# Housing Law Practitioners' Association

## Minutes of the Meeting held on 16 November 2016
## University of Westminster

# Housing Law Update

Speakers: **John Gallagher, Shelter**
**Sarah McKeown, Arden Chambers**

Chair: **Simon Marciniak, Miles & Partners**

**Chair**: Good evening everyone and welcome to tonight's meeting which is a Housing Law Update. My name is Simon Marciniak and I am chair of HLPA. Firstly I would like to ask if anyone has any corrections or amendments to the minutes of the last meeting. If not, I will hand you over to tonight's speakers. We are very pleased to welcome back John Gallagher of Shelter and Sarah McKeown of Arden Chambers who will share the relevant developments in the law over the last 12 months.

**John Gallagher:** Good evening everyone. Sarah and I have divided up the material for tonight's presentation. Sarah will look at possession proceedings and a number of important cases on that subject that have occurred during the year. I have a mixed bag of topics which will include the new provisions on eviction in the Immigration Act 2016, some cases on Allocations and some cases on Homelessness with a diversion into the Homelessness Reduction Bill which is before Parliament at the moment.

Bedroom Tax / DHP

I'd like to start off with a case that came out last week. It's the Judgment of the Supreme Court in the Bedroom Tax or Social Sector Size Criteria appeals. We all know about the size criteria, but just to remind ourselves, they have been with us since April 2013. Broadly, the eligible rent for Housing benefit, and the housing element of Universal Credit, is reduced by 14% for one room and 25% for two rooms, where the claimant is considered to be under occupying. This applies only to working age claimants and there are a number of exemptions. Among the exemptions are those in respect of a disabled adult who needs an overnight carer and for a disabled child, who is unable because of his or her disability to share a room. The cases that came to the Supreme Court concerned households where the need for an extra room was connected with a disability and one case where the spare room was adapted to provide protection from severe domestic violence as part of a sanctuary scheme.

The cases fell into, firstly a batch of five cases known as the *MA* cases – the name they were known by in the Court of Appeal. Very briefly, these comprised: Mrs Carmichael, who was unable to share a bedroom with her husband because of her disabilities; Mr Rourke, who used a room to store his disability related equipment; Mr Daly, who needed a room to accommodate his disabled son, for whom he had shared care, when he stayed with him at weekends and during school holidays; Mr Drage, who suffered from Obsessive Compulsive Disorder and hoarded papers in his extra two rooms and had a 25% reduction; and Mr JD, who lived with his severely disabled daughter in a

specially constructed three bedroom property. In most of those cases the claimants were receiving discretionary housing payments to make up the shortfall in the rent caused by the deduction from housing benefit. But the challenge was on the basis that the application of the deduction in principle was a breach of the claimant's Article 14 rights – prohibition of discrimination – taken with their Article 8 rights, and also a breach of the Public Sector Equality Duty under s149 Equality Act. So the argument was that it shouldn't depend on the vagaries of the Discretionary Housing Payment pot, there should be an entitlement as of right to housing benefit paid at the full rate.

The other two cases which I haven't mentioned are *Rutherford* and *A*. The *Rutherford* case concerned grandparents, Mr and Mrs Rutherford, who were caring for their severely disabled grandchild. They cared for him on a 24 hour basis for almost the entire week but they just needed two nights' respite when they had carers in, and the carers needed the extra room. In *A v SSWP* – Miss A lived with her son in a three-bedroom council house and, as a result of severe domestic violence, one of the rooms was equipped to provide a secure space under the Sanctuary Scheme: but this was still treated as a spare room for the purposes of the bedroom tax. In both those cases the rent shortfall was made up by discretionary housing payments, but the argument was that in principle the claimants should not be dependent on DHPs.

In each of these cases the Secretary of State admitted that the effect of the bedroom tax was discriminatory under Article 14. The issue in all the cases, however, was whether the admitted discrimination should be addressed by a general exemption for a particular class of persons or whether it was satisfactory to deal with such cases on the basis of individual assessments which might give rise to a DHP. The question which the Court had to decide was this: is there a particular class of persons who need protection, or is it sufficient to deal with the claims on the basis of individual assessments?

In the Court of Appeal the *MA* claimants, Carmichael and Rourke, failed, the Court of Appeal accepting that the regulation B13 of the Housing Benefit Rates had a discriminatory effect, but the discrimination was not, in that deathless phrase, "manifestly without reasonable foundation". The Supreme Court accepted that the fundamental reason for applying the "manifestly without reasonable foundation" test in cases about inequality in benefits regulations and the like is that choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities, and therefore in order to challenge a specific measure, you have to cross this high threshold and show that the legislation is "manifestly without reasonable foundation". But the Rutherford case had succeeded on the basis of disability discrimination and Miss A's case had also succeeded on the basis of gender discrimination. DHPs, said the Court of Appeal, were not an adequate answer.

So we end up in the Supreme Court, and the Court agrees with the Secretary of State on the main issue of principle, that the test to be applied in cases involving cases of economic and social policy is whether the discrimination is manifestly without reasonable foundation. You still have to address whether or not the application of the regulation in the particular case is justified, but that is the fundamental test. Although regulation B13 fell within this rule, nevertheless, said the Court, some people have a transparent medical need for an additional bedroom and Mrs Carmichael, one of the *MA* claimants, fell within that class. She was the lady who couldn't share a bedroom with her husband because of her disability. As we mentioned, there was already an exemption in the regulations for children who couldn't share a room and there was no reason to justify distinguishing that exemption for children from the need for an exemption for adults. But Mrs Carmichael was the only one of the *MA* claimants who succeeded. In the *Rutherford case,* the Rutherfords' grandson also had a need for an overnight carer and here the existing provision in the regulations was the

reverse - that there was already an exemption for adults who had a need for an overnight carer, but not for children. And so, again, the Supreme Court said, why the difference. There's no reason to distinguish between children and adults in this context.

As for the other *MA* claimants, the Supreme Court said that they had a *social* need for their extra room which was connected with their disability rather than a transparent medical need, and it was appropriate in their cases that their claims should be considered on the basis of individual assessment under the DHP scheme. The Court felt that Miss A fell into that category as well, so the Secretary of State's appeal against the Court of Appeal's decision was upheld in her case. The Court said there was no automatic correlation between being in a sanctuary scheme and requiring an extra bedroom, which on the face of it seems slightly strange. Ms A did not therefore have a valid claim for sex discrimination. There was a strong dissenting opinion from Lady Hale and Lord Carnwath, who felt that the State has a positive obligation to provide protection against domestic violence, and that DHPs were not sufficient to justify this discrimination.

So there we are. I think we might have hoped for a decision that would rely less on the availability of discretionary housing payments than this judgment does in respect of most of the *MA* claimants. But the point of principle is well explained in the Supreme Court judgment. It's a clear read, which we have to be grateful for, and the basis on which the Rutherfords' and Mrs Carmichael's case succeeded is also well explained. There will need to be changes in the regulations to equalise the situation between children and adults as regards overnight care and the inability to share a bedroom.

Immigration Act 2016

Moving on then to the next subject which is the even more deathless effects of the Immigration Act 2016. This is due to come into force, or at least these provisions on residential accommodation, are due to come into force on 1 December 2016 and, in relation to tenancies, will affect tenancies whenever they began, before or after 1 December.

First of all we have a criminal offence of leasing premises which are occupied by a disqualified person – a person who doesn't have the right to rent. It is not enough, apparently, to have the fixed penalty scheme which is already available where a landlord or an owner grants a tenancy or licence to somebody who doesn't have the right to rent – or allows a person who has a limited right to rent to remain over their period of leave. Now we have a criminal offence (under new section 33A, Immigration Act 2014) where the premises are occupied by an adult who is disqualified as a result of their immigration status and the landlord knows, or has reasonable cause to believe, that the premises are occupied by such an adult. There is a separate criminal offence committed by an agent who his responsible for the landlord's contravention – not only where the agent has full charge of the letting of premises, but where the agent knew of the presence of a disqualified person and ought to have advised the landlord and did not.

There is yet another offence, also under s.33A, where there are occupiers who previously had a limited right to rent but have now lost that right. Where the occupier's eligibility period has ended and the landlord fails to notify the Home Office that there are disqualified adults in occupation, then the landlord will be committing an offence. This offence only applies to `post-grant contraventions' which occur after 01 December 2016.

The landlord will have a defence to the main offence under section 33A if he or she is taking reasonable steps to evict the person who is disqualified from renting. And so, to accompany the criminal offence, there are additional provisions designed to make the eviction process easier for

landlords. First, we have a provision for eviction where all the occupiers are disqualified from renting. In that scenario, a landlord can terminate a residential letting agreement of any kind, whether there is statutory protection or not, whether it's an assured, or an assured shorthold tenancy, or whether it's unprotected, if the Secretary of State has given a notice to the landlord which identifies the occupiers of the premises and states that all the occupiers are disqualified from renting. The notice must relate to all of the adult occupiers in the premises.

There is then a prescribed form of notice that the landlord can serve on the tenant. It's a 28 day notice, in writing, and at the end of it the tenancy becomes an `excluded letting' under section 3A of the Protection from Eviction Act 1977, so the landlord can simply move in and take possession. No need for any niceties such as court proceedings or court orders, because it's now an excluded letting. But just to emphasise, that's only where all the adult occupiers of the premises don't have the right to rent and where the Secretary of State has served a notice to that effect.

What about where one or more of the adult occupiers, but not all of them, are disqualified from renting? Well, sure enough, the Act has something to say about that as well. If it's an assured or an assured shorthold tenancy, there is to be a new mandatory possession Ground 7B to deal with that situation. The text of the Ground is set out in your notes. Ground 7B again depends on the Secretary of State having served a notice in writing – this is a different kind of notice from the notice under section 33A, that identifies the tenant or one of them, or one of the occupiers, as a person disqualified as a result of their immigration status. That is the first condition of Ground 7B. The second condition is that the occupier must actually be disqualified as a result of their immigration status. At the end of all this, we find a rather unusual provision that, if you have one of joint tenants who is disqualified and the other who isn't, then the court has the power to transfer the tenancy to that other person instead of making a possession order.

If it's not an assured, or assured shorthold tenancy, say it's an unprotected tenancy or a licence, then it will be an implied term of that agreement that the landlord may terminate the tenancy if the premises are occupied by an adult who is disqualified as a result of their immigration status, in other words somebody who doesn't have the right to rent. We're not talking here about assured shorthold tenancies, but about unprotected tenancies, such as the letting of a room in a converted house with a resident landlord. This isn't going to happen very often. I think the only situation in which this provision has any meaning is the unusual case where a person has a fixed term letting of an unprotected tenancy or licence and this enables the landlord to bring that fixed term to an end by way of forfeiture proceedings based on this implied term.

How far this will have a practical impact on our clients is really difficult to know. What it will do, I suspect, is create a climate – as, of course, the right to rent has already done - which encourages landlords to think that all controls are off. Obviously they will need to be reminded that they need a Notice from the Secretary of State before the protection from eviction controls are off, but no doubt some landlords will be only to ready to ignore the procedural niceties.

Allocations

Moving on to allocations, I'd just like to feature a couple of cases on the theme of reasonable preference.

Last year we came across cases such as *R (Jakimaviciute) v LB Hammersmith & Fulham* in which it was held that local authorities couldn't exclude from their allocation scheme people who would be entitled to reasonable preference. Here we have some more cases on a similar theme. One is *H v Ealing LBC*, and this is where Ealing introduced a quota system whereby 20% of all its lettings would

be reserved for two classes of people – for working households and for model tenants. But who are these paragons of virtue, who are classed as model tenants? They are actually council tenants, people who already have a social tenancy who have kept to the terms of their tenancy and who are seeking a transfer. So the policy purpose is obviously to encourage certain behavioural standards, such as compliance with tenancy conditions and being in employment. A legitimate aim, which will generally be accepted by the courts, but in the particular case, the outcome, the effect of Ealing's scheme, was to enable someone in the lowest band of the allocation scheme to jump ahead of people in the higher bands if they qualified for a letting from that 20% quota.

Ms H and others sought judicial review on behalf of classes of people such as elderly persons, disabled persons unable to work, and single parent carers who couldn't bring themselves within the conditions of that 20% quota, and the challenge was upheld in the Administrative Court on all four grounds. First, on the basis that the `working households' element amounted to indirect discrimination against certain groups with protected characteristics under the Equality Act. The way that Ealing had sought to achieve their objective was disproportionate. It could have been achieved in a less intrusive way: other councils also have `working households' criteria, but they allow exceptions for people who cannot qualify under those conditions. The scheme was also in breach of Articles 8 and 14 of the Convention because of the differential treatment of disabled and elderly people, and of women, and of private tenants - because it was not open to model private tenants to bring themselves within the relevant class. The scheme was also in breach of the Public Sector Equality duty and in breach of the authority's duty under s11 of the Children Act, in failing to consider the interests of children being cared for by a non-working parent. So a fairly resounding judgment from the Admin Court. Another case of some interest is *YA v Hammersmith & Fulham*. YA was a young man who was a former asylum seeker. He had been in care since the age of 11 and he had committed a number of offences between 12 and 16. He was now 19 and his convictions were spent, but the council decided that he wasn't eligible to join the allocations scheme because, although they accepted that his convictions were spent and they were not relying directly on the convictions, they said that his underlying behaviour made him guilty of unacceptable behaviour which made him unsuitable to be a tenant. The Admin Court said no, that can't be right. The purpose of the Rehabilitation of Offenders Act would be frustrated if a person's underlying behaviour could be taken to override the eradication of the spent convictions. The council were not entitled to rely either on the convictions that were spent, or on the conduct that gave rise to those convictions.

We have become quite used to quite favourable decisions in allocations cases over the past couple of years, but *Woolfe v Islington* wasn't such a favourable decision. Miss Woolfe, who was pregnant, had lived with her mother in Islington until she had to leave because of social services concerns. The mother had already had a child taken into care and social services said they would have to take Miss Woolfe's newborn baby into care if she didn't move out. So she was placed in temporary accommodation by Islington and that gave her 110 points on the council's allocation scheme, which comprised 100 for local residence and a mere 10 for homelessness. That placed her a tantalising 10 points short of the 120 points which she would need to stand any chance of bidding for a tenancy. Not only that, but the indication was that she would never be able to make up that 10 points unless she was able to rely on one particular factor, which I'll come to in a moment. But first of all she argued that the policy itself was unlawful because it denied her a reasonable preference as a homeless person, since ten points could not be sufficient to reflect that reasonable preference. But the court said no - a minimum number of points is perfectly lawful. It amounts to some reasonable preference, even though it is not very meaningful. Even 10 points could amount to a reasonable preference. But Ms Woolfe lived happily ever after, as it were, because she was entitled to an extra

90 points under the council's `New Generation' scheme. That was a scheme to benefit people who had lived, generally with their parents, as Islington residents for a certain number of years. Why wasn't Ms Woolfe awarded those points at the beginning? Well the problem was that Islington said, "You don't qualify because you've now moved out of your parent's home", because she'd been placed in temporary accommodation, so she no longer qualified for those 90 points, which was a somewhat rigid application of the policy. In the event, the Court was able to say: "No, the policy is satisfied by residence for three out of the last five years, so you don't actually have to be living with your parents at the time when you apply for an allocation". But that was a special circumstance of Ms Woolfe's situation which enabled her to gain the extra points. If Miss Woolfe had not been living with her mother previously when she became homeless, she would not have got her 90 points, and she'd still be languishing on her 110 points with no chance of bidding.

Homelessness Reduction Bill 2016

Moving on to homelessness, I would first like to mention the Homelessness Reduction Bill 2016. A rather odd title, the reduction of homelessness. You won't find anything about this in the notes I'm afraid, because it's such a moveable feast. It's already come out of the Parliamentary drafting machine in a totally version from its original incarnation, and it's likely that it will look different again by the time it goes through, if indeed it goes through. It's a Private Member's Bill sponsored by Robert Blackman MP, first introduced on 29 June. Because it's a Private Member's Bill it can only be brought before Parliament on a Friday, when most MPs have already gone home to their constituencies. At least in the early stages, you need a quota of some 100 MPs to see a Bill through. Crisis have been very good at martialling support from MPs and the Bill survived its Second Reading on 28 October. It's based on the Welsh model, the Housing (Wales) Act 2014, which has gone in a very different direction from the Housing Act 1996, with which we're familiar. It's built on the foundations of the 1996 Act, but the policy intention is to provide more help for the non-priority homeless. The way it does this is to introduce three new duties: one is a more extensive duty of assessment; then there is a new duty to prevent homelessness; and, thirdly, a new duty to relieve homelessness. These new duties are grafted onto the scheme in Part 7 of the 1996 Act, and they apply before you get to the main Part 7 duties that we're familiar with.

How does that work? Well, first of all the Bill will extend the period during which a person is threatened with homelessness from 28 to 56 days, in order to give greater scope for prevention activity. Additionally, under the original version of the Bill, a person was to be treated as homeless from the date when a s21 Notice expires. The intention is to prevent local authorities telling people to wait until the day of eviction, because they will not be considered as homeless until that point. However, it seems that this clause may not survive into the final version of the Bill. The new duty of prevention is combined with an enhanced duty of assessment, which includes the drawing up of a personal housing plan for each household - and this doesn't only include the single non-priority homeless, it includes all households. The effect of this is to give a statutory framework to what goes on already, that is, the housing options activities undertaken by local housing authorities. I think that has to be welcomed, because we all know that prevention work happens, but what goes by the name of prevention may often disguise a multitude of sins of inaction on the part of the authority. Now there is to be a paper trail dating from the day when the person first approaches and some kind of personal housing plan. I've seen a couple of personal housing plans from Welsh authorities and one of them was very good, while the other was not much more than a list of letting agents, such as people would get now. There will no doubt be some quite extensive guidance as to what a personal housing plan should contain.

Then there is the other new duty of relieving homelessness, so if it is not successful in preventing homelessness, the local authority moves on to a further stage, that of `helping to secure' accommodation for every homeless household, irrespective of priority need. This duty lasts for 56 days, so authorities have to assist everyone, including single people, to obtain accommodation within those 56 days. This assistance will operate alongside the existing s188 duty. So people who authorities have reason to believe may be in priority need must still be placed in interim accommodation and the authority will then look at ways in which each household can remedy or relieve their own homelessness, including securing offers of private rented accommodation. One major concern is about what consequences there might be if a person is judged not to have co-operated with the conditions of the personal housing plan or with the authority's prevention or relief activities. Would that inaction or perceived non-cooperation prevent them from going on to access the full housing duty? At first the Bill said that it would, and that a person would be considered intentionally homeless if they failed to cooperate with such measures. The most recent form of the Bill is an improvement, as it now provides that an applicant in priority need can still progress to the full homeless duty but if they have "deliberately and unreasonably refused to cooperate with assistance provided to alleviate homelessness" then the authority will have a lesser duty to provide them with a six month assured shorthold tenancy. I won't say anything more about the Bill now, unless anybody has any questions during the question and answer session, because there will almost certainly be further changes, and, of course it might not go through at all. But it seems that the Bill is likely to receive government support. Assuming it does receive DCLG support, although it still has to go through under the Private Members' procedure, it has a reasonable chance of going through.

