Housing Law Practitioners' Association

Housing Law Update

November 2023

1 Possession proceedings

Informal removal of tenant's name from joint tenancy did not amount to surrender of tenancy
Westminster CC v Kazam and Rahimi
[2023] EWHC 825 (KB) 9 March 2023
See Nearly Legal

In 2005, the Council granted a secure joint tenancy of the property to K and his wife, Mrs H. In 2011, K left the property and took a secure tenancy of a ground floor flat in the same block due to mobility issues, leaving Mrs H in sole occupation. The council removed K's name from the tenancy records, but no new tenancy agreement was signed.

In 2017, Mrs H's grandson (R), who had been living in a refugee camp in Greece, was granted leave to enter the UK and came to live with Mrs H. She had supported his application and undertook to accommodate him, using the original tenancy agreement as evidence. R lived with Mrs H at the property until her death in July 2020. His subsequent application for a "discretionary succession" from the council was refused.

The Council claimed possession. R filed a defence and counterclaim seeking a declaration that he had succeeded to Mrs H's tenancy. The basis of the counterclaim was that the original tenancy had been surrendered by way of operation of law when K had left the property and the council had re-granted Mrs H a sole secure tenancy, to which R as Mrs H's grandson was entitled to succeed.

The district judge dismissed the claim for possession. The Council appealed to the High Court. They argued that the judge erred in law in finding that there had been a surrender of the joint tenancy in 2011.

Appeal allowed. Lane J. said that it was necessary for there to be a quality and depth of evidence in order to engage the principle of surrender by operation of law. In previous cases of this kind, there was ample evidence of an agreement for the re-grant of a new tenancy. This was far from the position in this case.

The Council's housing file contained an internal document on a standard form headed "Amendments to housing tenancy details" and dated 28 July 2011. Under the heading, "Parties and agreements", the housing officer had ticked the option "joint to sole", and a handwritten note stated "Please remove Mr AM Kazam from rent account". The form was signed by the housing officer and witnessed by the estate manager.

The judge found that R had been unable to identify any evidence that Mrs H had agreed to the surrender. He therefore concluded:

> "*Standing back, what all of this reveals is that there simply was no evidence of unequivocal concurrence in any surrender by [Mrs H]… Even affording the necessary deference to the judge as the primary fact-finder, what was before him was incapable of constituting the unequivocal assent or agreement that was required by law*."

In any event, the judge had wrongly concluded that K had done everything he could to give up possession of the property and thus surrender the tenancy:

> *"His conduct could only be regarded as equivocal. He was interested in being re-housed. That is the extent of the evidence. As against this, Mrs Hussain remained in possession."*

Eviction of disabled tenant without alternative accommodation was justified
Reading BC v Holland
[2023] EWHC 1902 (Ch) 24 July 2023 See
https://www.bailii.org/ew/cases/EWHC/Ch/2023/1902.html
See

Ms H, aged 62, was an introductory tenant of a flat in a block of sheltered accommodation. She had a diagnosis of emotionally unstable personality disorder (EUPD) and from the start of her tenancy her occupation "gave rise to substantial problems for the [council], the other residents in the block, and those involved in the management and provision of services to the block". She had engaged in repeated abuse of carers sent by the operator of the call system, and the evidence showed a large volume of calls, voicemails, texts and abusive conduct to staff and contractors. H was said to have made over-55 neighbours, some elderly and vulnerable themselves, who had been assessed as suitable for sheltered housing, feel unsafe and insecure in their homes such that some of them had asked to leave it. It was alleged that H's excessive use of, and damage to, the Tunstall carers' call system put other residents at risk.

A medical report concluded that H had a disability within the meaning of s6 Equality Act 2010 as a result of her disorder, and there was a connection between this and her conduct but "not one which absolved [her] from responsibility for her actions".

H was well known to the Council following her earlier eviction from a private sector tenancy. The first instance judgment stated that the Council had "made multiple referrals to CMHT and Crisis, Talking Therapies and Reading Recovery College, tried to assist her to have medication reviews, access therapy, reduce or manage her alcohol intake, put in place identified support workers who rang and visited her regularly, reminded her about medication, etc. The documentation shows that all of this was with a sharp focus on the Defendant's diagnoses including EUPD and that they did so to try and improve the Defendant's ability to manage her relationships with neighbours, support staff and others; to improve her confidence and mood, settle her emotionally, etc."

The Council brought possession proceedings. The county court judge made an outright possession order. H appealed to the High Court. The issues on appeal were:

- Had the Council complied with the Public Sector Equality Duty (PSED) in relation to its decision to seek possession, given H's acknowledged disability and the effect of eviction and homelessness upon her?
- Was it proportionate to make a possession order where no suitable alternative accommodation was available for H? As matters stood at trial (and at appeal), no offer of suitable alternative accommodation had been made.

H argued that in order to demonstrate compliance with its PSED, the Council had to be able to demonstrate that it had considered, with sharp focus, the question of the specific effect an eviction (with consequential homelessness) would have on her, bearing in mind her particular disability. In particular, further expert evidence was needed. At best, the Council (it was argued) could demonstrate no more than a general consideration of the effects of eviction, which took no account of the specific effect that eviction would have on H, and which was conducted without the required expert advice or evidence. As such, the Respondent was in breach of its PSED.

In relation to the PSED, Edwin Johnson J held that there was no basis for interfering with the decision of the trial judge. She had heard and reviewed substantial relevant evidence. She had identified certain deficiencies in the Council's formal Equality Act assessment, but had also correctly found, following London & Quadrant Housing Trust v Patrick (2019) EWHC 1263 (QB), that the PSED did not have to be in the form of a single formal exercise. The Judge had been entitled to find that the Council had given the required 'sharp focus' to the effect of homelessness on Ms H, in considering multi agency meeting records and emails from medical practitioners:

> *As the Judge pointed out, the same problems of behaviour carried over from the Appellant's previous accommodation "despite the many hours of effort from the Claimant and the many services they sought for the Defendant to engage with". Given the Respondent's extensive experience of trying to provide the Appellant with suitable accommodation, I take the Judge's essential point … to have been that the Respondent was entitled, on the basis of this experience, to conclude that eviction was indeed the only option; all other options having effectively been exhausted.*

Secondly, H argued that the Council had not been able to demonstrate that it had considered all the options regarding suitable alternative accommodation, including in Reading, and that in the absence of such consideration, it had failed to comply with the PSED. However, that argument was also rejected by the Judge. On the proportionality of the eviction, the same points applied. Proportionality was a balancing exercise for the Judge. The findings on H's impact on staff and other residents were serious, as were the potential ongoing risks and dangers:

> *"The risks and dangers of allowing the Appellant to remain in the Flat, which the Judge saw as very serious, seem to me to have been part and parcel of what fell to be taken into account in considering whether it was actually feasible to find some other suitable alternative accommodation for the Appellant. The Respondent clearly did not consider this to be a feasible course of action… The Judge clearly took the same view I cannot see that the Judge was wrong to take this view. To the contrary, it seems to me that the Judge was more or less compelled to this view, given her findings on the evidence, as those findings are set out in the Judgment."*

The Judge concluded:

> *"I add one final point in relation to this most unfortunate case. No court would wish, if this could be avoided, to make an order for possession or to uphold an order for possession which will leave a 62 year old woman, with a disability, in a state of homelessness. As against that, the Judge made very serious findings as to the problems created by the Appellant's behaviour, in terms of the risks and dangers to persons and property. The Judge also accepted the evidence of Dr Iles that the Appellant was capable of regulating her own behaviour, and could be considered responsible for her own actions."*

Tenant not obliged to accept payment by cheque
Richworth Ltd v Billingham
County Court at Central London 14 August 2023
[2023] EW Misc 8 (CC). See also Nearly Legal

B was an assured shorthold tenant of R. The landlord failed to protect the deposit. On 26 April 2022, R hand delivered a cheque to B with a covering letter which stated that the cheque was 'the sum of your deposit for the flat'. On 5 May 2022, R's solicitors sent B a section 21 notice. After the expiry of the notice, R issued a claim for possession. B defended the claim on the basis that the deposit had not been returned to him because he did not accept cheques and he had not presented it to his bank. B did not retain a copy of the defence and the court did not send R a copy of it. The district judge made a possession hearing on the basis that the deposit had been returned by cheque. No evidence was heard.

B's appeal to the circuit judge was allowed. A deposit can be returned by cheque if the tenant is obliged (by prior agreement, whether express or implied) to accept repayment by cheque or subsequently chooses to accept payment by cheque. In such circumstances, the repayment of the deposit will be on the date the cheque is received by the tenant irrespective of whether it is subsequently cashed. A tenant who does not reject a cheque reasonably promptly may be taken to have accepted payment by cheque. Whether the tenant is obliged to accept payment by cheque or whether time to reject payment has passed will be a question of fact in each case.

In this case, there was no evidence that B was obliged to accept service by cheque or that a reasonable period for him to refuse payment had elapsed prior to the service of the section 21 notice.

Service of notice on tenant's partner at the premises was good
Birmingham City Council v Bravington
[2023] EWCA Civ 308 22 March 2023

Mr B was a secure tenant of a council flat. In 2019, he was convicted of racially and religiously aggravated harassment and possessing a knife in a public place. Birmingham served him with a notice seeking possession relying on the mandatory ground for possession (HA 1985 s84A). The notice was served by leaving it with Mr Bravington's partner at the flat. The Council's claim for possession was dismissed on the basis that B had not been served with the notice. Birmingham's appeal to the circuit judge was dismissed. The Council appealed to the Court of Appeal.

Appeal allowed. Section 233 of the Local Government Act (LGA) 1972 permits the service of notices 'required or authorised by or under any enactment' to be left at the recipient's last known address. The Court held that section 233 applies to the service of notices under the HA 1985. Giving the notice to B's partner sufficed as it was served at his last known address in a manner that a reasonable person would adopt.

Notice of increase of rent may create a new tenancy
Tower Hamlets Community Housing v The PR of Desir and others
County Court at Clerkenwell & Shoreditch. 19 April 2023.
Unreported, but see Nearly Legal

Mr and Mrs Desir were assured tenants of a TCHC property. They both died in March 2020. Their daughter, Ms S Desir, who had lived in the property as her parents' carer for 10 years, applied for a discretionary succession.. THCH did not make a decision on that application, but in 2021 they served

a notice of increase of rent. They also served NTQ on the Personal Representatives and on the Public Trustee, and started possession proceedings. Ms Desir had paid the increased rent.

Ms Desir was joined to the proceedings and defended them on various grounds, one of which was that the rent increase had created a new tenancy. While payments accepted as use and occupation charges do not create a new tenancy, a notice of rent increase may do so where it can be shown that this was the intention of both landlord and tenant (*Vaughan Armatradung v. Sarsah*). Likewise, a demand for and acceptance of a notice of increased rent can create a new tenancy (*Leadenhall Residential 2 Ltd v Stirling*).

In this case, there been no communications referring to use and occupation charges, only rent. In addition, THCH's tenancy agreement terms and conditions stated:

> *"In accordance with the provisions of Ground 7 acceptance by THCH of Rent after your death shall not be regarded as creating a new Periodic tenancy unless THCH agrees in writing to a change in the amount of Rent, the period of the Tenancy or the Premises, which are let or any other term of the tenancy"*

Ms Desir argued that this showed the landlord's intention in serving a section 13 notice of increase of rent. The District Judge accepted that a new tenancy in favour of Ms Desir had been created in 2021, and dismissed the possession claim.

