Housing Law Practitioners' Association

Housing Law Update (Homelessness and Allocations)

November 2020

Homelessness: the impact of coronavirus

Letters from the Homelessness Minister

- **`Everyone in': Luke Hall I** Letter dated 26 March 2020

  The approach "aims to reduce the impact of COVID-19 on people facing homelessness and ultimately on preventing deaths during this public health emergency".

  The letter set out the basic principles, namely to:

  - focus on people who are, or are at risk of, sleeping rough, and those who are in accommodation where it is difficult to self-isolate, such as shelters and assessment centres
  - make sure that these people have access to the facilities that enable them to adhere to public health guidance on hygiene or isolation, ideally single room facilities
  - utilise alternative powers and funding to assist those with no recourse to public funds who require shelter and other forms of support due to the COVID-19 pandemic
  - mitigate their own risk of infection, and transmission to others, by ensuring they are able to self-isolate as appropriate in line with public health guidance.

- **`Moving on to the next phase': Luke Hall II** Letter dated 28 May 2020

  - "We must continue to focus on ensuring accommodation and support arrangements can be managed safely to protect the most vulnerable, includingthose with complex needs. At the same time, we need now to start planning the next steps for accommodating and supporting people to move on from emergency accommodation."
  - Emphasis on local authorities seeking to find sustainable move-on accommodation
  - Where such accommodation is not available, authorities put in place short term accommodation to ensure that people do not have to return to the streets while longer term options are sought for them.

- £433 milion of Government funding made available
- Re-statement of the government's position on eligibility relating to immigration status, including for those with No Recourse to Public Funds (NRPF). The law regarding that status remains in place.

- **`Funding support for those in emergency accommodation and EEA rough sleepers': Luke Hall III** Letter dated 24 June 2020
  - Additional £105 million to help local authorities implement a range of support interventions for people placed into emergency accommodation
  - Government's decision to suspend the UK's derogation from Article 24(2) of the EU Free Movement Directive (need for equal treatment of UK and EU nationals) to enable authorities to accommodate and support a specific group of rough sleeping EEA nationals for a one-off maximum period of three months. Those who would benefit are mainly EEA jobseekers. People must have been verified as sleeping rough by an outreach worker.

- **Provision for family members of a `person of Northern Ireland' to apply for ettled or pre-settled status under the EU Settlement Scheme and for persons with stateless leave** Letter dated 2 July 2020

The 'Protect Programme': the next step in winter rough sleeping plan

Announcement by the Secretary of State: 5 November 2020

- Councils asked to make sure every rough sleeper offered somewhere safe to go, as new national restrictions start.
- All councils to update their rough sleeping plans by the end of the year, providing an overview of their support for those sleeping rough. They will also be asked to carry out a rapid assessment of need for everyone they accommodate and to consider time limited interventions for those rough sleeping now or new to rough sleeping.
- "A further £15 million has been allocated to support the ongoing efforts to provide accommodation for rough sleepers during the pandemic. This scheme – called the 'Protect Programme' – will help areas that need additional support most during the restrictions and throughout winter."
- "This will run alongside the ongoing 'Everyone In' campaign, which is helping to protect thousands of lives during the pandemic – by September it had supported over 29,000 vulnerable people, with two-thirds now moved into settled accommodation."
- The "top 10" areas to receive funding are as follows:
  - London
  - Bristol
  - Brighton and Hove
  - Cornwall
  - Bournemouth, Christchurch and Poole
  - Manchester
  - Salford
  - Oxford

- Leicester
- Birmingham

Priority need and Covid-19: Amendments to the Homelessness Code of Guidance

In 29 June 2020, MHCLG published changes to Chapter 8 on priority need in the Code of Guidance. This statutory guidance on Covid-19 addresses the factors governing how vulnerability is to be assessed in the context of the pandemic:

> **8.44 COVID-19:** *Housing authorities should carefully consider the vulnerability of applicants from COVID-19. Applicants who have been identified by their GP or a specialist as clinically extremely vulnerable are likely to be assessed as having priority need. The vulnerability of applicants who are clinically vulnerable should also be considered in the context of COVID-19. Some applicants may report having medical conditions which are named in the guidance but have not yet been identified by a health professional as being clinically extremely vulnerable or clinically vulnerable, in which case it may be necessary to seek a clinical opinion in order to confirm their health needs.*
>
> **8.45** *Housing authorities should also carefully consider whether people with a history of rough sleeping should be considered vulnerable in the context of COVID-19, taking into account their age and underlying health conditions. Further guidance on clinical support for people with a history of rough sleeping can be found in the COVID-19 clinical homeless sector plan.*

Further guidance

In the *COVID-19 clinical homeless sector plan* (a detailed guide for LAs when accommodating rough sleepers following Luke Hall MP's letter of 26 March), it is stated that some people within the homeless population will be at increased risk of severe illness from COVID-19. They include those who:

> • meet the existing definition of 'extremely vulnerable'.
> • are at increased risk as a result of underlying health conditions, as set out in existing guidelines (eg any adult instructed to get a flu injection each year on medical grounds)
> • are aged over 55. For the general population, those over 70 are considered to be at increased risk. However, given that the average age of death for rough sleepers is 45 for men and 43 for women, we recommend the age limit is reduced to 55 for the purpose of operationalising this guidance

The above plan also sets out the particular risk factors for rough sleepers:

- 60% of homeless people are at increased risk of severe illness from COVID-19 – primarily due to high levels of chronic illness.
- People who are street homeless, living in hostels (with shared dining, bathroom and toileting facilities and sometimes with shared rooms) and emergency accommodation will not always be able to follow government advice.
- There is strong evidence of premature ageing in the homeless population, with the average age of death being 45 for men and 43 for women. Homeless people over

the age of 55 will have an underlying co-morbidity, although this may not be diagnosed due to lack of access to services.

- Many homeless people who develop symptoms of COVID-19 cannot currently follow government advice to self-isolate.

- In communal settings there will be a very high likelihood of outbreaks with high attack rates.

- High levels of co-morbidity will result in high case fatality rates for those infected.

Call for evidence on the impact of Covid-19

The Housing, Communities and Local Government Select Committee has issued an updated call for evidence about how effective government support has been in tackling the negative impact of COVID-19 on tenants, landlords, rough sleepers and homelessness: 'Impact of COVID-19 on tenants, landlords, rough sleepers relaunched' Evidence must be submitted by ***27 November 2020***.

Policy developments

The latest homelessness statistics for England, covering the last financial year, were published on 1 October 2020: *Statutory homelessness annual report 2019–20, England* (MHCLG).