Homelessness

Finally, I'd like to draw your attention to one or two recent homelessness decisions. *Hoyte v Southwark LBC* is aa case in which Miss Hoyte, a 58 year old woman who had a history of mental health problems, applied for assistance to Southwark, but the council decided that she wasn't `significantly more vulnerable' than an ordinary person facing homelessness in terms of the *Hotak* test that we're now familiar with, so they turned her down on that first occasion. Subsequently, her solicitors obtained a report from a clinical psychologist to say that she was quite a high suicide risk and she applied again. She was again turned down by the council because her GP's records indicated that there was no indication of any ideas of self-harm and there was no record of active suicidal thoughts, so again, no priority need. Then there was an incident in February of this year when she planned to commit suicide. She was on a bus heading towards Blackfriars Bridge when fortunately she took a call from her GP, who was concerned about her. The doctor persuaded her to come to his surgery, where he found that she did have clear suicidal thoughts. She was referred to a mental health nurse, who concluded that there was plausible evidence of plan and intent.

Ms Hoyte then approached the council a third time, but this time the council refused even to take a fresh homelessness application from her because they said there were no new facts. The "same facts" test comes from the case of *Rikha Begum v LB Tower Hamlets* case that we are familiar with. Her history of suicidal ideation was known to them when they made their previous decision and they took the view that there was nothing to justify a re-consideration. The Administrative Court said no, that must be wrong. The council had previously used the GP's records to conclude that there was no suicide risk. Now that there was evidence from the GP concerning the incident in February and indicating that there was clear suicidal intent. It was irrational to claim that the present application was on exactly the same facts. As a result, the council was obliged to accept a fresh application. So

this is really a case on the relevance of new facts, where the fresh application is based on facts which are not exactly the same as those which applied at the time of the previous application.

Allocation of Housing and Homelessness (Eligibility)(England)(Amendment) Regulations 2016 (SI No 965)

I need to mention very briefly the regulations that have now dealt with the `Appendix FM' problem. Class B in the Eligibility Regulations (governing eligibility for both homelessness assistance and allocations) consists of people with exceptional leave to remain granted outside the Immigration Rules and who were not subject to a "no recourse to public funds" restriction. The problem is that until July 2012 a person seeking leave to remain under Article 8 would be granted limited leave initially outside the Rules and that person would therefore come within Class B. However, under Appendix FM to the Immigration Rules, introduced in July 2012, most people who are granted Article 8 leave now receive it within the rules and so no longer qualify because Class B was not amended to reflect this change. When local authorities became aware of this discrepancy, they were entitled to say that people in this category were no longer eligible for assistance. Now, however, since 30 October 2016 there is a new Class G in the Regulations, consisting of people who have limited leave to enter or remain in the UK on family or private life grounds under Article 8 granted within the Immigration Rules. Class E is also dispensed with, that's the class that related to asylum seekers who applied many years ago and there can't be any of those left now.

Vulnerability

Lastly, I'd just like to look very briefly at a few cases on Vulnerability. Following the *Hotak* case of last year we're still waiting for our first Court of Appeal case on the meaning of "significantly more vulnerable". Just to remind ourselves, the test in *Hotak* is whether the applicant is significantly more vulnerable than ordinarily vulnerable as a result of being rendered homeless as compared with an ordinary person if made homeless, so that he or she is more at risk of harm than the ordinary person if made homeless. So while we wait for a major Court of Appeal decision, we can take some guidance from a number of County Court decisions reported in *Legal Action*.

The case of *Taani* in fact isn't a county court decision, but a Court of Appeal decision on permission to appeal. In this case the Reviewing Officer used the phrase "fend for oneself" in his decision, which, of course, is reminiscent of the old *Pereira* test. The Court of Appeal, in refusing permission, said that it was "linguistic opportunism" for the appellant to object to this phrase. It was a one-off misapplication. It was submitted that the reviewing officer in this case deals with review decisions on behalf of a number of local authorities, and that the error should not necessarily be seen as a one-off misapplication. But, said the Court, there was no indication that the reviewing officer was likely to misdirect himself in other cases. *HB v Haringey LBC* was a decision by His Honour Judge Lamb, sitting at the Mayors and City of London Court. The Judge was clearly not convinced that the reviewing officer had engaged with the test of vulnerability. It was impossible to discern whether the reviewer considered the applicant to be more vulnerable than the ordinary person; or how he had defined vulnerability; or how he had defined "significantly more vulnerable"; or where he considered the term "significantly" fell on a spectrum of meaning between "noticeable" and "substantial"; or whether any greater vulnerability than ordinary vulnerability was considered to be insignificant and, if so, to what extent and why.

In *Barrett v Westminster CC,* Miss Barrett, a single woman aged 58, suffered from a number of different medical problems, any one of which might not in itself have been enough to make her vulnerable, but as part of a composite assessment her case was more compelling. She'd been

homeless for two years, staying in hostels or hotels when she could afford it, making use of night buses, and living on the streets. The Council said that she wasn't vulnerable, because she could make use of toilet and laundry facilities at day centres. In that way they were applying the *Hotak* decision, on the basis that assistance from statutory or other public or private services could mitigate vulnerability. But Recorder Genn at the Central London County Court said that the Council had failed to engage with the approach to third party support identified in *Hotak*. There was no evidence of what facilities were actually available in day centres, while the Council had given no consideration to Miss Barrett's special difficulties and her frailties as a homeless woman at night. Moreover, the Council had not engaged with the Public Sector Equality Duty as to whether she was disabled, and what steps were required to meet her needs in the particular contexts of disability and gender.

*Mohammed* is also an important case, but I'll end with His Honour Judge Luba's decision in *Butt v LB Hackney*. Here, Mr Butt applied as homeless to the council, suffering from achalasia - a distressing condition involving the narrowing of the oesophagus and difficulties in swallowing - restricted mobility and depression. The council decided that he was not vulnerable. However, the Judge held that, although the reviewing officer claimed in his 14 page decision letter to have considered the Public Sector Equality Duty, he had failed to spell out what conclusions he had actually reached on the issues which the Supreme Court in *Hotak* had identified. What the officer had said was this: "I can confirm that I have reached this decision with the equality duty well in mind and carried out this exercise in substance, with rigour, and with an open mind". But he hadn't actually shown <u>how</u> he had carried out that exercise, and specifically how he had actually engaged with the four stage process : namely, whether the applicant is under a disability; the extent of the disability; the effect of the disability; and whether the applicant is, as a result, vulnerable. It was not enough to set out formulaic and high minded mantras and, as the Judge said, "The reviewing officer has taken himself to the well, but there is no indication that he has drunk from it". Nor had the reviewer set out either what he meant by "significantly more vulnerable", which was a similar flaw to the failures identified by the court in *HB v Haringey LBC*.

**Chair:** Thank you very much indeed John. If I could ask Sarah to continue from there.

**Sarah McKeown:** I will be looking at some of the recent cases in the last 12 months. I will start very briefly with *McDonald*. The Supreme Court has held that even though Article 8 is engaged when a judge makes a Possession Order, so it's engaged by the Court where it's making a Possession Order in a claim by a private sector landlord, subject to any authoritative guidance to the contrary from the European court, it was not open to the tenant to argue that the Possession Order should not be made, based on Article 8. It was said that Article 8 rights could not be invoked to produce a different result from that mandated by the contractual relationship between the parties, at least where we're talking about a mandatory ground, where Parliament has decided where the proper balance between the parties lay. It was said that to hold otherwise would mean the convention would be invoked to interfere with the A1P1 rights in a way which would be unpredictable. So it's actually saying that it would leave landlords in this uncertain position of whether they would be able to get their property back and in what circumstances. The purpose of the convention, it was said, was to protect citizens from having their rights infringed by the State, not to alter private contractual rights.

So that seems to put an end to that for the moment but it was also said that even if that were not right, and proportionality defences could be raised, it would not have been possible to read down s21 in a way which was compatible with Article 8. There would have had to be a declaration of incompatibility, and finally *obiter* it was said that in the case of *McDonald* the circumstances couldn't have justified postponing the mortgage company's right to be repaid in full. The parents had

defaulted on interest payments to the finance company which had financed the eight year loan of the property, but the full repayment of the loan sum was due a month after the first instance hearing and relied on the fact that the company would have been entitled to all its money back at that time, and it couldn't be put off for an indefinite period. The most that could have been hoped for if a proportionality defence was open would have been a Possession Order postponed for six weeks. It was spelled out that the options open to the court with regard to an Article 8 defence are an outright Possession Order, a Possession Order within 14 days, a Possession Order within 6 weeks if there's exceptional hardship or no Possession Order at all.

Interestingly I took from paragraph 73 on a more general application of Article 8 where it does apply, is was said that the evidence filed on behalf of Shelter indicated that Article 8 defences hardly, if ever, succeed against public authority landlords, save in combination with some other public law factor, and, were a proportionality defence to be available in s21 claims. It's not easy to imagine the circumstances in which an occupier's Article 8 rights would be so strong as to preclude the making, as opposed to the short postponement, of a Possession Order, but I was told this week, and it was second or third hand, that there may well be a petition to the European Court – so we will see if there is any authoritative guidance from the European Court on that.

An indication that they will not look favourably on this is the Croatia case of *Vrizic* which I have dealt with. In that case mortgage possession proceedings were brought by a private individual who was the lender. The European Court distinguished the earlier cases in which it had held that risk of eviction should be able to have proportionality determined by an independent tribunal because in those cases they concerned state owned or socially owned properties and there was no other private interest at stake. In this case the applicants had used the property as collateral that was heavily relied on. They had agreed as part of their contractual relationship that the lender would be entitled to enforce the debt by the sale of the property, so it was relied on that they were up front about this. It was quite clear that they could not now say that they should be entitled to renege on that, basically, so like the Supreme Court in *McDonald,* the European Court in *Vrizic* was emphasising the importance of contractual rights between private parties and the limited role that the court would play in interfering with those rights.

So, the next case, *Holley*, also concerns Article 8. A secure tenancy was granted many years ago to a lady and, on her death, her husband succeeded to that secure tenancy. He then died and the lady's grandsons were left in occupation of the property. The appellant in this case had mental health problems and he had lived in this property for all of his life. Now obviously there was no right under contract or statute for him to succeed, but he defended on the basis of Article 8 saying it wouldn't be proportionate to evict him. It was listed for a summary hearing and the judge at that summary hearing found that the length of a person's occupation was irrelevant to a proportionality assessment, referring to *Thurrock and West* which said that the fact that the defendant had occupied the property for a number of years was irrelevant and that Parliament had already prescribed that there could only be a maximum of two successions and therefore the length of occupation could not be relevant.

The Court of Appeal disagreed somewhat and found that length of occupation was or could be relevant to an assessment of proportionality because the court will look at all the circumstances, but it could never be sufficient to found a proportionality defence in the case of a second succession because otherwise the prohibition on second successions couldn't be compatible with Article 8. Even where there were other factors involved, the length of occupation was unlikely to be a weighty factor.

In this case, at the Court of Appeal stage the appellant also argued that the succession scheme of the local authority was unlawful because there was no discretion, it was set to allow an extra succession and, even if there had been such a discretion, it hadn't been exercised properly. The Court of Appeal didn't conclusively conclude whether there was a residual discretion, it said that it was arguable that there was, but it said, in any event, that the *ex post facto* evidence relied on by the local authority was sufficient to convince it that the discretion had been considered and it would not have been exercised in this instance in any event. The local authority put in a witness statement detailing many points such as acknowledged shortage of accommodation, waiting lists, particularly a need for three bedroom properties, because this was what it was, and the fact that in this case the appellant wouldn't have stood a realistic chance of being allocated a three bedroom property in any event.

Turning to anti-social behaviour and the *Massey* case and *Roberts.* There were two conjoined cases which were in the next of quite a long line of possession claims based on anti-social behaviour relating to drugs. In *Massey* the tenant's partner had used one of the bedrooms for growing cannabis and the partner was convicted for this. The tenant denied any knowledge of it. Possession proceedings against her were issued on the basis of Ground 12. The District Judge found that she had lied about knowing about the cannabis in the bedroom but she had lied, though, for the reason she was afraid of losing her home. He made a suspended order including a term of the suspension that the landlord could inspect the premises on short notice – and this was to determine whether there was any cannabis cultivation going on – which was relevant to another term, so it was another term that mentioned that cannabis cannot be cultivated. It was envisaged that the local authority would have the power in its own hands to determine whether that element of the suspension was being complied with. There was an appeal by the landlord for failure to make an outright order to the Circuit Judge and that was unsuccessful.

In *Roberts*, again premises were used for growing cannabis. Mr Roberts said that he didn't know about it, he had allowed another person to use the property as a result of threats, but he didn't know that there was cannabis growing going on. Again possession proceedings were issued, the judge didn't accept that Mr Roberts had been truthful about how the cannabis came into the premises, but again made a suspended order. The judge accepted an order that was put forward on behalf of Mr Roberts that one of the terms of the suspension should be that the landlord would be entitled to inspect on short notice. The landlord appealed, successfully, and Mr Roberts then appealed. So, the Court of Appeal dealing with both of these cases reiterated what we already know, that before suspending a Possession Order there has to be cogent evidence for a sound basis for believing that the conduct complained of is not going to recur.

That follows a long list of authorities: in *Manchester v Higgins* Lord Justice Ward had cited *Canterbury v Lowe* and said that the question of whether to suspend an order for possession must be a question for the future, previous unheeded warnings favour a decision not to suspend, genuine remorse favoured suspension, but there must always be a sound basis for hope that the antisocial behaviour will cease; *Sandwell v Hensley*, another drugs case, stressed the serious nature of a breach of condition which involves the commission of a criminal offence, and the more serious the offence, the more serious the breach, and in such circumstances the court should only suspend the possession order if there is cogent evidence which demonstrates a sound basis for hope that the conduct will not recur; and in *Birmingham v Ashton* it was held that where the court considered it reasonable to make a possession order based on anti-social behaviour the burden is on the tenant to provide that cogent evidence.

In *Massey* what the Court of Appeal said is that the cogent evidence is not simply evidence which shows there is some basis to believe that the tenant will comply, it has to be more than simply

credible, it has to be persuasive. It relied on previous findings by the Court of Appeal that when making a suspended possession order the focus is on the future not on the past, which fits with the line of cases referred to. It also said, interestingly, that the cogent evidence could come from any source. It didn't have to come from the tenant. It could come from the tenant but it could also come from someone offering support, such as a drugs counsellor, or an alcohol counsellor, or social worker, or support worker. They could provide the evidence which could be the basis for the cogent evidence if they say "I am dealing with Mr Smith and Mr Smith is engaging in this treatment and has attended all appointments and is responding well". There's no reason why that can't be cogent evidence.

Cogent evidence could also be the inclusion of a condition that allowed a landlord to inspect the premises. Now this would be fact sensitive and the court would have to have regard to what is reasonable in the circumstances, but it opens up the idea of, when talking about a suspension, including this and making an offer of such an inspection. It's a matter for the judge to decide whether the prospect of the inspection, or the tenant's perceived risk of the inspection, is sufficient to support the conclusion the tenant will comply with the terms of the suspension in the future.

The court also dealt with the position where the tenant has been found to give false evidence. Again, the previous authorities had indicated that it was likely to be doomed if the court finds that the tenants have lied. In *Leeds v Vertigan* was held that in deciding whether to suspend a possession order the court has to carry out an assessment of the future conduct of the tenants and such an assessment is grounded on past behaviour, the circumstances in which any offer of compliance is put forward and the reliance that can be placed on the word of the promisor, ie they were found to have lied to the court, what reliance can you put on their word that they will behave in the future. In *Lambeth and Howard* it was said when considering the future the court is entitled to take total denials of wrongdoing into account against a defendant in the light of what is found to actually have happened.

In *Massey* it was said that dishonesty in a tenant's evidence regarding the grounds for possession was not a complete bar to the making of an SPO. Tenants have to realise that if they lied in their evidence they would run the risk that the court will find that they have lied in respect of other matters and that their evidence is not to be trusted, so they won't take their assurances as to the future on the basis for making an SPO. Giving false evidence was a very serious matter and could have serious consequences, but there are two stages to making an SPO, involving the exercise of discretion and makings of findings of fact on the basis of which the discretion is to be exercised. The tenants should normally give evidence to the court so the court can assess credibility and the court might want to cross check any assurances given by reference to any other objective evidence. Now I would think that to some extent the decisions in this case are going to be fact dependent. In *Massey* the judge of first instance had noted that the tenant was willing to comply with the terms of her tenancy, that she would not allow the partner who had caused the problem to stay overnight or to store any belongings there, and that the landlord could inspect on not less than two hours' notice.

In *Roberts*, the judge at first instance had taken account of the guilty plea in the Magistrates Court and his expression of remorse. He noted the tenant was willing to agree terms that he would comply with the terms of his tenancy agreement and the landlord could inspect on a monthly basis. The Court of Appeal found that the Circuit Judge had been wrong to hold that the fact the tenant was willing to allow inspections was irrelevant – and surely that has to be right. If the tenant is saying: "well, I can offer assurances to the court it's not going to happen in the future because I will let the landlord inspect on two hours' notice". They can come in, they can check everything's being complied with. Surely that has to be at least a relevant consideration when looking at whether it's

reasonable to suspend. The Court of Appeal found the Circuit Judge had not been entitled to interfere with the District Judge's exercise of discretion in *Roberts*. So the Court of Appeal was really doing no more than confirming the District Judge was entitled to come to the decision he did on the facts of that case. That fits with the principle that Appeal Courts will not generally interfere with exercises of discretion, in this case to suspend or postpone a possession order, unless they're satisfied the judge has taken into account an irrelevant matter or failed to take account of a relevant matter, or if the decision is wrong for some other reason. There are some principles in there which can certainly be take forward.

How this will affect anti-social behaviour cases which concern, say, disputes between neighbours remains to be seen where there are allegations and cross allegations. I would have thought that if there are attempts by defendants to shift the blame onto another resident or witness or allegations that that resident or witness is lying will be a more serious form of the tenant's false evidence than happened in this case, but we'll see. It's also difficult to see how terms about an inspection will work in the case of, say, anti-social behaviour where there are perhaps noise and abuse or threats being made. If there's noise then arguably it could be a term that's offered up that the landlord could inspect for any music equipment in the property, have they any stereos with enormous speakers, or anything that's likely to be playing loud music, or it could be a term that the landlord could put in noise monitoring equipment on a, say, two monthly basis. But if you're looking at general anti-social behaviour to a neighbour it is difficult to see how this is necessarily going to be something which will be immediately applicable. But we will see.