Debt Respite Scheme

Mental health crisis moratorium cancelled due to criteria not being met
Kaye v Lees
[2023] EWHC 152 (KB), 27 January 2023
See Nearly Legal

The background to the *Kaye v Lees* litigation was as follows. Mr Kaye (K) had previously been granted an order for sale to enforce a judgment debt against Ms Lees (L). Two eviction dates were set and subsequently cancelled after L entered a breathing space moratorium, followed by a mental health crisis moratorium. L obtained a further mental health crisis moratorium the day before a third eviction. This time, the eviction went ahead. In February 2022, Ms Lees applied to court for a declaration that the eviction was null and void under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 reg 7(12). The application was successful, but the property had been sold in the interim and her mortgage repaid. The Court set aside execution of the warrant and sale of the leasehold property in breach of the mental health crisis moratorium, and L was restored to occupation of the property The matter now returned to court. This was the hearing of K's application under reg 19 of the DRS Regulations to cancel the mental health crisis moratorium which L had obtained, and to obtain an injunction preventing L from entering further moratoria. K alleged that L did not meet the criteria for a mental health crisis moratorium.

In entering L into the most recent moratorium, the debt advice provider had accepted that she was receiving 'any other crisis, emergency or acute care or treatment in hospital or in the community from a specialist mental health service in relation to a mental disorder of a serious nature' (DRS Regs reg 28(2)(e)). The provider was satisfied that 'an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment' (reg 30(4)(c)). Having satisfied themselves that the criteria are met, the provider's role is to enter a debtor into a moratorium under Part 3 of the Regulations.

L had engaged to an extent with the application, including submitting detailed arguments and 1,000 pages of evidence. However, she did not attend the hearing, and had not filed and served documents relating to the medical evidence relied on when entering the current moratorium, or ongoing evidence of her mental health, as directed. In the absence of such information, the High Court found that there was no evidence to indicate that L suffered from a mental health condition of the severity required for the creation of a mental heath crisis moratorium, or that her treatment was "*crisis, emergency or acute*" as required by the regulations.

The Judge held that there was material irregularity under reg 17(2)(a) because the debtor did not meet the eligibility criteria for a moratorium. The only evidence of L's illness and treatment was correspondence from two professionals. The court was not satisfied that her condition, adjustment disorder, was a 'mental disorder of a serious nature'. It was also not satisfied that she was 'receiving any other crisis, emergency or acute care or treatment in hospital or in the community'.

The Court also found that L had not explored options to deal with the debt. K had been unfairly prejudiced by the moratorium. The moratorium was therefore cancelled.
In light of the history of the matter, including the timing of L's successive moratoria, and her failure to make any proposals for settling the debt (together with the fact that L appeared to be well enough to have had two books published recently), the Judge also granted an injunction restraining L from making further applications for a moratorium, She was given permission to apply to vary or discharge that order, largely subject to producing the evidence as to her mental heath on which she intended to rely.

The court held that DRS Regs reg 28(2)(e), which covers community treatment, should be read consistently with reg 28(2)(a)–(d), which cover psychiatric in-patients. The debtor must be suffering from a severe disorder that in other circumstances would justify overriding the free will of the person. The care must go beyond routine treatment.

Refusal to extend an injunction preventing additional moratoria
Kaye v Lees
[2023] EWHC 758 (KB). 31 March 2023
See Nearly Legal

The Court (in the judgment above) had previously granted an injunction for a period of two months restraining L from applying for a further breathing space or mental health crisis moratorium (MHCM), to enable K to enforce his judgment debt. L was subsequently evicted from the property, which remained unsold although a sale was apparently imminent. Shortly before the injunction expired, K applied to extend it. to give enough time to complete the sale of the property.

The application was refused. David Lock KC considered that, as the regulations did not impose any restrictions on debtors making a fresh application for a MHCM after one was cancelled, Parliament had not intended that there should be such a restriction. It was not appropriate for the courts to deprive a debtor of their statutory rights. It was for a debt advice provider to decide whether it is appropriate to apply for a moratorium.

However, the Judge discussed at length the purpose of a moratorium. S.6(2) of the Financial Guidance and Claims Act 2018 provides that a debt respite scheme should do one or more of the following:

- protect individuals in debt from interest or charges during a moratorium;
- protect individuals in debt from enforcement action during a moratorium; and/or
- help individuals in debt and their creditors devise a realistic plan for the repayment of some or all of their debts.

The Court held that these three purposes must be taken together rather than considered separately. The purpose of devising a repayment plan should be part of the decision-making process when a debt advice provider considers whether a moratorium is appropriate.

The regulations envisaged that a MHCM should only be granted where there is a mental health crisis, not merely routine mental health treatment. The Judge considered that the debt advice provider was obliged to scrutinise applications to ensure that they were only granted where appropriate, i.e. that the purpose was met and there was indeed a crisis. A decision to enter someone onto a moratorium was a quasi-judicial decision which may be subject to judicial review, with a possible application for urgent interim relief.

While it was unlikely that a debt advice provider would be able to enter L into a fresh moratorium in the light of this, neither K nor the Court knew about her current circumstances (she did not attend the hearing and was not represented). They could not therefore be sure that she was not statutorily entitled to protection:

Updated mental health crisis moratorium guidance following *Kaye v Lees*

On 9 June 2023, the Insolvency Service and HM Treasury published updated breathing space guidance for money advisers (*Debt Respite Scheme (Breathing Space) guidance for money advisers* (the money adviser guidance)) and AMHPs and medical professionals (*Debt Respite Scheme (Breathing Space): guidance on mental health crisis breathing space*) respectively. HM Treasury has also published a separate statement discussing the implications for debt advice providers following the *Kaye v Lees* judgments (*Mental health crisis breathing space guidance changes following 2023 High Court judgments*, 9 June 2023 (the Treasury statement)).

In summary, the government's position is that debt advice providers are not required to assess the debtor's health for themselves or to second-guess medical evidence. Therefore, the debt advice provider can continue to rely on the evidence of the mental health crisis treatment form.

HM Treasury states that the debt advice provider should be satisfied that the crisis treatment evidence supplied by the AMHP/nominated point of contact is 'cogent' (see the Treasury statement). The Insolvency Service states that in certain situations, debt advisers should consider taking additional steps to confirm eligibility where there is 'cause to question' or `cause to doubt' the crisis treatment evidence provided (see its Money Adviser Guidance).

Changes in the Civil Procedure Rules: fixed recoverable costs

From 1 October 2023, there will be a new intermediate track in the county court, for claims between £25,000 and £100,000.

There will also be a system of 'fixed costs' for most civil litigation being conducted on the fast track or the new track: Civil Procedure (Amendment No 2) Rules 2023 SI No 572.

Under new CPR 45.20 and 45.21, 'fixed recoverable costs' (FRC) will apply to certain types of housing possession cases. But the FRC regime will not immediately apply to all other housing litigation. The explanatory memorandum accompanying the new rules states:

> *Rule 45.1 exempts housing claims, as defined in the rule, from the extension of FRC. The implementation of FRC for these claims will be delayed for two years from October 2023*

> *pending further work. These cases will be allocated to the appropriate track (generally the fast track), as now, but will not be subject to FRC for the duration of the delay* (para 7.17).

CPR 45.1 sets out the types of housing case to which the delay in implementation of the FRC regime apples:

> (4) Section VI and Section VII of this Part do not apply to a claim or counterclaim which relates, in whole or in part, to a residential property or dwelling and which, in respect of that property, includes a claim or counterclaim for –
>
> (a) possession;
> (b) disrepair; or
> (c) unlawful eviction,
>
> save where the claim or counterclaim in respect of the residential property or dwelling arises from a boundary dispute.

2 Private rented sector

Properties occupied by guardians are subject to licensing requirements
Global 100 Ltd v Jimenez & Ors
Court of Appeal
(2023) EWCA Civ 1243 27 October 2023
See Nearly Legal

This was a second appeal from the Upper Tribunal decision in *Global 100 Ltd v Jimenez & Ors* (2022) UKUT 50 (LC) which upheld Rent Repayment Orders against Global 100 (a company dealing in `property guardian' arrangements). It was heard alongside the joined appeal against the Upper Tribunal decision in *Global Guardians Management Ltd & Ors v London Borough of Hounslow & Ors* (2022) UKUT 259 (LC).

The First-tier Tribunal and Upper Tribunal held that the two associated companies and their director had each committed an offence under s.72(1) of the Housing Act 2004 of failing to license premises as an HMO. They dismissed appeals by the companies against civil penalty notices issued by Hounslow Council, and made Rent Repayment Orders (RROs) in favour of several "guardians" who had lived in the premises. The FTT and UT also ruled that one of the same companies had committed the s.72(1) offence at another property in the West End, and made RROs in favour of three residents of that building. The companies appealed to the Court of Appeal.

Global 100 Ltd argued:

- that residential occupation by the property guardians of their living accommodation did not constitute the only use of their living accommodation.
- that in the Hounslow case, the UT was wrong to find that Global Guardians had a tenancy of the property.
- that in the Hounslow case the UT was wrong to find Global 100 was a person in control because in receipt of the rack rent.

Licensable as HMOs

The companies argued that neither premises – and indeed no premises occupied by property guardians – were capable of meeting the Standard Test for HMOs because the guardians' occupation was not

"*the only use of that accommodation"* within the meaning of s.254(2)(d), HA 2004. They argued that the guardians' security function offered a second 'use'.

Rejecting this argument, the Court confirmed that the focus of the Standard Test is on the 'use' made by the occupiers of their living accommodation, not the companies' subjective purpose or intention when allowing them into occupation. It is irrelevant that the presence of guardians has the effect of deterring trespassers. They were permitted to live in the buildings but not to carry on any other business, and were not trained or allowed to act as security guards. Lord Justice Dingemans said:

> In this case, on the findings of fact made by the FTT in both cases, it was apparent that the property guardians were using the living accommodation as their main residence. They had no responsibilities as property guardians save to live in the accommodation. The presence of the property guardians in their living accommodation and the property may have deterred persons from entering the property, but it did not convert the use made of the living accommodation. In these circumstances in my judgment the Upper Tribunal was right in both appeals to find that the occupation of the property guardians of the living accommodation constituted the sole use of that living accommodation.

Although each case depends on its own facts and circumstances, this part of the judgment effectively confirms that most, if not all, premises occupied by multiple guardians should be licensed as HMOs. The Court did not think the unique nature of guardianship in itself made any difference to the application or interpretation of the Standard Test.

'Persons managing' the HMO – tenancy v licence

Secondly, Global Guardians Management (GGM) challenged the conclusion it was a 'person managing' the premises at Stamford Brook within the meaning of s.263(3)(b), HA 2004. GGM contended that the freeholder of the premises had not ranted it a tenancy of the building, but rather a mere licence, meaning that it was not an 'owner or lessee' for the purposes of ss.262 and 263(3).

The Court of Appeal rejected this argument. It was obvious that the agreement had provided for a term and payment of rent, and there was sufficient evidence before the FTT to support its finding that GGM had been given exclusive possession. That was the case even though the written agreement had been drafted using language more consistent with a service agreement or licence. The agreement had created a tenancy.

Persons 'in control' of the HMOs: meaning of 'rack-rent'

Thirdly, Global 100 challenged the conclusion it was a person 'in control' of the Stamford Brook premises within the meaning of s.263(1), HA 2004. It argued there had been insufficient evidence for the FTT to be satisfied to the criminal standard of proof that it was in receipt of the 'rack-rent' of the premises, defined by s.263(2) as *"a rent which is not less than two-thirds of the full net annual value of the premises"*.

The FTT and UT had both been satisfied that the income which Global 100 was able to generate from the property – *i.e.* the monthly licence fees which guardians were willing to pay for rooms advertised on the open market – was sufficient evidence of the annual value of the premises, and that Global 100 was therefore a 'person in control' by receipt of rack rent. The head landlord, NHS PS, had only received £600 per month for letting the property. Global Guardians, with Global 100, licensed property guardians to live in the property, and this generated £15,000 per month. The companies had conceded that 'rack-rent' could be comprised of licence fees as well as rent falling due under a tenancy.

