HLPA Conference 12 November 2019

Homelessness Update

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A Statutory homelessness

Authority must look to the future when determining whether it was reasonable for a family to continue to occupy their current accommodation
Safi v Sandwell Borough Council
Court of Appeal 21 December 2018
[2018] EWCA Civ 2876

S, her husband and their two young children occupied a one-bedroom flat let on a secure tenancy by the local authority. S had moved into the flat as a single person, but had then married and been joined by her husband. Following the birth of her first child in 2015, she applied to the Council. She claimed she should be treated as homeless because it was no longer reasonable for her to occupy the flat on the basis that it was overcrowded, damp and in disrepair.
In December 2015, the Council decided that S was not homeless, on the basis that the flat was suitable and that S was neither homeless nor threatened with homelessness. That decision was upheld by two review panels, in February and June 2016. The June 2016 decision noted that S was pregnant with her second child and that the family was on the housing register. It concluded that, given their level of priority, they were likely to be rehoused within a reasonable time if they were more flexible about location, and that it was reasonable for them to continue to occupy the flat in the meantime.

The county court upheld that conclusion. The judge concluded that the Council had correctly applied the law as stated in ***Aweys v Birmingham CC***; which required it to ask itself whether it was reasonable for S to continue to occupy the flat for the foreseeable future.

S argued that the Council had not approached the question of reasonableness in the manner required by ***Aweys***. It had not asked itself whether it would be reasonable for her to occupy the flat after the birth of her second child and had failed to give her the chance to deal with the housing register point, which had been relied on for the first time in the June decision.

S's appeal was allowed. The decision did not address the question of whether the birth of a second child would make it unreasonable to expect the family to continue to live in the flat. Essentially, the Council were relying on S being able to find suitable accommodation through the usual operation of the housing list, given her priority status. Instead, it should have asked itself whether, taking account of the family's circumstances and the impending birth of their second child, it was reasonable (looking to the foreseeable future as well as the present) for them to continue to live in the flat. If the answer was no, it should have asked how long it was reasonable to expect the family to stay there in the short term, and

whether they would be able to obtain suitable accommodation within that time through the operation of the housing register. The decision letter did not indicate that the local authority had asked itself those questions. The appeal was also allowed in relation to the procedural issue because a "minded to" letter should have been issued.

Capacity to make an application

In **R (Uddin) v Southwark LBC** [2019] EWHC 180 (Admin), Mr U was discharged from hospital having had treatment for a serious brain injury. He refused a hostel place and brought a claim in judicial review in which he sought an order for the provision of ordinary housing accommodation with a package of care and support. His consultant neurologist had written that he did not have mental capacity to make general decision regarding discharge, did not understand that he would need care and support but did have capacity to make more limited and specific decisions such as whether to say yes or no to a placement.

Dingemans J declined to grant the application and said that the consultant "had drawn a distinction between evaluating the obligations of a tenancy and evaluating a single offer on the one hand and making a distinction between, for example, hostel accommodation, residential accommodation or ordinary housing accommodation on the other hand. It is not apparent to me from the materials that he does have that capacity and therefore the applicant cannot be made by him acting alone."

Homelessness Reduction Act 2017: call for evidence

In this consutation, the Government's sought to gather evidence on:

- the impact the Act has had and the outcomes that are being achieved;
- how has the Act changed the approach of local housing authorities and their partners to tackling homelessness and supporting those in need;
- the experience of people approaching their local housing authority for help;
- how the implementation of the Act has been resourced, including the level of new burdens funding to assist this; and
- what elements of the Act and processes are working well, and which might need adjustment.

The call for evidence closed on 15 October 2019.

B Relief duty

Council cannot terminate interim accommodation where it has not complied with its relief duties

R (Harris) v LB Islington
High Court (Admin) CO/1282/2019
Nearly Legal blog, 7 April 2019

Mr H, who is severely disabled, made a homeless application after two years of beiig street homeless following his eviction in 2016 for rent arrears from supported

accommodation provided by St Mungo's. The Council decided that he was homeless and in priority need, but intentionally homeless. Its letter stated that Islington 'must help' Mr H in his 'search for alternative accommodation' and said that his temporary accommodation would end in 14 days' time.

H sought a s.202 review, but the Council refused to provide temporary accommodation pending review. Its letter stated that no 'Personal Housing Plan' (PHP) had been given to H as he had not been able to attend an appointment.

H applied for judicila review, on the grounds that, since the Council accepted that he was in priority need, that duty could only end upon the ***later*** of

> (a) the relief duty under section 189B(2) coming to an end or the authority notifying the applicant that they have decided that they do not owe the applicant the relief duty, and
>
> (b) the authority notifying the applicant of their decision as to what other duty (if any) they owe to the applicant upon the relief duty coming to an end.

In this case, it was clear that the relief duty had not come to an end. The mere passing of time (the 56 day period) did not end the duty. The authority must have decided to end the duty and must give notice (s.189B(5) and (6)), including notifying the applicant of their right to seek a review. This had not been done, so the duty was not ended.

Further, the authority cannot bring the relief duty to an end after 56 days unless it has complied with its relief duty (s.189B(7)(b)), which requires an assessment of the applicant's circumstances and needs and a PHP (s.189A). Since no PHP had been prepared, the Council had not complied with its relief duty.

Alternatively, even if the s.190(2) duty (duty to the intentionally homeless) had arisen, the Council had not given adequate consideration to H's circumstances in order to give him a `reasonable opportunity of securing accommodation'.