The statistics show a significant decline in the number of cases in which local housing authorities accepted that applicants were owed the main housing duty under HA 1996 s193:

> *Main duty acceptances have reduced by 29.3% or 16,560 from 56,600 in 2017-18 to 40,040 in 2019-20. Although the number of households approaching and receiving help from local authorities has increased, the overall fall in main duty acceptances is due to the number of households who are prevented from becoming homeless or have homelessness relieved under the new HRA duties. The reduction in main duty acceptances has been larger for households with children than for households without children. This is likely to reflect an increase in access to homelessness services for single households brought about through the requirements of the HRA.* [page 2]

On 31 March 2020, there were 8,180 households in B&B-style temporary accommodation. Of those, 530 were households with children who had been resident for more than the statutory maximum of six weeks. A further 20 were applicants aged 16 or 17.

Homelessness Reduction Act

The outcome of the independent review of the Homelessness Reduction Act has now been published, six months after its presentation: *Evaluation of the implementation of the Homelessness Reduction Act: final report* , together with the Government's response to the consultation: *Homelessness Reduction Act 2017: government response to the call for evidence* (MHCLG, 25 September 2020).

The Government acknowledges that: 'The review identified some challenges and we will continue to support local authorities to implement the Act and overcome these challenges.'

Case law: Homelessness

A Applications

Council's decision to refuse to accept second homelessness application despite new medical evidence was unlawful
R (Bukartyk) v Welwyn Hatfield BC
[2019] EWHC 3480 (Admin) 16 December 2019
Legal Action, Feb 2020, p.45

In March 2019, Ms B applied as homeless to the Council. It provided her with interim accommodation under s.188 HA 1996, but in July 2019 it decided that she did not have a priority need, having provided no medical evidence to indicate that she was vulnerable That decision was upheld on review in September 2019 and the interim accommodation was withdrawn. An appeal against that decision was lodged in the county court

After a few days of street homelessness and sofa-surfing, B made a second application to the Council. This time it was supported by medical evidence. On 9 October 2019, the council declined to take a fresh application because "the council is satisfied that there are no relevant new facts that were not known about at the time we dealt with your previous application, or that any new facts presented are trivial". The Council's letter continued:

> *Whilst you have presented information, the mere presentation of different information is not sufficient to lead to a new application being made. This would not be the case were the information presented to be of such weight that it would trigger a duty to provide interim accommodation or if the circumstances had changed in any way. As stated above, they have not.*

B applied for judicial review of that decision.
The Administrative Court allowed her application. The Council's approach was in conflict with the guidance given by the Court of Appeal in ***Rikha Begum v Tower Hamlets LBC*** [2005] EWCA Civ 340, because it failed to analyse whether the second application was based on new facts which were not `trivial or fanciful', contrary to the guidance in ***Rikha Begum.*** The Council had focussed instead on the separate question whether those facts would establish that the applicant was vulnerable and thus in priority need. That question is one that has to be addressed when the Council carried out its inquiries, and not at the prior stage of deciding whether there was an effective application in the first place.

It was important to recall that the basis of the earlier review decision was that while B had asserted that she mental health problems, she had provided no evidence in support, and had refused the attempt to refer her to a mental health team. The review decision referred to the absence of supporting medical evidence; and stated that B had 'no medical issues'. Yet in her second application, B had provided such evidence, in the form of the prescription and three letters, including one from a psychiatrist. It was difficult to see how the Council could rationally conclude that the medical evidence disclosed no new facts, or could regard such facts as trivial or fanciful.

The council's decision had been based on 'cherry-picking' from the medical evidence. The judge stated:

> *In my judgment it cannot be appropriate, when a housing authority is discharging its public law duty conscientiously to assess whether there are no new facts (and to assess whether any such facts are trivial or fanciful) to focus just on those parts of the evidence which are favourable to such a conclusion, and to ignore those that point against it.*

The judge rejected the Council's argument that because B had an ongoing statutory appeal to Luton County Court against the review decision, the claim for judicial review should be dismissed because B had an alternative remedy. The county court appeal was of no relevance to the present claim because in that appeal the court would be limited to considering the material which had been before the reviewing officer, which did not include the new medical evidence.

B Eligibility for assistance

EEA nationals, Brexit and access to homeless assistance after 1 January 2021

Regulations have now been made which set out the rights of EEA nationals after the end of the Implementation Period on 31 December 2020 and during the `grace period' until 30 June 2021:

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 with Explanatory Memorandum

and The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020

C Interim accommodation

Council's failure to bring interim accommodation duty to an end

R (Mitchell) v Islington LBC
[2020] EWHC 1478 (Admin) 10 June 2020
Legal Action, July/Aug 2020, p.53

Mr M applied to the Council for homelessness assistance and was provided with interim accommodation. By letter dated 5 October 2019, the Council notified him that, although he was homeless and eligible for accommodation, it considered that he was not in priority need. In consequence, it would not be providing him with accommodation on a temporary or permanent basis and that his interim accommodation would end on 14 October 2019.

The Council treated the letter both as a notice of its s.184 decision and as one that also brought the interim housing duty to an end.

S.188, HA 1996, as amended by the Homelessness Reduction Act 2017, reads:

> ***(1ZA**) In a case in which the local housing authority conclude their inquiries under section 184 and decide that the applicant does not have a priority need –*

(a) *where the authority decide that they do not owe the applicant a duty under section 189B(2), the duty under subsection (1) comes to an end when the authority notify the applicant of that decision, or*

(b) *otherwise, the duty under subsection (1) comes to an end upon the authority notifying the applicant of their decision that, upon the duty under section 189B(2) coming to an end, they do not owe the applicant any duty under section 190 or 193.*

M's claim for judicial review of the decision to end the interim housing duty was allowed.

The deputy High Court judge held that s.188(1ZA) applies where a local housing authority has concluded its inquiries under s.184 and decided that an applicant does not have a priority need. That was the situation in M's case. Although s.188(1ZA) is based on a decision having been made under s184, that is not identified as sufficient to bring the duty to an end. It is only a threshold criterion for what follows.

S.188(1ZA) sets out two alternative ways in which the authority can bring the interim duty to an end in such circumstances.

The first way, under s.188(1ZA)(a), is where the council notifies a decision that it does not owe the applicant a duty under s.189B(2). However, that was not relevant in M's case.

The second way of bringing the interim duty to an end is under s.188(1ZA)(b), where the council notifies a decision that when the relief duty comes to an end, it will not owe the applicant any duty under s.190 or s.193. Here, the letter of 5 October 2019 did not comply with the notification requirement in s188(1ZA)(b), as it failed to inform Mr Mitchell of a decision that when the Council's relief duty came to an end, it would not owe him a duty to provide him with accommodation under s190 or s193.

To the extent that para 15.9 of the MHCLG *Homelessness Code of Guidance for local authorities* was to be read as contrary to this interpretation, it was wrong. The result was that the interim duty owed to Mr Mitchell had not been brought to an end.

Insufficient merit for interim injunction
R (Nnaji) v Spelthorne BC
Administrative Court 10 July 2020
Legal Action, Sept 2020, p.46

Mr N was a Nigerian national who had been granted limited leave to remain in the UK. On his application for homelessness assistance, he said that he had been living with his sister until she evicted him in February 2020. He said that he had since been staying in hostels and sofa surfing and sometimes had nowhere to stay. A letter from his GP stated that he had ongoing mental health issues, was being treated for depression and PTSD and was receiving medication.