The Court of Appeal dismissed Global 100's argument that this was no evidence at all and that expert valuation evidence was required. There was nothing to suggest that higher sums could have been obtained. Global 100 was a commercial operator, not a charity.

Measure of damages for harassment and illegal eviction
Tahir v Aghri and Colavizza
(2023) EW Misc 2 (CC) 17 May 2023

T, a private landlord, brought a possession claim against his tenants A and C. The tenants defended and counterclaimed for deposit protection penalties, disrepair, harassment and unlawful eviction. T discontinued the possession claim, but the case proceeded on A's counterclaim and T's counterclaim to the counterclaim.

The tenants' evidence was that T wanted to sell the flat. When they did not leave, he let the flat fall into disrepair, cut off services and eventually changed the locks and their possessions were stolen or discarded. T's case was that this was all a conspiracy against him and he was the victim of malicious allegations by the defendants, who had failed to pay rent, cut off services, changed the locks and threatened him with violence.

HHJ Luba KC was not convinced: "*Sadly, the evidence demonstrates a propensity on the part of Mr Tahir to make outlandish allegations*". Judgment was given for the tenants in the following terms:

- Deposit to be returned, and 2 times the deposit penalty ordered for each of 3 tenancies, totalling £4,800
- £500 for a leaking shower
- On the harassment an unlawful eviction claim:
    - For anxiety and emotional distress – £25,000
    - Breach of quiet enjoyment: This ground was accepted as separate from other heads of claim, and not double counting. Assessed as abated rent at £880
    - Special damages – locksmith costs £777.60
    - Aggravated and exemplary damages –£5,000 for each, £10,000 in total
    - Loss of belongings – a list and some receipts, assessed at £2,000.

Total – £38,657.60.

See Nearly Legal for more detail of the harassment and unlawful eviction claims.

`How to rent' guide: delivery by email
Lowenthal v Djabbaroua
County Court at Wandsworth 14 November 2022
Legal Action, Feb 2023

Ms D was an assured shorthold tenant. On 10 January 2018, before her tenancy began, her prospective landlord emailed her the February 2016 version of the Department for Communities and Local Government's *How to rent* guide. D had not consented to it being sent to her by email.

On 17 January 2018, a new *How to rent* guide was published. On 26 January 2018, D was granted the tenancy. She was subsequently served with a section 21 notice and a claim for possession was issued.

The district judge dismissed the claim on two grounds:

- D had never consented to the *How to rent* guide being provided to her by email. She had therefore not been given the document for the purposes of reg. 3, Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 SI No 1646.

- Even if she had, the version that she had been given was not the version that had effect 'for the time being' and, as such, reg 3(2) had not been complied with.

Second penalty for breach of deposit protection was justified on tenancy becoming statutory periodic
Szorad and Kozma v Kohli
County Court at Central London 6 June 2023
(2023) EW Misc 12 (CC)
See Nearly Legal.

S and Z were the assured shorthold tenants of K, initially on a 12 month tenancy from July 2019, then on a statutory periodic tenancy until they left in December 2020. A deposit of £1,326.92 was paid. The deposit was never protected and was not returned to the tenants.

S and Z brought a claim under s.214, HA 2004 for the return of the deposit and two penalties for failure to comply with the deposit protection rules, one penalty for the initial tenancy and another for the statutory periodic tenancy. At first instance, the Deputy District Judge held that there was a single breach and that the tenants were not entitled to claim in relation to the subsequent failure to protect on the creation of the statutory periodic tenancy. It was not the intention of the Act that multiple penalties should be awarded in this situation. The DDJ awarded a penalty of three times the deposit.

HHJ Johns KC allowed an appeal, holding that as a result of the decision in *Superstrike Limited v Rodrigues* (2013) EWCA Civ 669 a statutory periodic tenancy was a new tenancy on which the deposit previously received was to be treated as received again. The tenants' claim for multiple awards was therefore made out. The judge awarded a second penalty of two times the deposit for the statutory periodic tenancy, on the basis that (1) there had already been an award at the top end of the scale for the original tenancy; and (2) the landlord was unlikely to have appreciated that there was a further breach on the tenancy becoming statutory periodic, in circumstances where the tenants' argument had not succeeded at first instance.

Renters (Reform) Bill

The Renters (Reform) Bill received its First Reading on 17 May 2023.

However, in its response to the Levelling Up, Housing & Communities Select Committee's report *'Reforming the Private Rented Sector'* report, the Government states that it will delay commencement "until stronger possession grounds and a new court process is in place". Responding to the Committee's recommendations on court reform, the Government said:

> "In our white paper, 'A Fairer Private Rented Sector,' we set out a range of court improvements to target those areas which can currently cause frustration and delays. We are working closely with the Ministry of Justice and HM Courts and Tribunal Service to drive forward improvements to the court possession process so that users have a modern, digital service that will align with the reforms to tenancy law.

Implementation of the new system will not take place until we judge sufficient progress has been made to improve the courts. That means we will not proceed with the abolition of section 21, until reforms to the justice system are in place."

The Government said that areas for improvements included:

- digitising more of the court process to make it simpler and easier for landlords to use;
- exploring the prioritisation of certain cases, including antisocial behaviour;
- improving bailiff recruitment and retention and reducing administrative tasks so bailiffs can prioritise possession enforcement; and
- providing early legal advice and better signposting for tenants, including to help them find a housing solution that meets their needs.

"We are also strengthening mediation and dispute resolution, seeking to embed this as a member service of the new Ombudsman. This will give landlords stronger tools to resolve disputes before court action is needed," it said.

Below is a summary of the important provisions as the Bill currently stands.

Part 1: Tenancy Reform

- **Abolition of assured shorthold tenancies (clauses 1 and 2)**

  Clause 1 provides that when in force, all assured tenancies will be monthly periodic tenancies. It will not be possible to create a fixed term assured tenancy. Terms in tenancy agreements deviating from these requirements will have no legal effect.

  Clause 2 would amend the Housing Act 1988 to omit reference to assured shorthold tenancies.

- **Changes to the grounds for possession (clauses 3, 4 and schedule 1)**

  - **Revised mandatory ground 1: Occupation as principal home for landlord or family member**
    - A landlord can use this ground once the tenancy has lasted more than 6 months. The landlord must intend it to be their (or their family member's) only or principal home.
  - **New mandatory ground 1A: Sale of property**
    - A landlord can use this ground once the tenancy has lasted more than 6 months. The landlord must intend to sell.
  - **Revised mandatory ground 2** (mortgagee exercising power of sale):
    - Mortgage does not need to pre-date tenancy; notice need not be given at start of tenancy
  - **Revised mandatory ground 6** (redevelopment):
    - Landlord can use ground even if they purchased the property subject to the assured tenancy; ground cannot be used during first 6 months of tenancy.
  - **New mandatory ground 6A: To allow landlord to comply with enforcement action**
    - This ground covers a number of situations, namely:
      - Letting is in breach of banning order
      - Improvement notice served because of overcrowding

        - Prohibition order
        - Landlord in breach of licensing requirements
        - Number of occupiers exceeds licensing maximum.
- **Revised mandatory ground 8:**
    - The Bill would amend ground 8 to provide that if a tenant's arrears have arisen only because a Universal Credit payment they are entitled to has not yet been paid, the relevant arrears do not count.
- **New mandatory ground 8A: Repeated rent arrears**
    - At least 2 months' rent was unpaid for at least a day on 3 or more separate occasions within a three-year period.
    - Again, the calculation of rent arrears should exclude any sums arising due to delays from the payment of Universal Credit.
- **Revised discretionary ground 14: Anti-social behaviour**
    - The wording will replace a reference to guilty of "behaviour causing or **likely to cause**" nuisance or annoyance with "**capable of causing**" nuisance or annoyance.

- **Rent increases**

Clause 5 makes the service of a section 13 notice the only way a rent increase could take place. Rent review clauses in tenancy agreement will be unenforceable (except for social landlords). Landlords and tenants may agree a lower increase than the amount proposed in the notice (but higher than the previous rent level). Rent can only be increased every 52 weeks. For increases under the amended section 13, the landlord must give at least **two months' notice.**

The rent set out in the notice will then apply unless the tenant applies to the First Tier Tribunal before the date the increase is due to take place or the landlord and tenant agree to a different amount. The Tribunal would still be able to increase the rent above that proposed in the landlord's section 13 notice.

Note that tenants will also have the right to challenge the rent set at the beginning of the tenancy within the first six months.

- **Clause 7: Permission to keep a pet**

Clause 7 makes it an implied term of an assured tenancy that a tenant may keep a pet with the landlord's consent, which must not be unreasonably refused. The landlord will be required to give or refuse consent in writing within 42 days of receiving a written request. The tenant's written request must describe the pet. As a condition of giving consent, a landlord will be able to require the tenant to take out insurance covering the risk of pet damage or to pay the landlord's reasonable costs of maintaining pet damage insurance.

- **Clause 19: Tenancy deposit requirements**

This clause amends the HA 2004 to continue the requirement for deposits to be protected in respect of all new assured tenancies and tenancies that were ASTs immediately before the `extended application date' (see below). Landlords who take a deposit and do not comply with the statutory requirements will not be able to claim possession order on any of the grounds for possession, apart from the ASB grounds 7A and 14.

However, there is no provision for defences for failure to issue the 'How to Rent' guide to the tenant; or to supply a current gas safety certificate and an energy performance certificate.

- **Clause 22: Penalties for unlawful eviction or harassment of occupier**

  This clause would insert a new section 1A into the Protection from Eviction Act 1977 to enable local authorities to issue fixed penalty notices for offences under section 1 of the 1977 Act up to a maximum of £30,000. Financial penalties may be imposed in lieu of prosecution. The burden of proof for levying a financial penalty would be 'beyond reasonable doubt'.

Part 2: Landlord redress schemes / Private rented sector database

The Bill will make it compulsory all private landlords in England to join a government approved redress scheme. Landlords will pay for the costs of the Ombudsman. It will be free for tenants to use if their landlord has not dealt with a "legitimate complaint".

Government Guidance promises that the redress scheme will be "quicker, cheaper, less adversarial, and more proportionate than the court system". Guidance also claims that the proposed Ombudsman will "tackle the root cause of problems, address systemic issues, provide feedback and education to members and consumers, and offer support for vulnerable consumers."

The Ombudsman will be able to "put things right", according to the press release. This includes requiring landlords to make an apology, provide information, take remedial action, and/or pay compensation of up to £25,000. Landlords will be required to abide by the Ombudsman's decision.

If landlords do not join the Ombudsman scheme, local authorities will be able to take enforcement action against them. This will range from a civil penalty of up to £5,000, through to a £30,000 fine or criminal prosecution. There is also the potential for a Banning Order for repeat offenders.

Regulations will deal with the detailed working of the scheme and with implementation.

Private rented sector database (Rented property portal)

The Bill also proposes a new digital database where each landlord and each "dwelling" will have an entry, and unique identifiers. The database is referred to as the "Rented Property Portal" in the government press release. Landlords will pay for the running of the database. There must be active entries for both the landlord and the property before a property is marketed for letting.

Landlords and letting agents will be required to keep accurate records and documentation on the PRS database. New offences will be introduced, including knowingly or recklessly providing false or misleading information. It will also be added to the list of offences that can enable a tenant to obtain a rent repayment order under section 40 Housing and Planning Act 2016. Government guidance on the database is here.