Turning to *Cardiff CC v Lee*, as I understand it judges seem to be talking amongst themselves as to how this will work. Starting with first principles, in this case it was common ground – so it was not argued before the Court of Appeal – that Rule 83.2(e) was applicable to suspended orders and Rule 83.2(e) says that a relevant writ or warrant must not be issued without permission of the court where:-

> "…under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled…".

So ultimately it was accepted that before a warrant of possession can be issued the landlord has to obtain the court's permission.

It was admitted that Cardiff did not have court's permission, and Cardiff applied under Rule 3.10 basically for the court to say it didn't matter, and remedy the failure to apply for permission. That was the only question the court was dealing with: Did it have power under 3.10 to forgive this default, and whether it should. It found that it could, and it would, because it was said that, in this particular case, the tenant had applied to discharge the warrant. Therefore the substance of 83.2(e) had been complied with so there was no prejudice to the tenant if the court did remedy the default because essentially there had been judicial scrutiny of whether the landlord was entitled for a warrant to be issued, and whether a warrant should be issued. All those issues had been aired under the tenant's application, so the tenant was in no worse a position than if the landlord had complied with 83.2(e) and applied for permission to issue a warrant.

It was made very clear by Lady Justice Arden that this should not be the norm and I think we will probably find three types of cases: cases before *Cardiff v Lee* where landlords will be applying, at least until something changes, under 3.10 saying we just didn't know we had to apply for permission; cases around about and just after *Lee* came out where landlords perhaps can be forgiven in the first couple of days after for not necessarily knowing, but certainly soon after to say,

well you ought to have known, you shouldn't be entitled to Rule 3.10 – it shouldn't be the norm, but also it was clear as of this judgment that you had to apply for permission, even if you didn't know before; and cases further on when there shouldn't be any issue and I imagine most social landlords will have to live with it and, as I understand, they are all talking amongst themselves about the best way to deal with it.

Certainly from my understanding, up until this case, everyone thought that the issuing of a warrant was an administrative act. It was done on application to the court but just required submission of form N325. The form does require an applicant to confirm that the whole or part of any instalments due under a judgment have not been paid but nothing that applies to the case of ASB. Certainly the previous case law would seem to make clear that to issue a warrant no application to the court was necessary and nor was the landlord required to notify the tenant of his request: *Leicester v Aldwinkle; Jephson Homes;* and, of course *Southwark LBC v St Brice*, which was referred to in the Court of Appeal. That had made clear that the issue of warrant was an administrative act. The purpose of it was to carry into effect the duty of the judicial determination which had already taken place at the possession hearing. The issue of the warrant involved no determination of the tenant's civil rights and obligations. They had already been determined at the hearing at the time when the order for possession was made. Interestingly, though, the reasoning in *St Brice* was that his right as a former tenant who has remained in occupation following determination of the tenancy to apply for an order under s85.2 was unaffected by the issue of a warrant.

So we can assume that was on the basis of the law of the time when we were in the old days of tolerated trespasses, so I don't know whether it can be said that there is very much difference. In that case when there was a suspended order, if there was a breach of the order the tenancy came to an end and all the landlord was doing was absolutely enforcing it because the tenancy was at an end and the warrant really was just carrying that into effect. Since the Housing and Regeneration Act of course that's not the case. The tenancy hasn't come to an end and I think that could be an important difference perhaps in this case.

Certainly under the old rules, Order 26 Rule 5, the CCR had provided that there didn't have to be a notice or permission obtained before any warrant was issued. In *Knowsley v White* it was said that a number of warrants had been issued and one was issued without permission of the court because the possession order was over six years old – that was one of the situations in Order 26 in which a landlord did require the permission of the court. So the warrant in this case having been issued without the permission of the court, the defendant applied to the court to set aside execution of the warrant. The judge dismissed the application. The defendant appealed and it was held that the warrant should be set aside as it had been obtained without the leave of the court, which constituted an abuse of process of the court as there has been no compliance with Order 26. The granting of leave was said to be more than a mere formality. Order 37 Rule 5 could not be used to remedy a breach of a mandatory requirement of the CCR such as Order 26.

A similar argument that Rule 3.10 couldn't be used to override the mandatory requirement in the CPR was run in *Lee* but didn't get anywhere. As I say, the court did find that it had power to do it. But it does shift the burden, and I'm not really sure quite how it's going to play out. It was said in *St Brice* that it wouldn't be unreasonable to expect essentially the tenant to take the burden on himself. If he wanted to say, well the landlord wasn't entitled to the warrant, or that the warrant should be suspended, he had to make the application. This changes it round and it says that the landlord has to make the application for permission, and it was stressed by Lady Justice Arden that this is an important stage of protection for tenants. I have seen a number of articles which do raise a question whether 83.2(e) in fact is engaged and is in play here and it's perhaps something that will

be taken up because it wasn't argued in that case. I suspect someone's going to take it to court eventually that this was all wrongly decided because it was never argued that Rule 83 wasn't even in play.

Lady Justice Arden was very firmly of the view that it is engaged. She said it wasn't an issue in the case but that was quite right. Both sides agreed that 83 was the relevant rule. But I think there is a massive issue as to how this will work in practice. It will certainly place an enormous burden on the court. There was a guest post on Nearly Legal by Michelle Caney and Nicholas Towers which said that from the second quarter in 2016 37% of landlord possession orders made were suspended, that was over 10,000, and there were something like 18,000 warrants for possession issued in that period. It is certainly going to lead to a number of issues until it's resolved. The *Lee* case refers to the application being made under Part 23, but made without notice. Now Rule 83 requires that the permission of the court is obtained where it is alleged that the condition has been fulfilled, so it's only an allegation that is needed. But if the court is looking to grant permission, will that be enough – and certainly Lady Justice Arden at one point did confirm that the landlord would only be entitled to the remedy of possession subject to the fulfilment of the condition that there hadn't been a compliance with the terms of the suspension. The landlord's only entitled to issue a warrant if there has been a breach, not an allegation that there's been a breach – and that the landlord would have to show it had informed the court that the applicant had breached. But, again, is that just informing that it had had information that it had been breached, or will it have to satisfy the court that there has been a breach?

Lady Justice Arden also said that to avoid injustice the court must fully consider the applicant's case – but how can it do that if the application for permission is going to be made without notice? My concern is, can you have the argument twice? Because the landlord will apply for permission. If it is dealt with on the papers and it gets permission, is it then open to the tenant to say that the court can discharge the warrant because there wasn't any breach. Surely the time for having that has to be when the court gives permission. I had a case this week where we'd applied to suspend the warrant, I think on the same day the landlord had applied under 3.10 to forgive the fact that they hadn't applied for permission. Our application was listed before the court. We were told then that the time limit had been increased to 15 minutes to deal with the landlord's application under 3.10, but when we went into court we were told by the judge that the landlord's application for permission had already been determined on the papers. But of course in this unusual case, at the time that the court is determining the application for permission, it already had before it quite compelling evidence that there hadn't been any breach of the possession order. The mind boggles frankly as to how this will work. Certainly in that case I think it cannot be right that although the tenant has acted proactively and put in evidence that it had not breached the possession order, the court is then still dealing with the application and effectively allowing the warrant to be issued without notice and, it would seem, without having regard to the tenant's application and the tenant's evidence. How can that be fully considering an application's case as envisaged by Lady Justice Arden?

It's also not clear what the position will be regarding expired warrants after a year. Will a fresh application be required? Will there be a return to postponed orders? If you remember in *Knowsley v McMullen* it was held that normally a postponed order should not include a term requiring the landlord to apply to the court for permission before applying for a warrant. I was trying to remember what we all did under postponed orders and I think that in that case there would simply have been an application for a date to be fixed on the papers. Once the date was fixed there would then be no requirement to get the permission of the court to issue a warrant. I think the concerning

issue is that it might well make landlords less willing to agree to suspended orders. I suspect they will have regard to the fact that, in my view, surely the landlord will have to have some evidence to support its application even if it's only from a professional witness saying that they have an allegation from a resident that there was a breach on this date. But we know from *Canterbury v Lowe* that the Court of Appeal has said when looking at suspensions that the court has to have regard to the difficulty in getting tenants to come forward to give evidence again. With that in mind, as I say, will landlords be more reluctant to agree to suspended orders when they know they're potentially going to have to have a fight on them when applying for permission to issue the warrant.

Turning to some cases on tenancy deposits, for which I entirely thank Nearly Legal, in *Yeomans v Newell* the issue was the landlord had authorised the return of the deposit through the DPS. After he'd done that he served a s21 Notice but the tenant did not receive the deposit until after the s21 notice had been served. It was said, therefore, that the deposit had not been returned in full. The landlord drew an analogy with the cheque rule and said it was available, it should be taken as having been returned and said that he tenant had the ability to obtain the deposit money once the return of it had been authorised. The court agreed and held that the deposit had been returned from the time it was authorised. A bit odd, because the statute does, of course, require the return of the deposit, which seems to put the burden on the landlord to return the deposit, rather than the tenant to try and obtain it. It contrasts slightly, although both, of course, are county court decisions, with an older case in 2015 *Ahmed and Shah*. In that the landlord sought to return the deposit through the DPS payment system. The tenant didn't accept it, landlord served a s.21 and then the claimant sent the defendant a cheque and said he'd now returned the deposit. The defendant didn't accept the cheque either. The landlord argued the deposit had been returned as it was available and, in any event, it had been returned by cheque and therefore the s.21 notice was valid and s.215(sA) did not take effect.

The court in this case found there was no evidence that the deposit had been available for the defendant to accept. The claimant relied on emails sent to the defendant by the DPS informing her that the landlord was seeking to return the deposit. The emails didn't specify it was a full deposit, and there was no evidence from the letting agent it would have been the full deposit returned. The court found the deposit had not been returned and found that returning a cheque, in any event, didn't retrospectively validate a s.21 notice. Now one difference might be that in *Yeomans* there was no evidence that the tenant had been told the landlord was seeking to return the deposit in full, so it might be distinguishable on the facts, but they're only county court decisions anyway.

In *Jhawer v Vatts* a deposit was paid to agents who later went out of business. In 2009 the landlord granted to the same tenant AST of a different property and then further AST of the same property were granted on two further occasions. Each tenancy agreement stated the deposit had been paid. There were a few procedural issues but ultimately the tenant argued that the deposit for the first property should have been deemed received for the second property and all the tenancies thereafter and it had not been protected. At first the landlord argued the reference in the new agreements to the deposit having been paid was an error as it was a template agreement, but the judge held that *Superstrike* applied by analogy and the tenant had been entitled to the return of the deposit at the end of his tenancy of the first property (even though the agents had gone out of business). Therefore the deposit was effectively carried over to the second property and the later tenancies, and the s21 notice was not valid.

*Okadigbo v Chan* is an old case but it's interesting when looking at it with the *Russell-Smith v Uchegbu* case. In the *Okadigbo* case, looking at whether the court should give a 1x or 3x payment it was set by the court that the complainants were not experienced landlords, it was the first time they

had let out any property, and they were letting out their home. Essentially they were not big business landlords. They put their matters in the hands of professional managing agents who had let them down, and therefore were given a 1x payment. On appeal to the High Court, the High Court dismissed the appeal, saying there's nothing wrong with this approach.

In *Russell Smith*, a Scottish case, Sheriff T Welsh QC said that each case turned on fact, but identified a method of calculation and aggravating factors, which you may want to have a look at when seeing if you can get into these to try and argue more towards the higher 3x payment rather than a 1x payment.

I will not discuss over *Bali* because there's one case I haven't referred to, because I only saw it on Nearly Legal last night. It's *Amak Property Investments (London) Ltd v Laura Sonny*, which you can find on their website. It's a case put in by Josephine Henderson. In this case the landlord issued proceedings under the accelerated procedure, and again there are procedural issues, possession order made, set aside, but ultimately the defence was that the prescribed information had not been served prior to the service of the s.21 notice. She relied on the MyDeposit scheme rules which specified that service of the prescribed information was an initial requirement, ie then it had to be done within the 30 days. It wasn't just that it had to be done before the s.21 notice, it was an initial requirement of 30 days and there couldn't be late compliance. So it was said that the only way the s.21 notice would be valid was if the deposit was returned. That defence was successful, so it's always worth checking what the initial requirements of the scheme are, and whether they've been complied with. They will often mirror the statutory requirements, but if they turn the statutory requirements into something which has to be done within 30 days this seems to say you might have a good defence.

I will deal very briefly with *Birmingham v Stephenson*. This was an Equality Act type defence. In this case the tenant suffered some paranoid schizophrenia and the symptoms were alleviated but not completely cured by medication. At the first hearing the matter was adjourned to enable the tenant to instruct solicitors and the order said that he had to use his best endeavours to found a defence. At the adjourned hearing the solicitor had only been instructed on a preliminary basis and asked the court for a further adjournment to put in a fully pleaded defence and indicated that the fully pleaded defence would raise issues under the Equality Act, Article 8 and Public Law. The District Judge refused and made a possession order based on the fact that there was no substantial defence before him and the tenant had had ample time to file a defence. That initial ruling does seem to fit with the incredibly hard line taken by the courts of, well you've had time and the fact that the tenant's vulnerable and your solicitor's overworked doesn't matter, you were given one chance and that's all.

The Court of Appeal allowed the appeal stating: "Had Mr Stephenson been a well-resourced individual with no mental disability that view might well have been sustainable but the fact is the council's own evidence showed that he was living on benefits and he had been seen begging in the local shopping parade". The Deputy District Judge's view also in my judgment took no account of Mr Stephenson's mental health problems. Mr Gilmore had only seen Mr Stephenson some two working days before the hearing and had only taken preliminary instructions. It was unrealistic to have expected him to have formulated a full defence by the time of the hearing. There was a potential Equality Act defence which shifted the burden of proof and once the principal criteria had been established the Supreme Court said it would only be in a rare case it could be summarily disposed of and there were a range of orders that could be made. So let's hope that has more application.

There's the *Edwards* case dealing with s.11, but I will finish with a couple of cases coming up. Following on from the *Butt* case that was referred to by John earlier, *Hacque v LB of Hackney* was a

case that was heard by His Honour Judge Luba with very similar findings to the *Butt* case. It was an appeal in relation to a 204 decision. The applicant had a number of children, none of whom lived with him. He suffered from back pain, neck and shoulder pain, stiffness and depression. He said he couldn't walk long distances. He was given interim accommodation in a hostel and the local authority accepted a duty to him but purported to discharge that duty by leaving him in the hostel. He said it wasn't suitable because it was too cramped, that worsened his pain and exacerbated his depression and anxiety. He couldn't bring his children there because it had a no visitors rule and that meant he had become very isolated. On review the local authority found it was suitable and made very brief reference to - and I quote - the "Equalities" act. His Honour Judge Luba found that the local authority had failed to apply the correct legal test for considering whether it was suitable having regard to the applicant's medical conditions, s.149 and the 202 decision failed to give sufficient or indeed any reasons. That's being heard on 14 and 15 December.

On 14 February the Supreme Court is hearing the *Poshteh* case. In this case the applicant was an Iranian national. She had been imprisoned and tortured and suffered from PTSD. She was granted asylum here and applied as homeless. The local authority accepted a duty and offered her a flat. The difficulty was that one of the windows in the living room was round, which she said reminded her of her prison cell and brought on a panic attack. The local authority said the duty had been discharged and wrote to that effect and there was an appeal to the County Court and Court of Appeal, both of which were unsuccessful on Ms Poshteh's behalf. The Court of Appeal held that the question was whether it was unreasonable for her to have rejected the offer, it being accepted that it was objectively suitable for her. The Reviewing Officer had understood that premise may be unsuitable if it caused her to suffer mental illness but had been entitled to conclude it was not likely to have a sufficiently adverse effect on her mental health so her refusal was unreasonable. There was nothing in the medical evidence to suggest her clinicians knew about her panic attack in response to the window or that they considered accepting the premises would have a significantly adverse effect on her. The reviewing officer had had a full medical information, had assessed it, had recognised her disability and had regard to s.149. Lord Justice Ali said, dissenting, that the issue was whether the review officer could properly have concluded there was no real risk to her mental health and, while that conclusion was open to him, it was not clear how he had reached it. It is being heard by the Supreme Court and the issues are set out:

> "Whether the decision in *Ali v Birmingham* … that the right to accommodation under s.193 was not a civil right within art. 67(1() should be departed from … and, if so, to what extent and what if any, impact does that have on the approach of a court determining an appeal under s.204 either generally or in relation to the suitability … and discharge … under s.193;
>
> Whether the review officer should have asked himself whether there was a real risk that the applicant's mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and, if so, whether he did in fact apply the right test".

So they will be coming up shortly.

**Chair**: Thank you to both speakers for giving us so much food for thought. I will now open the floor to questions.

**Ranjit Bains, Community Law Partnership:** I just wondered if you had any idea why the point on Part 83 in the *Cardiff v Lee* case was conceded.

**Sarah McKeown:** As I understand it, Cardiff decided to go with someone local who is in fact an employment practitioner. I'm not sure, to be honest, whether it was necessarily appreciated, and certainly although *St Brice* was referred to, all of the other cases were not. There is support for it in that Lady Justice Arden then gives judicial approval and says it's quite right to do so. But even if the result is right it seems to me that there was a lot more there which ought to have been discussed before any final decision was come to, and it is leaving it in the position now where I suspect there will be an appeal saying that it was wrongly decided because none of this was argued through. I understand from colleagues that it may be one of those cases where local authorities will join together to fund an appeal because it will cost a considerable amount of money, £255 per hour for an on notice application and about £155 for a without notice application. It will clog up the courts.

I think it's right, and it's an important protection. I think it is very valuable because there wasn't any judicial scrutiny of whether an order had been breached, it was just on a say so tick box. It wasn't administered by the court, it was just based on the landlord stating that it had been breached. As was made clear in that case that's not enough, there has to be some sort of scrutiny. It's all very well if a tenant goes to a solicitor who makes an application to suspend the warrant and in that they argue actually, more than that, the warrant should be discharged. But what if they don't, and we all know that in a lot of cases people just don't. There ought to be some judicial interference to check that landlords are getting possession to which they are entitled. So whilst the ultimate result is probably right, I think there may be problems as to how it's worked out as I am not sure that the back history was appreciated and certainly it doesn't seem to have been referred to by the Court of Appeal.

**John Gallagher:** If I could just add to what Sarah has said, we're getting reports from our various offices around the country about how District Judges are dealing with this and there is a certain amount of confusion. I think there is talk of some guidance being issued next month, but we're aware that one district judge in Norwich has expressed the view that the Lee judgment only applies to suspended possession orders made on the basis of anti-social behaviour. That can't be right, I think, because CPR 83 doesn't make any distinctions about the kind of condition that has to be fulfilled in a conditional order. In Newcastle the council has offered to apply for an outright order on the basis that they won't enforce it, so in other words they'll regard it as a suspended order out of kindness to the tenants, so the tenant won't be faced with paying the extra fee for the application for permission. But I think that degree of benevolence probably has to be resisted.