The Council refused to provide N with interim accommodation under s.188 HA 1996, on the basis that, in the light of inconsistent accounts he had given, it was not satisfied that he may be homeless Nor did they believe that he may have a priority need, because his health problems were being met by medication. It also failed to provide him with accommodation made available to rough sleepers in the light of the pandemic. He applied for judicial review.

Freedman J refused to grant an interim order to accommodate. N had failed to show that there were sufficient merits to his case in the judicial review claim for the purposes of obtaining an injunction. There were inconsistencies and contradictions concerning

his relationship with his sister and his homelessness. The GP's letter did not give the council reason to believe that he may be vulnerable. It referred to the existence of mental illness, but indicated that N's medication was sufficient to deal with his problems. It did not show that he would be more vulnerable than an ordinary person if rendered homeless. The Council had applied s.188 correctly. Nor was N able to establish that he was within one or more of the categories covered by the emergency Covid-19 arrangements.

`Suitability' carries no obligation to provide basic furnishings
R (Escott) v Chichester DC
Administrative Court 5 May 2020
Legal Action, June 2020, p.48

Mr E applied to the Council for assistance as a homeless person. He was a Traveller who suffered from sepsis and aspirational pneumonia, and required ongoing medication. He also had mental health and substance abuse issues.

The council initially offered interim accommodation in a shared hostel. E contended that this was unsuitable because his medical history made him extremely vulnerable to coronavirus and other residents were not practising social distancing. The Council identified a self-contained unfurnished flat, which E accepted. The flat did not have a fridge or cooker. A Council officer personally provided a microwave. E's solicitors requested furniture and white goods, on the basis that he could not shield himself indoors if he had no cooking or food storage facilities.

E applied for judicial review of the Council's failure to provide these items, together with an injunction.

Martin Spencer J refused the application. No precedent had been identified showing that unfurnished accommodation was not 'suitable' for the purposes of the Act. The existence of the coronavirus pandemic did not change that. In general terms, the duty was still met if unfurnished accommodation was provided.

The judge accepted that E had particular vulnerabilities, and that he needed not just self-isolation, but shielding from all contact to eliminate the risk of infection. His accommodation had to provide sufficient facilities so that he could remain inside at all times. But the Council had not acted unlawfully in not providing a fridge and cooker. It was significant that E had originally accepted the unfurnished flat. The microwave allowed him to cook food. It was not arguable that Council had acted unlawfully in not providing another cooker. E had rejected an offered fridge because he would have had to disinfect it himself, which was a wholly unreasonable attitude given the efforts made by the Council.

Oral `reconsideration' of refusal of interim relief on the papers

R (Nolson) v Stevenage BC
[2020] EWCA Civ 379 19 March 2020
Legal Action, June 2020, p.48

The Council decided that Mr N had become homeless intentionally. He applied for a review and for temporary accommodation pending the outcome of the review. On 16 September 2019, the council declined to exercise its power to provide such accommodation. On 17 September 2019, N applied for judicial review and sought an interim injunction.

The injunction application was refused on the papers on the same day. On 24 September 2019, Mr Nolson applied under CPR 54.12(3) for an urgent oral hearing to

reconsider the decision to refuse interim relief. At that hearing, on 3 October 2019, a deputy High Court judge concluded that the court did not have jurisdiction to consider a renewal of an application for interim relief. N applied for permission to appeal.

Hickinbottom LJ held that it was clear that the deputy judge *did* have jurisdiction under CPR 3.3(5) to consider an application to set aside or vary the order refusing permission, and he was wrong to refuse jurisdiction. But on the facts, events had moved on and rendered any appeal academic, so permission to appeal was refused.

However, the Judge set out the principles which were relevant to applications, including applications for interim relief (para 18):

i) In any application to the court, even where the relevant court form does not ask the specific question, the applicant should generally indicate whether he wishes to be heard orally or whether he is content for the application to be dealt with on the papers alone. Whilst in itself that will not prevent a later application under CPR rule 3.3(5) (even by the applicant himself), it will give the other parties an opportunity to consent to the application being dealt with on the papers alone, which would prevent such a further application.

ii) Where the court refuses an application on the papers, unless both parties have consented to it being dealt with on the papers alone, the order should be endorsed with a statement of the right to make (within 7 days or such other time as the court considers appropriate) an application to have the order set aside, varied or stayed under CPR rule 3.3(5). If the parties have consented to a paper determination, then the order will be final and should be endorsed with a statement of the right to appeal to this court within 21 days.

iii) Any application for an adverse decision made on the papers to be 'reconsidered' at an oral hearing should clearly state that it is made under CPR rule 3.3(5) (or, if made under another specific provision of the rules, that it is so made).

Court's discretion in relation to costs in judicial review proceedings: investigation of causation would be disproportionate

R (Parveen) v Redbridge LBC
[2020] EWCA Civ 194 12 March 2020
Legal Action, June 2020, p.48

Ms P, a victim of domestic violence, applied to the Council for assistance with accommodation for herself and her six daughters. The Council accepted the interim housing duty under s.188 HA 1996. On 5 November 2018 provided two rooms in a mixed-sex family hostel. Facilities (such as the bathrooms) were shared with other residents.

On 12 November 2018, P brought a claim for judicial review seeking a mandatory order for the provision of suitable accommodation. Ten days later, the Council accepted that it owed P the main housing duty but decided that the hostel accommodation would satisfy that duty until more suitable accommodation could be found. It said that it operated a "first in, first out" policy for the hostel and that six households had been in occupation longer than P. These decisions were upheld on a suitability review and P appealed to the county court.

The claim for judicial review was listed for a trial on 5 March 2019 before the county court appeal could be heard. On 22 February 2019, the Council offered a four-bedroom property that P accepted on 28 February 2019.

The parties agreed that the judicial review claim had become academic and should be withdrawn. P sought her costs on the basis that she had obtained the relief she sought. However, the Council denied that there was any causal connection between the making of the claim and the provision of more suitable accommodation.

On paper submissions as to costs, a deputy High Court judge decided that the issue of why the offer had been made could only be resolved at disproportionate expense and made no order as to costs.

The Court of Appeal dismissed an appeal. It held that the fact that P had obtained the relief which she sought in the proceedings did not necessarily mean that the existence of the proceedings had caused or contributed to that result. It may be that it would have happened anyway.

The cases showed that causation was a relevant and sometimes decisive factor in the exercise of the court's discretion concerning costs. In ***RL v Croydon LBC*** [2018] EWCA Civ 726, July/August 2018 *Legal Action* 46 the Court had noted::

- that 'success' may consist not only of obtaining the relief which the claimant was seeking, but also of obtaining it *earlier* than would otherwise have been the case; and
- the investigation of matters of causation (eg, as to what had caused accommodation to be provided when it was) 'must be kept within reasonable and proportionate bounds'.