3 Regulation of social housing

The Social Housing (Regulation) Act 2023 received Royal Assent on 20 July 2023. The main provisions are summarised in Towers and Hamlin's Essential Guide to the Act and in this briefing from Bevan Brittan. See also Shelter's blog here.

Winckworth Sherwood have also published a short but clear summary of the main anticipated changes to the consumer regulation regime.

The Regulator of Social Housing is currently consulting on their new consumer standards: see the Consultation (deadline for responses 17 October). The RSH has set out proposals for a new Safety and Quality Standard, which includes proposed requirements around repairs.

The Department for Levelling Up Housing and Communities publish a monthly bulletin, which gives an update on the Government's work to improve the quality of social housing. The bulletin sets out a rough timeline of "our planned activity over the coming months and years", including a list of "immediate next steps".

Awaab's law

Section 42 of the Act contains provision for what has become known as 'Awaab's Law'. The section provides for new sections 10A and 10B in the Landlord and Tenant Act (LTA) 1985. S.42 was brought into force on 20 September 2023 by the Social Housing (Regulation) Act 2023 (Commencement No 1 and Saving Provision) Regulations 2023 SI No 1001. This places a duty on the Secretary of State to make regulations requiring landlords to investigate and rectify serious hazards, such as damp/mould and fire safety, within specified time frames. A consultation will take place about the process and timings to be adopted.

S.10A(2) supplements sections 9A and 10 of the Act (fitness for habitation) and implies into social housing tenancies a covenant by the lessor that the lessor will comply with all prescribed requirements that are applicable to that lease.

S10A(3) requires the Secretary of State to make regulations which require the landlord to take action in relation to prescribed hazards which affect or may affect the dwelling, within the period or periods specified in the regulations. S.10(4) provides:

> Regulations under subsection (3) are enforceable against lessors only through actions for breach of the covenant that is implied by subsection (2).

Under s.10A(5), in any proceedings for a breach of the covenant implied by subsection (2), it is a defence for the landlord to prove that the landlord used all reasonable endeavours to avoid that breach.

4 Homelessness

A Housing needs assessments / suitability of interim accommodation

Council's failure to produce lawful PHP and housing needs assessment and to provide suitable accommodation
R (UO) v LB Redbridge
[2023] EWHC 1355 8 June 2023
See Nearly Legal

UO was a single parent with 3 children. She applied as homeless in October 2022, shortly after her asylum application was granted and before she was evicted from her most recent NASS accommodation. At that time her children were at primary school in Tottenham, the eldest being in year 6 and preparing for SATS as well as scholarship exams for private schools. Redbridge took no action until the afternoon before the eviction, and then on the basis of a phone call where no questions were asked about the family's needs, placed the family in a hotel with no cooking or laundry facilities, 1½ hours' journey from the school.

A PHP (here called a Relief Assessment and Personalised Plan – RAPP) was produced making no reference to the family's actual needs, and UO was never asked to agree this. The family was then moved 8 times in the following 4 months between numerous other hotels, all of which lacked cooking and laundry facilities and which required 1-2½ hours travel to the school. UO requested a review of the suitability of each hotel, with supportive letters from the school. No reviews were ever carried out, but on each occasion the family were moved with no explanation.

In December 2022, the Council made a private rented sector offer in Peterborough, which UO declined due to the distance from existing networks and her reluctance to change schools in her eldest child's SATS year and in the middle of secondary applications. The Council accepted the main housing duty in February 2023. Subsequently, two offers in Peterborough were made and declined, and the Council sought to discharge duty. It considered that the family had no medical or other need to stay in London, and that the children were not at a key stage in their education.

UO applied for judicial review. Interim relief and expedition were granted (prompting a further 4 different offers of hotel accommodation in 7 weeks, the last being a Travelodge 45 minutes from the school). The Council failed to comply with directions and were only permitted to rely on summary grounds of defence, and no evidence.

At the substantive hearing before Lane J., UO succeeded on each of the following grounds:

- The initial Housing Needs Assessment (HNA) and Personal Housing Plan (PHP), contained in the RAPP, were unlawful. The Council had failed lawfully to identify or assess the housing needs of UO and her children. The RAPP was inadequately evidenced and reasoned.

  The Judge noted that the Council failed to adduce any evidence that it had made any enquiries regarding the availability of accommodation nearer to the school or of alternatives to B&B accommodation. It had failed to have regard to the evidence from the school: *"The defendant's position was, in effect, that because none of the children had special educational needs and none was taking GCSEs or A levels, there was no point in having any regard to what the headteacher was saying.*" This was to elevate the Council's policy into a rigid rule. The references to GCSE's and A levels, and to those with special educational needs, constituted examples of where particular consideration would be given to the needs of children, not an exhaustive list."

- The Council had failed to conduct a lawful review of UO's housing needs and the suitability of the hotel accommodation and Peterborough accommodation.

  The Judge found that Redbridge had demonstrated no real engagement with the issues and facts of the case. The representations and evidence submitted on UO's behalf clearly ought to have caused the defendant to initiate a review of the HNA and the PHP:

  > "*In addition, it is significant that no reviews were carried out in respect of any of the offers of hotel accommodation. In this regard, the defendant's approach was, on each case occasion, dismal. The claimant was merely instructed to relocate without further inquiry or assessment and, in some instances, under threat of termination if she did not do so."*

- There was an ongoing breach of the duty to provide suitable accommodation under s188(1), and s193(2). UO also sought to include a fourth ground, that the purported discharge of duty was unlawful as the Peterborough accommodation was not suitable. The Judge allowed the challenge to suitability within the JR, rather than by way of s202 review/s204 appeal. He considered that grounds 3 and 4 were closely related to grounds 1 and 2, and accepted UO's submission that for her to have to embark upon the review process would incur unnecessary further delay and expense.

The hotel accommodation could not rationally be regarded as suitable particularly in light of the impact upon the children, the distances to school and the lack of cooking facilities, as well as article 3 of the Homelessness Order 2003 (limits on the use of B&B accommodation) and the Code of Guidance.

The decisions that the Peterborough accommodation was suitable were also irrational. Its location would require the children to change school during the academic year. The council had failed to show that it undertook any (let alone legally sufficient) inquiries into the effects of such a move on the children's education. It could not rely on the general premise that there is an acute housing shortage in London.

Out of area interim accommodation was unsuitable where the Council's housing needs assessment was defective, especially with regard to the children's educational needs
R (YR) v London Borough of Lambeth
[2022] EWHC 2813 (Admin) 8 November 2022
See Nearly Legal .

In July 2022, Ms YR, a single mother with seven children of ages from four months to 16 years, applied to Lambeth Council for homelessness assistance. She had pre-settled status, having been working as a cleaner despite her limited English, and had a small support network in Lambeth, where her children went to school.

The Council carried out an assessment of her circumstances and on 18 August 2022 offered her s.188 interim accommodation in a four-bedroom property in East Tilbury, Essex, some two hours in travelling time away from Lambeth. YR reluctantly accepted the offer, although she did not consider it suitable because of the disruption it would cause to her children's schooling; her own employment prospects; social isolation from her support networks; and affordability. Ultimately, she accepted the property, although In September 2022, when the school term started, she moved in with a friend in Lambeth so that her children could get to school.

YR issued proceedings for judicial review. She relied on various grounds, including that the Council

- had failed to carry out a lawful assessment of YR and her family's housing needs and to keep their housing needs under review (s.189A, HA 1996);
- had failed to have regard to the need to safeguard and promote the welfare of the children in accordance with s.11(2), Children Act 2004; and
- was in breach of its continuing duty to provide suitable accommodation that 'so far as reasonably practicable' was in the Lambeth area.

The Council submitted that the Tilbury accommodation was suitable in relation to the children's education, employment, local amenities/services, transportation and healthcare.

The claim was allowed. Paul Bowen KC, sitting as a Deputy High Court Judge, held:

- Lambeth's initial housing needs assessment and personal housing plan were unlawful under s.189A(2) of the Housing Act 1996, taken with s.11(2) Children Act 2004. The s.189A assessment made no reference to the needs of the children or to the impact on their education which would result from moving to Essex. No steps had been taken to determine whether there were, in fact, school places available for the children in Essex. Taken together or individually, these failures rendered the assessment unlawful. Such matters were integral to the assessment both of the family's housing needs and to the suitability of any property offered.

- The Council's decision that the property was 'suitable' for the purposes of s 188(1) was vitiated by the fact that it was based on an unlawful assessment under s 189A and a failure to conduct adequate inquiries for the purposes of s 184 and 188(1): "*To the extent that the assessment under s 189A was flawed, those flaws also undermined the s 188(1) decision as a matter of both fact and of law*."

- The Council's conclusion that the property was suitable accommodation for the purposes of s188(1), was irrational.

- Lambeth had failed to keep YR's housing needs under review under s.189A(9) and paragraph 17.8 of the Homelessness Code of Guidance. Its Suitability Assessment was inadequate to meet that obligation.

- Lambeth's decision that the interim temporary accommodation was suitable also demonstrated a failure to apply its own placement policy (that an applicant with a child entering year 11 would be afforded priority accommodation within the Lambeth area).

The Judge quashed the decisions, but declined to make a mandatory order for provision of in-borough accommodation because the Council had by then accepted the main accommodation duty under s193(2). The Council would therefore need to make a new decision as to suitability, which should be informed by a fresh assessment under s189A..

See also **R (ZK) v LB Havering** [2022] EWHC 1854 (Admin), in which the Administrative Court held that a lawful housing needs assessment must identify the "nuts and bolts of the applicant's housing needs", to enable the authority to assess the suitability of current and future accommodation.

B Relief duty (duty to `help to secure' accommodation: s.189B, HA 1996)

Where suitable accommodation is provided under the relief duty, does this end all other duties?

R (Ahamed) v Haringey LBC
[2023] EWCA Civ 975 11 August 2023

Ms A was a single woman aged 48, who came to the UK from Somalia in 2010. In August 2021, she was granted leave to remain and, as a result, had to leave her NASS accommodation. She applied as homeless to Haringey. She suffered from high blood pressure, hearing impairment and Type 2 diabetes. The Council accepted the `relief' duty under section 189B. But it considered that it did not have reason to believe that she might have a priority need, so it declined to provide her with interim accommodation duty under section 188. The housing needs officer recorded her as not being more vulnerable than average.

A was offered and accepted a single room with shared kitchen and bathroom facilities in a hostel on a half-board basis. The Council informed A that the relief duty had come to an end because she had suitable accommodation with a reasonable prospect of it being available to her for at least 6 months, and that the s193 duty did not apply because she was no longer homeless.

The following month, A asked to be provided with alternative interim accommodation, relying on section 188. The Council refused, stating that the hostel accommodation was suitable in terms of facilities and A's medical conditions and it was reasonable for her to continue to occupy it. A applied for judicial review of that decision. Permission was refused, on the basis that she had an appropriate alternative remedy through the statutory review/appeal procedure.

A appealed against the refusal of permission. She argued that the judge had been wrong to consider that, if the relief duty under HA 1996 s189B comes to an end by reason of the provision of suitable accommodation, that must mean that A is no longer homeless and is not owed the 'main housing duty' under s193.

A also sought a s202 review, which was unsuccessful. The reviewing officer decided that the accommodation met the requirements of the relief duty because it was suitable and it would be available to her indefinitely. She appealed against the review decision, and that appeal was transferred from the county court to the Court of Appeal to be heard with the permission appeal.

Both appeals were dismissed.