The High Court granted interim relief for temporary accommodation and permission for judicial review. The case was subsequently settled.

Failure to engage with personal housing plan was not a reason for refusing temporary accommodation pending review
R (on the application of Laryea) v L.B. Ealing
Administrative Court 29 August 2019
Unreported (note of extempore judgment on Lawtel)

Mr L was homeless and suffered from epilepsy and PTSD. He had applied to the Council as homeless, and had been placed in interim accommodation. The Council determined that he was in priority need, but intentionally homeless. They gave L notice that they were discharging their duty under s.189B Housing Act 1996 (relief duty), and that they no longer had a duty to help to secure accommodation.

L requested a review of this decision and asked the Council discretion to continue accommodating him pending the review decision. The Council refused temporary accommodation, on the basis that L had not taken the reasonable steps agreed in his personal housing plan.

L applied for judicial review, on the basis that the Council had failed to take into account his personal circumstances and the consequences to him of not exercising their discretion. In particular, they had ignored the medical evidence that his epilepsy became worse when homeless.

L's application was allowed. While L and not taken full advantage of the opportunities set out in his personal housing plan, that had to be balanced against his health problems, including physical and mental disabilities.In terms of the factors in *R v Camden LBC ex parte Mohammed* (merits of the decision; any new information or evidence; personal circumstances), the Council's letter did not identify the likely consequences of a decision not to provide temporary accommodation, or consider whether those consequences should affect its decision.

The medical evidence was that Mr L's epilepsy became worse when he was homeless. The Council's letter did not engage with that evidence, or with Mr L's personal circumstances and the consequences to him of being homeless.

C Eligibility for assistance

Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 SI 2019/861
In force: 7 May 2019

With effect from 7 May 2019, these regulations amend the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI 2006/1294 to correct an unintended consequence of the coming into force of the EU Settlement Scheme. Until 6 May, people whose only right to reside in the UK was the initial right for three months or as a jobseeker, and who also obtained `pre-settled' status under the scheme, were eligible for housing and homelessness assistance The 2006 regulations have now been amended to clarify that pre-settled status in these circumstances no longer confers eligibility.

Background to the EU Exit regulations

EEA Nationals are now able to apply for ***settled*** *or* ***pre-settled*** status under Appendix EU of the Immigration Rules. This right will continue until the December 2020 if the UK leaves the EU without a deal, or otherwise until June 2021.

Between now and either of those dates, an EEA national can hold leave under Appendix EU at same time as they have a right to reside under EU law. The applicant can choose which right to rely on. Until they get leave under Appendix EU, they can only rely on their right to reside under EU law.

Settled status

If the EEA national can provide evidence that they have been resident in the UK for five years (they do **not** have to have been exercising treaty rights during that period: para EU 11 and EU14)) then they should be granted ***settled status***. They will have proof of this status via an emailed letter from the Home Office in response to their application.

If they chose to do so, that EEA national could rely on their settled status to be eligible for homeless assistance under Class C reg 5 of the Eligibility Regulations, i.e. they are a person subject to immigration control who has indefinite leave to remain.

In the alternative, if that EEA national is currently exercising Treaty rights (working, self-employed etc family member) then they could rely on reg 6 of the Eligibility Regulations.

Note that obtaining settled status is of considerable benefit to EEA nationals who have been living here for 5 years or more but have not been exercising treaty rights for the 5 year period which might give them permanent residence rights.

Pre-settled status

If the EEA national can only provide evidence that they have been resident in the UK for less than 5 years, then they will be granted ***pre-settled status*** or limited leave. Once they have been in the UK for 5 years, then they can acquire settled status. (Again, there is no requirement that they were exercising Treaty rights during that period, only proof of living in the UK).

This EEA national will also have dual rights to remain in the UK – pre-settled status and either a right to reside as a person exercising their Treaty rights or an EU 'non-qualifying' right if s/he only has a right to reside as a job seeker, an initial 3 month right to reside or as a *Zambrano* carer.

The 2019 Eligibility Amendment Regulations amend regulations 4 and 6 of the 2006 Regulations to state that pre-settled status should be disregarded when determining if someone is eligible for homelessness assistance or a housing allocation.

Tarola (Citizenship of the Union - Employees and self-employed persons - Right of residence for more than three months)
[2019] EUECJ C-483/17

In this case, the European Court of Justice ruled that a two-week period of economic activity in the host EU Member State entitled an EEA national to retain his worker status for up to six months on the grounds of 'involuntary unemployment', provided that he was registered with the relevant employment office (see reg 6(2) of the Immigration (EEA) Regulations 2016).

Other cases

- The ***St Prix*** principle (retained worker status: pregnancy) is now applied to self employed pregnant EEA nationals who stop work in late pregnancy and childbirth. She will retain her right to reside just like an EEA worker in the same situation provided she returns to work within a reasonable period after the child is born. *HMRC v Henrika Dakneviciute* [2019] CJEU C-544/18.

- An EEA national pursuing an economic activity in the UK may have a right to reside as a worker or a self-employed person despite generating income below the threshold for National Insurance contributions. See *JS v Secretary of State for Work and Pensions* (CA) [2019] UKUT 239 (AAC) and *RF v London Borough of Lambeth* (HB) [2019] UKUT

- A self employed EEA national who had become involuntarily unemployed after less than one year of self employment retained right to reside for 6 months under Article 7(3)(c) of the Directive 2004/38/EC (the 'Citizenship Directive'). See *SB v*

Secretary of State for Work and Pensions (UC) [2019] UKUT 219 in the Upper Tribunal.