**Sarah McKeown:** There is a lot of confusion and it's a problem that different bodies are dealing with it in different ways. Until we get any guidance, a bit like in the early days of Article 8 defences, I imagine different courts will deal with it differently, different judges within different courts will deal with it differently, and there will be much confusion. I know one local authority is potentially putting in the application for permission at the same time as putting in the application for the warrant; there is some talk of whether you can get the permission granted almost in the future, at the time, written into any possession order , but I don't' see how you possibly could. If this was all a horrible mistake and the CPR was just very badly drafted, it seems one way round it is they simply change the CPR, but until some guidance comes through I think it will be interesting.

What will be particularly interesting is what about anyone who's been evicted pursuant to a warrant? It's particularly interesting more recently because you can say you were evicted in August and that warrant was improperly obtained. I think that will be an interesting question, particularly if people have actually been evicted on warrants where a possession order was granted before *Lee*, but the warrant was executed just after *Lee*. It seems that local authorities and social landlords have

to step up. They are obliged to know that they are not entitled to a warrant without getting permission and the onus has to be on them.

**Contributor:** There is some discussion in the articles around *Cardiff v Lee* that the term "entitled to remedy" - I think you touched on it with a reference to *St Brice* - the remedy is the order for possession, and therefore you get that in the form of an order for possession, and therefore there's no need for a fulfilment of the condition. My reading of that passage is the remedy is the actual eviction. What's your view on those articles and those arguments that the remedy is the actual order of possession, unenforced, whereas the view that seems to be taken by Lady Justice Arden is that the remedy is the actual eviction and therefore the need to prove that the tenant has breached the order?

**Sarah McKeown:** I think that Lady Justice Arden is quite clear and I would tend to agree with her, because it's under the judgment or order any person is entitled to a remedy. It seems absolutely to apply to suspended possession orders. I would say that the judgment or the order is the SPO and under that they are entitled to a remedy which is the eviction. Some time ago there was the case of *Fleet Mortgage and Investment* and in that case a similar rule to Rule 83 was applied in the same way that the court is now applying Rule 83. That was dealing with relief from forfeiture and it said that the rule applied – the rule that would be rule 83 – where any person was entitled to relief subject to the fulfilment of any condition and it was held that relief from forfeiture did qualify as relief. Arguably I suppose, potentially in the same way, if relief from forfeiture is relief, the warrant is potentially remedy under 83. I mean 83 is directed at the warrant and therefore I would say would have to be directed at a stage after the order, otherwise it would be directed to an earlier amount, but I do know that that's certainly one of the arguments that is being run and is likely to be a main prop of the argument when saying the concession in *Lee* was wrong, and 83 actually doesn't apply in these types of cases.

I think, actually, there may be two camps in my Chambers that one article has said it doesn't think Rule 83 is engaged and I think someone else is writing or has just written an article saying that they think it does. I think it's an interesting technical question, and I think there are likely to be differing views, and it will be interesting to see how far it can be run or how much it is run at the county court stage. I think it would need to go higher because whatever your views, whether you think it rightly or wrongly engages Rule 83, Lady Justice Arden has given judicial approval. She thinks it does and, until the Court of Appeal has another look at it, surely I would say that has to be the prevailing view.

**Contributor**: One question linked to that. In terms of how those advising tenants deal with it, would you recommend that they make an application direct to court that the warrant is stayed pending the landlord getting permission, and then holding off the more detailed application to suspend the warrant under the usual discretionary grounds while they get their case in order and their first application gets dealt with? How would you approach that?

**Sarah McKeown**: If the landlord hasn't yet put in a CPR3.10 application, simply put in an application and say the warrant has to be discharged. They do not have permission. The rules clearly provide that they have to obtain permission and therefore the warrant is a nullity. The problem will be getting in there very quickly. If the landlord does apply under 3.10, you will want a chance to address that and you'll want to be made aware of any application because otherwise, as I say, you'll end up (as I have) that even though the court's has evidence and the tenant's saying there's no entitlement to the warrant, the court is still dealing with permission. I think if you're getting a warrant and you're not aware of permission being granted then, as Lady Justice Arden is very much saying, it is not the norm to be granted indulgence under Rule 3.10. As I say, I really cannot see, now

that leave is known about or should be known about, that you should be getting any kind of indulgence under 3.10. When no one knew it could be argued that maybe some leeway should be given, but as of now landlords ought to know and they need to make the application and they shouldn't then, retrospectively, get it. It is simply: "No, there's no entitlement to the warrant; it is discharged. If you want to make an application for permission you make it."

**David Foster, Foster & Foster Solicitors:** Same point, but leading on. If the tenant has been evicted where an application hasn't been made for permission, the property hasn't been re-let and the tenant's applying to be readmitted, presumably that's an abuse of process so they should be readmitted?

**Sarah McKeown:** I would say the argument has to be oppression and it would fall under that heading and therefore you could apply to set aside the warrant and be re-entered.

**David Foster:** Can there then be a counterclaim for damages, breach of covenant for quiet enjoyment for the time spent out of the property?

**Sarah McKeown:** I don't see why not

**Chair:** I suppose it is a judicially authorised action, even though there was an abuse of process. Does that generate a right to damages? I'm not sure. I wouldn't be too confident I'm afraid.

**Sarah McKeown:** I'm trying to think back under old cases. It may be worth having a look at old cases where there was perhaps oppression and judicially authorised actions.

**Contributor**: I would like to make two points. One is: who would the claim for unlawful eviction be against, bearing in mind that it is the court that has actually made the error? The rule says: A warrant shall not be issued in a case where permission has not been granted. So the court has made a fundamental error in issuing, by administrative act, the warrant. The second point is: there are two actions that the tenant can take. One is the point around oppression, that could be met by a landlord's application 3.10 to deal with the issue; but the other action the tenant can take is apply for a warrant of restitution which, on the basis the application has been obtained wrongly, essentially gets them re-entry anyway. It's in the various provisions, I think it's 83.26. It's the provisions that are called applications for warrants, but it's dealing with the request for a warrant.

**Deirdre Forster, Anthony Gold Solicitors:** You'll only be able to answer this if you were preparing to speak about *Edwards v Kumarasamy*. I read the case recently and I couldn't understand why the section about notice – in your note it says that had the defendant been obliged to repair the pathway he would only have been liable to do so once he had been given notice of disrepair – and I couldn't understand why that wasn't *obiter* given that they'd already made a decision that he had no obligation to repair.

**Sarah McKeown:** As I understand it, I think it was *obiter.* Basically everything from "Liverpool Court" to "tenancy by s.11(1A)(a)" everything from then on is *obiter*.

**Chair**: Thank you very much, I will now move on to the information exchange.

**Eleanor Solomon, Anthony Gold Solicitors:** I have been attending meetings with the Legal Aid Agency at the Ministry of Justice with Sara Stephens, who isn't here today. There is no update on contracts until December when there'll be an Extraordinary General Meeting. Carol Storer from the LAPG is putting together a Freedom of Information Request on how CCMS is not working to combat the party line that CCMS is working, with lots of graphs to show us that it is. Also the Legal Aid Agency are asking if anyone has very specific examples of means queries about very small sums of

money, especially queries that don't go to eligibility. So, for example if your client is on a passported benefit and they're asking you to prove a £10 entry on a bank statement, can you contact me with those specific examples, because they don't believe that they are happening.

**Chair:** Also the Law Reform Subcommittee is responding to consultations on the closure of Camberwell Magistrates which was where the possession cases from Lambeth were supposed to be going. It is also responding to a consultation on the enquiry by the Women and Equalities Committee into disability and the built environment and a Welsh government consultation on a national housing pathway for ex service personnel.

Thank you all for coming. The next meeting will be on 18 January 2017 on the subject of Disrepair.

Housing Law Practitioners' Association 16 November 2016

# Housing Law Update

John Gallagher
Shelter

## 1 Housing benefit: the `bedroom tax'

*The Supreme Court bedroom tax appeals*

**R (on the application of Carmichael and Rourke) (formerly known as MA and others) v SSWP**
**R (on the application of Daly and others) (formerly known as MA and others) v SSWP**
**R (on the application of A) (v SSWP**
**R (on the application of Rutherford) v SSWP**
[2016] UKSC 58 9 November 2016

*The under-occupation charge (`bedroom tax')*

The under-occupation deduction from housing benefit was introduced with effect from 1 April 2013. The regulations provide that payments of housing benefit to those renting in the social sector will be reduced by 14% if the claimant has one more bedroom than is necessary, increasing to 25% if there are two or more unnecessary rooms (reg B13, inserted into the Housing Benefit Regulations 2006 by the Housing Benefit (Amendment) Regulations 2012). The same criteria apply to determinations of the housing element of universal credit.

This amendment applies only to those of working age. Those who have reached the age at which pension credit is payable are exempt from the change. There are a number of other exemptions from the regulations. A claimant who requires regular overnight care from a non-resident carer will be allowed one additional bedroom. It is necessary to show that s/he reasonably requires this care and (in most cases) that s/he is receiving a particular benefit, such as attendance allowance, the middle or highest rate care component of Disability Living Allowance, or either rate of the daily living component of Personal Independence Payment.

*The `MA' claimants*

Mrs Carmichael lived in a two-bedroom flat with her husband. They were unable to share a bedroom because of her disabilities.

Mr Daly lived in a two-bedroom property. His son, who was disabled, stayed with him every weekend and for part of the school holidays.

Mr Drage lived in a three-bedroom flat. He suffered from obsessive compulsive disorder and the bedrooms had been filled with papers that he had accumulated.

JD and his daughter lived in a specially constructed three-bedroom property. His daughter had cerebral palsy with quadriplegia, learning difficulties and double incontinence, and she was registered blind.

Mr Rourke and his step-daughter lived in a three-bedroom property. One of the bedrooms was used to store disability-related equipment.

The Court of Appeal had accepted that reg B13 had a discriminatory effect on some people with disabilities, but held that the discrimination was justified. The *MA* claimants' needs could be met though the Discretionary Housing Payment (DHP) scheme based on individual assessments.

### *Rutherford*

Mr and Mrs R were the grandparents of T, a child with severe mental and physical disabilities who lived with them in a three-bedroom housing association property which had been adapted for T's needs. T required 24-hour care from at least two people. Mr and Mrs R provided that care, but they were in poor health themselves and they received respite care twice a week from carers who stayed in the house overnight.

Under regulation B13 of the Housing Benefit Regulations 2006, the third bedroom was considered to be `spare', and housing benefit was accordingly reduced by 14%. The local authority had, however, awarded DHPs to cover the entire reduction for the financial years 2013/14 and 2014/15.

### *A v SSWP*

A was a victim of domestic violence who lived with her son in a three-bedroom council house. The house had been adapted to provide protection under the sanctuary scheme, which provided a high level of security, and she received on-going security monitoring. A's housing benefit was reduced on the basis that number of bedrooms in her property exceeded the number she were entitled to under the size criteria in reg. B13. She also received DHPs which made up the shortfall in her rent.

In the Court of Appeal, the Rutherfords' claim succeeded on the basis of disability discrimination, and A's claim succeeded on the issue of discrimination on the basis of gender under artcles 8 and 14 ECHR.

### *The Public Sector EqualityDuty*

All parties' claims under the Public Sector Equality Duty (PSED) in s.149 Equality Act 2010 were rejected.

### *The judgment*

In respect of the *MA* claimants' discrimination claims, the Supreme Court allowed the Mrs Carmichael's appeals and dismissed the other claimants' appeals. The *MA* claimants' appeals under the Equality Act were dismissed. The Secretary of State's appeal in respect of the Rutherford family was dismissed. The Secretary of State's appeal in respect of A was allowed, and A's cross appeal was dismissed, by a majority of 5 to 2.

The Court held that the normal test in cases involving questions of economic and social policy is whether the discrimination is "*manifestly without reasonable foundation"*. The

Court of Appeal was correct to apply this test. The question of how to deal with the impact of reg B13 on persons with disabilities was a clear example of a question of economic and social policy: the housing benefit cap scheme was integral to the structure of the welfare benefit scheme.

However, some people with disabilities had a transparent medical need for an additional bedroom. This was recognised by reg B13 to a certain extent, in that it entitled claimants to an additional bedroom in the case of children (but not adults) who cannot share a bedroom because of their disabilities and in the case of adults (but not children) in need of an overnight carer. Mrs Carmichael was an adult who could not share a room with her husband due to her disabilities. The Rutherfords required a regular overnight carer for their grandson with severe disabilities. There appeared to be no reason to distinguish between adult partners who cannot share a bedroom because of disability and children who cannot do so because of disability; or between adults and children in need of an overnight carer. The decisions in relation to Mrs Carmichael and the Rutherfords were therefore manifestly without reason.

In relation to the other *MA* claimants, their need for an additional bedroom was not connected, or not directly connected, to their/their family member's disability. The Court characterised their need as a social need connected with disability. While there might be good reasons for them to receive state benefits to cover the full rent, it was appropriate for their claims to be considered on an individual basis under the DHP scheme.

A, had a strong case for staying in her current house; it had been adapted under the sanctuary scheme and she felt safe there. However, there was no automatic correlation between being in a sanctuary scheme and requiring an extra bedroom: the reason that A currently has an additional bedroom is that no two bedroom properties were available when she moved. The fact that people may have strong reasons for wanting to stay in their property unrelated to the number of bedrooms is taken account of through DHPs. It therefore did not follow that A had a valid claim for unlawful sex discrimination.

The Court held that the PSED is a duty on the part of a public authority to follow a form of due process. On the evidence, the Secretary of State had properly considered the potential impact of the housing benefit cap on individuals with disabilities unrelated to the number of bedrooms, and had addressed the question of gender discrimination.

Lady Hale and Lord Carnwath dissented in relation to the Court's conclusions in respect of A. They considered that the state has a positive obligation to provide effective protection for victims of domestic violence. A's reduction in housing benefit put at risk her ability to stay in her home and therefore constituted discrimination. DHPs were not good enough to justify this discrimination; it was not acceptable for A to endure the additional difficulties and uncertainties involved in obtaining them.

## 2 Immigration Act 2016: eviction of occupiers who lack the right to rent

Sections 39-41 of the Immigration Act 2016 (residential tenancies) will come into force on ***1 December 2016***. The provisions of the Act will

- make it a criminal offence for a landlord or agent to let premises in breach of the Right to Rent conditions; and
- make it easier for landlords to evict a tenant who is occupying premises in breach of the Immigration Act 2014 .

**Offence of leasing premises**

S. 39, IA 2016, inserts new s.33A-33C into IA 2014. S.33A provides that:

- The landlord under a residential tenancy agreement which relates to premises in England commits an offence if the first and second conditions are met.

- The ***first condition*** is that the premises are occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement.

- The ***second condition*** is that the landlord ***knows or has reasonable cause to believe*** that the premises are occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement.

New s.33B IA 2014 creates a further offence of leasing premises which is committed by an agent who "is responsible for a landlord's contravention if the agent (a) knew or had reasonable cause to believe that the landlord would contravene the scheme by entering into the residential tenancy agreement in question, and (b) if s/he had sufficient opportunity to notify the landlord of that fact before the landlord entered into the agreement, but did not do so.

A person who is guilty of an offence under these provisions is liable—

- on conviction on indictment, to imprisonment for a term not exceeding five years, to a fine or to both; or
- on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine or to both. [new s.33C, IA 2014]

**Eviction without a court order**

S.40(2), IA 2016 inserts new s.33D and s.33E into IA 2014.

New s.33D (***Termination of agreement where all occupiers disqualified***) permits a landlord to "terminate" a residential tenancy agreement if the Secretary of State has given a notice in writing to the landlord which

- identifies the occupier of the premises or (if there is more than one occupier) all of them, and
- states that the occupier or occupiers are disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement.

The Secretary of State's notice must be in a prescribed form, which is contained in Sch.1 of the Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc.) Regulations 2016 SI No 1060.

The landlord may terminate the residential tenancy agreement by giving at least 28 days' notice in writing and in the prescribed form to the tenant specifying the date on which the agreement comes to an end.

The Home Office notice 'converts' the occupation status of an assured (including assured shorthold), Rent Act, or basic protection occupier to that of excluded occupier under the Protection from Eviction Act 1977 (s.3A(7D) PfEA 1977, inserted by s.40(5) IA 2016).

Where such a notice is served, it ends the tenancy (s.40(6), IA 2016) and the occupier has no right to remain until a court order is obtained.

**Other procedures for ending tenancy agreements without statutory protection**

In other situations – ie, where there is no Home Office notice stating that all the occupiers are disqualified from renting – new s.33E IA 2014 provides that it will be an implied term of a residential tenancy agreement that the landlord may terminate the tenancy if

- the premises are occupied by an adult who is disqualified from renting; and
- the tenancy is not an assured tenancy or a Rent Act protected tenancy.

**Other procedures for ending agreements with statutory protection**

Section 41(2), IA 2016, creates a mandatory ground for possession of an assured or assured shorthold tenancy where a tenant or occupier is disqualified from renting as a result of their immigration status. The new ground will be **Ground 7B** in Part 1 of Schedule 2 to HA 1988. A similar ground is inserted in the Rent Act 1977 (Case 10A, Sch 15) in respect of regulated tenancies.

**Ground 7B** requires that two conditions are satisfied:

- The Secretary of State has given a notice in writing to the landlord which Identifies the tenant or one or more other persons aged 18 or over who are occupying the premises, as a person or persons disqualified from occupying the premises under the tenancy.

- The person or persons named in the notice is/are in fact disqualified from occupying the premises under the tenancy.

For the purposes of this ground a person ("P") is disqualified as a result of their immigration status from occupying the premises under the tenancy if—

- P is not a relevant national, and
- P does not have a right to rent in relation to the dwelling-house.

A "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.

P does not have a right to rent in relation to the premises if—

- P requires leave to enter or remain in the United Kingdom but does not have it, or
- P's leave to enter or remain in the United Kingdom is subject to a condition preventing P from occupying the dwelling-house.

Where an order for possession is made against joint tenants solely on the basis of Ground 7B (above), and one or more of the joint tenants is a qualifying tenant (ie, has the right to rent), the court may, instead of making an order for possession, order that the tenant's interest under the tenancy is to be transferred to the other joint tenant(s) (new s.10A, HA 1988, inserted by s.40(5), IA 2016.

**Effect on existing tenancies**

Sections 33D and 33E will apply equally in relation to a residential tenancy agreement entered into before or after the coming into force of the 2016 Act (s.40(3), IA 2016).

