HOUSING CONDITIONS

non-tenant occupiers

This session deals with accommodation that has been provided to people with no settled immigration status under

- s17 Children Act 1989
- Care Act 2014
- Asylum Support provisions under Immigration and Asylum Act 1999

I am not going to deal with how to access accommodation under these Acts, or the eligibility criteria. We will look at what we can do when accommodation has been provided but it is unsatisfactory. For example:

- shared accommodation for families with children or vulnerable adults / victims of trafficking / domestic violence
- mixed sex accommodation for some vulnerable adults
- poor quality accommodation – e.g. damp, overcrowded, suffering from infestations etc.
- unlicenced HMO accommodation
- unlicenced accommodation where local licencing in force

ASYLUM SUPPORT

Out of the three types of accommodation support this session deals with, only Asylum Support is provided within a context where the statute and guidance has something to say about the quality / type of accommodation.

IAA 99 requires any accommodation provided under s95 to be:

> **"adequate for the needs of the supported person and his dependants (if any)" (s96 (1)(a)) and also requires the Secretary of State to provide for the "essential living needs of the supported person and his dependents (if any)" (s96 (1)(b))**

Any challenge – at its most basic – will be to the assertion that the accommodation or support provided are *adequate*. A failure to provide adequate accommodation or support will be a breach of s95 and s96 and will give rise to a challenge by way of judicial review.

Sections 99 and 100 of the IAA 99 provide the Secretary of State with the power to source accommodation from Local Authorities and other housing providers to meet a person's need for adequate accommodation under s95 and 96 of the Act.

It could be arguable that the Home Office has fettered its discretion by not considering or evidencing consideration of such alternative provision if the Home Office providers are unable to meet the person's needs adequately within a reasonable timeframe.

S55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK.

55 is drawn widely and covers services provided by sub-contractors of the Secretary of State (e.g. accommodation providers) (s55(1)(b)).

Reg 4 of the **Asylum Seekers (Reception Conditions) Regulations 2005** SI 2005/7 deals with the need to accommodate families together and to take into account the needs of vulnerable asylum seekers.

NB & Ors v SSHD [2021] EWHC
A challenge brought by 6 asylum seekers who had been placed in wholly inappropriate dormitory accommodation in Napier Barracks despite advice from PHE that it was not safe to do so. The court found for the Claimants on the basis that the accommodation did not comply with s96 IAA read with **Directive 2013/9/EC** which sets out "minimum standards" for reception of asylum seekers.

Tim will deal more extensively with the Napier challenge in his paper.

S17 CHILDREN ACT 1989 AND CARE ACT 2014

Because the primary purpose of these two Acts is not the provision of accommodation - the quality of accommodation is not addressed in the statutes or associated guidance.

Challenges are likely to therefore be based on the rationality and adequacy of the assessment of accommodation needs and any accommodation related services identified in the **assessment** and associated **child in need plan** or **care plan** rather than pointing at a specific accommodation related breach.

Of particular use in challenges to the child in need plan / quality of accommodation provided under s17 is s11 Children Act 2004 which requires that a Local Authority must make arrangements for ensuring that their functions are discharged "**having regard to the need to safeguard and promote the welfare of children**"

For an interpretation within a s17 case see *R (S and J) v Haringey LBC* [2016] EWHC 2692 (Admin) per Neil Cameron QC at para 46:

"Section 11 of the 2004 Act does not in terms require that the children's welfare should be paramount or even a primary consideration. However as held in Nzolameso v. City of Westminster [2015] UKSC 22 if ECHR rights are engaged, they are to be interpreted and applied consistently with international human rights standards, including Article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"), which provides:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

THE HOUSING ACT 2004

1 - Hazards

The 2004 Act introduced the Housing Health and Safety Rating System which identified 29 hazards. The HHSRS is a framework for assessing hazards and identifying how to deal with them. If a hazard is a serious and immediate risk to an occupier's health and safety then it will be categorised as a Category 1 Hazard. If a hazard is less serious or is less urgent it will be Category 2.