In the present case, the judge had concluded that, on the paper submissions before him, it was not possible to say what if any causal connection there was between the claim for judicial review and the offer and acceptance of the appellant's current accommodation. Males LJ said:

> "On the basis of the submissions made to the judge, it is not possible for this court to say that his conclusion in this case was not open to him. Some judges might perhaps have regarded the timing of the offer as telling, coming as it did only a short while before the hearing of the judicial review claim, and might have been sceptical about the speed with which the appellant had apparently reached the head of the queue when the average delay had previously been stated to be of the order of something more than six months. But it is impossible to say that the judge was not entitled to conclude that the position was not clear' (para 50).

He added:

> "In ***RL v Croydon***, Underhill LJ referred at [78] to "the importance to solicitors undertaking publicly funded work of recovering costs on an *inter partes* basis not only when they succeed in litigation but when the litigation is resolved on a basis that represent success". I respectfully agree that solicitors and counsel undertaking this work perform an important public service in ensuring access to justice for those faced with homelessness. The appellant's solicitors in this case demonstrated impressive dedication and commitment on her behalf. However, we must determine this appeal by reference to the principles which I have set out which do not justify overturning the judge's decision.

D Priority need

No breach of the Public Sector Equaity Duty where council failed to consider whether applicant was a disabled person for the purposes of priority need

McMahon v Watford BC; Kiefer v Hertsmere BC
[2020] EWCA Civ 497 8 April 2020
Legal Action, June 2020, p.46

Mr M and Mr K were both homeless applicants. In each case, the Council decided that they did not have a priority need, and those decisions were upheld on review. The reviewing officer in each case did not determine whether the applicant was a 'disabled' person for the purposes of section 6, Equality Act 2010.

M and K's county court appeals were both upheld, on the basis that, although the assessments of lack of vulnerability were otherwise sound, the reviewing officers had in each case failed to demonstrate compliance with the Public Sector Equality Duty in s.149 EA 2010.

The Councils' appeals to the Court of Appeal were allowed. The failure to consider whether an applicant was a 'disabled' person for the purposes of the EA 2010 was not a fatal flaw in a reviewing officer's decision on vulnerability.

The Court held that the factors that need to be considered in an assessment of vulnerability are those that are relevant to a person's ability to deal with the consequences of being homeless. What the reviewing officer must consider is whether a person is vulnerable as a result of `mental illness or handicap or physical disability'. It is difficult to see how that task can be performed without a sharp focus on the extent of the illness or disability and its effect on the person's ability to deal with the consequences of homelessness. However, Lewison LJ said:

> "Some categories of person are entitled to automatic priority: pregnant women among them. But the disabled are not. They are only entitled to priority if the disability causes them to be vulnerable" [para 73].

What matters is the substance of the assessment, not its form. Provided that a reviewing officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed. But "just as a failure to mention the PSED or a failure to tabulate each feature of it will not necessarily vitiate a vulnerability assessment, so a mere recitation of the PSED will not save such an assessment if it has failed in substance to address the relevant questions" [para 68].

The PSED is not a free-standing duty. It is not a duty to achieve a result, but a duty to have due regard to achieve the goals identified in s149. Nor was there any need to make a finding as to the precise effect of the PSED. The Court considered that it was more likely to be of relevance to questions of whether a person is homeless, became homeless intentionally or has been offered suitable accommodation.

In the words of Lewison LJ:

> "There is a 'real danger of the PSED being used as a peg on which to hang a highly technical argument that an otherwise unimpeachable vulnerability assessment should be quashed. I do not consider that that is why the PSED exists. It is not there to set technical traps for conscientious attempts by hard-

pressed reviewing officers to cover every conceivable issue. Nor is it a disciplinary stick with which to beat them" [para 89].

`Looked after, accommodated or fostered' includes private fostering arrangement even after the age of 16

Jones v Southwark LBC
Central London County Court 30 June 2020
Legal Action, Nov 2020, p.41

J was a care leaver who had been fostered under a private fostering arrangement after reaching the age of 16. When an adult, but while still under 21, he applied for assistance as a homeless person. He claimed to be in priority need under article 4 of the Homelessness (Priority Need for Accommodation) (England) Order 2002 (person under 21 who was looked after, accommodated or fostered between ages 16 and 18).

Southwark decided that the term "fostered" in the 2002 Order is defined by reference to Children Act 1989 s.24(2), which extends to private fostering only where the young person is under 16 (or is between 16 to 18 years and disabled).

J's appeal to the county court was upheld. HHJ Parfitt held that s.24 was intended to include all persons who were fostered after reaching 16 but while still under 18. The more restrictive definition of private fostering in ss.66 and 105 of the Act did not apply to s.24 and therefore, by extension, did not apply to the priority need category in the Order.

E Intentional homelessness

In considering probability of violence, LA must take into account all relevant matters up to the date of review decision. But reviewing officer correctly assessed the risk to the applicant as a result of continuing to live at the home

LB v Tower Hamlets LBC
[2020] EWCA Civ 439 24 March 2020
Legal Action, June 2020, p.47

Ms LB had been evicted because of rent arrears. The Council decided that she had become homeless intentionally. She argued on review that it had not been reasonable for her to continue to occupy the accommodation because it was probable that her continued occupation would have led to domestic violence from her estranged husband. He had previously barricaded himself into the property with their children and had to be removed by the police. LB obtained a non-molestation order against him.

According to the housing file, when LB first approached the Council in April 2016, she stated that she was in arrears with her rent owing to a change in her housing benefit. The landlord obtained a possession order in August 2016, and LB was evicted in November 2016. LB was placed in temporary accommodation. When interviewed in November 2016, LB said that she was not in fear of violence. She had been trying to negotiate a payment arrangement with the landlord.

LB obtained a second non-molestation order in January 2017, on the basis of evidence that her husband had continued to threaten and abuse her and had tried to see the children at school. A third non-molestation order was made in July 2017, following a breach of the previous order when the husband had attended the children's school.

The reviewing officer was not satisfied that LB was at risk of violence at the property and upheld the initial decision that she was intentionally homeless because of rent arrears. LB's appeal to the county court was dismissed and she appealed to the Court of Appeal.

The question for the Court of Appeal was whether, against the background of LH's eviction for rent arrears, it would not have been reasonable for her to continue to occupy the property because it was probable that occupation would lead, or would have led, to domestic violence or other violence against her and/or her children. It was argued for LB that the reviewing officer did not give enough attention to the post-eviction events and that she had assessed the reasonableness of continued occupation solely by reference to the likelihood of violence while the family were still living in the home while ignoring later events, such as distress caused to the children at school.

The appeal was dismissed. The Court of Appeal accepted that, even if a person deliberately does or omits to do something that results in the loss of her home, it would be reasonable for her to cease to occupy the home if at the time continued occupation of it would probably lead to domestic or other violence. In making an assessment of probability, a council is not confined to considering only the evidence as at the date the accommodation was lost because the assessment needs to be informed by all relevant matters, including events that may occur up to the date of the authority's review decision.