# 3 Allocations

`*Community contribution' basis of allocating properties was unalwful*

**R (on the application of H and others) v Ealing London Borough Council**
[2016] EWHC 841 (Admin)

The Council had introduced an amendment to its housing allocations policy in October 2013 by which 20% of all available lettings would be reserved for "working households" (where the applicant or a family member worked at least 24 hours pw) and "model tenants" (applicants who already had a Council secure tenancy but sought more appropriate accommodation and had complied with the terms of their tenancy). The purpose was to incentivise tenants to work or return to work and to encourage good tenant behaviour.

H and others applied for judicial review of the lawfulness of the scheme, on the basis that it

- Indirectly discriminated against women, disabled and elderly people (in relation to the working household element);
- breached Article 14 ECHR because it discriminated against women, children, disabled persons, the elderly and tenants who did not already hold Council tenancies;
- breached the Council's Public Sector Equality Duty; and
- breached the Council's obligations in relation to the welfare of children under s.11 Children Act 2004.

The application was allowed. The Court concluded as follows on the main grounds of challenge:

***Indirect Discrimination***: The allocation scheme indirectly discriminated against the disabled, the elderly and women. There was no reason why the Council could not have introduced a "safety valve" by allowing officers a discretion in exceptional circumstances to admit some people who could not work, even if they might wish to do so.

***Discrimination under Article 14 ECHR:*** The judge considered that it could not be said that the scheme was the least intrusive method of achieving its purposes (incentivising work and good tenant behaviour) without unacceptable results or that a fair balance had been struck.

***Breach of the Council's Public Sector Equality Duty:*** There had been a breach of the PSED. There had been no real enquiry into, or consideration of, the potentially discriminatory effects of the working households element of the Scheme .

***Section 11 Children Act 2014*****:** There had also been a breach of this duty. Children with single parent carers who could not work would be adversely affected by the scheme. There had not been any real consideration of the interests of children in this context.

*Spent convictions could not be considered as reasons for disqualification from the housing register*

**YA v L.B. Hammersmith and Fulham**

[2016] EWHC 1850 (Admin)

YA, a former asylum seeker, had been taken into care when he was 11. In 2010, at the age of 14, he was granted indefinite leave to remain in the UK. Between the ages of 12 and 16, he committed several offences of violence, dishonesty and possession of drugs. Under s 4 Rehabilitation of Offenders Act 1974 s.4, all those convictions were spent. None of the offences had been committed after January 2012.

In 2015, at the age of 19, he applied to join the Council's housing register. His application was supported by his social worker and by the care leavers' housing panel. However, his application was refused. The Council had a policy of disqualifying from its allocation scheme applicants who "have been guilty of unacceptable behaviour which makes them unsuitable to be a tenant".

YA challenged this decision by way of judicial review on the grounds that (1) it was unlawful for the Council to take account of the spent convictions; and (2) the policy discriminated against him as a care leaver. . The Council maintained that YA's behaviour remained relevant even though his convictions were spent

Allowing the claim on the first ground, Peter Marquand (sitting as a High Court judge) held that the Council was not entitled to rely on convictions which were spent. It was not lawful to base a decision on those convictions or on the conduct which gave rise to them. The purpose of s.4 of the 1974 Act was "to seek to prevent the past offences coming to light and to ensure that the rehabilitated person is treated as not having committed the offence in question."

The second ground failed because, although the judge was satisfied that there has been discrimination against care leavers (because young people in that class were statistically ikely to engage in criminal/anti-social behaviour), the discrimination was justified.

*Points threshold for bidding does not breach requirement to give reasonable preference*

**R (on the application of Woolfe) v L.B. Islington**

[2016] EWHC 1907 (Admin)

Ms W lived with her mother in a privately rented one-bedroom flat. When she became pregnant, social services told her that unless she moved out of her mother's home they would seek a care order in respect of the new baby. This was in the context of two of the mother's children having been taken into care.

W applied to the Council for assistance as a homeless person. The Council accepted the main housing duty towards her and provided her with temporary accommodation in the private rented sector.

W also joined the Council's allocation scheme. She was awarded a total of 110 points: 100 points for previous residence in the borough, and 10 points for homelessness. However, the threshold for bidding for any properties which became available was 120 points.

W applied for judicial review, on the ground that the Council's sceme was unlawful, as it prevented applicants who were owed a `reasonable preference' from bidding for properties, and also that it was in breach of the duty under s.11(2) Children Act 2004 to have regard to the welfare and interests of the children of affected families.

W's application on these grounds was dismissed. The Council's scheme accorded `reasonable preference' by means of a points system. It was not unlawful to set a

minimum level of points before an applicant could bid. The Council had had regard to the need to safeguard and promote the welfare of children when the policy was devised.

The second ground was that the Council had misapplied its own policy by refusing to award W an additional 90 points under its `New Generation' policy. In order to qualify for these points, "applicants must be living continuously as an agreed member of the household of an Islington resident for at least three out of the last five years." The Council had refused to award W these points because, since she had been temporarily rehoused by the Council in a private sector flat, she was not presently living with her mother. However, the judge took the view that the words: "…*be living continuously….for at least three out of the last five years*…" were capable of being interpreted as meaning "be *living*" and also "*or have been living*". He considered that the Council had misapplied its own policy and ordered it to reconsider the question of awarding the New Generation points to W.

*Discretionary offer of accommodation did not extend to disabled person who had recently joined the household*

**Jones v Luton Borough Council**

[2016] EWHC 2036 (Admin)

Jack Jones's parents were joint secure tenants of a two-bedroom Council property. Mrs Jones died in 2012. Mr Jones died in May 2015. Jack had lived in the house for 18 years, since the age of 14. At that time, Jack was residing in the home with his civil partner and with the partner's brother Jake. Jake had moved in following the breakdown of his relationship in March 2015. He had complex health issues, including diabetes. He was looked after by Jack and his own brother (Jack's partner). Jack and his partner also suffered from chronic depression.

As Jack did not qualify to succeed to his father's tenancy, the Council served Notice to Quit on him. Jack applied to the Council for the grant of a new tenancy of the house to him.

The Council had a policy that it would consider making a discretionary offer of a new tenancy to a member of the family who satisfied certain conditions. The Council decided not to offer Jack a new tenancy of the home, but to offer the tenancy of a one-bedroom property elsewhere to him and his partner. It considered that Jake was not a dependant of Jack, nor was he a member of his household.

Jack's application for judicial review of this decision was dismissed. Jake had only moved into the house shortly before Mr Jones died. The Council was entitled to take the view that his medcial condition was not sufficient to render him a dependent member of Jack's family, bearing in mind the short period for which he had lived there. The medical evidence did not indicate that Jake could not live independently of Jack and his partner.

# 4 Homelessness

## A Statutory homelessness

### *Fresh application after previous refusal*

*Authority bound to accept a fresh application where there was new evidence concerning the state of the applicant's mental health*

**R (on the application of Hoyte) v Southwark LBC**

Administrative Court 8 July 2016

[2016] EWHC 1665 (Admin);

Ms H was a 58 year old woman who had a history of mental health problems and depression. She was homeless and had been staying temporarily with family members. In June 2015 she applied to the Council for assistance. The Council decided that she was not in priority need as she was not “significantly more vulnerable” than someone ordinarily vulnerable as a result of being homeless.

Subsequently, H’s solicitors obtained a report from a clinical psychologist, who concluded that H was quite a high suicide risk. On the basis of that report, H made a second application in October 2015. However, the local authority again decided that she was not in priority need, after consulting its medical adviser. On a review of that decision, the Council obtained records of H’s doctor's appointments before and after the psychologist's consultation. The GP had noted that she had no thoughts or plans to self-harm. The Council affirmed its decision that that she was not in priority need.

On 23 February 2016 H was advised that she could not appeal the review decision. On 24 February she planned to commit suicide, but instead saw her GP, who found that she had clear suicidal thoughts and urgently referred her to a mental health nurse. The nurse found that she demonstrated suicidal ideation with plausible evidence of plan and intent.

H made a third application for homelessness assistance, supported by those findings. However, the Council refused to take the application, concluding that there had been no material change in the facts that had led to its previous decision as it was already aware that she had a history of suicidal ideation. H applied for judicial review of that decision and for an injunction, on the basis that the events of 24 February constituted new facts.
.
The Administrative Court granted H’s application. The Council had not said anywhere in its previous decisions that it accepted that H was a suicide risk. It had concluded that there was no significant risk and had been influenced by the GP's views at that time. It had clearly placed significant weight on the fact that no active suicide plan or risk appeared from the GP records.

In rejecting the new application, the authority had not specifically referred to the events of 24 February. Nor had it referred to the fact that, having previously relied on its interpretation of the GP records as being inconsistent with the psychologist's view on the risk of suicide, there was then evidence from the GP to support suicidal ideation. The events of 24 February had resulted in new evidence from those who were responsible for the claimant's primary healthcare. On any reasonable interpretation, the new application could not be considered by any reasonable authority to be based on "exactly the same" facts as those which existed at the time of the previous review..

Having placed reliance on its interpretation of the GP's views, it was irrational of the local authority to say that the facts were exactly the same when the GP's views had clearly changed. It was

## B Eligibility for assistance

### Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2016 (SI No. 965)

These regulations came into force on ***30 October 2016***. They amend the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294.

The amendments will ensure that homeless persons who have been granted limited leave to remain in the UK under Appendix FM to the Immigration Rules and who are not subject to a 'no recourse to public funds' condition, are eligible for a housing allocation and/or homeless assistance under Part VI and Part VII Housing Act 1996.

**Background**

Under the present eligibility regulations Reg 5 defined which persons subject to immigration control were eligible for housing assistance under Part VII. Such persons included:

- refugees (Class A),
- those granted exceptional leave *outside* the immigration rules and who were not subject to a 'no recourse to public funds' (NRPF) restriction (Class B)
- those who are habitually residence in the UK/Common Travel Area without any limitation other than some sponsorship conditions (Class C),
- those with humanitarian protection (Class D),
- asylum seekers whose claims were made before 3rd April 2000 (Class E) and
- Afghanis who were habitually resident and who had limited leave under para 276BA1 of the Immigration rules (Class F).
-

Under Reg 3 there were similar provisions in relation to eligibility for an allocation of housing accommodation.

Until July 2012 it was usual for any person seeking leave to remain in the UK under Art8 ECHR (right to family life) to be granted leave *outside* the immigration rules. Such persons thus fell within Class B and were entitled to homeless assistance and an allocation of accommodation if they were not subject to the NRFP condition.

However, in July 2012 the Home Office introduced a new Appendix FM to the Immigration Rules and after this date most persons being granted leave under Article 8 were granted their leave *inside* the rules. This change meant that these persons no longer came within Class B. The Home Office failed to amend the Eligibility Regs to take account of this change in the Immigration Rules.

**The changes**

(1) A new Class G has been inserted at Reg 5(1)(g):

> **Class G –** ***a person who has limited leave to enter or remain in the United Kingdom on family or private life grounds under Article 8 of the Human Rights Convention, such leave granted—***
>
> - ***under paragraph 276BE(1), paragraph 276DG or Appendix FM of the Immigration Rules, and***
> - ***who is not subject to a condition requiring that person to maintain and accommodate himself, and any person dependent upon him, without recourse to public funds.***
>
> *Paragraph 276BE(1): Dependants of a relevant Afghan citizen*
>
> *Paragraph 276DG: Indefinite leave to remain on the grounds of private life in the UK*

(2) Class E and the related provisions in Reg 5(2) and (3) relating to pre-2000 asylum seekers are now omitted, as they are no longer relevant.

**Eligibility for an allocation of accommodation**

(1) a new Class F in the same terms as Class G above has been inserted at Reg 3 (1) (f)

*Irish citizens are eligible for Part 7 assistance by virtue of their nationality and habitual residence in the Common Travel Area of the United Kingdom and the Republic of Ireland. They do not need to rely on EU rights of free movement.*

**McCarthy v London Borough of Brent**
Central London County Court 5 August 2016
*Legal Action,* Nov 2016, p.41

Ms M fled domestic violence in the Republic of Ireland and came to London, where she applied to Brent for housing as a homeless person under Part 7 of the Housing Act 1996. She was caring for young children and therefore not working or looking for work. She was found to be ineligible for assistance by the Council, applying regulation 6 of the Homelessness and Allocations (Eligibility)(England) Regulations 2006. Regulation 6 applies to persons from abroad who are not subject to immigration control. In order to be eligible under regulation 6 a person has to have a right to reside in the UK other than as an EU jobseeker.

The Council decided an Irish national had no right to reside in the UK above and beyond that enjoyed by all other EU nationals. M was not working and did not have a right to reside as an EU worker. She did not have a right to reside at all and was therefore ineligible pursuant to regulation 6.

M's appeal to the county court was upheld.

Section 1(3) of the Immigration Act 1971 provided that arrival into and departure from the UK on a journey from or to the Republic of Ireland was not subject to control under the 1971 Act and a person did not require leave to enter the UK on arriving from Ireland. It further provided that the UK, the Channel Islands, the Isle of Man and the Republic of Ireland were referred to as the Common Travel Area. There was no specific mention of a right to remain in the UK.

In practice Irish nationals did not apply for leave to remain in the UK and it was not clear how such an application would be determined. Neither party could give an example of an Irish national having applied for leave to remain in the UK. There were hundreds of thousands of Irish nationals living in the UK. The Council had argued that they were residing on the basis of tolerance, but this was a far-fetched analysis.

The lack of restrictions on arrival into and departure from the UK within the Common Travel Area, coupled with the absence of a mechanism for Irish nationals to apply for leave to remain, led to the conclusion that Irish nationals had an unfettered right to remain in the UK. To be habitually resident in Ireland was to be habitually resident in the UK and a person habitually resident in Ireland ought to have the right to claim housing assistance in the UK. It could not be said that Irish nationals in the UK were in transit and their presence only tolerated. Section 1(3) of the Immigration Act 1971 granted a broad status including a right to remain. For all practical purposes Irish nationals were treated as UK citizens.

Leave to remain, if granted, was for a limited time and with restrictions. There were no such limits on the rights of Irish nationals to be in the UK.

If the court was wrong on the application of regulation 6 then regulation 5 of the 2006 Regulations applied to ensure that Irish nationals were eligible for homelessness assistance. This regulation applied to those subject to immigration control and provided,

in Class C, that "a person who is habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland and whose leave to enter or remain in the United Kingdom is not subject to any limitation or condition" was eligible for homelessness assistance.

## C Priority need

### The Supreme Court cases

*Vulnerability: comparison with the `ordinary homeless person'?*
**Hotak v Southwark LBC; Johnson v Solihull MBC; Kanu v LB Southwark**
[2015] UKSC 30 13 May 2015

The issues in the Supreme Court decision were as follows:

1. ***Does the assessment of `vulnerability' involve a comparison? If so, is the right comparison with an `ordinary (actual) homeless person', or with an `ordinary person who happens to become homeless'?***

The Supreme Court accepted that the meaning of vulnerability involves a comparative exercise. "Vulnerable" is a word that implies a comparison with someone else. So who should the homeless applicant be compared with?

The Court unanimously rejected the approach of the Council in *Johnson*. It was wrong to look at the characteristics of other persons who were actually street homeless. The right comparator was the ordinary person, not the ordinary homeless person or street homeless person who was already likely to be suffering from a number of problems. The focus should be on the particular characteristics of the applicant and upon all of the applicant's difficulties when taken together. The authority must conduct a composite assessment of those issues. The well-known guidance in the *Pereira* case was unhelpful and did not represent the statutory test.

Vulnerability in this context means an applicant's vulnerability if homeless. An authority must, "pay close attention to the particular circumstances of the Applicant in the round". (Lord Neuberger, para 38). The correct approach should be to take "the ordinary person if rendered homeless and compare how the applicant would fare as against him" or "to compare him with an ordinary person if made homeless, not an ordinary actual homeless person".

The local authority's finite resources are irrelevant to vulnerability (para 39). But to be vulnerable a homeless applicant must be likely to suffer more than many others in the same position (para 52); and must be significantly more vulnerable than ordinarily vulnerable as a result of being homeless (para 53). For the future expressions such as "when street homeless" and "fend for oneself" should be avoided in favour of the plain wording of the Act (para 40). The use of statistics to determine vulnerability is dangerous (para 43).

2. ***When assessing an applicant's vulnerability, can the authority could take into account care that is provided by a relative or friend to him/her or other third party support?***

The Court held (Lady Hale dissenting) that care given by statutory bodies or by a carer, whether a family member or not, could be taken into account, but great care should be taken in deciding whether that care will really be effective when the person is homeless (para 61). Other people's support can, however only be taken into account if the support will be provided on a "consistent and predictable basis" (para 65). Even if a relative can

provide some care to the applicant it will not necessarily remove the vulnerability (para 69).

### *3. Does the Equality Act 2010 add anything to the decision-making process?*

The Court held that the s.149 Public Sector Equality Duty is a duty of substance, not form. It is not necessary for the decision maker to refer to the duty specifically: indeed, he or she may be ignorant of the existence of the Equality Act. At each stage of the decision-making process the authority must ask whether an applicant with an actual or possible disability, or other protected characteristic, is vulnerable. The authority must focus sharply on whether the applicant is disabled, the extent of the disability, the effect of the disability and whether the applicant is vulnerable (para 78). There must be rigorous consideration and a particularly sharp focus where the equality duty is engaged. Simply paying lip service to the Equality Act would not save an otherwise poorly reasoned decision.

**Taani v Hackney LBC**
[2016] EWCA Civ 216 25 January 2016
*Legal Action*, Oct 2016, p.41

T's application for assistance as a homeless person was rejected by the Council on the basis that he was not vulnerable. T applied for permission to appeal to the Court of Appeal on the basis that the reviewing office had misdirected himself by considering in his decision whether T was able to "fend for himself". Permission was refused, on the basis that "a one-off misapplication of the legal test does not satisfy the test for a second appeal".

T's application for permission was renewed, on the basis that the misapplication was unlikely to be a "one-off", as the reviewing office, Mr Minos Perdios, is contracted by a number of local authorities to carry out reviews. However, the application was refused. It was held that "There is no particular indication from the [review decision] letter that this review officer is likely to misdirect himself in other cases."

## County court cases on Vulnerability following *Hotak/Johnson/Kanu*

**HB v Haringey LBC**
Mayor's and City of London Court 17 September 2015
*Legal Action*, Dec 2015

HB was a single man, aged 45, from Algeria. He had been the victim of torture. He uffered from chronic post-traumatic distress disorder and recurrent depressive disorder. He was described by a consultant psychiatrist as chronically disabled by virtue of his mental and physical disorders. His application to the council for homelessness assistance was made before the Supreme Court decision in *Hotak v Southwark LBC* had been handed down. The council indicated that it was minded to find that he was not vulnerable. Detailed representations were made in response, which drew attention to the *Hotak* decision. The reviewing officer'sfinal decision stated: 'I am satisfied that your circumstances are not sufficiently serious for me to conclude that you are vulnerable. This is because I am not satisfied that when homeless you are significantly more vulnerable than an ordinarily vulnerable [sic].'