- A British citizen who had returned to the UK with his non-EEA spouse after exercising EU Treaty rights in another EEA state was not required to demonstrate that he had transferred his 'centre of life' to the host EEA state in order for the non-EEA spouse to acquire a right to reside in the UK under the 'Surinder Singh' route. Regulation 9(3)(a) of the Immigration (European Economic Area) Regulations 2016 SI 2016/1052 lists 'transferring centre of life' as one of the relevant factors when determining if residence in another EEA state was 'genuine'. It was held that regulation 9(3) of the 2016/1052 Regulations should be applied in accordance with EU law which does not impose this requirement. See *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC),*

- An economically active EEA national who had become permanently incapacitated needed factual rather legal residence to acquire permanent residence, just as was necessary for an EEA worker/self-employed person following retirement. See *Secretary of State for Work and Pensions v NZ (ESA) (Final decision)* [2019] UKUT 250 (AAC),

D Priority need

Vulnerability: Council erred in preferring Nowmedical's advice to that of consultant psychiatrist who had examined applicant
Guiste v L.B Lambeth
Court of Appeal 22 October 2019
[2019] EWCA Civ 1758

G had lived from childhood with his mother in rented accommodation provided by the th Council. In May 2017, his mother was found by the council to have made herself homeless intentionally as she had unlawfully sublet her previous home.

Since then, G had continued to live with his mother in interim accommodation provided by the Council pending the outcome of his own application for homelessness assistance.

The Court of Appeal said that the fullest and most authoritative assessment of G's mental health problems had been carried out, on the instructions of his solicitors, by Dr Judith Freedman, a consultant psychiatrist with more than 20 years' experience of preparing court reports. Her evidence was that G had a history of depressive illness leading to acts of self-harm and/or attempted suicide at times of high stress, or at least to the contemplation of such acts, and the risk that homelessness might significantly increase the probability of his carrying out such acts, with or without fatal consequences.

The Council had sougth advice from NowMedical. Two psychiatric advisers employed by NowMedical prepared reports for the council about G, but neither of them interviewed or examined him in person. Nor were their qualifications at the same level as Dr Freedman's.

Nowmedical were of the view that "there is no evidence of significant impairment in functioning as a result of his mental health". They also stated: "I am unable to find evidence of a severe and enduring mental disorder". They concluded:

> "I acknowledge that the applicant reports occasional suicidal thinking and has a history of self harm and auditory hallucinations, although these appear related to social circumstances and substance misuse. My view would therefore be that the

> applicant does not have psychiatric issues of particular significance when compared to an ordinary person if homeless*".*

G's solicitors proposed a discussion between the NowMedical advisors, Dr Freedman and a doctor who was still his treating consultant paediatriciain. But nothing came of this proposal.

Inj July 2018 an external reviewing officer employed by RMG Limited, to whom Lambeth had contracted out the function of carrying out homelessness reviews, issued her review decision. She upheld Lambeth's original section 184 decision that G was not in priority need for homelessness assistance. G's appeal to the county court was dismissed.

However, his appeal to the Court of Appeal was allowed. In relation to the issue of G's mental ill-health, Henderson LJ noted that when asked to provide her opinion on the critical question of the effect that homelessness would have on G's mental health, Dr Freedman's opinion was clear:

> "In the short term, I think that Mr Guiste would have increased depression and anxiety. He would be at risk for self-harm and suicide, particularly in response to his auditory hallucinations."

Henderson LJ considered that this evidence, from a distinguished consultant psychiatrist, and directed to the key legal point in issue, could not be disregarded, and if the review officer was going to depart from it, it was necessary for her to provide a rational explanation of why she was doing so:

> "If (the reviewing officer) was intending to base her conclusion on the views of the two psychiatrists instructed by NowMedical, she needed to explain why their views should prevail over that of Dr Freedman, when they were less highly qualified that she is, and (more importantly) they had never met or interviewed Mr Guiste."

The judge found it hard, if not impossible, to trace a coherent line of reasoning in the review decision. The reviews officer appears to have accepted that 'further suicidality in response to various life stressors' was not unlikely, which on the face of it appears to be consistent with the consultant's own prognosis. In the very next sentence, however, the officer said "I do not think there is current evidence to indicate you would experience harm or deterioration as a result of homelessness*".*That appeared to amount to a rejection of the consultant's firmly stated opinion to the contrary, but he was unable to find any clear indication why the officer took this view. Instead, the ensuing paragraphs of the review decision veered off into generalities and paraphrases of the ***Hotak*** judgment, he said.

> "If [the officer] was intending to base her conclusion on the views of the two psychiatrists instructed by NowMedical, she needed to explain why their views should prevail over that of Dr Freedman, when they were less highly qualified than she is, and (more importantly) they had never met or interviewed Mr Guiste,"

In view of these shortcomings", the review decision did not do justice to this crucial part of G's case.

> "The question whether Mr Guiste's mental illness makes him more vulnerable than an ordinary person to the risk of suicide if made homeless is self-evidently a very serious matter, which requires careful consideration of all the relevant evidence and an adequately reasoned conclusion."

There had been a breach of the principles of rationality and fair decision-making. It was ordered that the question of priority need should be reconsidered by an experienced review officer other than the original officer.

The Council had also argued that s. 31(2A), Senior Courts Act 1981 applied to statutory homelessness appeals. S. 31(2A) allows a court to refuse relief in judicial review cases "if

it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" Henderson LJ left the question open, but said "I am inclined to think that there is no proper basis for extending the scope of the new test in section 31(2A), by judicial decision, to statutory housing appeals under section 204 of the 1996 Act." However, there was no need to make a final decision.