The Court held that

> "In the present case, therefore, in deciding whether or not it was reasonable for this appellant to have continued to occupy her old accommodation, instead of ceasing to do so deliberately by not paying the rent (and ignoring the non-payment of rent for this purpose), the authority had to consider whether it was probable that this would have led to violence. It could not ignore evidence from events up to the time of review, informing it as to whether violence would have been probable or not" [para 32].

The reviewing officer had made enquiries of the police about events following the eviction. She was trying to express her assessment of the risk to the Appellant *as a result of* continuing to live at the home. She was not confining herself solely to incidents that might have occurred physically *at the home*. Her decision letter showed that she was assessing the probability of further violence as a result of continued occupation in the light of the history of the case overall, including the non-molestation orders and the breaches identified and alleged.

F Discharge of duty

Council's failure to provide suitable accommodation after acceptance that current property was unsuitable was breach of duty

R (M) v Newham LBC
[2020] EWHC 327 (Admin) 19 February 2020
Legal Action, April 2020, p.45

Mr M lived with his wife and four children. One of the children had learning difficulties and other disabilities. In January 2005, the Council had accepted that it owed the family the main housing duty. For the next 13 years, the family was provided with temporary accommodation in a three-bedroom house. By the end of 2017, the Council accepted that the accommodation had become unsuitable and offered a four-bedroom house in its place. Mr M did not agree that the accommodation offered was suitable, so

he exercised his right to both accept the offer and seek a review of its suitability. His review was successful. On 27 February 2018, the reviewing officer accepted that the accommodation was not suitable.

Two years later, no suitable alternative had been provided and the family were still living in the same accommodation. M brought a claim for judicial review seeking a declaration that the Council was in breach of its duty together with a mandatory order requiring it to provide him with suitable accommodation within a period of eight weeks. The Council denied that it was in breach of duty, but argued that if it was found to be in breach, the Court should refuse relief because of delay in bringing the claim.

M's claim was allowed. Linden J found that, by its letter of 27 February 2018, the Council had admitted that it was in breach of duty, so that the only issue was that of relief. He stated that "once it is accepted or established that the accommodation currently occupied by the applicant is not suitable, the housing authority which owes the applicant a section 193(2) duty will be in breach of that duty". If the Council had been entitled to a period of grace within which to seek to meet that duty, any such period had long expired. He rejected the council's case on delay.

As to whether a mandatory order should be made, the Judge stated: '[T]he evidence as to the defendant's efforts to find suitable accommodation [is] unsatisfactory to the point at which it does not appear to be taking the claimant's case seriously'. He granted an injunction requiring the provision of suitable accommodation within 12 weeks.

Council could not revisit its acceptance of duty for want of capacity

AW v Richmond upon Thames LBC
Central London County Court 13 December 2019
Legal Action, Nov 2020, p.41

AW, who had serious mental health issues, applied as homeless with the assistance of the council's adult social services department. Despite being aware of reports by a consultant forensic psychiatrist and an independent social worker stating that he lacked capacity to make a homelessness application, the Council accepted the application and decided that it owed the main housing duty: HA 1996 s193. Later, the Council obtained its own psychiatric report, which concluded that AW lacked capacity to make a homelessness application. It purported to rescind its acceptance of the main housing duty, since, following ***R v Tower Hamlets LBC ex p Ferdous Begum*** [1993] AC 509 and ***WB v W District Council*** [2018] EWCA Civ 928, no duty was owed to a person who lacked capacity to apply. The decision was upheld on review.

AW's appeal to the county court was allowed. HHJ Baucher held that the Council had no power to withdraw acceptance of the main housing duty simply because the applicant lacked capacity. HA 1996 s193 contains a complete code as to when the main duty can be brought to an end. *Ferdous Begum* and *WB* were concerned with whether or not the duty arose in the first place, not with ending it once it had been accepted.

The Council's argument that it was entitled to rescind on the basis of a fundamental mistake of fact was rejected. Capacity had been a matter for the Council to decide. The psychiatric report subsequently obtained by the Council was entirely in accord with the previous medical evidence available to it, and therefore did not contain anything that would entitle it to rescind its acceptance of the duty. In reality, the Council was simply seeking to revisit its earlier decision because it did not like it, which it was not entitled to do: ***R (Sambotin) v Brent LBC*** [2018] EWCA Civ 1826.

G Suitabilty of accommodation

Counci's decision to accommodate seriously disabled man far away from its area despite extensive support needs could not be justified

S v LB Waltham Forest –
Central London County Court 2 November 2020
Local Government Lawyer, 12 November 2020

S applied as homeless to the Council. He was a disabled man who relied on a network of friends and family for his extensive support needs. The Council offered him accommodation in Wolverhampton. He argued that this was unsuitable, since he required assistance for his disability on a day-to-day basis. S reluctantly accepted the offer and moved to the accommodation, and requested a review. The Council upheld the offer on review, and S appealed to the county court.

In the case of ***Saleh v Waltham Forest LBC*** [2019] EWCA Civ 1944, the Court of Appeal held that where a homeless applicant had accepted the accommodation offered, an authority conducting a subsequent s.202 review was required to reconsider its decision to secure accommodation outside the local authority's area in the light of all material circumstances at the date of the review, not that of the original decision.

The Council argued that the ***Saleh*** judgment was based on the former wording of para 17.48 in the 2006 Homelessness Code of Guidance.

Allowing the appeal, HHJ Saunders held that the change in the wording of para 17.48 in the 2018 version of the Code of Guidance did not relieve a local authority of the need to consider whether suitable accommodation which was nearer to the authority's area had become available at the date of review. The authority was required to consider the situation at the date of the review, and it had fallen into error in not doing so.

The Council's decision was also unlawful because:

- The reviewing officer failed to explain how S's extensive support needs would be met given his significant disability and the fact that he was wholly dependent on his wife, who was not able to meet those needs.

- The review decision had concluded that the S's network of friends and family could continue irrespective of his move to Wolverhampton. The decision failed to appreciate that he required assistance for his disability on a day- to-day basis. It would be impossible for any family or friends to maintain that level of support at such a distance, which was more than a three–hour trip by train.

- The review officer concluded that S should have adapted to his surroundings by the date of the review decision (six months after he moved there). However, the review officer had no expertise in respect of the particular disability and the extent to which an affected person might be able to adapt to their new surroundings (particularly in the absence of a support network). No advice was sought by the reviewing officer in this regard to assist her with reaching her review decision, despite the high level of disability represented by S's condition. Moreover, it was S's evidence that he was having profound problems in carrying out day to day activities, and the reviewing officer had no reason to reject this evidence.

The judge concluded that, while there had been some attempt to deal with the issues raised, there appeared to have been a failure properly to appreciate and investigate the consequences of S's significant disability. Any remaining doubt should have been resolved in S's favour.