Alolwing the appeal, HHJ Lamb QC held that it was impossible to discern from the reviewing officer's decision:

- how he defined 'vulnerability';
- what, if any, attributes of vulnerability he had ascribed to the ordinary comparator;

- how he defined the word ‘significantly’, ie where on a spectrum of meaning between ‘noticeable’ and ‘substantial’ he had placed ‘significantly’;

- whether he considered HB to be more or less vulnerable than the ordinary comparator;

- whether he considered HB to be invulnerable or without vulnerability; and

- if he considered the appellant to be more vulnerable than the ordinary comparator, whether and to what extent and why the difference was insignificant..

**Barrett v Westminster City Counci**
County Court at Central London 2 October 2015
*Legal Action*, Feb 2016, p.45

Following the Administrative Court’s decision above, the Council made a decisioin under s.184 of the Act that Ms Barrett was not vulnerable, and was therefore not in priority need. It reasoned that her medical conditions could be minimised by use of toilet and laundry facilities at day centres. The reviewing officer’s decision stated that the Supreme Court judgment in *Hotak v Southwark LBC* had been taken into account and the public sector equality duty had been considered.

On appeal, Recorder Genn held that the reviewing officer had failed to apply the approach to third-party support identified by Lord Neuberger in the Suprme Court case of *Hotak* (see below). She accepted that the reviewing officer would know about relevant services in the local area, but there was no identification of whether the toilet facilities in day centres would be private or the extent to which laundry facilities were available. It was therefore difficult to assess the extent to which the anxiety and panic attacks and ability to eat and drink would be improved. There was no consideration of the appellant’s specific difficulties and frailties as a homeless woman at night.

The judge also held that, even if she were wrong on the other grounds, the manner of engaging with the PSED contained significant errors of law. The appellant had presented with the potential protected characteristic of ‘disability’. There was no decision on whether she was a disabled person or not. Since there was no assessment of whether she was disabled, the council could not possibly identify what steps might be required to meet her needs. Had it looked at the cumulative conditions in the context of disability and gender, potentially there might be a different conclusion on the review. The appeal was allowed and the review decision quashed.

**Mohammed v Southwark LBC6**
County Court at Central London 18 December 2015
*Legal Action*, July/Aug 2016, p.48

M applied to Southwark for homelessness assistance. He provided a GP’s letter stating that he suffered from depression, was prescribed anti-depressants and was awaiting therapy. Later, M’s brother was murdered. He was badly affected. The council found that he was not ‘vulnerable’. On review, a letter was provided from an NHS psychological therapist. It set out the results of a mental state assessment, in which M was found to be in the `moderate to severe’ range for both depression and anxiety. The letter mentioned that he was experiencing bereavement after the death of his brother and that should he be made homeless ‘it will have a significant impact on his well-being and ability to cope, and likely increase his symptoms of low mood and anxiety and it would also significantly impact on his ability to engage with counselling sessions …’.

The Council served a 'minded to' letter acknowledging that in light of the Supreme Court decision in *Hotak v Southwark LBC* there had been a deficiency in the original decision, but it was minded to uphold the finding of no priority need. Further representations were made to the effect that, if homeless, M would be significantly more vulnerable than an ordinary homeless person. The council made no enquiries of the NHS psychological therapist, nor did it obtain its own medical advice. It issued a review decision upholding the finding of no priority need.

Recorder Hochhauser QC allowed M'sappeal. In the absence of guidance from the Supreme Court in *Hotak* as to the meaning of the term 'significantly' (in the phrase 'significantly more vulnerable' adopted in that case), he held that – by analogy with the definition of 'substantial' in Equality Act (EA) 2010 s212 – it simplymeant 'more than minor or trivial'. He further held that if clinical depression is a 'mental illness' for the purposes of HA 1996 s189(1) or a 'disability' for the purposes of EA 2010 s149(1), which in his judgment it was, and an applicant was likely to suffer more harm by the exacerbation of that mental illness by reason of being rendered homeless than an ordinary person would, then he or she is to be regarded as vulnerable for the purposes of the Act.

On a fair reading of the medical evidence, if he were rendered homeless, M's mental illness and his disability would worsen, and therefore he was significantly more vulnerable than ordinarily vulnerable. Before departing from the tendered prognosis, any reasonable council, complying with the public sector equality duty, would have made further enquiries of the psychological therapist or obtained its own medical advice. The fact that the Council did not was evidence that it didnot approach the matter 'with rigour'as required by *Hotak* (at para 78). The decision was one that no reasonable council could have reached without making further enquiries.

**Butt v London Borough of Hackney**
County Court at Central London 22 February 2016
*Nearly Legal*, 25 September 2016 (with link to transcript of judgment)

Mr Butt applied to the Council for homelessness assistance in 2014. He provided evidence of various physical and medical conditions. The Council rejected his application, on the basis that he was not vulnerable. A reviewing officer, in a 14-page letter, upheld that decision. B appealed to the county court.

The appeal turned on two grounds. Ground 1 was that the Council was in breach of the public sector equality duty under section 149 of the Equality Act 2010 in that the review decision fails to address the following aspects of that duty.

Allowing the appeal, HHJ Luba QC noted that in the reviewing officer's list of matters taken into account, he had referred to "section 149 of the Equality Act 2010 and the Supreme Court judgment in *Hotak*." Furthermore, he had said:

> "I can confirm that I have reached this decision with the equality duty well in mind and carried out this exercise in substance, with rigour, and with an open mind. I have focussed very sharply on 1) whether you are under a disability bracket or have another protected characteristic 2) the extent of such disability 3) the likely effect of the disability when taken together with any other features on you if and when homeless and 4) whether you are as a result vulnerable."

The judge determined that reviewing officers need to "spell out, at least in summary form in their decisions, what conclusions they have reached on the four matters set out at the end of paragraph 78 of the judgment in *Hota*k. These are: (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such

disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'. What was not sufficient, as Lord Neuberger said, was for reviewing officers' decisions to simply contain 'no more than formulaic and high-minded mantras.' (para 78 of *Hotak*).

Ground 2 was that the reviewing officer in that paragraph did not explain what he meant by 'significantly': did it mean 'to a greater extent than simply insignificant or peripheral', or 'something really serious'? Upholding the appeal on this ground also, HHJ Luba QC concluded that the obligation to give reasons in section 203, taken with the obligation to direct himself in accordance with the Supreme Court judgment in *Hotak*, required the reviewing officer to identify the sense in which he was using the term 'significantly'.

**Ward v Haringey LBC**
County Court at Central London 22 February 2016
*Legal Action*, Sept 2016, p.38
See also *Nearly Legal*, `A compendium of vulnerability cases', 12 September 2016

W was a single man aged 50 who had a history of mental illness since childhood. He applied to the Council as homeless, but the Council decided that he was not in priority need. The Council obtained its own advice from NowMedical, but this was based on the *Pereira* (pre-*Hotak*) approach to vulnerability. The reviewing officer applied the *Hotak* test of vulnerability, but did not invite NowMedical to reconsider its advice in that light. The decision was upheld on review.

W's appeal to the county court was upheld. Recorder Powell QC held that on any fair or reasonable reading of the medical advice and information available on review, the *Hotak* criteria were made out. The contrary finding was irrational. `Indeed… it is difficult to comprehend the review decision consistent with proper applicaton of the *Hotak* test'.

**SS v LB Waltham Forest**
County Court at Central London 5 September 2016
*Legal Action*, Nov 2016, p.41

SS had left her home due to severe domestic violence which had left her with chronic mental and physical health problems. She had been provided with supported accommodation in a specialist refuge. This was coming to an end and she applied to the Council as homeless.

The Council decided that SS was not in priority need as compared to the ordinary homeless person, in accordance with *Hotak*. It did however accept that she was disabled within the meaning of the Equality Act 2010 where her disabilities arose out of domestic violence and so the Public Sector Equality Duty (PSED) was engaged. It upheld the "not vulnerable" decision on review.

SS's appeal to the county court was allowed. The Local Authority had not lawfully applied the test of vulnerability from *Hotak* and had not completed a composite assessment, as it had not taken into account the risks of harm presented to the appellant arising out of the risk of loss of specialist support and accommodation, which rendered the appellant significantly more vulnerable than an ordinary homeless person of robust health.

Further, while Waltham Forest had accepted the appellant's disabilities had arisen out of domestic violence but had only considered the protected characteristic of disability in their PSED assessment. The assessment had failed to address the protected characteristic of gender which was directly linked to domestic violence, such that it could not be said that the PSED had been lawfully discharged.

## D Local authority duties in relation to those not in priority need

*Assessment of housing need required to perform s.192 duty to those not in priority need*
**R (on the application of Smajlaj) v Waltham Forest LBC (2016)**
[2016] EWHC 1240 (Admin) 26 May 2016

Ms S was a victim of human trafficking who was receiving treatment from the Helen Bamber Foundation (HBF). She applied as homeless to the housing authority, HBF exhibited medical evidence that S was a vulnerable young woman with significant mental health problems who needed housing in single sex accommodation close to the charity's premises in London. However, the authority offered mixed gender interim accommodation outside London was offered, which S rejected as unsuitable.

The authority then decided that S was not in priority need and that it therefore had no duty to house her, but only to offer her advice and assistance in helping her to find her own accommodation. It stated that an information booklet which it had previously given to her fulfilled that duty. S requested temporary accommodation pending a review of that decision, but the Council refused her request on the basis that her application for review lacked merit. She appealed against the priority need decision and applied for judicial review of the Council's failure to provide temporary accommodation,

S argued that (1) the local authority had failed to decide whether to exercise its discretion to accommodate her under s.192(3) or, alternatively, any such decision was unlawful in the absence of a housing needs assessment as required by s.192(4); (2) the local authority had not discharged its duty to provide her with advice and assistance under s.192(2).

Section 192 provides as follows:

> **192.— Duty to persons not in priority need who are not homeless intentionally.**
>
> (1) This section applies where the local housing authority—
> (a) are satisfied that an applicant is homeless and eligible for assistance, and
> (b) are not satisfied that he became homeless intentionally,
> but are not satisfied that he has a priority need.
>
> (2) The authority shall provide the applicant with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.
>
> (3) The authority may secure that accommodation is available for occupation by the applicant.
>
> (4) The applicant's housing needs shall be assessed before advice and assistance is provided under subsection (2).
>
> (5) The advice and assistance provided under subsection (2) must include information about the likely availability in the authority's district of types of accommodation appropriate to the applicant's housing needs (including, in particular, the location and sources of such types of accommodation).

Allowing S's application, the Administrative Court held:

- A "housing needs" assessment was required before a housing authority could assess whether and how to exercise its discretion to accommodate. Otherwise any decision would be uninformed. The authority had decided not to provide

accommodation for S under s.192(4). The issue was whether the authority could demonstrate that it had made a housing needs assessment prior to reaching that decision. It could not demonstrate that it had. Its decision letter was inadequate because it failed to address the specific details of the claimant's case, including the reasons why she could not be housed outside London. The authority had therefore acted unlawfully in failing to carry out its duties.

- Once the housing authority made a s.184 decision of no priority need, its obligations under s.192(2) and s.192(3) were engaged and were not held in suspense pending completion of a review or appeal.

The authority was wrong to assert that S's challenge should have been brought under the review procedure in s.202 of the Act. Section 202 covered disputes as to what duty was owed to an applicant, such as whether she had a "priority need". Challenges to the legality of the exercise of a statutory duty (or the failure to exercise a statutory duty) had to be brought by judicial review.

## E Intentional homelessness

*Accommodation provided under the s.190 to the intentionally homeless was not "settled" accommodation which broke the chain of causation: all relevant factors had to be considered*

**Huda v Redbridge LBC**

Court of Appeal 12 July 2016

[2016] EWCA Civ 709;

H had applied to the Council for assistance as a homeless person in 2008 and had been placed in interim accommodation under s.188(1). H occupied the accommodation under a written licence from the housing provider, London & Quadrant Housing Trust (L). The Council decided that H had become intentionally homeless, but continued to allow him to occupy the accommodation on a temporary basis under s.190(2).

H applied for a review of the decision that he was intentionally homeless, but was unsuccessful. In January 2010, the Council informed him H that it did not owe him any housing duty, but, owing to an administrative error, it did not take any steps to evict him. In July 2012, H made a further application for housing, at which point the Council realised its mistake and required London & Quadrant to serve a notice to quit.

The Council's reviewing officer concluded that H's occupation of the property during the period from January 2010 to July 2012 did not break the chain of causation between the intentionality of his homelessness and his new application for housing. She concluded that the accommodation had at all times been precarious and occupied in circumstances that were incompatible with it being "settled". H argued that (1) it could be inferred from the fact that he had occupied the property for over two years since the decision of January 2010, the Council had effectively agreed to his being there indefinitely. At some point during the two-year period, he must have become an assured tenant; (2) the reviewing officer's statement that accommodation provided under s.190 was not capable of being "settled" was wrong in law; (3) although the Protection from Eviction Act 1977 did not in general apply to licences under Pt VII of the 1996 Act, it applied from the time that the reasonable period of extended accommodation under s.190(2) had expired.

H's appeal was dismissed by the county court judge and also by the Court of Appeal. The Court held:

(1) The reviewing officer had concluded that H had continued to occupy the property as a licensee. To succeed in his argument, H would have to show that the reviewing officer's decision that the accommodation was held on a licence was perverse or irrational. The reviewing officer had looked at the situation as a matter of substance on the facts. She concluded that the licence was not a sham and that H's occupation was precarious throughout the relevant period. Her process of reasoning could not be considered perverse. The duration of occupation could not itself be determinative.

(2) The assessment to be carried out was one of fact and degree. The terms of the licence could not be taken on their own: they had to be seen in the light of the fact that H was fully informed in January 2010 that no housing duty was owed to him (para.21).

(3) The fact that the reasonable period of extended accommodation under s.190 had come to an end did not result in any change in the nature of H's permission to occupy, which was still by virtue of a licence. Since H's only right of occupation was under the licence from London & Quadrant, on any basis that right was precarious, and he could not have any reasonable expectation of continuing in occupation for a significant period of time.

## F Temporary accommodation pending appeal

*Test for exercise of discretion*
**SN v Waltham Forest LBC**
Central London County Court 5 September 2016
*Legal Action*, Nov 2016, p.42

SN had been found intentionally homeless for a second time (following a previous successful appeal) and had lodged a further appeal under s.204 HA 1996. She had two young children, one of whom suffered from chronic constipation and daily vomiting. SN herself suffered from high blood pressure. The Council refused to accommodate her pending the appeal.

On an appeal under s.204A, SN argued that the Council had failed properly to consider `limb 3' of the test in *R v Camden LBC ex parte Mohammed*, namely the personal circumstances of the Appellant, and more particularly the consequences of a refusal to accommodate. The Council argued firstly that the merits part of the balancing act ('limb 1') was the overriding consideration and without merits the other factors were unlikely to outweigh an unmeritorious case. The Council further argued that it had recorded the personal circumstances and considered the medical evidence adequately so as to comply with the *Mohammed* test. There was no need to go further and consider endless hypothetical scenarios.

Allowing the appeal, HHJ Hand QC held that:

- There was no hierarchy in the *Mohammed* test: personal circumstances were capable of tipping the balance in an appellant's favour regardless of the merits. LocalaAuthorities rarely accept that there are merits in an appeal and therefore the Council's position would mean most people pursuing an appeal would fall at the first *Mohammed* hurdle, which could not be right.

- The Council's decision was unlawful as the consequences of a negative decision had not been properly considered, despite the reviewing officer having set out the facts and made reference to the evidence. While a reviewing officer did not have to write chapter and verse, s/he had properly to consider what the real effect of its decision on this applicant with her particular circumstances would be.

The judge was also satisfied that substantial prejudice to the SN's ability to pursue her appeal would be caused and so he made a mandatory order under s.204(4)(6). He held that the test was met where there were issues of credibility in the main appeal, and where the Appellant may have to deal with her children going into care, which would affect her ability to cope, interfere with her benefits and impact on her public funding certificate.

# 5 Community care: Care Act 2014

*A need for accommodation is not necessarily a need for care and support*
**R (GS) v Camden LBC**
[2016] EWHC 1762 (Admin) 27 July 2016
*Nearly Legal*, 3 August 2016

GS was born in Afghanistan, but became a Swiss national in 2006. She had physical and mental health problems and was wheelchair dependent. Between 1992 and 2011 she was accommodated and supported by the Swiss state. In 2011, she left her accommodation after she had been raped and slept in Zurich airport. In 2013, she came to the United Kingdom and lived in Heathrow airport for six months before being admitted to hospital. After leaving hospital she moved into a hostel and applied to the Council for accommodation under s.21, National Assistance Act 1948.

The Council found that she was ineligible for assistance under the 1948 Act and offered her money to return to Switzerland. However, subsequently it decided that GS was entitled to assistance under s.21 after she was assessed as having a persistent delusional disorder and therefore lacked capacity to decide whether to return to Switzerland. It continued to provide accommodation until October 2015 when an assessment was carried out under the Care Act 2014. As a result of that assessment, the Council decided that GS did not have a need for care and support under the 2014 Act. It was satisfied that while she suffered from a mental disorder this did not prevent her from being able to achieve two or more outcomes as prescribed by the Care and Support (Eligibility Criteria) Regulations 2015. A need for accommodation was not a need for care and support.

GS challenged that decision on the grounds that her need for accommodation amounted to care and support within the meaning of the 2014 Act and, in any event, that if she were not provided with accommodation this would result in a breach of Article 3, ECHR.

### *Is a need for accommodation a "need for care and support"?*

Under s.21, National Assistance Act 1948, a need for accommodation was not sufficient to engage the duty. The duty to provide accommodation only arose if the need for care and attention was for services that were not otherwise available unless residential accommodation was provided: *M v Slough BC* [2008] UKHL 52 and *R (SL) v Westminster CC* [2013] UKSC 27.

GS's argument that neither *M* or *SL* should be followed because they concerned a different statute and the tests under the 1948 Act and 2014 Act were different, was rejected. A need for care and support, as under the 1948 Act, meant more than a need for accommodation. The fact that accommodation could be provided by an authority under s.8 to meet a need for care and support did not mean that a need for accommodation was

a need for care and support. That meant that GS' need for accommodation did not give rise to a need for care and support so as to trigger the obligation to provide her with accommodation. As she did not otherwise satisfy the eligibility criteria an obligation under the Care Act 2014 did not arise.

But the Court accepted GS's alternative argument that the Council was under a positive obligation to exercise its power under s.1, Localism Act 2011 to provide her with accommodation as to do otherwise would result in a breach of Article 3 or Article 8 of the Convention. Peter Marquand, sitting as a High Court judge, said:

> "Taking into account the entirety of the Claimant's circumstances including her potential social isolation, physical disabilities, pain, mental health condition and the physical difficulties that she encounters it is my judgement that if she were to become homeless then there would be a breach of article 3."