It is for the **Local Authority** to keep local conditions under review and to inspect for hazards when alerted to their presence and take action if appropriate.

A Local Authority must inspect if an "**official complaint**" is made to the proper officer indicating that a category 1 or 2 hazard exists. This means a complaint in writing by either a justice of the peace with jurisdiction in any part of the district **or** the parish or community council for a parish or community within the district.

The hazards include

- damp and mould growth
- excess cold
- excess heat
- crowding and space
- lighting
- domestic hygiene, sanitation and drainage
- electrical hazards

Where a Category 1 Hazard is identified the Local Authority must act, where a Category 2 Hazard is identified, the Local Authority may act.

Enforcement options include

- improvement notice
- prohibition order
- hazard awareness notice
- demolition order

R(MW) v Secretary of State for the Home Department CO/108/2020 – 7/6/21
Rolled up permission hearing – case regarded concerns about accommodation provided by SSHD for an asylum seeker and her two small children. She was given one room with sleeping and cooking facilities. Concerns were raised by health officials as to safeguards and welfare of the children.

Although the SSHD fully defended the case in their summary defence, when the Claimant's solicitors replied and provided a report from Bristol City Council Environmental health officers, the SSHD settled the case by providing suitable safe alternative accommodation and agreed to pay the claimant's costs.

The environmental health officer report found the lack of space was causing a risk within bands A/B on account of overcrowding. This constituted a category 1 hazard –

which meant the council had a duty to take action, including the service of a hazard awareness notice or a prohibition notice.

Take away points here:

- develop relationships with the Local Authority environmental health / private sector standards team
- know how to use the teams and obtain an inspection
- get clients to measure the rooms and take photographs as evidence for the inspection team
- get familiar with space and other standards in the 2004 Act
- effective two-pronged approach – use of 2004 Act plus Judicial review much more effective than either on their own
- same approach can be used in homeless suitability reviews – get the inspection report to support the review

2. HMO licencing

The 2004 Act sets out the definition of HMOs and the main provisions for the regulation of these properties. The 2006 Regulations supplemented the provisions in the 2004 Act relating to the licencing of HMOS and it is worth considering this passage from the Explanatory Memorandum to the 2006 Regulations (para 26):

> *The rationale for licensing Houses in Multiple Occupation is that they are often in poor condition and represent a much higher risk to the safety and welfare of the occupants. Poor management and the presence of unscrupulous landlords can also increase the likelihood of health and safety risks developing for tenants, even when the HMO is in an acceptable state of repair. Many HMOs also house some of* ***the most vulnerable members of society who most need protection from poor physical conditions****.*

If this is true for tenants with security of tenure and settled immigration status, then it must also be true for destitute families and vulnerable adults placed in such premises by Social Services.

The Queen (on the application of Titiloye) v LB Southwark CO/3897/2018

The Claimant (T) was a Nigerian national with two children and had been provided with a single room in a house by Southwark under section 17 of the Children Act ("CA") 1989. The occupants of the 5 rooms in the house shared a kitchen, bathroom and WC. However, Southwark did not recognise the Property as being a house in multiple occupation ("HMO") – to which the licensing and standards regime under Part 2 of the Housing Act ("HA") 2004 would apply – on the basis that the families living there, being accommodated on a temporary basis under nightly lettings, were not occupying the accommodation as their (only or main) "residence" within the meaning of section 254(2)(c) HA 2004.

T issued a claim for judicial review of Southwark's refusal to recognise the house as an HMO, contending that occupation by destitute NRPF families under section 17 CA 1989 would almost inevitably be occupation as their "only or main residence"; except possibly where occupation is for a very short period with a defined end date (see

Dacorum BC v Bucknall [2017] EWHC 2094 (QB); [2017] H.L.R. 40, in the context of temporary accommodation for homelessness families under Part 7 HA 1996).