Council failed to take account of applicant's views as to whether she needed to move away from the area to escape violence

SM v Waltham Forest LBC
Central London County Court 23 June 2020
Legal Action, Nov 2020, p.41

SM applied as homeless as it was likely that she would be subject to domestic violence from her husband if she remained in occupation. The Council accepted that she was homeless and that the relief duty under s189B(2) HA 1996 was owed. It made her a final accommodation offer (s193A(4)) of an assured shorthold tenancy in Stoke on Trent within 24 hours of her application being made.

SM refused the offer and sought a review of the suitability of the accommodation offered. She said that she and her three daughters knew no one in Stoke; it was too far from her support network; one of her daughters was taking GCSEs; and moving to Stoke and having to change schools or college would cause further distress to her daughters, who were already having to leave their home due to domestic abuse. The Council affirmed its decision that the accommodation had been suitable.

SM's appeal to the county court was allowed. HHJ Backhouse found that the review was based on the assumption that in the interests of her safety, SM required to be accommodated in a location well away from her former home and in a place where her husband could not find her. That view had not been put to SM in the council's 'minded to' letter. While it was for the reviewing officer to balance the disruption to the family in moving to Stoke and the issue of safeguarding the family, the reviewing officer ought to have taken SM's own views into account, as she was in the best position to know whether she needed to move away from the area.

The judge also held that some sections of the review letter were expressed in striking and unusual terms and suggested disbelief of SM's account of domestic abuse, although these doubts had not been put to SM. The review decision betrayed a lack of understanding of the complexity of domestic abuse. There had also been a failure to appreciate that SM's daughter was taking GCSEs and no enquiries had been made as to whether her course would have been available in Stoke.

H Reviews and appeals

Late s.202 review decisions: whether to appeal against original or review decision

Stanley v Welwyn Hatfield B.C.
[2020] EWCA Civ 1458 6 November 2020

Ms S had applied to the Council as homeless. On 1 July 2019, the Council decided that she was intentionally homeless and she sought a review. An agreement was reached to extend the 8 weeks deadline within which the review decision had to be notified, the new deadline being 20 September 2019. The review officer sought a further extension from S's solicitors, but received no response.

On 16 September 2019 a regulation 7 "minded-to" letter was sent to the solicitors by the review officer, seeking representations by 24 September 2019. S's solicitors asked that

they should be given until the 25th and this was agreed. They delivered the submissions on 26 September 2019. Both the letter making the representations and the covering e-mail from S's solicitors acknowledged that a review decision would follow. On 1 October, S's solicitors e-mailed the review officer and stated that their representations were "without prejudice to the contention that the review decision is now out of time and would therefore be ineffective". They also formally rejected the earlier extension request.

A review decision was reached on 2 October 2019.

An appeal was lodged against the section 184 decision on 4 October 2019, followed later in October by a 'protective' appeal against the review decision. The appeals were listed to be heard together, on 15 January 2020.

It was argued for S that she wished to pursue the appeal against the section 184 decision and that she had not validated the review decision by reason of her appeal against it. HHJ Bloom struck out the section 184 appeal, on the basis that that the parties had in fact agreed an extension of the review deadline. In any event, by bringing the appeal against the review decision, she considered that S had elected to validate that decision. The substantive appeal was also dismissed.

S appealed to the Court of Appeal against the strike out of the section 184 appeal (though not against the dismissal of her appeal against the late review decision). She argued that:

- There could be no agreed extension as allowed by regulation 9 of the Homelessness (Review Procedure etc) Regulations 2018 because the parties had not agreed an actual date by which a review decision had to be notified.
- The mere bringing of an appeal against the late review decision could not be treated as validating that decision.

S's appeal was dismissed. On the first issue the Court agreed with HHJ Bloom that the parties had agreed an extension of time within which the review decision had to be notified. A specific end date to the extension was not required. There could only be one appeal, and the correct one was therefore against the review decision and not the original (section 184) decision.

The Court dealt *obiter* with the second issue of "validation". McCombe LJ rejected S's argument to the effect that a late decision was in fact no decision at all. He stated that:

> *"…as at the date of the review decision, that decision replaced the original decision of the authority and there would be no legitimate interest in doing other than addressing such legal challenge as there might be to what was decided on the review."*

The Court considered the notion that a late decision was 'invalid' or in need of validation as misconceived. If a review decision was to arrive after an appeal against the section 184 decision had been lodged, the court must decide whether that appeal is academic or still of relevance. McCombe LJ explained:

> *"…once the authority fails to notify a review decision in time, but produces a late review decision, the applicant has a choice of an appeal against the original decision or the review decision but not both. If he/she does appeal against both … the first appeal will remain an appeal before the County Court, but the review decision will not be a nullity; unless there is some distinct factor giving rise to a legitimate interest in pursuing a quashing of the first decision…, the court … will treat the composite case as an appeal against the review."*

The *obiter* parts of this judgment, concerning when appeals can or should be brought against the original decision or the late review decision, are the subject of a pending appeal in the case of ***Ngnoguem v Milton Keynes Council***. The appeal in ***Ngnoguem*** was adjourned to a date to be fixed after the decision in this case.

See also:
Karimi v Southwark LBC**,** *Legal Action*, July/Aug 2020, p.54
Khamassi v Hillingdon LBC**,** *Legal Action*, April 2020, p.45
Castro v Lambeth LBC**,** ***Legal Action***, Dec 2019/Jan 2020, p.30
Muloko v Newham LBC**,** *Legal Action* June 2018 p.35
Jobe v Lambeth LBC *Legal Action* Feb 2018, p.45
William v Wandsworth LBC [2006] EWCA Civ 535; *Legal Action* June 2006.

`Minded to' decision under reg 7 cannot be subject to outstanding enquiries about affordability

Scanlon v Lambeth LBC
County Court at Central London 14 September 2020
Legal Action, Nov 2020, p.42

S had applied to the Council for homelessness assistance. The Council decided that she had become homeless intentionally. S requested a review. The reviewing officer was satisfied that the original decision was deficient, as it failed to address the affordability of the S's last settled accommodation. However, the reviewer sent a 'minded to' letter indicating an intention to uphold the original finding of intentional homelessness subject to a further enquiry into the issue of affordability. The council then made further enquiries about affordability but, without putting its findings to S, it notified a negative review decision.

On appeal, S argued that there had been a failure to comply with reg 7(2) of the Homelessness (Review Procedure etc) Regulations 2018, since the 'minded to' letter should have been sent *after* conclusion of the fresh enquiry into affordability.

The Council argued that the issue of affordability was not central to the finding of intentional homelessness, and any default in respect of it did not affect the fairness of the procedure adopted in the review. Alternatively, it contended that if the defect were corrected and the decision taken again, it would have inevitably reached the same decision.

S's appeal was allowed. HHJ Raeside QC held that reg 7(2) was an important procedural safeguard and the failure to comply with it was an unanswerable ground of appeal.

Good reason for late s.204 appeal can include difficulties in finding legal advice
L.B Tower Hamlets v Al Ahmed
[2020] EWCA Civ 51 30 January 2020
Legal Action, March 2020, p.46

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. HHJ Hellman said: “I am satisfied that…it was reasonable for [A] to wait for Crisis to find him a legal representative because without a legal representative this appeal was never going to go anywhere.”