The Court of Appeal held that it was necessary to consider whether, on the particular facts of the case, A was "homeless" and so potentially owed the main housing duty even if the Council was entitled to bring its relief duty to an end based on suitability. A argued that, while her room might have been suitable as emergency accommodation, it was not suitable in the longer term. The Court held that the reviewing officer had not failed to make relevant enquiries concerning A's medical conditions and had accepted that she was disabled. He was entitled to take the view that he knew enough about the relevant medical matters and his decision letter showed that he had carefully considered them. Further, he had had regard to the Public Sector Equality Duty in the context of the suitability of the accommodation. Accordingly, the reviewing officer was entitled to conclude that A's accommodation was "suitable" and that the relief duty had come to an end. The Council's decision that A was not homeless, and therefore not owed a s193 duty, was "entirely reasonable".

The Court of Appeal accepted that it was possible that a person might still be "homeless" and so owed the main housing duty under s193, despite having "suitable accommodation available for occupation" and "a reasonable prospect" of retaining it for at least six months (within the meaning of s189B(7)(a)). Therefore, where a LA terminated its relief duty on the basis that suitable accommodation was available, that might not prevent the applicant from remaining homeless and being owed the s193 duty. However, that situation would rarely arise. Typically, the matters rendering the accommodation potentially "suitable" for at least 6 months would also tend to make it "reasonable

… to continue to occupy". The fact that the applicant is no longer 'homeless' would have the consequence that the applicant could not be owed the main housing duty (para 49).

C Eligibility for assistance

Pre-settled status and fundamental rights

The First-tier Tribunal was right to allow an EU national with pre-settled status but no qualifying right to reside to claim universal credit in cases where refusing the claim for UC would leave the claimant or their children destitute or at risk of being unable to meet their basic needs of adequate food, shelter, hygiene and clothing.

Secretary of State for Work and Pensions v AT (AIRE Centre and Independent Monitoring Authority for the Citizens' Rights Agreements intervening)
Court of Appeal 8 November 2023
[2023] EWCA Civ 1307.

AT is a Romanian national with pre-settled status. She was HIV+ as a result of a contaminated blood transfusion. She had come to the UK in 2016 and obtained employment. Her daughter D was born in February 2018. In January 2021, following an incident at the home AT shared with her partner, V. AT and D were temporarily placed in a hotel and then went to a refuge run by a charity. In her evidence before the First-tier Tribunal, AT explained that she had been subjected by V to domestic violence throughout the course of their relationship, including when she had been pregnant. V had controlled all aspects of her life. He had prevented her from working by refusing to pay for childcare and had cut up AT's and D's passports. He had made threats to kill her, in particular if she moved back to Romania. He had held her captive and subjected her to emotional and physical abuse.

AT applied for universal credit (UC), but the DWP refused her claim on the basis that she was unable to demonstrate a qualifying EU right of residence. AT appealed to the First-tier Tribunal (FtT)

At a hearing on 31st May 2021, the FtT allowed AT's appeal. The Tribunal Judge made findings of fact in respect of AT's specific circumstances. He referred to:

> (i) her lack of financial resources to care for herself and her dependent child;
> (ii) the fact that she was in arrears of rent and other charges in the sum of c.£14,000 and that it was only out of a sense of charity that her landlord had not evicted her and the child;
> (iii) the fact that she had to reside in shared accommodation.
> (iv) the fact that she did not have enough money to pay for decent food for herself and her child;
> (v) the history of prior abuse and violence perpetrated by her partner which left her in a state of isolation from friends or other family support in the UK;
> (vi) the fact that she had to rely extensively upon charitable support and donations which in the view of the Judge, because it was not provided by the state, was "unpredictable, unreliable and precarious"; (vii), the harmful psychological impact of these living conditions upon AT and upon the child including a pervasive state of "uncertainty and worry".

The Judge found that there was a risk that AT and her child would be unable to live in dignified conditions. The Judge also concluded that it would not be unfair to describe the position of AT as having been subject to inhuman or degrading treatment within the meaning of Article 3 ECHR. The result was that AT's continuing right to reside in the UK had been violated by the refusal to provide support. The SSWP's argument that there was no breach because of the broad and adequate nature of the support regime which was, in principle, available, was rejected.

The SSWP appealed to the Upper Tribunal, which on 13th December 2022 dismissed the appeal. The UT held that, following the withdrawal of the UK from the EU, the right to "dignity" under Article 1 of the Charter of Fundamental Rights of the European Union continued to apply in certain limited respects to ensure that a person with a subsisting right of residence could enjoy that right in a manner that was dignified, in the sense of meeting a minimum level of viability. The UT held that on the facts the state had failed to ensure that the mother and child were able to enjoy that continuing right.

The SSWP appealed to the Court of Appeal.

Appeal dismissed. The Court of Appeal rejected all four of the Secretary of State's grounds of appeal:

Ground 1: The SSWP argued that the Charter did not apply at all, since it had no continuing application following the departure of the UK from the EU; and that the UT had erred in holding that the Charter applied in AT's case by reason of the Withdrawal Agreement.

The Court of Appeal held that the Charter does apply to the right of residence set out in Article 13 in Part Two of the Withdrawal Agreement. That right derives from Article 21 of the Treaty on the Functioning of the European Union ("TFEU"). The UT was correct to accept that it applied with the added protection of Article 1 of the Charter which ensured that the right was rendered effective and could be enjoyed on a continuing basis, in a dignified manner. The Court further held that the Charter continues to apply after the end of the transition period on 31st December 2023.

While AT relied on her right to dignity under the Charter of Fundamental Rights, the Court noted that the principle of dignity has a *"long-standing counterpart"* in the *"constitutional traditions"* of England & Wales known as the *"law of humanity"* [35, 183]. The Court noted that government was right to point out that *"the true position is that human dignity pervades all* [rights under the European Convention on Human Rights]" [36].

Ground 2: The SSWP argued that the UT should have held that the DWP did not need to carry out an individualised assessment in every case, or alternatively was only required to carry out such an assessment in respect of those considered "vulnerable"

Ground 3: The SSWP argued that that compliance with the Charter was achieved by the UK "in principle" in setting up a "statutory framework" of support, notably under section 17 of the Children Act 1989) that could be available for a person with pre-settled status

The Court rejected Grounds 2 and 3. Applying the decision of the CJEU in ***CG v Department for Communities in Northern Ireland*** (15th July 2021), the Court held that an individual assessment is required in all cases where a person covered by the Withdrawal Agreement would otherwise be refused UC on grounds they do not have a right to reside. The UT did not err in the approach it took to other forms of support potentially available to AT. The system as presented by the SSWP did not seem even *in principle* to be capable of protecting a person such as AT. In particular it was not sufficient that section 17 Children Act 1989 support was in principle available. As the UT stated, the DWP was required to "focus on the concrete factual position, not the theoretical legal one". This provided

> "a complete answer to SSWP's case that s. 17 of the Children Act 1989 ought to have provided a route by which support could be given to AT and her child. Legal theory had to yield to reality."

Ground 4: The Secretary of State argued that there is a high threshold that must be met in order for a breach to be found and that the threshold had not been met in AT's case. However, the Court of Appeal held that the FtT decision on whether there was a breach of articles 1 and 4 of the Charter was

unimpeachable and the UT had been right not to disturb it. The UT had used the expression "most basic needs" as indicating the threshold for intervention. This must be understood in the light of the judgment in ***CG***:

> On the basis of ***CG*** the facts relevant to a Charter violation are within a relatively narrow compass and focus upon: the availability of means and resources to meet needs (which would include accommodation); the degree of isolation; and the degree of dependency of children. The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary. [112]

The SSWP's application to the Court of Appeal for permission to appeal to the Supreme Court was refused.

Israel/Gaza: eligibility and habitual residence

The Allocation of Housing and Homelessness (Eligibility) (England) and Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) (No. 2) Regulations 2023 (SI 2023/1142) confer eligibility for homelessness assistance and for allocation of social housing on persons who have fled violence in Israel, the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights (referred to as the Occupied Palestinian Territories) or Lebanon. The person must have been residing in those areas immediately before 7 October 2023, and must have left in connection with the Hamas terrorist attack on 7 October or the subsequent violence in the region.

This extension of eligibility applies to persons subject to immigration control who have leave to remain with no restrictions on recourse to public funds.

The Regulations also exempt British nationals and others not subject to immigration control from the habitual residence test in the above circumstances.

Does a person with pre-settled status automatically qualify for settled status after 5 years' residence?
R (Independent Monitoring Authority for the Citizens' Rights Agreements) v SSHD 2022 [EWHC] 3274 (Admin) 21 December 2022

In this case, the IMA challenged the requirement that EU nationals who have been granted pre-settled status are required to make a further application for full settled status when they have complete a period of 5 years' residence in the UK.

The Court (Lane J.) held that the Withdrawal Agreement between the EU and the UK allowed for a constitutive scheme, whereby leave to remain depended upon the EU citizen making an application for settled status, rather than leave arising automatically on the person meeting the requirements. However, the Withdrawal Agreement envisaged that the UK would require the EU citizen to make only one application. If the requirements for indefinite leave to remain were not met at the date of application, the person would be awarded limited leave. After five years' residence, and without further application, this would automatically be converted into indefinite leave.

Note, however, that this decision applies only where the person with pre-settled status has been exercising an EU qualifying right for 5 years. Where a person cannot show this quality of residence, s/he will still need to apply for settled status after 5 years.

Extension of exclusion of certain migrants from protection

The Homelessness (Suitability of Accommodation) (England) (Amendment) Order 2023 came into force on 31 May. It extends for a further year until 1 June 2024 the Homelessness (Suitability of Accommodation) (Amendment) (England) Order 2022 which effectively disapply two aspects of suitability for certain groups of applicants:

- The 6 week maximum time for which households with children can be left in B&B accommodation, and
- The requirement to take into account location when assessing suitability, except for limited caring responsibilities.

The regulations apply to applicants who:

- apply as homeless under Part 7 HA 1996 on or after 1 June 2022, and
- their application is made within 2 years of their arrival in the UK, *unless*
- during the period of 3 years before their arrival they had a right to occupy accommodation in the UK for an uninterrupted period of 6 months or more.

Accommodation must still be suitable in terms of size, type, quality, etc, and although B&B is not deemed unsuitable after 6 weeks, unsuitability can still be argued on the facts of the case where appropriate.

The exclusions largely (but not exclusively) apply to Ukrainian and Afghan nationals arriving on the visa schemes.

Accommodating asylum-seekers

The draft Houses in Multiple Occupation (Asylum-Seeker Accommodation) (England) Regulations 2023 were laid on 30 March 2023, but require the approval of Parliament under the affirmative resolution procedure.

The regulations propose to exempt accommodation provided by the Home Office for asylum-seekers in HMOs in England from the requirement to have a local authority licence under Part 2 of the Housing Act 2004 for a period of two years.

The House of Lords Secondary Legislation Scrutiny Committee has suggested that Parliament may wish to seek further assurance that the proposed policy will not lead to poor quality, unsafe or inappropriate housing being used for asylum-seekers (see HL Paper 187, 4 May 2023). The Committee also suggested that the Government might be invited to publish statistics on the number of asylum-seekers who are placed in unlicensed HMO accommodation.

A House of Commons briefing paper considers the reasons why the UK bans migrants from claiming benefits such as social housing and homelessness assistance, and the arguments for and against the 'no recourse to public funds' policy: *No recourse to public funds* (House of Commons Library Research Briefing No CBP-9790, 9 May 2023).

D Intentional homelessness

A person can be intentionally homeless from temporary accommodation if it is reasonable to continue to occupy
Hodge v Folkestone and Hythe DC
Court of Appeal 27 July 2023
[2023] EWCA Civ 896

Ms H had a long history of serious mental health issues, including diagnoses of personality disorders, suicide attempts and hallucinations. She left home when she was 12 and went to live with her grandmother for some years. In 2015, still aged under 18, she moved into a studio flat in a hostel run by Porchlight. She signed a licence agreement for what was described as temporary supported accommodation with the objective of moving into longer term accommodation. The agreement stated that the licence could be terminated on 7 days' notice.