2 days before the Defendant's acknowledgement of service was due, T and her children were moved to alternative, self-contained accommodation. Southwark suggested that the claim had become academic and should be withdrawn. However, T proposed to continue with the claim on the basis that the evidence appeared to show a systemic problem. Specifically, a FOI response showed that, as at 4 September 2018:

(a) the Defendant was accommodating 182 families under section 17 CA 1989;
(b) of those, 153 were in accommodation where they shared a toilet, bathroom and/or cooking facilities (the average time spent there being 20 months);
(c) of those, 63 were accommodated within Southwark (such that the Defendant would be responsible for issues of HMO licensing); and
(d) of those, fewer than 10 were licensed as a HMO.

Southwark agreed to settle the claim, not only agreeing to recognise the Property as an HMO, but also agreeing the following recitals:

> *AND UPON the Defendant accepting that occupation of living accommodation by families accommodated under section 17 of the Children Act 1989 is capable of constituting occupation as their "residence" within the meaning of section 254(2)(c) of the Housing Act ("HA") 2004, even if the accommodation is secured on a nightly-let basis*
>
> *AND UPON the Defendant accepting, accordingly, that where such families are accommodated in such accommodation, without an identified end date, on the basis that they have no other suitable accommodation available to them, they will generally be occupying it as their "only or main residence" within the meaning of section 254(2)(c)*

At the time of the case Southwark operated an additional licensing scheme under section 56 HA 2004 requiring that all HMO's in the borough be licensed, regardless of whether they met the criteria for mandatory licensing under section 61. Southwark also had a policy which imposed extra conditions in HMOs.

Take away points here:

- If your client is sharing facilities – do the premises meet the statutory definition of an HMO?
- If so, are the premises subject to mandatory licencing, either because they meet the statutory criteria or because the Local Authority has adopted an additional licencing scheme for HMOs
- Is the property licenced (you can normally check online)
- Does it meet the criteria to have a licence (there are minimum size and other criteria)
- Is there a local policy giving additional criteria for the licencing / approval of HMOs
- Get your client to measure the room/s and obtain detailed instructions about how the HMO is occupied, managed etc.
- Use the Land Registry to identify ownership

- Use FOI requests to see how widespread the issue is

Also see case v **Clearspring Ready Homes** found guilty of letting an HMO without a licence at Newport Magistrates Court on 21/10/21. Three charges – managing an HMO without a licence, failing to produce documents as required under s235 Housing Act 2004 and failure to ensure firefighting equipment and fire alarms were maintained in good working order. In total, Clearspring were fined £60,586.25.

THE ENVIRONMENTAL PROTECTION ACT 1990

The people we are dealing with in this session are not tenants. They have no contract to enforce and so cannot use the normal statutory or common law provisions to enforce standards.

However the EPA 90 can be used by occupiers (regardless of their security of tenure) and Local Authorities to force landlords / providers to carry out necessary works and improve the condition of the property that they own or manage.

Key concepts
There must be a "**statutory nuisance**" for the EPA to apply. The definitions are at s79. The one most likely to apply for the purposes of this session is "**any premises in such a state as to be prejudicial to health or a nuisance**".

Premises

all land and vessels.

in such a state

where the state of the premises *as a whole is* such as to be prejudicial to health or a nuisance. It may arise from a single item or an accumulation. It is the effect of the defects which give rise to the statutory nuisance rather than the fault itself.

prejudicial to health

injurious or likely to cause injury to health" so both actual and potential ill health are covered. The requirement to be "prejudicial to health" will be satisfied simply where the state of the premises is such that would cause a well person to become ill or the health of a sick person to deteriorate further.