The Council’s appeal against that decision was upheld in the High Court. Dove J. said that there was no “good reason” for the delay in filing the appeal. Although the appeal could only be pursued on a point of law,

> *I am unable to accept the contention that it is necessary for a lawyer to be instructed before adequate grounds of appeal, sufficient to bring the appeal before the court, can 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. 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.

A appealed to the Court of Appeal. Shelter was given permission to intervene in the appeal. Shelter’s evidence outlined the practical difficulties involved in a homeless applicant issuing a notice of appeal in person; the wider difficulties and circumstances that homeless persons often have to contend with; and the difficulties that homeless applicants face in finding solicitors who are able to advise and represent them in homeless appeals, and the lack of capacity in the housing advice sector.

The Court of Appeal allowed A’s appeal. The Court accepted that the context of s.204(2A) was different from other cases where it had been held to be reasonable as a general rule to expect litigants in person to comply with relevant rules of court. Shelter’s evidence had presented “a bleak picture of the difficulties faced by homelessness applicants in bringing an appeal under s.204 of the 1996 Act without legal advice and representation, and of the difficulties they may face in finding someone to provide those services under legal aid, especially as a result of the post-LASPO shrinkage of the housing advice sector”.

Sir Stephen Richards said:

> *Everything will of course depend on the circumstances of the individual case, but it would be both surprising and unfair if difficulties of that kind could not be taken fully into account and given appropriate weight in the assessment of whether there was a good reason for failure to bring an appeal in time and, to the extent that it arises as a separate issue, for delay in applying for permission to bring an appeal out of time.*
>
> *In no way does that view give carte blanche to delay. The basic rule remains the 21 day time limit… Where an applicant relies on the fact that he was unrepresented and was seeking legal aid as a reason for non-compliance, the circumstances will need to be examined with care, including scrutiny of the diligence with which he acted in seeking legal aid.*

The county court judge clearly did not accept that A was able to identify even the substance of the two grounds of appeal that were advanced once he did have legal representation. The judge was looking, perfectly reasonably, at the practicalities of the matter. That was his assessment, and there was no proper basis for Dove J to interfere with it.

Sir Stephen added that if and in so far as Dove J was basing himself on a wider proposition that homelessness applicants were able as a general rule to draft a notice of appeal and adequate grounds of appeal without legal representation, such a proposition was mistaken.

See Jo Underwood's blog on the above decision and Shelter's intervention at https://blog.shelter.org.uk/2020/01/late-homeless-appeals-and-legal-aid-cuts-key-guidance-from-the-court-of-appeal/.

County court's appeal jurisdiction under s.204 HA 1996 extends to the extent of legal powers, including the lawfulness of contracting out arrangements

James v Hertsmere BC
[2020] EWCA Civ 489 2 April 2020
Legal Action, June 2020, p.47

Mr J applied to the Council as homeless. It decided that he was not in priority need. The decision was upheld on review. J appealed to the county court.

The Council had contracted out its homelessness review function to Residential Management Group Limited (RMG) by means of a contract signed on 23 August 2017 by the Council's chief executive. On his appeal, J alleged that the review decision in his case was of no effect because the Council's Authorised Officer had purported to agree to an extension of RMG's contract which covered the period during which the review in J's case was completed, and to do so orally. The Council had not therefore lawfully contracted out its homelessness review function. The Recorder dismissed the appeal because any deficiency in the extension of the contract had been cured by later ratification by the Chief Executive and the Leader of the Council.

J appealed to the Court of Appeal. The Council argued that the Recorder should have held that county court's jurisdiction under s.204 HA 1996 did not extend to a challenge to the lawfulness of the contracting out, which could only be pursued through judicial review.

The review function is one that may be contracted out by a local authority under Deregulation and Contracting Out Act (DCOA) 1994 s70.

The appeal was dismissed. The Court held that for the purposes of s.204, a point of law arises from a decision if it concerns or relates to the lawfulness of the decision. Both normal statutory construction and case law point to the conclusion that the county court's jurisdiction to hear appeals from s.202 review decisions is not limited to "points of housing law", but extends to the full range of issues that would otherwise be the subject of an application to the High Court for judicial review. These include challenges on grounds of procedural error, the extent of legal powers, irrationality, and inadequacy of reasons.

The court did not accept that an error of law arising from a decision could only relate to errors that are intrinsic to the making of the decision or to events during the period between the request for a review and the making of the review decision. That narrow reading conflicted with the intention of the legislation that this statutory appeal jurisdiction should be removed from the Administrative Court and entrusted to the county court.

However, if, in a small minority of cases, the county court considers that the issue raised is one of general public importance, it is open to it to transfer it to the High Court under s42 of the County Courts Act 1984.

In the present case, the review decision was lawfully made because it was commissioned during the review period of the Council's contract; and, if that was wrong, it had in any event been validly ratified by the Leader of the Council and by the Chief Executive.

Case law: Allocations

Applicant had caused overcrowding by the `deliberate act' of moving family into a flat which was bound to become too small as children got older

R (Flores) v Southwark LBC
[2020] EWHC 1279 (Admin) 20 May 2020

In July 2014, Mr F entered into a private sector tenancy of a one-bedroom flat for himself, his wife and their two young children. In February 2016, when the older child reached the age of 10, the accommodation became statutorily overcrowded for the purposes of HA 1985 s.326. F applied to the Council for an allocation of social housing.

The Council placed the family in Band 3. The allocation scheme provided that Band 1 status would be awarded to:

> *Applicants who are statutorily overcrowded as defined by Part X of the Housing Act 1985 and have not caused this statutory overcrowding by a deliberate act.*

The Council refused to move the application to Band 1. F applied for judicial review. He argued that the reference to 'a deliberate act' in the scheme was intended to apply to an act which was culpable, ie, it was an act deliberately undertaken with the intention of promoting the interests of the applicant in relation to social housing allocation.

H's claim was dismissed. Martin Spencer J held that interpretation for which F argued was incorrect and an unnecessary gloss on the wording of the scheme. The intention behind the Council's policy was that an act was 'deliberate' if an applicant had entered into a tenancy which would, in time, become statutorily overcrowded. F had entered into a tenancy for a one-bedroom flat in the knowledge that he would be occupying the flat with his partner and their two children. That was sufficient for the Council to conclude that this was a 'deliberate act' within the meaning of its scheme.

In the judge's words, the reviewing officer had "adopted a sensible and lawful approach in finding that a family of four which moves into a one-bedroomed flat where statutory overcrowding will become inevitable when the children grow older is fairly to be contrasted with a family which moves into accommodation which is appropriate for the number of family members at the time, but where the accommodation then becomes overcrowded because the family increases in size" (para 31).

