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General Editor
Peter Hubbard, Solicitor Housing specialist and partner at Anthony Collins Solicitors, Birmingham.

Consultant Editor
Ed Mitchell, Solicitor in the Office of the Counsel General to the National Assembly for Wales and General Editor of Social Care Law Today (Arden Davies Publishing)

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HOMELESSNESS & ALLOCATIONS

MEANING OF HOMELESSNESS

Fletcher v Brent LBC – it should not be assumed that an applicant has a licence to occupy a dwelling without investigation of the terms of any supposed licence

This case shows how homelessness decision making can be fatally flawed if decision makers (which included the County Court on appeal in this case) have an insufficient knowledge of landlord and tenant law.

The issue in this case was a short one, namely whether the applicant was homeless. He had been a joint secure tenant along with his wife. His wife gave a unilateral notice to quit. This had the effect of terminating the joint tenancy (see, for example, the decision of the Law Lords in *Harrow LBC v Qazi* [2004] 1 AC 983).

The claimant's application for assistance under the homelessness legislation was rejected on the basis that the wife's notice to quit was not effective to terminate the joint tenancy. According to the council concerned, this meant that for the purposes of the definition of "homeless" in s.175 of the HA 96 there was accommodation which the applicant was "entitled to occupy by virtue of an interest in it", namely a subsisting joint tenancy. This decision was upheld on review and on an appeal on a point of law to the County Court. The Court of Appeal allowed the applicant's appeal against the County Court's decision. The Court referred to the well-established case law that a notice to quit given unilaterally by one joint tenant does operate to terminate the tenancy regardless of the other joint tenant's wishes. Such a notice renders the remaining joint tenant, under domestic law, a trespasser with no legal right to remain in the property in question. The County Court's failure to appreciate this was an error of law.

This applicant appeared to have stayed at the premises in question, or at least to have stored his belongings there, following the giving of the notice to quit. On this basis the County Court concluded that it appeared that the applicant, even if he was no longer a tenant, had an implied licence to occupy the dwelling house concerned and, as a result, could not be homeless under s.175 HA 96 (s.175(1)(b) HA 96 provides that a person is not homeless if there is accommodation in respect of which he has an express or implied licence to occupy). This, according to the Court of Appeal, was an unsatisfactory approach to take. The council's case had never been that the applicant had a licence and, as a result, there had been no investigation of the terms of any supposed licence. For example, if there was a licence it might only have been a licence to store possessions and therefore not sufficient to render the applicant non-homeless for HA 96 purposes. The Court of Appeal stressed that, generally, the nature of an applicant's supposed interest in property should be determined before a decision is made as to whether or not she is homeless by virtue of having no right to occupy a dwelling. The case was remitted back to the local authority concerned for its review officer to reconsider whether the applicant had an express or implied licence to occupy the dwelling in question.

The Court of Appeal gave its unanimous decision in Fletcher v Brent LBC on 7 July 2006: [2006] EWCA Civ 960. The Court was comprised of Mummery and Rix LJJ and Peter Smith J

HOMELESSNESS: LOCAL CONNECTION

Royal Borough of Kensington and Chelsea v Danesh – an applicant's perception of the risk of violence in the area of another authority is not directly relevant to the question of whether his/her application can be referred there

THE FACTS

Mr D and his family arrived in the UK in 2003 and claimed asylum. Under the National Asylum Support Service's (NASS) 'dispersal' policy, the family were accommodated in Swansea in West Wales.

Mr D did not have a pleasant time in Swansea. Whilst there, he reported a number of instances of verbal abuse, some racist in nature, to his NASS support worker. In addition, he also reported two incidents of violence. On one occasion, he was pushed from behind by an unknown assailant, fell to the ground and was knocked unconscious. On the second occasion, he was 'mugged' in Swansea city centre.

In October 2004, Mr D was granted indefinite leave to remain in the UK. Accordingly, the bar on his accessing mainstream social welfare services, that had existed whilst he was an asylum seeker, was lifted. Following the 'cancellation' of his NASS-provided Swansea accommodation, Mr D decided that he did not wish to remain in that area and instead in November 2004 applied to the Royal Borough of Kensington and Chelsea ("the Council") for accommodation under the homelessness legislation.