E Discharge of duty

Council had failed to discharge housing duty with private rented sector offers
R (on the application of SH) v L.B. Waltham Forest
Administrative Court 11 October 2019
[2019] EWHC 2618 (Admin)

SH arrived in the UK in 2012, having fled trafficking for sexual exploitation. She was granted refugee status in 2014. In April 2015, the Council accepted the main housing duty to her under section 193(2) HA 1996.

After SH had spent some time in temporary accommodation in Ilford, In August 2017 the Council made her an offer of accommodation in Tottenham by what they considered a private rented sector (PRS) offer. The accommodation had communal grounds which the judge described as "an open-air brothel". SH's daughter's school warned the Council that living in these conditions was damaging the child's mental health.

In July 2018, SH approached the Council again. They treated her as having made a fresh homeless application, whereupon they offered her a property in Kettering under the `relief' duty (s.189B), which she rejected.

SH applied for judicial review of the Council's that it had discharged its s.193 duty to SH by an offer of private sector accommodation under s.193(7AA). In fact, WF maintained it had done so twice, through the offers of the Ilford and Tottenham properties. SH maintained that the Council had a continuing duty, and there was no warrant for considering her to have made a fresh homeless application.

On her application for judicial review, it was held that the case turned on whether the offers of tenancies at the Ilford or Tottenham properties were made in accordance with the provisions relating to private rented sector offers contained in section 193 (7AA) and (7AB) of the Act.

Deputy Judge David Pittaway QC said that the relevant provisions were:

"There has to be an offer of property in writing, which warns the applicant of the matters in section 193(7AB), namely: (i) the possible consequences of refusal or acceptance of the offer; (ii) the right to request a review of suitability; and (iii) the effect under section 195A of a further application to an authority within 2 years of acceptance of the offer. The property has to comply with the conditions in section 193(7AC), namely, (i) it has to be an AST for a fixed term of at least 12 months, (ii) it has to be made with the approval of the authority in pursuance of arrangements made by the authority with a view to bringing the authority's duty to an end. The authority have to be satisfied that the property is suitable (section 193(7F))."

SH argued that the absence of an offer letter for Ilford and of any proper enquiry into the suitability of the Tottenham property, meant neither of these provisions were met and so the Council had failed to discharge its duty under section 193.

The Council argued that it had met its duties by offering the properties and that in the absence of documents the court should infer that the procedures were followed in accordance with the statutory requirements. It relied upon its 'standard practice' to send PRSO letters and the fact that it had made an incentive payment to the private landlord.

The judge found that there was no evidence to indicate that the Council sent a standard form offer letter for the Ilford property to SH. As for the Tottenham property, although the PRS offer had been made in writing, the accommodation was “never suitable accommodation”. Due diligence should have alerted the defendant to the unlawful sexual activity that was taking place in the communal gardens of the property. The offer should never have been made.

The section 193 duty, accepted in 2015, had never been validly discharged and was continuing, because neither the Ilford nor theTottenham property were valid PRS offers within the meaning of the Act. Accordingly, the Council had acted unlawfully in breach of its statutory duty to secure suitable accommodation under section 193 of the Act.

F Reviews and appeals

Good reason for late s.204 appeal does not include difficulties in finding legal advice
LB Tower Hamlets v Al Ahmed
High Court 26 March 2019
[2019] EWHC 749 (QB)

Mr A received a s.202 review decision that he was intentionally homeless on 6 April 2018. The deadline for lodging his appeal to the county court was 27 April 2018. He had lost confidence in the solicitors who had represented him on the review, so with the assistance of Crisis he looked for new solicitors. All the solicitors he contacted did not have capacity to take his case.

Eventually, on 23rd May he found new solicitors, who obtained legal aid and filed his appeal on 25th May. In his notice of appeal, A requested permission to extend the 21 day time limit for appealing under s.204(2A), on the ground that he had "good reason" for filing his appeal out of time because of his need to secure legal representation. The county court judge agreed to extend time. The Council appealed against that decision.

The Council’s appeal was allowed. The judge had erred in deciding that there has been “good reason” for the delay in filing the appeal. Although the appeal could only be pursued on a point of law, and it was understandable that A would want the costs protection that legal aid would offer, it was not necessary for a lawyer to be instructed before adequate grounds of appeal could be drafted: A could have drafted the appeal himself. It was a relatively simple process to lodge an appeal. The two grounds of appeal (failure to serve a `minded to’ letter and failure to deal with medical evidence properly) were capable of simple expression.

All of the factual circumstances had to be carefully examined, but the fact that a party was not professionally represented could play only a very limited, if any, part in the assessment of whether there was good reason for a departure from the time limit. The application to extend time was refused, and the appeal was dismissed.

Applicant did not have good reason for late appeal despite uncertainties about delivery of post during Christmas period and need to find solicitor and lodge appeal

Emambee v London Borough of Islington

High Court 25 October 2019

[2019] EWHC 2835 (QB)

Ms E, a single parent with thre children, applied to the Council as homeless in June 2018, having been required to leave her aunt's house. She was placed in temporary accommodation in Enfield. On 4 July 2018 the Council accepted a full housing duty towards her.

In November 2018, E's father suffered a stroke in Mauritius, and on 28 November 2018 she travelled to Mauritius to see him. Because of the urgency, she did not notify the Council of her absence.