A social landlord's policy of housing only members of the Orthodox Jewish community was proportionate, and the Council had 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
Supreme Court 16 October 2020
[2020] UKSC 40

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 Agudas Israel Housing Association ("AIHA") is a small housing association whose charitable objective is to provide social housing for members of the Orthodox Jewish community, in particular the Haredi community. Hackney Council has nomination rights to 50% of AIHA's one bed properties and 75% to all others. When AIHA units fall vacant, they are advertised on Hackney's choice-based letting platform, but on the basis that only members of the Orthodox Jewish community will be nominated for AIHA units. The social housing provided by AIHA makes up less than 1% of the social housing available in Hackney.

Z and her family were previously tenants of a different Hackney property that was unsuitable and unsafe. In other proceedings, the Council was ordered to re-house the family in accommodation which would provide a safe and risk-free environment. Following this, the Council moved the family to temporary accommodation and agreed that it would make Z a direct offer of the next unit of suitable three-bedroom accommodation that became available.

Z applied for judicial review. She complained that because she was not a member of the Jewish Orthodox community, she had not been offered suitable units of accommodation with AIHA which had become available. She contended that this amounted to unlawful discrimination on grounds of race and religion, on the part of both AIHA and the Council.

The Divisional Court dismissed Z's claim. Her appeal to the Court of Appeal was dismissed and she appealed to the Supreme Court.

Z's appeal was dismissed. It was common ground that the AIHA arrangements involved direct discrimination on the ground of religion. The Council and AIHA relied on the statutory exemptions in Equality Act 2010 ss158 and s.193, whereby certain actions will not be considered as unlawful direct discrimination.

Section 158 provides an exemption where positive action addresses needs or disadvantages connected to a protected characteristic in a proportionate manner.

Section 193 sets out two further exemptions. Section 193(2)(a) permits charities to restrict benefits to persons who share a protected characteristic (a) if that restriction is a proportionate means of achieving a legitimate aim; or (b) if it is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

For the purpose of s.158 and s.193(2)(a), the legitimate aims in this case included the minimisation of disadvantages connected to the Haredi community's religious identity and counteracting discrimination which they suffer, including in the private housing market, and the fulfilment of relevant needs which are particular to that community. AIHA were entitled to adopt a clear and strict rule about who could and could not apply for its social housing, to ensure that its charitable activities were focused on members of the Orthodox Jewish community. In any event, the Divisional Court had found their allocation scheme to be proportionate and lawful, and that Court's assessment of proportionality could only be set aside if it had misdirected itself or reached a decision which was demonstrably wrong. An appellate court should generally not make its own assessment of proportionality in such circumstances.

The Court found that AIHA did not contravene the `Race Directive' Council Directive (2000/43/EC) for the reason that its allocation policy differentiated on the basis of religious observance and not of race or ethnic origin.

AIHA's policy was therefore lawful and, in consequence, so was that of the Council.

Care Act duties extend to the identification of housing need, but the satisfaction of that need is a matter for the local housing authority under Part 6, HA 1996

R (Idolo) v Bromley LBC
[2020] EWHC 860 (Admin), 8 April 2020
Legal Action, June 2020, p.46

Mr I, together with his wife and child, applied to the Council for homelessness assistance. The council accepted that it owed them the main housing duty. On 26 September 2017, the duty was discharged by the grant of a tenancy of a two-bedroom flat on the eighth floor of a block. Two months later, in November 2017, Mr I suddenly became paralysed from the waist down. He could not leave his bedroom. The flat was not suitable for a wheelchair user. Assessments under the Care Act 2014 were conducted and it was accepted that he needed to move to suitable accommodation, ie, a three-bedroom ground-floor property with wheelchair accessibility.

In May 2018, Mr I applied to join the Council's housing allocation scheme. After a five-month delay, on 24 October 2018, the family were placed on the housing register in the second-highest priority band and advised how to bid. Weekly bids were made for the next three months, without success. In February 2019, in response to representations from solicitors, the family were moved to the highest priority band, which had only one applicant with a higher priority for a three-bedroom property. By early August 2019, no suitable property had been identified and Mr I applied for judicial review. Four days later, a suitable property was identified and accepted.

Mr I continued with the judicial review claim, seeking a declaration of breach of duty and compensation for the hardship he had endured from January 2018 to October 2019. He contended that the Council had failed in its obligations under CA 2014 to secure suitable accommodation for him and that, in breach of Article 8, ECHR, there had been an unlawful interference with his rights to private and family life.

The claim was dismissed. Rowena Collins Rice, sitting as a deputy High Court judge, held that the effect of s.23, CA 2014 was that an adult social services authority could not meet identified care needs by doing anything that a housing authority was required to do under the HA 1996. Part 6 of HA 1996 required the Council to have a statutory housing allocation scheme which recognised categories of housing need. That amounted to a duty, and s.23 ensured that the CA 2014 did not cut across it.

The judge stated that "[t]he solution the law appears to provide is that (re)housing needs, even if identified through the Care Act route, cannot shortcut the detailed system of balanced priorities within Housing Act schemes, but must find their proper place within those schemes". The duties under the CA 2014 required the identification of housing need, but not the satisfaction of it. The only proper response of the Council was an assessment of Mr I's priority in the allocation scheme by the housing department. The housing allocation scheme had been lawfully applied and there was no evidence that there were suitable properties available to the Council which could have been allocated to Mr I any sooner.

In the absence of any breach of the CA 2014 or the HA 1996, the claim for damages under the Human Rights Act 1998 could not be sustained. This was not a case of lack of respect for the individual and culpability on the part of a public authority, as in ***R (Bernard) v Enfield LBC*** [2002] EWHC 2282 (Admin). Here, the conduct of the council officers and the co-operation between the departments showed a degree of respect for Mr I's needs and acknowledgment of the council's duty to help him. If there had been poor practice or maladministration, those matters should more properly have been subject to the Council's complaints procedures and investigation by the appropriate ombudsman, rather than pursued by judicial review.

Hourly rate charged by council in claim for costs was justified. Counsel's participation in permission hearing was also justified.

R (Kuznetsov) v Camden LBC
[2019] EWHC 3910 (Admin) 21 November 2019
Legal Action, Sept 2020, p.46

Mr K failed in his attempt to apply for judicial review of an allocations decision (see *Legal Action*, July/August 2019, p.44). K was ordered to pay costs of £11,614.20. He applied to set aside the costs order because it had been based on a solicitor's hourly rate of £317 per hour and a brief fee for Counsel's attendance at the permission hearing of £950. He contended that the costs order "wildly exceeds the maximum possible costs that have been incurred by the London Borough of Camden, and that therefore the indemnity principle is being breached".

K's application was dismissed. The hourly rate was justified for central London work, which encompassed a great deal more than just the payroll costs of Camden's staff. It extended to the costs of maintaining not only the Council's equipment, utilities and all other office costs, but also the capital costs of the building in which the legal department was housed'. Counsel's fee for the permission hearing would also be allowed as Counsel "was an active participant at the permission hearing and succeeded in persuading the judge not to grant permission on a number of grounds".

John Gallagher
Shelter
November 2020