The Council decided that Mr D was owed the main housing duty (he was found to be non-intentionally homeless and in priority need because of his dependent children). However, they went on to conclude that they were entitled to refer him to Swansea County Council on the basis that he had a "local connection" with the area of that authority.

The finding that Mr D had a local connection with Swansea was not in dispute in these proceedings. His argument was that the council were prevented from referring him to Swansea because s.198(2A) HA 96 applied. That provision states that the conditions for referral are not met where:

> "(a) the applicant...has suffered violence...in the district of [the authority to whom it is proposed to refer him]; and
>
> (b) it is probable that the return of that victim will lead to further violence of a similar kind against him."

For this purpose, "violence" includes "threats of violence from another person which are likely to be carried out": s.198(3).

A case worker rejected Mr D's argument. On review, the review officer also disagreed with Mr D. The review officer reasoned that:

(i) 'violence' refers to physical violence and does not include verbal abuse without the threat of violence;

(ii) the two incidents of physical violence inflicted upon Mr D were random incidents unfortunately prevalent in inner city areas. They were not perpetrated because Mr D was identified by his assailants as an asylum seeker;

(iii) therefore, it was not probable that Mr D would suffer further acts of violence of a 'similar kind' if he were to return to Swansea. Accordingly, there was no bar to the application of the referral provisions of the HA 96 and his application would be referred to Swansea (who agreed that the conditions for referral were met).

Mr D appealed to the County Court arguing that the Council had erred in law. The County Court allowed his appeal. It held that: 'violence' could include verbal abuse that was not accompanied by, or likely to lead to, physical attacks; the review officer had paid insufficient regard to Mr D's perception of the risks of him, or his family, being attacked if they returned to Swansea; and that it had been 'irrational' for the review officer to have concluded that it was unlikely that Mr D would be attacked again if he returned to Swansea. The Council appealed to the Court of Appeal.

THE DECISION

The Court of Appeal allowed the appeal. Its key findings were as follows:

(i) the County Court had misconstrued the meaning of 'violence' under the HA 96. The Court of Appeal held that it is limited to "physical violence". Accordingly, in order for s.198 to apply, it had to be likely that, if Mr D were to return to Swansea, he would suffer physical violence (or threats of physical violence) similar to that already suffered there;

(ii) s.198(2A) calls for an objective consideration of what has happened to an applicant and what is likely to happen. The County Court erred by taking into account a subjective matter (Mr D's perception of the risk of violence) when applying s.198. On this point, Neuberger LJ said:

> "the terms of s.198 are objective in nature: whether violence occurred, whether a threat of violence had occurred, whether either is likely to occur, and whether it is probable that such acts or threats may occur. Subjective concepts do not seem involved in that section. Furthermore, it seems somewhat difficult for a housing officer to assess the genuineness of an applicant's fears and it is, further, questionable, at least to my mind, whether a housing authority's duty under section 198 should be influenced, indeed determined, by the subjective feelings of an applicant about the likelihood of violence."

The Court of Appeal set aside the decision of the County Court and restored that of the Council.

COMMENT

It seems that the applicant, for a quite separate reason to that discussed above, has been unfortunate.

In issue 10 we considered the decision of the Law Lords in *Al-Ameri v the Royal Borough of Kensington and Chelsea* [2004] UKHL 4. In that case their Lordships held that an applicant for homelessness assistance does not have a local connection with an area merely because s/he was accommodated there under arrangements made by the National Asylum Support Service. This finding was made on the basis that an asylum seeker effectively has no choice as to whether or not to accept NASS accommodation. At the time the applicant in this case applied to Kensington and Chelsea (November 2004) the *Al-Ameri* decision remained good law.