The Council visited the temporary accommodation on 28 November and 6 December. They concluded that E was not residing at the property, although some of her personal belongings were there. On both occasions a note was left asking her to contact the council, but it received no response. On 6 December 2018 the council terminated the accommodation under section 193(6), on the basis that she had ceased to occupy it.

E returned to the UK on 7 December 2018 and found thatshe had been evicted. On 10 December 2018, she requested a review of the council's decision to terminate its duty. In this letter she nominated her aunt's address as the address to which to send correspondence

In support of the review, E sent copies of boarding passes and passports to show that she was in Mauritius between 18 November 2018 and 7 December 2018.

On 21 December 2018 the Council made its review decision upholding the decision to discharge its housing duty. The decision letter was sent by second class post to the aunt's address on 21 December 2018. The aunt had gone away for Christmas and returned on 8 January 2019. When the aunt returned, she notified E of the letter and assisted E to find legal advice. She obtained an appointment with a solicitor on 15 January 2019. An appeal was drafted with short grounds on that day. The Appellant's Notice was marked as filed by the court on 18 January 2019.

At the hearing of the s.204 appeal, HHJ Hellman considered the two questions which he had to decide: first, was the appeal brought within 21 days of E being notified of the decision, and secondly, if not, was there a good reason for her failure to bring the appeal in time.

The judge said that as the appellant's notice was filed on 18 January, an appeal would have been brought in time if E received notification of the local authority's decision on or after 28 December. However, he was satisfied that the notification date was the date of delivery of the letter to the aunt's home. He rejected a submission from E's counsel that notification meant the date of actual receipt, saying that would "introduce a very substantial degree of uncertainty as to the notification date into the section, which I am satisfied was not the legislative intent". He said:

> "I am satisfied that the notification date was the date of delivery of the letter to the premises notified by Ms Emambee. This is by analogy with the concept of service. However, notification is a less technical concept; it is an ordinary English word, and so delivery was the actual date of delivery, and not a deemed date of delivery."

The judge also concluded that E did not have a good reason for not filing her notice within the 21 day period. He was not satisfied that her dyslexia was a good reason for the late filing.

E's appeal to the High Court was dismissed by Stewart J. In relation to the date of delivery of the letter, he did not accept E's submission that the judge ought to have been satisfied that the letter was delivered on or after 28 December 2018 in view of the busy period.

E further submitted that the Judge had failed to have proper regard to her circumstances and in particular her dyslexia. This argument was also rejected:

> "Dyslexia could not have been a reason for delay until 8 January 2019 when the Appellant first received the decision letter; nor could it have been a reason for delay after 15 January when the Appellant consulted solicitors."

In relation to the general background:

> "However the judge took into account (i) the local authority's decision letter which said that despite her dyslexia the Appellant was well versed in contacting the authority, (ii) the fact that the Appellant had been able to receive assistance from her family, (iii) that she had filed two witness statements in the appeal but did not explain why she took no action until 15 January 2019 and (iv) that her solicitors, once she had consulted them, could have sent the application notice by special delivery so that it would have been received the next day by the court i.e on 16 January 2019, instead of 18 January 2019.

The Judge had considered all the circumstances and used them to make his decision. Even if he not given adequate reasons, this would not assist in the appeal as on a fresh consideration, there was no evidence supporting the relevance of the dyslexia in causing the delay.

A homeless person cannot raise claims alleging unlawful discrimination under the Equality Act in a homelessness appeal. The court cannot decide disputed issues of fact on a s.204 appeal

Adesotu v Lewisham London Borough Council
Court of Appeal 2 August 2019
(2019) EWCA Civ 1405

A was a single parent with three children. The Council accepted the main housing duty to her under s.193, HA 1996 and made her an offer of private leasing accommodation. A told the housing officer that she could not accept it because the property was too far from her children's schools and that she had recently given birth and was too depressed to move from her current accommodation. After further discussions with the housing officer in which it was unclear whether she would accept, A was given a deadline to sign for the tenancy. She did not do so, and the Council notified her that it had discharged its duty.

A requested a review of that decision, on the additional ground that the property was unsafe fro children, as the front door opened onto a main road. The reviewing officer confirmed the decision to discharge duty.

A submitted a section 204 appeal to the county court. The grounds of appeal included the following:

- *The Respondent breached section 19 of the Equality Act 2010 by applying provisions, criteria or practices that are discriminatory in relation to the Appellant's disability, and which cannot be justified.*
- *The Respondent breached section 15 of the Equality Act 2010 by treating the Appellant unfavourably (deciding that the section 193 duty was discharged) because of something arising in consequence of her disability*

- *The Respondent breached section 149 of the Equality Act 2010 (by failing to accommodate the Appellant's disability by allowing her time to reach a decision as to whether to accept the offer and/or by allowing her time to take legal advice (in breach of sub-sections 149(3)(a)-(b), 149(4) and 149(6)).)*

It was argued for A that the Council had treated A her unfavourably because of her delayed and equivocal decision as to whether to accept the accommodation offered, which A said arose from her disability.

The Council applied to strike out the above grounds of appeal. The strike-out application was made on the alternative footings that:

- in a section 204 appeal the county court has no jurisdiction to determine claims alleging unlawful discrimination under sections 15 or 19 of the Equality Act 2010 ("the Equality Act point").
- in a section 204 appeal the county court has no jurisdiction to make findings of fact ("the Housing Act point")
- the points of law identified in the grounds were not points "arising from" the decision of the reviewing officer and were thus not within the proper scope of a s 204 appeal.