The licence recorded that:

- Porchlight provided temporary accommodation while residents looked for more permanent accommodation;
- Porchlight helped people to find, but could not guarantee access to, permanent housing;
- the maximum length of stay would depend on the licensee's needs; and
- staff provided support to residents and each would be given a key worker.

In August 2016, H left the accommodation 'of her own accord'. She then spent some years sofa surfing with relatives and friends and sleeping in a car. In May 2021, she was pregnant and applied to the Council as homeless and was found to have become intentionally homeless from the studio flat. The decision was upheld on review, and her appeal to the county court was dismissed.

H appealed to the Court of Appeal. She argued that the Council had erred in law in concluding that the room was 'accommodation' for the purposes of s191(1) HA 1996 and/or in finding that it was 'settled accommodation'. She submitted that the room was only intended to be temporary and had minimal security of tenure, and therefore she could not be intentionally homeless from it.

Appeal dismissed.

Laing LJ held that it was not relevant whether the accommodation was settled. For the purposes of intentional homelessness, the issue was whether she had had accommodation available to her and whether it would have been reasonable for her to continue to occupy that accommodation.

Earlier decisions of the courts (and in particular *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484*, R v Brent LBC ex p Awua* [1996] AC 55 and *Birmingham CC v Ali; Moran v Manchester CC* [2009] UKHL 36; had established that:

- whether the place that an applicant happens to occupy is 'accommodation' for the purpose of HA 1996 s191(1) is a question of fact and degree for the local housing authority;
- whether it is reasonable for an applicant to continue to occupy temporary accommodation is also a question of fact for the authority (although the House of Lords in *Moran* found that a woman in a refuge remained homeless);
- in order to qualify as accommodation for the purposes of HA 1996 Part 7, there is no requirement that accommodation be 'settled'. The concept of settled accommodation only

arises when looking at whether the chain of causation between the original intentionality and the current homelessness has been broken.

It was not therefore the case that an applicant can only be intentionally homeless from settled accommodation.

The council could see no evidence of any reason why the studio flat would not have continued to be available, H had access to support there, and there was no evidence that her decision to leave was related to her mental health issues or that she did not have capacity.

The Court held that the Council were entitled to decide that the studio flat had been accommodation for the purposes of section 191(1) -- and indeed that they had been entitled to find that it had been settled accommodation, even though this was not in fact relevant -- and that it would have been reasonable for H to continue to occupy it. Had she stayed, she would have received an offer of secure accommodation; and it would have been reasonable for her to have continued to occupy the room until then, rather than giving it up. The Council were therefore entitled to decide that H was intentionally homeless.

E Suitability of accommodation / discharge of duty

The Local Government and Social Care Ombudsman (LGSCO) has issued a new guide for housing and homelessness officers working in local housing authorities: ***Unsuitable temporary accommodation: guide for practitioners*** (LGSCO, May 2023). The guide offers good practice advice on dealing with people who are owed the main housing duty (Housing Act (HA) 1996 s193) and are occupying temporary accommodation that the council accepts is unsuitable.

Amendment of definition of B&B

The Homelessness (Suitability of Accommodation) (England) (Amendment) Order 2023 (see also page 23) amend the definition of B&B accommodation in the Homelessness (Suitability of Accommodation) (England) Order 2003, extending it to include accommodation in which no cooking facilities are provided, as well as where shared facilities are provided. The purpose of the amendment is to "clarify the law", and this amendment is not time-limited. The effect is that pregnant women and families with children should not be accommodated in hotels of any type unless as a last resort, and even then for no more than 6 weeks.

Council failed to explain why it had not been able to find any properties nearer than Stoke-on-Trent when making a private rented sector offer
Zaman v LB Waltham Forest; Uduezue v LB Bexley
[2023] EWCA Civ 322 24 March 2023
See Nearly Legal

Each of the appellants in these conjoined appeals were owed the main s.193 housing duty. Before becoming homeless, both Ms Zaman and Ms Uduezue had lived in London. Each had 3 children,

Each applicant was made a private rented sector offer (PRSO). Ms Z was offered accommodation in Stoke-on-Trent, more than 160 miles from where she was previously living. Ms U was offered accommodation nearer to London (in Kent), but which would still involve a 20 mile journey. Both applicants rejected the offers. Their applications for review were unsuccessful and their appeals to the county court were dismissed. Each appealed to the Court of Appeal.

Z submitted that the s193(2) duty obliged the council to offer her accommodation as close as possible to where she had previously been living, and that it had not done so. U submitted that the local authority had failed to consider the possibility of offering her two-bedroom accommodation and to investigate the impact of a 20-mile move on her eldest child.

Both appeals were allowed.

In Z's case, the Court held that if it was not reasonably practicable to offer in-borough accommodation, a council was obliged to try to place the applicant as close as possible to where they had previously lived (*Nzolameso v Westminster CC)*. The Suitability of Accommodation Regulations 2012 required local authorities to take into account distance from the borough when assessing the suitability of a property. Although para. 17.50 of the Code envisaged that compliance with a published policy should be capable of establishing suitability, that did not derogate from the need to try to secure accommodation as close as possible to where the applicant had previously been living. It was therefore incumbent on the Council to try to offer Z accommodation as close as possible to the borough. However, the Council had not offered any explanation for the fact it had made so many `out of borough' offers in Stoke-on-Trent "when common sense indicates that it should normally have been possible to obtain accommodation closer to the borough". In the absence of any evidence that it had tried to do, Z's appeal succeeded.

In Z's case, the U's case, the Court concluded that the Council had taken account of U's concerns about the adverse impact of the move on her daughter, particularly in terms of her education. The appeal would have been dismissed on the merits, but the court gave U permission to take a new point which had not been argued in the county court, namely that Bexley had not informed her of "the effect under section 195A of a further application to a local housing authority within two years of acceptance of the offer". That point was unanswerable on the facts and, accordingly, the appeal was allowed.

Council's evidence was `just about adequate' to show that it had followed its own temporary accommodation acquisition policy in looking for properties close to the borough
Moge v London Borough of Ealing
[2023] EWCA Civ 464 27 April 2023

Ms M applied as homeless to Ealing Council, seeking accommodation with her adult son. The Council accepted the relief duty and initially offered a PRS property within the borough, which M refused. They then offered another PRS property in Hounslow, a neighbouring borough. M said that the property was too far from her places of work in Ealing (she was a carer working at various locations) and was therefore not suitable. She was advised to accept the offer and request a review. Her position was then that she had not refused the offer and was waiting to sign a tenancy, but the evidence was that she had refused to sign up on several occasions. The Council treated the offer as a final offer under s189B(2) and indicated that no further offers would be made. It notified M that the relief duty had ended and that she was not owed the main housing duty under HA 1996 s193.

M's review request and county court appeal focused on whether she had been entitled to an in borough offer under the Council's policies, and whether she had technically refused the offer. The second appeal was brought on the grounds that the Council (a) could not demonstrate that it had not been reasonably practicable to provide her with accommodation in its own borough, as required by HA 1996 s208; and (b) could not show that it had looked for available accommodation in its own social housing stock, in addition to the private rented sector.

The Court of Appeal considered that the issue at the heart of the appeal was whether the council made sufficient inquiries to ascertain whether there were any other suitable two-bedroom properties available outside Ealing but closer to Ms Moge's work'. The evidence on that issue had been deficient as at the date of the county court hearing.

However, the Council were permitted to adduce additional evidence of its policies, notably their temporary accommodation acquisition policy. They maintained that this had been followed, but without explaining what enquiries had been made about the availability of closer properties on the date the offer had been made.

Snowden LJ considered that the evidence given, read with emails referring to other available properties in Ealing and neighbouring boroughs shortly before the date of the offer, was just about adequate to demonstrate that the policy was followed in practice. The situation was different from Zaman, where there was no evidence to explain Waltham Forest's unlikely contention that no property could be found closer than Stoke. On that basis, the Court concluded that:

> *"… there is (just) sufficient evidence before this court to show that at the relevant time the council's acquisitions officers did carry out an appropriate search to find suitable private sector properties for Ms Moge in neighbouring boroughs to Ealing, that there is no evidence that any other more suitable property of this type was available, and hence that the offer … did not breach the council's obligations under section 208(1)."* [para 130].

The second ground also failed. The Council had been under no obligation to see whether it had any suitable vacant accommodation held for allocation under HA 1996 Part 6 (whether in its own stock or by exercise of nomination rights to housing associations) before making a private sector offer in performance of its homelessness duties.

Decision to offer accommodation outside of London to homeless single parent who was subject to benefit cap was lawful
Webb-Harnden v London Borough of Waltham Forest
[2023] EWCA Civ 992 22 August 2023
See Nearly Legal

WH was a single mother with three children who had lived in London all her life. She became homeless, The Council accepted the main housing duty to her under s.193, HA 1996, and arranged for an offer of an assured shorthold tenancy in the private sector in Walsall. WH requested a review of suitability. but the Council upheld the decision. The reviewing officer considered that the authority did not have a suitable 3-bedroomed property available for WH in or near London and, in any event, she would have been unlikely to be able to afford such a property as she was subject to the benefit cap.

The Council had a policy of offering accommodation in the private rented sector as a means of discharging its s193 duties which included the provision that –

> "In assessing the suitability of any property for a PRSO for a particular applicant, the Council will consider whether or not that applicant can afford their housing without being deprived of basic requirements such as food, clothing, heating, transport and other essentials, and in so doing will take account of the costs arising from the location of the accommodation."

The policy also provided that –

> "Households in receipt of welfare benefits may be subject to restrictions on the amount of benefits they can receive, which may affect their ability to pay rent. Offers of accommodation in Waltham Forest or nearby boroughs are subject to affordable accommodation being available and the applicant being able to afford accommodation in those areas. If the benefit restrictions (cap) makes properties in Waltham Forest and London unaffordable then they will not be regarded as suitable."

The county court dismissed WH's appeal and she appealed to the Court of Appeal. The issue before the Court of Appeal was whether

> "The Respondent breached s. 149(1) of the Equality Act 2010 (the Public Sector Equality Duty (PSED) by failing to consider the discriminatory impact of moving the Appellant and/or single parent (female) households out of borough due to being impacted by the benefit cap."

WH contended that the Council were using the benefit cap as a provision, criterion or practice to determine what accommodation would be suitable and that this put women at a disadvantage. She also argued that the Council could have decided to perform its s.193 duty by other means, such as providing temporary accommodation which would not be subject to the benefit cap.

Appeal dismissed.

Lewis LJ noted that the section 149 duty -- to have due regard to the need to eliminate discrimination and to advance equality of opportunity across the protected characteristics -- needed to be considered in the context of the particular housing functions that the authority was exercising. Here, the Council was performing its duty under section 193(2). In determining whether accommodation was suitable, the authority was required to consider whether the accommodation was affordable and, in that regard, it had to take into account the financial resources available to the applicant for housing, including social security benefits and rent.

The Court of Appeal rejected WH's submission that the Council's policy used the fact that a homeless applicant was subject to the benefit cap as a proxy for determining whether they would be allocated accommodation in London or not. A fair reading of the Council's policy indicated that it did not use the fact that someone was subject to a benefit cap as a means of determining which accommodation would be offered. It was a simple recognition of one factor, the affordability of the accommodation, in considering what accommodation to offer to a person in fulfilling the duty imposed by section 193(2) of the Act.