There was a legislative response to the *Al Ameri* decision. S.11 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 amended s.198 of the Housing Act 1996 by inserting a new sub-section (6) which provides that "a person has a local connection with the district of a local housing authority if he was (at any time) provided with accommodation in that district under s.95 of the Immigration and Asylum Act 1999 (support for asylum seekers)". However, this amendment did not come into force until 4 January 2005 (see S.I. 2004/2999). Coincidentally (perhaps) it was on 4 January 2005 that Kensington and Chelsea decided that Mr D had a local connection with Swansea. If they had made that decision the day before, they would have been bound by *Al Ameri* to have concluded that Mr D had no local connection with Swansea and, therefore, would have been unable to refer him to Swansea.

The Court of Appeal gave its decision in the Royal Borough of Kensington and Chelsea v Danesh on 5 October 2006: [2006] EWCA Civ 1404. The Court was comprised of Mummery, Jacob and Neuberger LJJ.

HOMELESSNESS & ALLOCATIONS: CASES IN BRIEF

Lin v Barnet LBC – Court of Appeal may consider whether Barnet's allocation scheme gives the required reasonable preference to homeless families

In issue 33, we considered the case of *Ling Lin v Barnet LBC; Hassan v Barnet LBC* [2006] EWHC 1041 (Admin.). That case was a judicial review claim in which it was alleged that, on a number of grounds, Barnet LBC's housing allocation scheme was unlawful. The High Court held that in one respect the scheme was unlawful – the award of 100 points to transfer applicants (who are not a statutory reasonable preference category) meant that the scheme failed to give the required reasonable preference to the statutory groups. All the claimants' other arguments were rejected.

The claimants in that case have been given permission to appeal to the Court of Appeal against the High Court's finding that the grant of only 10 points to homeless families is within the law. May LJ said there was a "proper argument" that "a mere 10 points for families accommodated under [the homelessness legislation] does not amount to a reasonable preference". He adjourned the matter in order for Barnet to make representations on whether permission to appeal should be granted, but for the appeal to follow at once if permission is granted.

The Court of Appeal (May LJ) gave its decision in *Ling Lin v Barnet LBC; Hassan v Barnet LB C*on 24 August 2006: [2006] EWCA Civ 1217. This decision, being a judgment given on an application for permission, may not be cited in court and is offered here for information only.

Watchman v Ipswich BC – Court of Appeal to consider whether mortgage defaulters can be considered intentionally homeless

The facts

In March 2004, Mr W, with the aid of a mortgage, purchased a house for himself, his wife and their five children to live in. It was later stated in court that the mortgage repayments were such that they could "just about manage".

In August 2004, Mr W lost his job. He defaulted on his mortgage and eventually his home was re-possessed by the mortgage company. He applied for accommodation as a homeless person to his local authority, Ipswich BC ("the Council").

The Council decided that, whilst Mr W was in priority need (dependent children), they did not owe him the main housing duty because he was intentionally homeless. The Council's Review Officer decided that there had never been a realistic prospect of Mr W keeping up with his mortgage repayments and that, sooner or later, he would default. That came sooner, rather than later, because of Mr W's unemployment. In the words of s.191 of the Housing Act 1996, the Review Officer concluded that Mr W had deliberately done, or failed to do something, in consequence of which he ceased to occupy accommodation that was available for his occupation (that is the accommodation occupied before the mortgage was taken out). This decision was upheld by the County Court. Mr W applied to the Court of Appeal for permission to appeal against the County Court's decision.

The decision

Auld LJ granted permission to appeal, commenting as follows:

> "I feel unease about the suggestion that it is implicit in s.191(1) that a person who makes an unwise commitment, which he might or might not have been able to meet, should be capable of being found intentionally homeless if some later event turns the possibility or probability of homelessness at some time into actuality at the time of that event…It seems to me that the operation of the statutory provision…raise an important point of principle where mortgage commitments are undertaken which, for one reason or another, subsequently cannot be met."

The Court of Appeal (Auld LJ) gave its decision in Watchman v Ipswich BC on 26 September 2006: [2006] EWCA Civ 1376. This decision, being a judgment given on an application for permission, may not be cited in court and is offered here for information only.