HHJ Luba QC accepted the Council's arguments and accordingly struck out the relevant grounds of Ms Adesotu's appeal to the county court. He granted permission to appeal and transferred the appeal to the Court of Appeal.

On the Equality Act point, the Court of Appeal held that Part 9 of the Equality Act limited proceedings for a contravention of Part 3 (services and public functions) to claims in the county court (s.113(1)). There are certain exceptions, including "a claim for judicial review" (s.113(3)(a)). However, although there were many similarities between s.204 appeals and judicial review, they were not the same. A statutory appeal was not a "claim for judicial review" within the meaning of s 113(3)(a).

The judge's decision to strike out Grounds 1 and 2 was therefore clearly correct on the Equality Act point alone.

On the Housing Act point, the first two grounds of appeal raised issues of disputed fact which fell within the exclusive jurisdiction of the County Court under Part 9 of the 2010 Act. The Court's decision in *Bubb v Wandsworth LBC* (2011) EWCA Civ 1285 remained binding authority that the county court cannot decide disputed facts in a s.204 appeal. In relation to the most important issue of disputed fact - whether or not Ms Adesotu was disabled – Bean LJ said:

> "I cannot accept…that this was an issue of law. Of course the statutory definition of disability is a question of law, but whether the appellant fell within it depended on findings of fact, followed by an evaluative judgment as to whether those facts fitted the statutory definition."

On the question of whether the points of law were "'issues arising from the decision", ie, the s.202 review decision, A had had adequate time on review to raise any points, so the question of whether or not she was given adequate time to accept or reject the offer of accommodation had become academic, and was not an issue arising from the decision. Additionally, the Council had not been put on notice that A was entitled to be treated as disabled. The relevant grounds of appeal therefore did not take points "arising from" the reviewing officer's decision, and the court did not have jurisdiction to entertain them.

A review of the suitability of accommodation must be requested within 21 days of the local authority's decision. But where the accommodation later becomes unsuitable, the applicant may ask the authority to make a fresh decision on suitability

B v L.B. Redbridge
Court of Appeal (permission application) 31 July 2019
[2019] EWCA Civ 1592

B challenged the suitability of accommodation offered to her by the Council under the main housing duty on the grounds of affordability. The Council decided on review that the property was suitable, but subsequently B claimed that the accommodation was unaffordable because the actual bill which she faced for electricity supplied to the accommodation was materially higher than the estimate of £20 a week on the basis of which the property was originally allocated to her. B asked the Council to carry out a second suitability review.

The Council failed to undertake the second review and B applied for judicial review. In the Administrative Court, the judge noted that under s.202(4) a request for a review had to be duly made within 21 days of the decision or such longer period as the authority allowed. He held that the applicant was not entitled to what was in effect a second review of the decision on suitability because she had not made the application within the 21-day period.

However, there were other means by which affordability and hence suitability could be raised by a person in the applicant's position in the event of a change of financial circumstances after the expiry of the 21 day period. A local authority could be asked to consider a request out of time. He said:

> "In deciding whether to consider a request out of time the local authority must act rationally. If it does not do so it can be challenged by judicial review."

Moreover, since the Council was under a continuing obligation to secure that the accommodation provided was suitable, it could be asked to make a further decision as to suitability if circumstances changed.

Permission to appeal to the Court of Appeal was refused.

Lord Justice Males said that the wording of the statute was clear. A request for review must be made within 21 days unless the authority allows a longer period.

B had asked Redbridge to carry out a further review of its decision as to the suitability of the accommodation for her. Her case was that the unaffordability, and hence unsuitability, of the accommodation provided to her was demonstrated by the electricity bill which she received. It was not suggested when requesting this further review that there was any other reason to suppose that there had been a material change of circumstances since the property was allocated to her. Although the particular electricity bill was higher than the estimate of £20 a week originally provided, it covered the coldest part of the year and it was necessary to balance it out over the year as a whole.

Males LJ concluded that B had no real prospect of showing on appeal that the judge's conclusion that it was too late to request a statutory review should be overturned. It was noted that she had produced further and more recent information about her finances. It was said that her expenses had increased, largely as a result of her children growing older and having additional needs. However, it was not necessary to consider those changes. If B's financial circumstances had changed, such that there had been a material change so far as affordability is concerned, then that was a matter which the Council would be obliged to consider if requested to carry out a review out of time.

As the judge's comments may be relevant to the position of other persons whose financial circumstances deteriorate after the expiry of the 21 day period and who therefore seek a review of suitability out of time, he gave permission for the judgment to be cited.

An applicant who does not appeal against a discharge of duty decision cannot later challenge that decision in a subsequent application
Godson v L.B. Enfield
[2019] EWCA Civ 486 22 March 2019

Mr G applied to the Council as homeless in 2012 and was provided with interim accommodation. The Council accepted a full housing duty and offered him the tenancy of a different property, warning that if he refused it, their duty to him would cease.
He considered the property unsuitable and refused the offer. The Council upheld its decision on review. G did not appeal that decision and was evicted with his family from the interim accommodation.

G and his family lived in bed and breakfast accommodation until 2016, when he made another application to the Council for assistance and was given interim accommodation. In 2017 the Council decided that G had not resided in settled accommodation since he refused the alternative accommodation and he had made himself intentionally homeless by refusing that accommodation: a decision which was upheld at another review. G appealed unsuccessfully to the county court. He appealed again to the Court of Appeal.