Lewis LJ found that the reviewing officer was well aware of the need to have regard to the s149 duty. He rejected the contention that the Council could have decided to perform its duty by providing temporary accommodation. This was not a case where, realistically, other suitable accommodation was likely to become available such that the Council should have considered whether it should not have discharged its duty immediately but should, rather, have provided temporary accommodation. The reason WH wanted the s193(2) duty performed by the provision of temporary accommodation was that it would avoid the application of the benefit cap, However, "*That is not the purpose of section 149 and is not what the section requires."*

Having accepted that the applicant's temporary accommodation was unsuitable in the long term, the Council were in breach of their housing duty by leaving him there for 3½ years
R (Jaberi) v City of Westminster
(2023) EWHC 1045 (Admin) 4 May 2023
See Nearly Legal

J is an Iranian refugee, and lives with his wife and two young children. He suffers from epilepsy which is not controlled despite his medication, mobility difficulties and chronic muscular pain. He also suffers from severe depression and anxiety. As a result of his disabilities, he needs support with everyday activities, including cooking, personal care, dressing and mobilising. His wife is his principal carer.

J applied to the Council as homeless in 2018 and a full duty was accepted. The family were placed in a split level two-bedroom flat on the 16th floor of a block of flats. J could not manage the stairs and was effectively confined to the top floor of the flat, without access to the kitchen and living area.

J was placed on the housing register. In October 2018, the Council accepted that J needed for a property without internal stairs, and in April 2021 they accepted that he needed a three-bedroom property. However, J was not moved from the 16th floor flat.

In June 2022, J applied for judicial review on the basis that the Council was in breach of its duty under section 193 HA 1996 to secure suitable accommodation. Subsequent to the issue of the claim, the Council offered a three bedroom one level flat as temporary accommodation. This was on the 18th floor of a block with two lifts. The offer was accepted, subject to adaptations being completed, while J also requested a review of the suitability of the accommodation.

By the time of the hearing, the adaptations had not been completed and the family remained in the previous flat, although completion was expected within a few days.

J argued that Westminster, having accepted his need for a level property in 2018 and then a three-bedroom property in 2021, must have accepted that the temporary accommodation was unsuitable in the long term, so that there was a breach of the s.193 duty. Westminster argued that J should have sought a section 202 review of suitability, and that the acceptance of the subsequent offer meant the claim was academic.

Steyn J. agreed with Westminster that they could only be shown to have breached the main housing duty if it would have been irrational for them to conclude that the temporary accommodation was suitable, even in the short term. No decision on suitability had been made between October 2018 (when the existing flat was considered suitable) and about April 2021 (when it was considered not suitable, at least for the long term).

The Judge accepted it would have been irrational to conclude that the existing flat was suitable, at least by the time the claim was issued on 9 June 2022. By then, J had been in a property with internal stairs for 3 years 8 months, despite Westminster's recognition throughout that time that he needed a property with level access. In addition, he had by this time been in a two bedroom property for fourteen months since Westminster had accepted that he required a third bedroom.

There was therefore a breach of the section 193 duty, and a declaration accordingly. However, the breach was no longer ongoing in light of the acceptance of the offer, and it would not be appropriate to make a mandatory order.

Steyn J granted a declaration that the main housing duty had been breached. She stated:

> *"In my judgment, the claimant has shown that a conclusion that the … flat was suitable for the claimant, even only in the short-term while alternative suitable temporary accommodation was identified, would have been irrational at least by the time the claim was issued on 9 June 2022. By then, the claimant had been in a property with internal stairs for 3 years 8 months, despite the defendant's recognition throughout that time that he needed a property with level access internally. This has had the serious consequence of effectively confining the claimant to the top floor, as it is very difficult for him to access the kitchen and living area. In addition,*

by the time the claim was issued, the claimant had been in a two-bedroom property for a period of 14 months since the defendant had accepted that, for health reasons, the family required a three-bedroom property." (para 57)

She added:

"I recognise that suitability is a flexible concept and accommodation which is unsuitable in the long term may be regarded as suitable in the medium term, or for a brief period, while suitable alternative accommodation is identified. However, by the time the claim was filed, the medium and short term periods for which the … flat could rationally have been regarded as remaining suitable while alternative temporary accommodation was identified had been exhausted." (para 58)

Private rented sector offer did not meet the suitability requirements in the 2012 Order; and suitability is to be judged as at the date of the offer, not at the date of review

Ayinla v LB Newham
County Court in Central London 29 September 2023
Unreported, see Nearly Legal

Ms A had refused a Private Rented Sector Offer (PRSO) owing to concerns about the potential effects of damp and mould on her health conditions. The Council considered that the property was suitable and discharged its duty.

In the light of Article 3 of the Homelessness (Suitability of Accommodation) (England) Order 2012 (Circumstances in which accommodation is not to be regarded as suitable for a person when making a PRSO) HHJ Saunders found that there was little or no evidence that the council had followed up an inspection of the property in making sure that 13 items of safety and repair works had been carried out, or that the tenancy agreement had been checked. It was wholly unclear whether the tenancy agreement or property condition form were before the decision-maker at the time of the decision.

In the circumstances, the authority had erred in finding that the property was a suitable PRSO, as it could not have concluded that the property was in "reasonable physical condition". Nor was the judge convinced that acceptance of a blank AST form (albeit it one produced by the National Residential Landlords' Association) could be described as "adequate".

The review decision had also stated that it had been "*a reconsideration of the facts, including any fresh facts coming to light after the making of the original decision*." This was wrong. The issue was whether the local authority had properly satisfied itself that the property was suitable as at the date of the offer. The authority could not take into account subsequent information.

The Judge therefore concluded that the property was not properly found to be suitable at that date, and in light of the evidence, the offer was not an offer in discharge of duty. The Judge therefore varied the decision to one that the main housing duty was still owed.

This case acts as a reminder of the importance of the local authority complying with each of the requirements of Article 3 of the Homelessness (Suitability of Accommodation) (England) Order 2012 when making a PRSO in discharge of the main housing duty, as set out by the Court of Appeal in ***Hajjaj v City of Westminster*** **(**2021) EWCA Civ 1688 (see Nearly Legal). As Judge Saunders said:

"…compliance with Article 3(1) should not simply be a technicality. The terms of the Order as interpreted in Hajjaj place great importance on local authorities in observing their

obligations for all the reasons that I have already set out – not least issues of disrepair and safety."

Council required to send `minded to' letter on suitability review
Elbhiri v Royal Borough of Kensington and Chelsea
Central London County Court 9 December 2022
Unreported: see Nearly Legal

RBKC owed E the full housing duty following her homeless application. E had been placed in temporary accommodation under s193. She sought a review under s202 of the suitability of the accommodation. The review upheld the suitability of the accommodation and E brought a s204 appeal.

As a preliminary issue, the court considered the question of whether regulation 7(2) of the Homelessness (Review Procedures etc) Regulations 2017 (the "minded to" provisions) was engaged. Reg 7(2) requires a review officer to inform the applicant when they are minded to uphold a decision on different grounds from the original decision and to invite representations on this,

E's case was that on requesting the review, she had made detailed submissions on the detrimental impact of the location of the accommodation on her son, who had an expensive trip to school involving three buses and lasting two hours. The school provided a letter confirming details of the impact on the son's education and mental health.

E argued that the travel time to school had not been considered in her homelessness assessment or in her PHP. It was not until the review that this was considered. The review officer, who did address the travel time to school in the review decision, must therefore have been upholding the decision on different grounds to the original decision. On that basis reg 7(2) was engaged, and a minded to letter should have been sent.

The Council argued that reg 7(2) only applied where there was a written adverse decision. Here, it was not engaged because there was no original written decision by which the review officer could ascertain the basis on which the original decision of suitability was made.

Appeal upheld. The Circuit Judge held that while there was no requirement to provide a written decision on suitability, the Council were required to make a considered decision as to suitability. There was nothing in Reg 7 that restricted it to cases where a written reasoned decision had been given.

Reg 7(2) was clearly engaged as new facts had emerged on an important issue for suitability, namely location. The review officer should have considered whether the new information revealed a deficiency in the original decision, which it clearly did, and then whether to issue a `minded to' letter.

The matter remitted to the Council for a fresh review decision.

Mandatory order to provide suitable accommodation where Council had not considered all possible means of meeting the family's needs
R (Coleman) v LB Harrow
Administrative Court 4 May 2023
Unreported except on Nearly Legal

Ms C and her two children were placed in temporary accommodation by Harrow under the main housing duty. Her daughter had profound disabilities and extensive care needs, which could not be

met in the flat. The child was non-verbal and had lifelong and complex developmental and mobility conditions. She needed specialist equipment to allow her to be transferred and to use the home safely, which the existing accommodation could not facilitate. She had been without necessary adaptations for nearly a year. As a result, Ms C had to lift the child manually and had developed physical and mental health issues herself as a result.

Harrow accepted that the accommodation was not suitable, but argued that it was taking reasonable steps, including increasing the family's allocations banding, to secure alternative accommodation for them. They said that the specific needs of the family made it difficult to find suitable accommodation. In the meantime, it had offered what it considered to be reasonable temporary adaptations suggested by an occupational therapist.

Ms C applied for judicial review. Interim relief was refused, but the full hearing was expedited. At the substantive hearing, the Court considered that the time in which the family had been in unsuitable accommodation was far too long (they had lived there for nearly a year).

The witness evidence from the authority fell short of showing that it had done all it reasonably could and it had other powers it could use. The property was having a detrimental effect on the family. The temporary adaptations suggested were not realistic and did not mitigate against the unsuitability.

The council had focused on finding suitable Part 6 accommodation, and had not properly considered all other means by which suitable accommodation could be found, for example the private rented sector, discretionary provision (such as DHPs or under section 17 of the Children Act 1989), or buying a property. Although Harrow were facing genuine difficulties, it needed to set its mind to thinking of other ways to meet the obligation Parliament had placed on it.

The Court made a mandatory order that Harrow should provide suitable accommodation within two months and pay Ms C's costs.

Discharge of duty: council must ensure that consequences of refusal are understood
Mekonen v Waltham Forest LBC
County Court at Central London, 3 August 2022
Legal Action, Feb 2023 See also Nearly Legal

Ms M was a refugee from Ethiopia with limited ability to speak or read English. The Council made her an offer of private sector accommodation in discharge of the main housing duty. The offer was made in writing without a translation and over the telephone without an interpreter. M was accompanied to view the accommodation by a voluntary support worker who did not speak her native language (Amharic). M refused the accommodation. She was assisted by her support worker and the property manager to complete a refusal form, which gave her reasons.

Later, the support worker expressed concerns that M would not have understood the consequences of refusing the offer because of her language difficulties. However, the Council decided that its duty had been discharged and upheld that decision on review. It concluded that she would have understood the contents of the offer letter as a result of the support received from her friends and support workers. M appealed to the county court.

HHJ Backhouse allowed the appeal. The reviewing officer's finding that M had understood the consequences of refusing the offer was irrational. The judge stated:

"Irrationality is a very high hurdle, but in looking at the total picture, it is striking that the local authority at no point took the obvious and easy step of arranging a telephone call with Ms Mekonen with the help of an Amharic interpreter, to go through the policy and the consequences, even more striking when on two occasions the local authority had done just that when signing Ms Mekonen up for temporary accommodation."

The judge accepted that 'the evidence before the review officer was overwhelmingly that even with help from lay people and [her support worker] in particular she couldn't get across the consequences of refusal'. The reviewing officer's decision was varied to one that the main housing duty had not been discharged.

5 Allocations

A local authority is entitled under its allocation scheme not to give additional priority on medical grounds to homeless applicants in temporary accommodation
R (Jaberi) v Westminster City Council
[2023] EWHC 1045 (Admin), 4 May 2023
See Nearly Legal

For the background to this case, see the case note on the Suitability issue (page 28).