Bennett v Croydon LBC – whether settled intervening accommodation existed

Mrs B was a Lambeth Council secure tenant. She rented a 2 bedroom flat in which she lived with her husband and 2 children. Her mother, however, was the tenant of a 3 bedroom house owned by Croydon LBC. In March 2003, Mrs B's mother became unwell and Mrs B moved in with her to care for her. Mrs B's husband remained living in the Lambeth flat with the children.

In February 2004, the mother died. Mrs B then gave notice to quit in respect of the Lambeth flat because she thought that would lead to her succeeding to the tenancy of her mother's Croydon house. She was mistaken, however. She had not resided with her mother for the year preceding her death and so did not have the right to succeed to her mother's tenancy. Things then got even worse for Mrs B and her family. Lambeth LBC obtained a possession order in respect of Mrs B's flat on the basis that, following the giving of the notice to quit, Mrs B and her husband were trespassers in the flat with no lawful right to remain there.

Mrs B applied to Croydon LBC for assistance under the homelessness legislation. A case worker decided that she was not owed the main housing duty because she was intentionally homeless. She had deliberately done something – served notice to quit in respect of the Lambeth flat – which caused accommodation to cease to be available to her. The case worker also addressed the 'intervening settled accommodation' point often raised in intentional homelessness cases. She concluded that there was no intervening accommodation such as to break the chain of causation. This decision was upheld by a Review Officer. The Review Officer, however, failed to address the intervening settled accommodation point. Mrs B appealed to the County Court on a point of law.

Before the County Court, Mrs B's counsel argued that the Review Officer had erred in law by failing to address the settled intervening accommodation point. The County Court rejected this argument on the basis that the Review Officer would have seen the matter had been considered by the case worker and that it was implicit in the Review Officer's decision that the point had been considered by her. Mrs B applied to the Court of Appeal for permission to appeal to it.

The decision

The Court of Appeal rejected the application. Tuckey LJ held as follows:

> "I think it is necessary to consider the relevance of settled accommodation to the facts of this case given the finding that the applicant took no steps to give up her flat where, until very recently at least, her family had been living and which was still available for her occupation, until after her mother died. She intentionally gave up this flat, so the question became: was it this act which caused her to become homeless. The answer to this question must, I think, inevitably, have been "yes" – it was the proximate and direct cause of her being homeless. On this analysis, I do not think the question of settled accommodation comes into this case at all. If she had given up the flat in 2003 when she moved to care for her mother, it might have done. There the question would have been whether the causative effect of that earlier deliberate act had been spent because she had obtained settled accommodation and so only the loss of the latter accommodation would be relevant to the cause of her homelessness, but that is not the case. It can hardly be claimed that the applicant obtained settled accommodation after she gave up her flat in the very short time before it was made clear to her that she had no right to remain in the house."

The application for permission to appeal was, accordingly, refused. The settled intervening accommodation point was irrelevant and so the Review Officer could not be faulted for having failed to mention it.

The Court of Appeal (Mummery and Tuckey LJJ) gave its decision in Bennett v Croydon LBC on 7 September 2006: [2006] EWCA Civ 1292. This decision, being a judgment given on an application for permission, may not be cited in court and is offered here for information only.

MALADMINISTRATION

Ombudsman complaint 04/C/18012 (Nottingham City Council) – maladministration because a council failed to inform a tenant fleeing harassment that she may have rights under the homelessness legislation

KEY POINTS

The Local Government Ombudsman found maladministration because a council

- Failed to develop a strategy to tackle a tenant's housing crisis
- Failed to inform the tenant that she might be statutorily homeless and hence possess certain rights under the homelessness legislation
- Adopted a blanket policy as regards the treatment of rent arrears owed by a tenant seeking a move

THE FACTS

In July 2003, Ms P, who was a tenant of Nottingham City Council ("the Council"), sought their assistance because she and her three primary school-age children were the victims of a campaign of harassment. The Council accepted her claims and moved her to a property some two and a half miles away.