GS would become homeless because she could not afford to pay for accommodation. Although the lack of accommodation was not of itself sufficient to engage Article 3, in her case it did so because the lack of accommodation had in the past exacerbated her mental conditions, which included suicidal ideation. The Council was therefore obliged to provide GS with accommodation in the exercise of its power under s.1, Localism Act 2011.

# 6 Children Act cases

*Authority's decision refusing a teenage girl accommodation as a child in need under s.20 Children Act 1989 was fundamentally flawed*
**A v Enfield LBC**
Administrative Court 16 March 2016
[2016] EWHC 567 (Admin)

A, aged 17, had been referred to Enfield children's services authority as a homeless young person. Her family lived within the Council's area, but she did not wish to return to them. She gave a generalised account of incidents of domestic violence and explained that she had been abroad for two months and had just returned to the UK. It became apparent that A had previously been detained at an airport after leaving her family home without her family's consent and had travelled through Turkey to the Syrian border. There were concerns around radicalisation.

The authority conducted a `child in need' assessment under s.17(10) Children Act 1989 and concluded that A was not homeless as she was able to return to her parents, and that as she was not homeless she could not be a child in need. Following the assessment, she was again detained by police at the airport whilst seeking to travel to Bulgaria with a significant amount of money.

The Court had granted an injunction ordering the local authority to provide A with accommodation and support under section 20 of the 1989 Act. She had since turned 18 years old. She argued that she had been a child in need of accommodation and support under s.20, and that the authority should therefore treat her as if she were a `former relevant child', thereby triggering its `leaving care' responsibilities.

A's application was granted. The Administrative Court held:

(1) The authority had not properly analysed A's case within the framework of the Act. The risks to her by virtue of her views and belief structure and the concerns that she was within a spectrum of radicalisation, undoubtedly placed her securely within the reach of s.17. There were also concerns that she was being prepared for marriage to a much older man, which her parents were apparently unable to

prevent. There had been two occasions on which she travelled extensively and alone in dangerous parts of the world. She had alleged that she had been locked in her home against her will for considerable periods of time.

(2) The court's view was reinforced by the guidance from the Family Division on *Radicalisation Cases in the Family Courts*. It was hard to envisage any circumstances where issues such as those that arose in the instant case would not fall within the ambit of section 17.

(3) The status of being a `former relevant child' provided a gateway to a raft of provisions for care and support, including care and accommodation which a local authority was obliged to provide. If A had not turned 18 she would have continued to be looked after by the authority under s.20 CA 1989, and on reaching 18 would have had the status of "former relevant child". It would be unfair to exclude her from consideration for the entire range of services that should have been open to her. It was held that A was to be regarded as if she were a former relevant child and therefore entitled to `leaving care' assistance.

*Child was not `in need' where parents had not been forthcoming about sources of support*
**R (on the application of O) v London Borough of Lambeth**
Administrative Court
[2016] EWHC 937

O was a child, who supported by her mother and litigation friend. She was born in the UK in 2010. Her mother, PO, was a Nigerian national and an over-stayer, having entered the UK on a six month visitor visa in 2007. The family had no recourse to public funds, had minimal family support and were destitute.

The mother had applied to the Council for assistance and accommodation under s.17 Children Act 1989. However, the Council decided that O was not a `child in need' and refused to provide the family with accommodation and support. O applied for judicial review of the authority's decision.

It was argued for O that the Council's assessment of her as not being in need was irrational. The Council conte3nded that O was not in need, and even if the Court found that she was in need, the needs of the family could be met by relocating to Nigeria.

The Judge found in favour of the Council and dismissed O's claim. Whether or not a child is 'in need' is a question for the judgment and discretion of the local authority, and appropriate respect should be given to the assessments of social workers, who have a difficult job in financially straitened circumstances. Further, the Council was entitled to draw inferences of 'non-destitution' from the combination of (a) evidence that sources of support have existed in the past; and (b) lack of satisfactory or convincing explanation as to why they will cease to exist in future.

The Judge found that the family did have a reasonable level of support and that PO had been dishonest in seeking to conceal her income from the authority. Additionally, O and PO had been assisted by friends with accommodation in the past. PO could provide no explanation as to why such support could no longer continue. As such, it was a reasonable inference for the Council to conclude that O was not a child in need.

*Council ordered to provide interim accommodation for a mother and her 7 year old son pending judicial review of decision that the son was not a `child in need'*

**R (on the application of N) v Greenwich LBC**
Administrative Court 25 May 2016

N was a child aged 7 whose mother had asked the Council's children's services department to provide accommodation for him and N under section 17 of the Children Act 1989.

N was a French national. But he had lived with his mother in the UK for his whole life. The mother was a Gambian national who had overstayed on a visitor's visa. She was refused a residence card and was challenging that decision. She was not entitled to benefits because of her immigration status, and she did not have the `right to rent' under the Immigration Act 2014.. She and N were evicted from their accommodation and applied to the local authority for housing.

The Council conducted an assessment report and decided that N was not a `child in need'. N, through her mother, applied for judicial review of that decision and for an injunction ordering the Council to provide interim accommodation. It was submitted that the decision that N was not a child in need under s.17 was unreasonable and irrational, as the mother had been deprived of the right to rent privately due to her immigration status, and that they would become street homeless without interim accommodation. The Council submitted that they could stay with friends or family members, or in B&B accommodation pending the hearing of the judicial review.

Judge Andrew Thomas QC ordered the Council to provide interim accommodation pending the judicial review. Since the mother did not have the right to rent, there was no immediate prospect of her finding suitable accommodation for herself and N in the short term. The assessment report had suggested friends or family as a fallback, but it had not identified particular individuals. The suggestion that they stay in a B&B had not been considered in the assessment report, and the actual cost of it compared with the mother's resources had not been properly considered.

The question was whether there the child's application for judicial review had good prospects of success. Section.17 Children Act 1989 did not of itself impose a duty on the local authority, but gave rise to a discretion, to be read alongside other duties including those under article ECHR art.8, to house homeless children. The interrelationship between s.17 and those other duties could cause that discretion to become a duty where a child would otherwise be homeless or destitute,

The child's application had good prospects of success. The court considered the various factors, including the authority' section 20 duty to ensure a child was not homeless, the local authority's limited resources, the fact that interim housing relief could disincentivise a family from finding its own accommodation, and the impact that the case could have on other `right to rent' cases,
.
It would be a significant detriment to the child if he did not have appropriate accommodation and if he were separated from his mother, when he had never been separated from her. The balance of convenience was on the child's side, and the local authority had to provide accommodation until the judicial review application was heard.

*Social services authorities had not adopted inflexible practices when assessing the financial support to be provided to children in need*
**R. (on the application of C) v Southwark LBC**
Court of Appeal 12 July 2016
[2016] EWCA Civ 707

C was a Nigerian citizen who had overstayed her leave to enter the UK. She had four children who had been born in the UK. The family were evicted for non-payment of rent after their father left. The social services authority accepted that it had a duty to provide emergency accommodation for the children under s.17 Children Act 1989 pending the outcome of C's application for leave to remain. It provided them with bed and breakfast accommodation for eight months, which comprised one bedroom with a shared kitchen and bathroom. The family were offered alternative accommodation in different parts of London, but C preferred to stay where they were as it was close to the children's school.

Over the next two years, six assessments were made of the children's needs and the family lived in four different homes. The local authority initially paid subsistence support of £47 per week. The family also received food vouchers from a charity. The local authority payments increased to £140 per week. The family were later relocated to Rochdale, with C's agreement, and their payments increased to £216 per week.

The children (through their mother) applied for judicial review on the ground that the authority had adopted an unlawful policy in its provision of financial support to those seeking assistance under section 17, in particular by basing the support provided on a rate equivalent to child benefit and payments to asylum seekers under the asylum support system.

The children's application was dismissed in the High Court, and their appeal to the Court of Appeal was also dismissed. The Court of Appeal held:

- The s.17 scheme did not create a specific or mandatory duty owed to an individual child; it was a target duty which created a discretion to make a decision to meet a child's assessed need. The focus had to be on whether the information gathered by a local authority was adequate for the purpose of performing its statutory duty. The secretary of state had issued guidance to local authorities regarding assessments of need for s.17 purposes. Each child's needs were to be individually assessed by reference to the framework.

- There was, however, a need for a rational and consistent approach to decision-making. That permitted authorities to adopt appropriate internal guidance or cross-checking consistent with the guidance, but not a policy or practice of fixing financial support by reference to that available under other statutory schemes.

- In the present case, the financial support provided exceeded child benefit rates and s.4 support rates for most of the period in question. There had been repeated assessments and consequential changes to the level of support provided. There was no basis to challenge the local authority's decisions based on a flawed policy or practice of inflexibly fixing its support payments.

- In relation to article 8 ECHR, the question was whether article 8 imposed a positive obligation on the state in the factual circumstances complained of. If a local authority failed to provide services in accordance with an assessment of need, it was arguable that there was an immediate and direct link between the services requested and the appellant's article 8 rights. However, the local authority's decisions were well within the margin of appreciation that the state enjoyed.

# HOUSING LAW UPDATE


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*McDonald v McDonald* [2016] UKSC 28

1. The facts of the case where that the appellant's parents had purchased a property for her to live in, which was financed by a loan secured by a mortgage from a finance company. The mortgage deed provided that the company could appoint receivers with power, among other things, to take possession. The appellant was granted an AST by her parents. Her parents fell into arrears and the mortgage company appointed receivers. They eventually served a s.21 notice on the defendant and issued proceedings in the name of her parents. The appellant defended the claim based on Art. 8. There was evidence that if she were evicted she would be severely distressed and may attempt suicide. A possession order was made as the Judge at first instance found that the appellant had no right to a review of proportionality as the landlord was a private landlord (further finding that if he were wrong about this, it would not be proportionate to make the possession order). The appellant appealed, unsuccessfully, to the Court of Appeal and then to the Supreme Court.

2. The Supreme Court held that even though Art. 8 was engaged when a judge made a possession order of a tenant's home in a claim by a private sector landlord, *subject to any authoritative guidance on the contrary from the European Court*, it was, as a matter of principle, not open to the tenant to argue that the order should not be made, based on Art. 8 (i.e. if the domestic law would mandate an order, then the order had to be made): Parliament had decided the legislative provisions which balanced the competing interests of private sector landlord and their tenants. To hold otherwise "would mean that the Convention would be invoked to interfere with the A1P1 rights of the landlord and in a way which was unpredictable": [41]. The purpose of the Convention was to protect citizens from having their rights infringed by the state, not to alter private contractual rights. It was not possible to read s.21(4) HA 1988 as allow such a challenge. In *Pinnock* and *Hounslow LBC v Powell* [2011] UKSC 8, the landlord were public authorities who were obliged to use their powers lawfully in accordance with general principles public law. A private landlord was under no obligation to give reasons for seeking possession when relying on a s.21 notice whereas the statutory schemes for introductory and demoted tenancies required such reasons. Neither s.6(1) nor s.7(1)(b) applied to private landlords. Looking at the European authorities, it was held that none of them pointed to a different conclusion as to the right to argue Art. 8 in the case of a private sector landlord: in *Belchikova*, *Zehentner, Brezec* and *Zrilic* the states had not challenge the applicability of Art. 8 so it had not been decided. *Zehentner* and *Zrilic v Croatia* did not concern the enforcement of a landlord's contractual rights which were subject to specific legislative protective provisions. *Zehentner* was concerned with statutorily created powers of a court to enforce debts owed by creditors by ordering the sale of the debtor's assets, including her home.

3. Although not necessary to do so, the Court considered, if it had found a proportionality defence was available, whether it would have been possible (s.3 Human Rights Act 1998) to read s.21 (HA 1988) in a way which was compatible with Art. 8. Recognising that private landlords needed a high degree of certainty that they will be entitled to a possession order if the correct procedure was followed, the

court held that if private sector tenants were entitled to a proportionality defence, it would have had to make a declaration of incompatibility.

4. Finally, it was said (*obiter*) that the appellant's circumstances could not have justified postponing the mortgage company's right to be repaid in full (which was due a mother after the first instance hearing), for a indefinite period. The most she could have hoped for, if a proportionality defence was open to her, would have been a possession order postponed for six weeks (s.89 HA 1980).

5. At [73], s.89 HA 1980 was considered and it was said that:-
"… The cases in which it would be justifiable to refuse, as opposed to postpone, a possession order must be very few and far between, even when taken as a proportion of those rare cases where proportionality can be successfully invoked. They could only be cases in which the landlord's interest in regaining possession was heavily outweighed by the gravity of the interference in the occupier's right to respect for her home. The evidence filed on behalf of Shelter indicates that the *Pinnock* case [2011] 2 AC 104 defences hardly if ever succeed against public authority landlords save in combination with some other public law factor (although they may well provide a helpful bargaining counter in particularly deserving cases). Were a proportionality defence to be available in section 21 claims, it is not easy to imagine circumstances in which the occupier's article 8 rights would be so strong as to preclude the making, as opposed to the short postponement, of a possession order".

6. In an editorial ((2016) 19(4) JHL 61-65) HHJ Madge referred to the case of *Ivanova v Cherkezov v Bulgaria* [2016] HLR 21. In that case, the first applicant owned a 77.5% interest in a plot of land, on which there was a dilapidated cabin. The second applicant was her partner. In around 2004, the applicants converted the cabin into a house, in which they subsequently lived. Before converting the cabin, they did not obtain the consent of the other co-owners of the land. In 2006, two of the other co-owners found out about the conversion and notified the first applicant that they did not agree to it. In September 2013, the National Building Control Directorate notified the first applicant that, as the house had been constructed without a building permit, the house had to be demolished. The first applicant sought judicial review of the Directorate's decision; her claim was dismissed by the Administrative Court, which held that the decision to demolish the house was lawful. Her appeal to the Supreme Administrative Court was dismissed. Neither court considered whether the proposed demolition would be a disproportionate interference with the applicants' right to respect for their home under art.8 of the European Convention on Human Rights, or the first applicant's right to peaceful enjoyment of her possessions under art.1 Protocol No.1. The applicants applied to the European Court of Human Rights, contending that there had been a breach of their Convention rights. It was held that both applicants had lived in the house for several years and it was their home for the purposes of art.8 of the European Convention on Human Rights, even though the second applicant did not have any legal right in the land; the decision to demolish the house was an interference with the applicants' right to respect for their home. The decision to demolish the house was in accordance with

the applicable domestic law and pursued the legitimate aim of ensuring the effective implementation of the regulatory requirement that buildings could not be constructed without a permit. In considering whether the demolition was necessary in a democratic society in accordance with art.8(2), the case was similar to cases concerning the eviction of tenants from public housing and the eviction of occupiers from publicly owned land; an analogy could also be drawn with cases concerning evictions from properties previously owned by applicants but lost by them as a result of civil proceedings brought by a private person or a public body, or tax enforcement proceedings; the applicants were therefore entitled, in principle, to have the proportionality of the demolition determined by an independent tribunal; there had therefore been a breach of art.8. In contrast with art.8 of the art.1 of the First Protocol does not require an assessment of the necessity of each measure which implements planning rules; the house had been built without a permit in flagrant breach of domestic building regulations; there had been no breach of the first applicant's rights under art.1 of the First Protocol.

7. HHJ Madge made the point that there was a strong indication that the European Court considered the possibility of a proportionality defence to be extremely wide-ranging.

8. In *Vrzic v Croatia* App. No. 43777/13; 12 July 2016 mortgage possession proceedings had been brought by a private individual (the lender). The court distinguished earlier cases in which it had held that any person at risk of eviction from his home should be able to have the proportionality of that measure determined by an independent tribunal because they concerned State-owned or socially-owned properties so there was no other private interest at stake. In *Vrzic* the applicant's had used the property as collateral and had agreed that the lender was entitled to enforce the debt by its sale. It was noted at [68] that the applicants had voluntarily used their home as collateral and the specific agreement that if the debts were not paid, the creditors were entitled to seek enforcement through the sale of the property. The sale was as a result of the applicants' failure to meet their contractual obligation and there was no violation of Art. 8. Like the Supreme Court, the European Court emphasised the importance of contractual rights between private parties and the limited role of the court in enforcing those rights.

<u>*Holley v Hillingdon LBC* [2016] EWCA Civ 1052</u>

9. The local authority granted a secure tenancy to a woman in 1976. In 2009 her husband succeeded to the tenancy on her death. He died in 2012 and the Appellant and his brother were in occupation. The Appellant had mental health problems and had lived at the premises all his life. There was no statutory or contractual right to a further succession so the local authority served a notice to quit and began possession proceedings. The Appellant defended the claim on the basis, among other things, on Art. 8 and that it would not be proportionate to evict him. The matter was listed for a summary hearing and at that hearing the Judge found that the length of a person's occupation was irrelevant to proportionality and found the defence was not seriously arguable and made an order for possession. The Appellant appealed. The Court of Appeal held that although it was relevant to an assessment of

proportionality, the length of a person's occupation could never be sufficient to found a proportionality defence in the case of a second succession because otherwise the prohibition on second succession's could not be compatible with Art. 8. Even where there were other factors, the length of occupation was unlikely to be a "weighty" factor. The Appellant also argued that the local authority's succession scheme was unlawful as it did not permit the exercise of a discretion and even if there was such a discretion, the local authority had failed to properly consider it. The Court of Appeal did not conclude whether there was sufficient residual discretion, but held that the authority's *ex post factor* evidence that had the discretion been considered, it would not have been exercised, defeated the Ground of Appeal.

*City West HT v Massey; Manchester and District Housing Association v Roberts* [2016] EWCA Civ 704

10. In *Massey*, the tenant's partner used one of the bedrooms for growing cannabis and he was convicted for this. The tenant denied all knowledge of this. Proceedings were possession were issued on the basis of Ground 12 (it was a term of the tenancy that tenant could not use the premises for unlawful purposes or allow others to do so) and Ground 14. The District Judge found that the tenant had lied about KNOWING about the cannabis as she was afraid of losing her home. He made a suspended possession order including a term that the landlord could inspect the premises on short notice (so that it could determine whether there was cannabis cultivation, which was relevant to another term of suspension). The landlord appeal, unsuccessfully to a Circuit Judge. In *Roberts*, the tenant covenanted not to use the premises for unlawful purposes of allow other to do so. A room in the premises was used for growing cannabis. Mr. Roberts said he had allowed another person to use the flat as a result of threats. He pleaded guilty to an offence of permitting the cultivation of cannabis at the premises. Again, proceedings for possession were issued on Ground 12 and 14. In this case, the Judge did not accept that Mr. Roberts had been truthful concerning how the cannabis came to be in the premises (a gang had used the bedroom, he had been paid £1,200 but he was took frightened of the gang to tell the police) but made a suspended order. The Judge accepted an offer from Mr. Roberts that one of the terms of suspension should be that the landlord was entitled to inspect on short-notice. The landlord, successfully appealed (an outright order was made) and Mr. Roberts appealed that order.