Mr Jaberi was living in temporary accommodation provided by the Council under the main housing duty. He was awarded 150 points under the Council's allocation scheme on account of being in the homeless priority group. Medical priority, under the scheme, would confer 200 points. However, the scheme excluded homeless applicants from having medical priority points.

J contended that Westminster's allocation policy was unlawful in that it denied him priority on the basis of his medical need, restricting him to homeless reasonable preference, since, in the light of his disabilities and medical needs, he should have been awarded the 200 points given to those in the medical priority group. He argued that to deny him medical priority was a breach of the Council's obligation under s,166A(3) HA 1996 to give applicants a reasonable preference.

The House of Lords confirmed in R (Ahmad) v Newham that local authorities were only required to give people in the classes encompassed in s.166A(3) "reasonable preference"; the section "does not require that they should be given absolute priority over everyone else". There is no requirement for local authorities to frame their scheme to afford greater priority to applicants who fall within more than one reasonable preference category over those who have reasonable preference on a single basis.

Steyn J rejected J's application. First, it had not been unlawful to award fewer points to priority homeless than to priority medical need applicants. She stated that:

*"At first glance, it may appear incongruous that a person who has a medical need to move will be given fewer priority points if they have the **additional** misfortune of being homeless and in temporary accommodation. However, on analysis, the approach taken by the defendant is clearly a rational one. It is proper for the defendant to proceed on the basis that if it owes an applicant a duty to secure suitable temporary accommodation, it will comply with that duty. If an applicant in temporary accommodation is identified as needing to move on medical grounds, the defendant will put them on the transfer list with a view to identifying alternative suitable accommodation. It is true that the flexibility of the term 'suitable' is such that the temporary accommodation from which an applicant needs*

> *to move for medical reasons may remain suitable in the short or possibly medium term. Nonetheless, the applicant's need to move will be identified and I accept that, given the well known shortage of social housing, they are likely to be provided with suitable temporary accommodation considerably earlier than suitable Part VI accommodation would be made available to them."* (para 75; emphasis in original)

Nor was it unlawful to deny applicants a choice as to which priority group should apply to them. Facilitating such choices would impose a considerable 'administrative burden' on local housing authorities.

J's second ground was that the council had failed to provide him with the information he needed to enable him to know whether and when he would receive an allocation of social housing (under s166A(9), HA 1996). However, this ground had been wrongly framed as a breach of statutory duty. There had been no failure to comply with s166A(9). Even if framed as a failure to provide information required under the council's allocation scheme, the challenge failed because the scheme did not require that Mr Jaberi be provided with information as to what his 'position would be if, hypothetically, he were placed in the medical priority group' (para 95).

Allocations policy: non-priority homeless persons cannot be excluded from the register
Khayyat & Anor v Westminster City Council
(2023) EWHC 30 (Admin) 20 January 2023
See Nearly Legal.

The Council's allocations policy provided that only those who were owed the main housing duty under section 193 HA 1996 could be placed on the housing register. Those who were statutorily homeless but not owed the full duty (e.g. as they were intentionally homeless) could not join the register. This was despite the requirement under s166A of the Act that reasonable preference for allocations must be given to "people who are homeless (within the meaning of Part 7)", ie those who are homeless as defined by the Act, not only those who have had the main duty accepted.

The Council argued that its policy admitted a significantly large proportion of homeless applicants (at least 30%), so that the scheme could not be said to frustrate the purpose of s166A.

Eyre J. rejected the Council's argument. The decision in *R (Jakimaviciute) v Hammersmith and Fulham LBC* had clearly established that although local authorities may exclude those who would otherwise be entitled to reasonable preference from their scheme (eg due to rent arrears), such exceptions must be *"by way of "factors of general application"*. This was not the case here:

> "*The Scheme clearly operates as a redefinition of the statutory scheme because it strikes through parts of section 166A(3) with the effect that no homeless person other than one with a priority need (and who is thereby the subject of the Main Housing Duty) is to be given a reasonable preference by being placed on the Register*."

While Westminster had appeared to think that the proportion of applicants affected was an argument in their favour, Eyre J said:

> "*I draw a rather different conclusion from these figures. They show that even on the most favourable view for the Defendant only a minority of those in the reasonable preference categories were being given a reasonable preference. As Mr Nabi said 100% of those homeless who were not in priority need were excluded. Thus, even if regard is to be had to the effect of the Scheme it clearly operated contrary to the purpose of the Act."*

The scheme was found to be unlawful. By the time of the hearing both claimants had in fact had received notification that the Council had accepted the main duty to them. The Council has agreed to review its allocations policy.

Allocations policy discriminated against women fleeing domestic abuse
R(TX) v Adur DC
[2022] EWHC 3340 (Admin) 21 December 2022

Ms TX had a long history of serious mental health issues and was homeless from her tenancy in Brighton as a result of domestic abuse. She moved to Adur, where she had previously lived and had family connections. The main housing duty was accepted and she applied to the housing register.

Adur's allocations policy had residence requirements which TX did not meet. The policy did allow those who could not meet the residence requirement but who did have some connection with the area together with an overriding need to live in the area to go onto the housing register, but only into lower priority Bands C or D. TX was accepted onto the register and placed in Band C on this basis.

TX argued that the policy gave rise to unlawful indirect discrimination, contrary to section 19 of the Equality Act 2010: women were statistically overwhelmingly more likely to be victims of domestic abuse, and therefore more likely to be excluded from the higher priority bands.

The Council argued that TX had not been discriminated against. The operation of the policy had to be looked at as a whole, and it was as a result of the domestic abuse that she had been exceptionally allowed on the register. In the alternative, any discrimination was proportionate and justified in the light of the objective of ensuring that housing is allocated to those with the greatest connection to the district.

Margaret Obi, sitting as a High Court judge, rejected the council's argument that TX had in fact been given preferential treatment, since "*advantage in some other respect, does not remedy indirect discrimination*". It was plain that the effect of the policy was to indirectly discriminate against women fleeing to the Council's area because of domestic abuse. She stated that although the banding reduction appeared to be a neutral provision, in that it applied to everyone, women were put at a disadvantage when compared to men, as they were significantly more likely to be the victims of domestic abuse and, as a result, have to move to another area:

> *The Claimant returned to live in the Defendant's area because she was fleeing domestic abuse from another local authority area. This leads to a particular disadvantage because the Claimant, notwithstanding that she is entitled to a reasonable preference because she is owed the main housing duty under section 193(2) of the Act, is limited to Bands C or D and therefore less likely to obtain an allocation of social housing. I am satisfied that the Claimant has established a sufficient causal link between her protected characteristic of sex and the application of the qualification criteria*."

Was the discrimination justified? The council argued that to prioritise TX would potentially have a huge impact on the others on the register, and that the court should be slow to intervene, as the Council was best placed to prioritise housing needs. But there was no evidence before the court that the Defendant had addressed whether the effect of the policy on women fleeing domestic abuse from outside the area was proportionate; and if so, why. It was not for the court to fill in the gaps.

The policy was therefore not justified based on the evidence available, although the judge noted that the council might obtain evidence that specifically addressed the impact of the policy on women fleeing domestic abuse or violence.

The judge granted a declaration that the provision in the scheme discriminates unlawfully and has not been justified.

Council's decision to refuse Band A priority was lawful
R (Islam) v Haringey LBC
[2022] EWHC 3933 (Admin) 18 August 2023
See Nearly Legal

Mr I and his family had been accepted as homeless by the Council in 2015, and had been living in their current temporary accommodation since 2016. The property was held by the council on a 3 year lease which had recently been renewed. Mr I suffered from multiple serious mental and physical health conditions, including treatment resistant paranoid schizophrenia and type II diabetes. He was in Band B under H's allocation policy,

The allocations policy stated that Band A priority would be awarded in cases of "severe need", with the most relevant criteria being that the applicant "[has] *severe mental health problems and/or [has] been "sectioned" under the Mental Health Act and [has] been unable (or [is] likely to be unable) to cope with living in temporary accommodation*". Mr I challenged the Council's refusal to place him in Band A.

The Council accepted that Mr I had a severe mental health condition, but did not consider that the second limb of the test was met. Mr I argued that his mental health issues were such that he could not cope with living in temporary accommodation. He relied on supportive letters from his GP, one of which made an erroneous reference to Mr I "constantly having to be rehoused", whereas he had in fact been in the current accommodation for over six years, The Council obtained a report from a consultant psychiatrist at NowMedical. who reviewed the records and concluded that there had been no treatment or referrals to indicate that Mr I was unable to manage living in TA.

Kirsty Brimelow KC, sitting as a Deputy High Court Judge, dismissed Mr I's application for judicial review.

Mr I argued that the Council had been wrong to reject the GP's evidence on the basis that, because of the error in one letter, his conclusions could not be relied upon. He argued that the GP's evidence was reliable, and that the Council was mistaken in believing that he was unaware of the position. The Judge considered that it was unclear what the GP had believed. The Judge did not accept that the error of fact in the GP's evidence was an irrelevant consideration. It was a factor which the Council had been taken into account.

Secondly, Mr I argued that the Council erred in failing to take into account that Dr Wilson of NowMedical was not his treating doctor and had never met or examined Mr I. The Judge disagreed:

> *"I find no error in the LB of Haringey's approach to or application of the advice from Dr Wilson. The local authority was expecting an additional document analysis from an advisor who was appropriately medically qualified. That is what it received. The examinations of Mr. Islam by his GP and Dr Walters were taken into account, alongside the GP medical records."*

Thirdly, Mr I argued that the Council failed to take account of the fact that there was a break clause in the lease, and that Mr I could be moved at any time. However, the accommodation had been stable for over 6 years, and the Council's lease had recently been renewed for another three years. The Judge considered that this could not be characterised as irrational. It was not irrational for Haringey to have taken the history and likely future of the accommodation into account.

6 Accommodation under the Care Act 2014

No power to assist under Care Act where assistance available under Housing Act
R (Campbell) v LB Ealing
[2023] EWHC 10 (Admin) 9 January 2023
See Nearly Legal

This case was concerned with the interaction between a local authority's obligations under the Care Act 2014 and under the Housing Act 1996. C was partially sighted and also suffered from OCD and depression. He had eligible care and support needs for the purposes of the Care Act and been accommodated by social services since being evicted for rent arrears in 2016. In 2022, the Council noted that C had rejected a number of properties offered to him from the housing register. It decided that it would withdraw funding for the accommodation on the basis that C had not pursued opportunities to secure permanent alternative accommodation.

C applied for judicial review. The Council argued that it did not owe C a duty to provide accommodation under the Care Act because he was eligible for housing under Parts 6 or 7 of the Housing Act 1996. Section 23 of the Care Act states that a local authority *"may not meet needs under section 18 to 20 by doing anything which it is required to do under the Housing Act 1996*".

Application refused. The Court held that it was the intention of section 23 that priority mut be given to the general scheme of the Housing Act over the specific scheme of the Care Act. Housing needs, even if identified through the 2014 Act route, could not override the system of priorities within 1996 Act schemes.

In this case then, there was no duty or power for the social services to meet C's 2014 Act needs if the council were otherwise required to meet his housing needs under the 1996 Act. The Judge found that C was a qualifying person under Part 6, and might be homeless under Part 7. The authority was therefore required to provide him with housing under the Housing Act.

As to the fact that no allocation had yet been made: "*The fact the Defendant has not yet provided accommodation to the Claimant under Part VI of the Housing Act does not mean that it is not 'required' to do so".* The Council had no power or duty under the 2014 Act to meet C's accommodation needs. The resolution of his housing issue was properly to be addressed under the 1996 Act. Its decision to withdraw Care Act funding was therefore not irrational.

Shelter / Housing Law Practitioners' Association

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