The second property was what is known as a 'decant property': a house which is normally used as temporary alternative accommodation whilst works are being carried out on a tenant's usual home. Where a tenant was 'decanted', s/he would retain the tenancy on the previous dwelling because s/he would be expected to move back into it once works were complete. Ms P was treated in this fashion and, accordingly, she retained her tenancy on the home that she had left due to harassment.

Ms P was not able to relocate all her belongings to the decant house. Her previous home was broken into (it had not been boarded-up) and a number of her personal possessions were stolen.

Ms P did not view the decant house as a permanent solution to her housing needs. She did not like the area, she thought the house was in a poor state of repair and her children had not settled at the local primary school. As a result, she asked the Council for a move in February 2004.

The Council treated Ms P's request to move in the same way as any application for a transfer. This meant that outstanding rent arrears on her first property became a stumbling block. At the time of Ms P's move from the first property, her rent account was some £900 in arrears. However, her full current rent was being met by housing benefit and the arrears were being paid off by direct deductions from her welfare benefits income. However, due to an error the deductions ceased to arrive at her rent account following her move to the decant property and, as a result, outstanding arrears appeared to be rising. The rent arrears picture had these consequences:

(i) under the Council's transfer policy, an application for transfer made by a tenant with arrears would only go before the 'Housing Management Panel' with the consent of an Assistant Housing Director. The rising arrears (as a result of the deductions ceasing to be made) meant that housing officials decided not to even refer Ms P's application to the Assistant Director;

(ii) it appears that it was not until sometime in the summer of 2004 (once the deductions had been restored) that Assistant Director consent was sought. This was refused but no documentary evidence was retained to explain the reason for the refusal other than a note that it was 'in accordance with procedure' which the Ombudsman subsequently took to mean that the Assistant Director had refused to pass the transfer application to panel because of the outstanding rent arrears; and

(iii) in November 2004, the Assistant Director re-considered the matter and on this occasion agreed to pass the application to panel.

The panel considered, and granted, Ms P's transfer application in February 2005. She moved to a new property in June 2005.

Ms P, with the assistance of Shelter who had been negotiating with the Council on her behalf throughout, made a complaint of maladministration to the Local Government Ombudsman.

THE DECISION

The Ombudsman agreed that the Council were guilty of maladministration. Her key findings were as follows:

(i) there was no evidence that the Council had formulated any strategy to find a long term solution to the housing crisis faced by Ms P in mid-2003, whether by taking enforcement action against those harassing her or by beginning the search for suitable long term alternative accommodation. This was maladministration;

(ii) when she first approached them, the Council failed to address whether Ms P might have rights under the homeless legislation, and to explain those rights to her. This was maladministration. She may well have been homeless within the meaning of the Housing Act 1996 (for example it appeared likely that she did not have accommodation which it was reasonable for her to occupy). If she had been homeless, she would have been entitled to accommodation which (in the Council's opinion) was 'suitable' and would also have had legal rights of appeal against various decisions made about her under the homelessness legislation;

(iii) the Council pointed out that the official Homelessness Code of Guidance says that councils can seek to find non-formal ways of meeting the housing needs of a homeless person (that is without following the formal procedure set out in the homelessness legislation contained in Part VII of the Housing Act 1996). The Council was missing the point here. Whilst there is no objection to a council seeking informally to resolve a homelessness crisis, it must act above board. The individual must be provided with the necessary information so that s/he can make an informed choice as to whether or not the formal route should be taken. In this case, Ms P was not given that information;

(iv) the Council had erred by initially treating Ms P's rent arrears as an impediment to her transfer application. They were entirely historic arrears that were not relevant to the reasons for her facing a housing crisis in mid-2003. In any event, Ms P had always kept to the agreement to pay off the arrears that had been in place for many years. The Ombudsman said that "having agreed to recoup the arrears via deductions from Ms P's benefit the Council's insistence on taking account of the arrears was unfair and was maladministration";

(v) the Ombudsman was bemused by the inefficient use by the Council of their housing stock. She said that "without the efforts of Shelter on her behalf, it seems quite possible that Ms P would have remained in indefinite occupation of one property, while remaining the tenant of another. This is an inefficient use of the housing stock. The Council's approach made no sense from any point of view";

(vi) however, the Ombudsman rejected the complaint that the council's failure to board up Ms P's original home meant the blame for its subsequent burglary could be laid at their door: "the main responsibility to protect her property lay with Ms Porter".