11. The Court of Appeal reiterated that before suspending an order for possession, there had to be "cogent evidence" or a "sound basis" to believe that the conduct would not recur. It was held that cogent evidence not simply evidence which showed there was some basis on which it could be said that the tenant would comply. To be "cogent", the evidence had to be more than simply credible; it had to be persuasive. The instant court had repeatedly made it clear that when making an SPO the focus was on the future and not on the past.

12. What the Court of Appeal did say was that the "cogent evidence" could come from any source (i.e. it did not have to be from the tenant). It could come from the tenant, from someone providing support or from the inclusion of a condition that allowed the landlord to inspect the premises. It was said that

whether it would be appropriate to expect a landlord to carry out such inspections was a fact-sensitive question, having regard to what was reasonable in the circumstances. It was a matter for the Judge to decide whether the prospect of inspection, or the tenant's perceived risk of inspection was sufficient to support the conclusion that the tenant would comply with the terms of the tenancy agreement in future.

13. The Court also dealt with the position where the court has found that the tenant has given false evidence and said that dishonesty in a tenant's evidence regarding the grounds for possession was not a complete bar to the making of an SPO. The warning was given that tenants should realise that if they lied in their evidence to the court, they ran the risk that the court would find that their evidence on other matters was not to be trusted and would not accept assurances from them regarding the future. Giving false evidence was a very serious matter and could have serious consequences for the tenant. There were, however, two stages to a decision whether or not to grant an SPO, involving the exercise of discretion and making findings of fact on the basis of which the discretion was to be exercised. The tenant should normally give evidence in court so that the court could assess his credibility. The court might want to cross-check any assurances given by reference to other objective evidence.

*Cardiff CC v Lee* [2016] EWCA Civ 1034

14. It was common ground in this case that CPR r.83.2(e) was applicable to suspended possession orders and that therefore a landlord would need the permission of the court to enforce such an order. The relevant rule is:-

    "A relevant writ or warrant must not be issued without permission of the court where:-

    …

    (e) under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled…".

15. The question before the Court of Appeal was whether the court could and should remedy the failure to apply for permission under r.3.10. It was said that, as the tenant had applied to discharge the warrant, the "substance" of r.83.2(e) had been complied with and so there was no prejudice to the tenant if the court did remedy the default (which it found it had power to do), but it was made clear that this should not be the norm.

16. Until this case, it was understood that the issuing of a warrant was an "administrative" act, done on application (using form N325) by an officer of the court. The form does require the applicant to confirm that the whole or part of the instalments due under the judgment have not been paid, but nothing that applied in cases of ASB.

17. The previous case law had made clear that, to issue a warrant, no application to the court is necessary nor is the landlord required to notify the tenant of his request: *Leicester CC v Aldwinkle* (1991) 24 HLR

40, CA; *Jephson Homes HA* [2001] 33 HR 54, CA. In *Southwark LBC v St. Brice* [2002] 1 WLR 1537, it was decided that the issue of a warrant of possession in the County Court is an administrative act; the purpose of which is to enable there to be carried into effect the judicial determination, which has already been expressed in the order for possession in aid of which the warrant is issued. The issue of the warrant involves no determination of the former tenant's civil rights and obligations. His rights and obligations as a tenant have already been determined at a public hearing at the time when the order for possession is made. His right—as a former tenant who has remained in occupation following determination of the tenancy—to apply for an order under s.85(2) of the Housing Act 1985 is unaffected by the issue of the warrant.

18. It was said in *St. Brice* that "it is surely in no way unreasonable to expect the tenant, who is likely to be the party with the relevant information, to bring the matter before the court if there has been a change of circumstances which might persuade the court to intervene"…. the trial judge said in paragraph 16 of his judgment in the present case, implicit in that decision of the European Court is an acceptance of the principle that to cast upon the person whose rights are in issue the burden to initiate process is not intrinsically wrong. In my judgment it cannot possibly be wrong where, as here, there has already been a full hearing leading to an order as a result of proceedings initiated by the landlord.

19. It was also said that it would be absurd to require the landlord to prove against what he had proved to establish his right to possession, but the point is that there is no right to possession unless the SPO has been breached and this was something which had not already been proved.

<u>Tenancy Deposits</u>

20. In *Yeomans v Newell*, Canterbury CC, 25 May 2016, an AST was granted by the landlord in 2011. A deposit of £300 was taken but not protected until November 2015. On 22 December 2015 the landlord authorised the return of the deposit (through DPS). On 23 December he served a s.21 notice. The tenant did not receive the deposit via the DPS until 19 February 2016. Possession proceedings were begun and the tenant defended them on the basis that the deposit had not been returned "in full" (s.215(2A)) at the time the notice was served. The landlord drew an analogy with the "cheque rule" (see *Coltrane v Day* [2003] EWCA Civ 342 and said that the tenant had "had the ability" to obtain the deposit money once it had been authorised. The court agreed and held that the deposit had been returned in full on 22 December 2015 as it was available to the tenant.

21. In *Ahmed v Shah*, Bradford CC, June 2015, the tenant was granted an AST which commence din February 2014. A deposit was paid but not protected until 12 August 2014 and the prescribed information was never sent. The landlord sought to return the deposit through the DPS payment

system, although the tenant did not accept it. The landlord served a s.21 notice in October 2014 and issued proceedings. The tenant defended the proceedings on the basis that the deposit had not been protected within 30 days and had not been returned. In June 2015 the Claimant sent the Defendant a cheque and said that he had now returned the deposit. At trial it was accepted by both parties that the prescribed information had not been served and the Defendant had not accepted the return of the deposit. The landlord argued that the deposit had been returned as it was available for the tenant to accept and in any event, the deposit had been returned and s.215(2A) would not take effect. The court found that there was no evidence that the deposit had been available to the Defendant for her to accept. The Clamant relied on emails sent to the Defendant by DPS informing her that the landlord was seeking to return the deposit. The emails did not specify that it was the full deposit and there was no evidence from the letting agent that it would have been the full deposit repair. The court found that the deposit had not been returned. The court also found that returning a cheque did not retrospectively validate a s.21 notice.

22. In *Jhawer v Vatts*, Brentford CC, 18 February 2016, the first AST began in 2006. A deposit was paid to agents who later went out of business. In 2009 the same landlord granted the same tenant an AST of a different property and further tenancies of that property were granted in 2012 and 2014. Each tenancy agreement stated that a deposit had been paid. A s.21 notice was served and possession proceedings brought. The tenant did not attend the hearing and an order was made, but he subsequently applied to set it aside and strike out the claim. The tenant argued that the deposit for the first property should be deemed received in respect of the second property. The deposit had not been protected.

23. The landlord argued that the reference in the agreements to a deposit having been paid was an error (it was a template agreement).

24. The Judge held that *Superstrike* applied by analogy and the tenant had been entitled to the return of the deposit at the end of his tenancy of the first property (even though the agents had gone out of business). Any deposit requirement under the later tenancies was fulfilled by a right of set-off of the right to claim repayment of the first deposit and thus a deposit was "paid" for the later tenancies of the other property. The lack of repayment of the deposit, together with the tenancy terms in the later agreements showed a deposit had been paid and it had not been protected. The s.21 notice was not valid.

25. In *Okadigbo v Chan* [2014] EWHC the tenancy commenced in August 2012 but the deposit was not protected until March 2013 and the prescribed information was not provided until July 2013. The landlord issued a claim based on a s.21 notice and the tenant counterclaimed under s.214. The tenant asked for a "3x" payment and the landlord said it should be "1x". The court said:-

"I find that the Claimants are not experienced landlords, that this is the first time that they had let out any property and that they were letting out their home. That they quite properly put the matter in the hands of professional managing agents who let them down by not complying with the terms of the Act. I find this case to be at the lowest end of the scale of culpability for non-compliance. And for those reasons I award the sum of £1,520" (which was "1x" the deposit).

26. The tenant appealed to the High Court, who dismissed the appeal:-

> "In my judgment, however, the judge was entitled to regard the question of culpability as the most relevant factor in determining what order to make and was entitled to find that the culpability in this case fell at the lower end of the scale for the reasons which she gave. It is not as if the breach was uncorrected and therefore, although the appellants were lacking the protection for a period of some months, in the end matters were put right".

27. In *Russell-Smith v Uchegbu* [2016] SC Edin 64 at para. 9, Sheriff T Welsh QC said that each case turned on its facts. The court identified a method of calculation and aggravating factors, including:-
    (a) Failure to comply for a long period of the tenancy;
    (b) Whether the failure was dilatory or wilful;
    (c) Whether actual prejudice occurred;
    (d) Whether the purpose of the Regulations was defeated;
    (e) Whether the deposit was returned.

28. In *Bali v Manaquel Company Limited*, Central London County Court, 15 April 2016, a deposit was taken in respect of an AST. It was protected and the landlord purportedly served a s.21 notice and brought possession proceedings. At first instance, the issue was whether the landlord had complied with the requirements for prescribed information. The Judge found that it had and made the possession order. The tenant appealed and argued that the prescribed information was defective for the following reasons.

29. First, as (a) the landlord had not included the DPS leaflet (as required by reg. 2(1)(b) Housing (Tenancy Deposits) (Prescribed Information) Order 2007) only a print out of the DPS "terms and conditions". The appeal Judge held that the regulations required the landlord to provide "any information contained in a leaflet" but not the leaflet itself. As it was common ground that the "terms and conditions" included all the information that was contained in the DPS leaflet, the requirement had been met.

30. Second, the landlord had not properly provided a certification as required by reg. 2(1)(g)(vii). The certificate provided was signed with the landlord's name written in manuscript and signed "PP"

with illegible initials. The tenant argued that this did not comply with s.44 Companies Act 2006 which provides that:-

"(2) A document is validly executed by a company if it is signed on behalf of the company:-
(a) By two authorised signatories, or
(b) By a director of the company in the presence of a witness who attests the signature">

31. The question was whether the prescribed information certificate was a document that required "execution". The Judge held that it was, as it was a certificate of the accuracy of the information for a "formal legal purpose" and the requirement of s.2(1)(g)(vii) had not been met.

*R (MacLeod) v Peabody Trust Governors* [2016] EWHC 737 (Admin)

32. In June 2009, the Crown Estate Commissioners granted the claimant an assured tenancy of a flat. The tenancy agreement prohibited assignment. The agreement also specified that the rent could not exceed 60% of the market rent for the flat. In February 2011, the defendant housing association bought approximately 1,200 properties, including the flat, from the Commissioners. The association issued bonds to finance the purchase. The transfer of the properties to the association was subject to a Nominations Agreement which provided that the association could only let the transferred properties to "key workers", defined to include, inter alia, teachers, members of the police force and employees of the NHS or Transport for London, provided that they could afford to pay the rent without recourse to housing benefit and their total family income was less than £60,000. The association had a published policy pursuant to which tenants were allowed to exchange their tenancies with other tenants of social landlords. In May 2014, the claimant telephoned the association and asked if he could register his details on a website which facilitated mutual exchanges between tenants of social housing. He was told that he could do so. He went to see a property in Edinburgh with a view to a mutual exchange. On 6 July 2015, he completed the association's application form for a mutual exchange on which he added a handwritten note that he was disabled. On 9 July 2015, the association replied that it had made a mistake in telling him that he could register with the website and that he was only allowed to exchange his tenancy with another key worker in one of the transferred properties.

33. The claimant sought judicial review of the decision to refuse his application for a mutual exchange, contending that the association had failed to follow its policy and that the decision was irrational. He also argued the association had failed to discharge its public sector equality duty towards him as a disabled person. Shortly before the hearing of his claim, the claimant filed a witness statement in which he said that he had mental health problems. The association argued, among other things, that, in deciding whether to allow the exchange, it had not been acting as a public body.

34. His claim was dismissed. It was held that the housing association had purchased the claimant's flat, together with other properties, from the Crown Estate Commissioners using funds raised on the open market; although the properties were not let at full market rent, the rent levels were above those for most social housing and the properties could be let to families with an income of up to £60,000; the transferred properties were not social housing for the purposes of s.69 of the Housing and Regeneration Act 2008; in deciding not to allow the claimant to assign his tenancy, the association was not exercising a public function and the decision was not susceptible to judicial review. It was also said, *obiter,* that the claimant's tenancy agreement did not permit assignment; the association's power to let any of the transferred properties was limited by the Nominations Agreement; on the assumption that the association's policy on mutual exchanges applied to the claimant, the association was nevertheless entitled to depart from it. Also *obiter*, it was said that although the association could be criticised for the way that it had handled the claimant's application, its decision could not be said to be irrational. Finally, again *obiter*, the only information available to the association about the claimant's disability was a handwritten comment on his application form; the evidence that the claimant had put forward during the proceedings consisted largely of assertions which were not supported by medical evidence; the public sector equality duty made no difference to the decision that the claimant was not entitled to a mutual exchange.

*Birmingham CC v Stephenson* [2016] EWCA Civ 1029

35. The Court of Appeal considered whether a possession order in respect of an introductory tenancy was wrongly granted where *Akermanv-Livingstone* Art. 8 and Equality Act defences were raised. The tenant suffered from paranoid schizophrenia, symptoms were alleviated but not completely cured by medication. At the first hearing the matter was adjourned to enable the tenant's to instruct solicitors and used his "best endeavours" to file a defence. At the adjourned hearing, the solicitor had only been instructed on a preliminary basis and asked the court for an adjournment to put in a fully pleaded defence (EA 2010, Art. 8 and public law). The DDJ made a possession order on the basis that there was no substantial defence and the tenant had had ample time to file a defence. The Court of Appeal allowed an appeal stating:-

    "Had Mr. Stephenson been a well-resourced individual, with no mental disability, that view might well have been sustainable. But the fact is that the council's own evidence showed that Mr. Stephenson was living on benefits and that he had been seen begging in the local shopping parade. The Deputy District Judge's view also, in mu judgment took no account of Mr. Stephenson's mental health problems. Mr. Gilmore had only seen Mr. Stephenson some two working days before the hearing and had only take preliminary instructions. It was unrealistic to have expected him to have formulated a full defence by the time of the hearing".

36. There was a potential EA 2010 defence which shifted the burden of proof. Once the principal criteria had been established, the Supreme Court established that it will only be a rare case that can be

summarily disposed of and there are a range of order that can be made (the approach to proportionality being different from Art. 8).

37. The local authority relied on evidence before the Court of Appeal of noise nuisance and the effect on the neighbours as to proportionality. The Court of Appeal said that the court's jurisdiction is not binary under the EA:
"Thus, in my judgment, the flaw in both the Deputy District Judge's approach and the council's respondent's notice is to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the well being of Mr. Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr. Stephenson out on the street…".

38. There were a range of possibilities which could not be summarily ruled out.

*Edwards v Kumarasamy* [2016] UKSC 40, [2016] HLR 32

39. The defendant had a long lease of a flat on the second floor of a block. Under the terms of his lease, he had the right to use the entrance hall, lift and staircases giving access to the flat, as well as the right to use a communal bin store situated in the block's car park. A paved pathway, about three metres long, provided access from the front door of the entrance hall to the car park. The defendant granted the claimant an assured shorthold tenancy of the flat together with the other rights under his lease. In 2010, the claimant tripped over an uneven paving stone on the pathway while taking rubbish to the communal bin store. He suffered injuries to his right hand and right knee. He brought proceedings for damages for breach of s.11 Landlord and Tenant Act 1985. It was common ground that the defendant had not been aware of the disrepair prior to the claimant's accident. A deputy district judge awarded the claimant damages of £3,750. The defendant appealed to a circuit judge, who held that, as the defendant had not had notice of the disrepair, he could not be liable under s.11(1A) of the 1985 Act. She allowed the defendant's appeal. The claimant appealed successfully to the Court of Appeal who held that, because the defendant had an easement of right of way over the entrance hall, he had an interest in the entrance hall for the purposes of s.11(1A)(a) of the 1985 Act, and that the pathway was part of the exterior of the entrance hall. Furthermore, the defendant was liable for the disrepair under s.11(1A)(a), notwithstanding that he did not have notice of the defect.

40. The defendant appealed to the Supreme Court who allowed the appeal. It was held that the fact that a piece of land is a necessary means of access to a building is not of itself sufficient for it to constitute part of the exterior of that building; steps separated from the outside of a building by a two metre path cannot be said to be part of the exterior of that building; *Brown v Liverpool Corp* [1969] 3 All ER1345; [1969] 13 HLR 1, had been wrongly decided. The pathway was not in any normal sense part of the building and lay wholly outside it; it could be said to abut the immediate exterior of the entrance hall but it was not part of the exterior of the entrance hall; the defendant was not obliged to

repair the pathway under the covenant implied into the tenancy by s.11(1A)(a). It was also said, *obiter*, that although the grant of the tenancy to the claimant had deprived the defendant of any practical benefit from his easement of right of way over the entrance hall, he nonetheless retained the easement and had an interest in the entrance hall for the purposes of s.11(1A)(a). Further, also *obiter*, that where the subject matter of the repairing covenant implied by s.11 is in the landlord's possession, the landlord is liable for disrepair as soon as it arises, without the need for notice to be given; the defendant was not in possession of the pathway and had effectively disposed of his right over it for the duration of the claimant's tenancy; had the defendant been obliged to repair the pathway, he would only have been liable to do so once he had been given notice of the disrepair. Per Lords Neuberger, Wilson, Sumption and Reed, *obiter*, said that where a landlord has covenanted to repair the structure and exterior of a flat and has not demised the structure and exterior to his tenant, the landlord is liable for disrepair to the structure or exterior as soon as it arises, without the need for notice to be given to him; where, however, the structure and exterior has been included in the demise, the landlord is only liable for disrepair once he has been given notice.

Upcoming

41. On 14-15 December 2016 the Court of Appeal will hear *Hacque v LB of Hackney*, which is an appeal by the local authority from a decision in respect of a s.204 appeal at which the Circuit Judge found that the local authority had failed to apply the correct legal test for considering whether the accommodation was suitable having regard to the applicant's medical conditions and s.149 EA 2010 and that the s.202 decision failed to give sufficient (or any) reasons.

42. On 14 February 2015 the Supreme Court will hear *Poshteh v Kensington & Chelsea RLBC* (see [2015] EWCA Civ 711; [2015] HLR 36 for the decision in the Court of Appeal). The issues are:-
    (a) Whether the decision in *Ali v Birmingham CC* [2010] UKSC 8; [2010] 2 AC 39, that the right to accommodation under s.193 was not a civil right within art. 6(1) should be departed from in light of *Ali v UK* (Application No. 40378/10); [2015] HLR 46 and if so, to what extent and what, if any, impact does that have on the approach of a court determining an appeal under s.204 either generally or in relation to the suitability of accommodation and discharge of an authority's duty under s.193;
    (b) Whether the review officer should have asked himself whether there was a real risk that the applicant's mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and if so, whether he did in fact apply the right test.