The question for the Court was whether G was entitled to challenge the lawfulness of the earlier review decision on a subsequent application for assistance as a homeless person. Lewison LJ said:

"At the root of the argument is whether a housing authority, in performing its duty under section 193(2), is entitled to choose how to perform it. In particular whether it is entitled to require an applicant to move from one set of temporary accommodation to another, even if the applicant would prefer to stay where they are."

On that issue, the Court held that where a duty can be performed in several different ways, as a matter of principle it is up to the authority to decide how to perform it. An applicant did not have a right to be housed in any particular accommodation, provided that the accommodation was suitable.

The Court also held that, where the Council had already determined on a previous homelessness application that an offer of accommodation was lawful and that its duty to the applicant had ceased, and the applicant had not appealed the decision to the county court, it was not open to him to raise the matter again when trying to argue that he had not made himself intentionally homeless on a subsequent application. The reviewing officer was entitled to find G intentionally homeless because the operative cause of his homelessness was the refusal of the alternative accommodation

6 Allocations

A social landlord's policy of housing only members of the Orthodox Jewish community was proportionate, and the Council therefore acted lawfully in making nominations in accordance with that policy

R (on the application of Z) v Hackney LBC and Agudas Israel Housing Association
Court of Appeal 4 February 2019
[2019] EWCA Civ 1099

Z was a single mother with four children: two sons diagnosed with autism spectrum disorder, and twin daughters born in July 2018. Z also suffered from anxiety and depression. She had lived in Stamford Hill her whole life and embraced the diversity of the local community. Her mother lived nearby and Z relied heavily on her support with the children. The family were previously tenants of a different Hackney property that was unsuitable and unsafe for the family.

In other proceedings, the Council was ordered to re-house the family in accommodation which provides a safe and risk-free environment for the claimant's young children. Following this, the Council moved the family to temporary accommodation and agreed ithat it would make Z a direct offer of the next unit of suitable three-bedroom accommodation that became available.

The Agudas Israel Housing Association ("AIHA") is a small housing association set up primarily to help the Orthodox Jewish community. AIHA's arrangements for the allocation of social housing are such that properties owned or controlled by AIHA are allocated only to members of the Orthodox Jewish community. The Council has nomination rights to 50% of AIHA's one bed properties and 75% to all others, but it only nominates members of the Orthodox Jewish community to AIHA.

Z contended that she had been discriminated against under Equality Act 2010 because she was not a member of the Jewish Orthodox community and for that reason had not been offered accommodation with AIHA.
It was common ground that the AIHAs arrangements involved direct discrimination on the ground of religion. Z's case was that the housing need of orthodox Jews was no different to any other family in Hackney living in unsuitable accommodation such that it was not proportionate or legitimate to discriminate.

The Divisional Court dismissed Z's claim. It considered that the arrangements were a proportionate means of overcoming a disadvantage shared by members of the Orthodox Jewish community, and hence were permitted by s.158 of the Equality Act 2010 (positive action).

The Court of Appeal dismissed Z's further appeal. Lord Justice Lewison said that although in form the challenge was one to Hackney's housing allocation policy, in substance it was primarily a challenge to AHIA's allocation policy.

The Court held that AIHA's allocation policy was permitted by s.193 of the 2010 Act (charitable organisation whose activity is for the purpose of preventing or compensating for a disadvantage linked to a protected characteristic).

That was enough on its own to dismiss the appeal in so far as it was directed against AIHA, but the Court also considered that, weighing all the relevant factors together, AIHA's allocation policy was proportionate. The needs of the Orthodox Jewish community linked to the relevant protected characteristic were many and compelling. The allocation of properties to non-members of the Orthodox Jewish community would fundamentally undermine AIHA's charitable objectives. Thus there was no more limited way of achieving the legitimate aim.

.As for the case against Hackney, although the Council could not rely on s.193 because it was not a charity, Lewison LJ said:

> "If (as I would hold) AIHA's allocation policy is justified by section 158, I cannot see why Hackney cannot rely on section 158, which applies to everybody, even though Hackney did not advance a positive case to that effect."

He added that “Because AIHA's allocation policy satisfies section 158(2), Hackney is not acting unlawfully in making nominations in accordance with that policy.”

Ten-year residency criteria within allocation scheme indirectly discriminated against Irish Travellers and refugees, and had not been justified

R (on the application of Ward) v L. B. Hillingdon
R (on the application of Gullu) v L.B. Hillingdon
(Equality and Human Rights Commission intervening)
Court of Appeal 16 April 2019
[2019] EWCA Civ 692

The London Borough of Hillingdon’s housing allocation policy provides that, subject to certain exceptions, a person who has not been continuously living in the borough for at least 10 years will not qualify to join its housing register. One of the exceptions to Hillingdon’s policy was that an homeless person who is owed the full housing duty but does not satisfy the residence requirement is entitled to join the register, but is placed in band D, not in any of the priority bands A to C.

Two challenges by way of judicial review were brought against the lawfulness of Hillingdon’s policy, on the ground that it was indirectly discriminatory on the ground of race, and could not be justified.

Ms W was a single parent of Irish Traveller descent, who had three children aged 7, 4 and 2. The family had become homeless, and had been placed in temporary accommodation by the Council. Having spent a significant part of her life travelling, W now wished to settle, to give her children better educational opportunities. Having applied to join the Council’s housing register, she was placed in the lowest band, Band D, because she had not lived continuously in the borough for 10 years.

G was a Kurdish refugee of Turkish nationality. He applied for judicial review of Hillingdon’s decision not to register him on its allocation scheme. He argued that the ten year residence requirement unlawfully discriminated against him as a refugee and a foreign national.

