's power to sell the property or, as in the present case, any constraints on its power to sell to a private landlord are irrelevant.

54.8 In the case of an unlawful eviction of a secure tenant, the valuer must take into account the fact that, on the sale by a local authority of their interest to a private landlord, a secure tenancy becomes an assured tenancy. The vulnerability of a secure tenant to being downgraded to an assured tenant on an open market sale is inherent in his rights. This is particularly so given that, on an open market sale, the highest bidder is likely to be a private landlord rather than a local authority.

54.9 An appeal was heard by the Supreme Court (Lords Neuberger, Wilson, Sumption, Carnwath & Toulson) on 21 October and judgment is awaited.

Adverse possession

55. Finally, in this miscellany of sorts,[12] in *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin), Ousely J held that the chief land registrar had been wrong to refuse a squatter's application for adverse possession under Land Registration Act 2002, Sch.6, on the basis that his occupation of the property had constituted a criminal offence under Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.144. An appeal is due to be heard by the Court of Appeal on 19 & 20 November.

ROBERT BROWN
ARDEN CHAMBERS

18th NOVEMBER 2014

[12] And saving *Best* for last.