Standard examples of those premises which are "prejudicial to health" include those with dampness, condensation, mould growth or infestations but not those who lack sound insulation.

or a nuisance

either

a. A public nuisance at common law
    i. the act or omission affects adversely the comfort or quality of life of the public generally or a class of citizens
b. A private nuisance at common law.
    i. substantial interference by the owner or occupier of a property with the use and enjoyment of the neighbouring property

Remedies

Local Authority (s80)

- can serve an Abatement Notice (s80) on the owner / person responsible for the nuisance to abate or prevent the nuisance arising or recurring.
- can also bring an action in the High Court
- can use emergency procedures including a nine day notice procedure after which the Local Authority can carry out works and recover costs.

Person Aggrieved (s82)
Where the Local Authority is not taking action, a person aggrieved (e.g. an occupier) can bring a private prosecution in the Magistrates Court and obtain a Nuisance Order, Compensation and Costs.

There is legal help for preparatory work but no legal aid for the actual litigation process in the Magistrates Court or for enforcement. CFAs may cover the gap, but remember the burden of proof is to the *criminal* standard.

Section 82 EPA 1990 works as follows:

a. The occupier sends a letter to the landlord giving notice that the statutory notice exists and giving the landlord 21 days to abate it;
b. When the 21 days has expired and the nuisance has not been remedied the occupier then asks the magistrates' court to issue a summons by providing the court officer with an information form and supporting documents
c. The court sets a hearing date and returns the summons for service on the landlord
d. If the Landlord pleads guilty a nuisance order is made. If there is a dispute on compensation and costs the hearing of that issue will be adjourned
e. If the Landlord enters a not guilty plea the matter goes to trial.
f. If successful the proceedings will produce a nuisance order under s 82(2) EPA 1990, breach of which constitutes a further criminal offence.
g. Such orders are admissible in other civil proceedings.

HUMAN RIGHTS LAW – BREACHES OF ARTICLES 8 AND 14 ECHR

It may be possible to run arguments based on Articles 8 and 14 ECHR. In particular where it is possible to identify a situation in which one group of people are denied the protection afforded to another group of people, discrimination may be an issue.

For example, the 2003 Homelessness Suitability Order prevents homeless families with children from being placed in accommodation with shared facilities. The Code of Guidance to the 1996 Act recognises in terms that shared facilities with strangers is

particularly detrimental to children's health and development. For eligible families it is only allowed in an emergency and then only for a maximum of 6 weeks.

If children within eligible families (i.e. families with the right sort of immigration status) are recognised as being particularly vulnerable to harm in bed & breakfast type accommodation – then why are the children of, for example, Zambrano carers or families pursuing human rights immigration claims, not also entitled to the same protection?

Similar arguments might arise where the Local Authority has a policy on minimum standards in HMOs but does not enforce them in accommodation provided to no recourse to public funds families.

Article 8 grants the right to respect for private and family life:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary etc…

Article 14 prohibits discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or ***other status****.*

The argument might go like this:

- Differences in treatment relating to benefits granted by the state which "demonstrate respect for family life" will fall within the ambit of Article 8.
- The provision of accommodation by local authorities to destitute NRPF families under section 17 CA 1989 / or by the Home Office to destitute asylum seekers under s95 IAA clearly falls within the ambit of Article 8 ECHR, for the purposes of Article 14 ECHR.
- The term "other status" is to be construed broadly.
- Once differential treatment is demonstrated, it is for the public authority to demonstrate that this is justified, i.e. that it is a proportionate means of achieving a legitimate aim.

Also in relation to discrimination, Article 2(2) UNCRC provides that:

> *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*

THE PSED

S149 of the Equality Act 2010 may be used where accommodation is being provided under a public function and where the provision of adequate accommodation (taking into account the occupier's disabilities / sex / other protected characteristic) would remove or minimise disadvantages suffered by persons who share a relevant protected characteristic. Or, for example, where the body has simply provided what it provides to everyone else (e.g. bed & breakfast accommodation), and not made any attempts to meet the need of a person with a protected characteristic.

OTHER IDEAS / POINTS FOR DISCUSSION

- Planning Law / Enforcement
- Complaints / Ombudsman
- Joint working with Local Authorities

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