In the Administrative Court, W’s challenge succeeded (*R (TW) v London Borough of Hillingdon* [2018] EWHC 1791 (Admin)), but G’s challenge failed (*R (Gullu) v London Borough of Hillingdon* [2018] EWHC 1937 (Admin)).

The Court of Appeal granted permission to appeal to Hillingdon (in respect of the *W* case) and to G, since the Administrative Court had reached different answers on substantially the same challenge.

In both cases, the Council had conceded that the PCP (‘provision, criterion or practice’) in its scheme amounted to indirect discrimination, but sought to justify its policy. The judge in W’s case (Mr Justice Supperstone) accepted Hillingdon’s position, but decided that the policy could not be justified.

However, the judge in G’s case (Mr Justice Mostyn) did not accept the Council’s concession, and held that the policy did not discriminate against Mr Gullu.

The Court of Appeal considered that the Council’s concession was rightly made, and that Mostyn J was wrong to reject it. The judge had compared G, a refugee, with a voluntary migrant from Yorkshire or France. Lewison LJ said:

> “If the case were one of direct discrimination, that would be the correct approach. But in a case of indirect discrimination, it is not. In the case of indirect discrimination, the correct comparison is between groups rather than individuals.”

> "In Ms Ward's case the relevant characteristic is being an Irish Traveller. In Mr Gullu's case, it is being a non-UK national. So the question in Ms Ward's case is: are Irish Travellers put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are not Irish Travellers? In her case it was common ground that they were. The question in Mr Gullu's case is: are non-UK nationals put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are UK nationals?"

The judge's second error was to compare G with a person who could not satisfy the 10-year residence requirement (because they were a recently arrived voluntary migrant):

> "Compounding this error was his concentration on some only of the comparator group. What he ought to have done was to have considered the comparator group (UK nationals) as a whole. The fact that some members of the comparator group are also disadvantaged by the PCP does not negate indirect discrimination, if a higher proportion of the protected group suffer that disadvantage.
>
> "If, then, one asks: does a 10-year residence requirement disadvantage non-UK nationals more than UK nationals, the answer must be "yes". A long line of cases has accepted that a residence requirement disadvantages non-UK nationals."

It was true that a person in one of the `reasonable preference' groups (such as a person to whom the main homelessness duty was owed) was permitted to join the register; but those who were homeless and could not satisfy the 10-year residence requirement were placed in band D rather than in any higher band. That reduced their chances of being allocated accommodation, and was a relevant disadvantage.

The Council had relied on a number of features of the scheme as 'safety valves', including in particular the possibility of a higher banding being granted on account of hardship, the possibility of a direct offer outside the choice based letting scheme, and the continuing duty to house the homeless under section 193 Housing Act 1996.

But this argument failed to save the policy:

> "The key principle is that the goal is equality of outcome. If a PCP results in a relative disadvantage as regards one protected group, any measure relied on as a 'safety valve' must overcome that relative disadvantage. Put simply, if the scales are tilted in one direction, adding an equal weight to each side of the scales does not eliminate the tilt."

The Court of Appeal allowed Mr Gullu's appeal. It also dismissed the Council's appeal on the discrimination point in W's case, although it allowed it on the question of whether there had been a breach of s.11(2) of the Children Act 2004.

The Court accordingly made a declaration that Hillingdon's policy constituted indirect discrimination against Irish Travellers and non-UK nationals, which was unlawful unless justified; and that Hillingdon had not yet shown such justification.

7 Cases under the Children Act 1989

Social services' section 17 assessment that family with no recourse was not destitute was unwarranted by the evidence
R (JA, GA, and EF by their litigation friend AA) v Bexley LBC
[2019] EWHC 130 (Admin) 1 February 2019

AA was a Nigerian national with no recourse to public funds. She had entered the UK in 2009 on a student visa and subsequently overstayed. She had two children, JA and GA (aged 11 and 7, and she was also the full-time carere for her niece EF (aged 13).

In 2013 AA applied for leave to remain outside of the Immigration Rules. During this time she worked, in the mistaken belief that she was permitted to work until her appeal rights were exhausted, and she was able to support the household from her earnings. In August 2015, she was informed that she was not able to work lawfully in the UK. As a result she approached the Council for support.

The Council accommodated and supported AA and her household under s.17 Children Act 1989 until September 2017. At that time the Council undertook a series of further assessments and a fraud investigation, culminating in a decision that the household was not destitute and that, as a consequence, the children were not 'in need' for the purposes of s.17. The investigation had concluded that AA had been living a lifestyle beyond what was affordable on the subsistence provided by the Council, and that she had been concealing her resources.

The children's application (by AA as their litigation friend) for judicial review was granted.

In relation to accommodation, no real consideration had been given as to how AA would accommodate the household if support were terminated, in light of the fact that they would not have the right to rent under Immigration Act 2014. It was possible that AA could be granted permission to rent. But that issue had not been considered.

In relation to the household's financial position, the Council had wrongly taken into account the fact that AA had certain high value items (such as a television and an iPad) without establishing when these items had been acquired. If they had been acquired – as AA contended – during the period she had been working and had funds, then they could not properly be regarded as evidence that she had not subsequently become destitute. The inconsistencies in AA's evidence and the failure to fully address all of Bexley's concerns did not provide a reasonable basis from which to infer she was not destitute. The evidence did not support a conclusion that she had alternative sources of funds or support.

Shelter
November 2019