The council agreed with the Ombudsman's recommendation that they pay her £2,000 compensation in respect of the injustice she had suffered.

The Local Government Ombudsman for England (Anne Seex) gave her decision on complaint no. 04/C/18012 (Nottingham City Council) on 12 July 2006.

MALADMINISTRATION

Ombudsman complaint 05/B/8409 (East Dorset DC) – local authority responsible for the maladministration of its housing association contractor

In this unusually critical decision, the Ombudsman reveals an almost wholesale departure from the law on the part of a housing association that carried out homelessness functions on behalf of a local authority.

THE FACTS

In 2000 Mr W's marriage broke down and he went to live with his elderly parents in their bungalow, where he slept on the lounge floor. He found that this exacerbated his severe asthma. In March 2003 he approached East Dorset Housing Association and applied for re-housing.

At this point, it should be pointed out that the relevant local authority, East Dorset District Council, had contracted out virtually all its functions under the homelessness legislation (contained in Part VII of the Housing Act 1996 to the Housing Association), as well as most of its functions of allocating available social housing under Part VI of that Act. In other words, the Association was the first point of call in East Dorset for people in housing need.

KEY POINTS

The Ombudsman found maladministration because:

- a council failed to retain documentation evidencing a delegation of its homelessness functions to a housing association
- the delegation arrangements did not include arrangements for dealing with complaints about the association's performance
- a council failed to appreciate that it was responsible for the maladministration of the association
- a housing association routinely failed to inform an applicant of decisions made on his application (serious maladministration)

In response to his March 2003 contact, an officer of the Association orally informed Mr W that he might be considered statutorily homeless (presumably on the basis that he had no accommodation that it was reasonable for him to occupy). However, the Association decided a few days later that he was not homeless. The Association failed to inform Mr W of that decision. Instead, they wrote to him to say that he was now on the "Common Housing Register", that is the list of persons awaiting an allocation of housing.

In late April 2003, Mr W's mother wrote to the Association to inform them that her son had been asked to leave her bungalow and was now staying with friends. In response to this, the Association decided that he was in fact statutorily homeless. Again, however, they failed to inform Mr W of this decision. Instead, they allotted him another 20 points under the housing allocation scheme on account of his homeless status. A further two decisions were made as to Mr W's homelessness status: yet again he was not informed of either of these. Over the same period a number of adjustments were made to Mr W's points score under the allocation scheme operated by the Association on behalf of the East Dorset Council. Some of these adjustments were difficult to understand because they were not made in response to a change in Mr W's housing situation.

Mr W was offered his first property under the allocation scheme in May 2004 (in the meantime he had been staying with various friends). He rejected this offer because it was outside his preferred areas. In December 2004 the Association offered him a two bedroom bungalow (by this time Mr W had included his adult son, who had mental health problems, within his application). Mr W accepted this offer and in January 2005 he moved in. Mr W, with the assistance of Shelter, complained to the Association about their treatment of his application for housing. The Association rejected his complaint in its entirety. Mr W then complained to the Local Government Ombudsman.

THE DECISION

The Ombudsman agreed with Mr W that the East Dorset Council were, through their agents the Housing Association, guilty of maladministration. In a decision that is particularly critical of the Association's cavalier attitude towards the legal rights of persons in housing need, the key Ombudsman's key findings were as follows:

(i) neither the Housing Association nor the council had been able to find all the documentation under which the Association had been authorised to act on behalf of the Council. Of this the Ombudsman said: "the Council's decision when to authorise the Housing Association to make decisions about homelessness matters was a very important delegation. So it is entirely unsatisfactory that the Council has been unable to find the relevant documentation";

(ii) there had been confusion within the council as to whether they were responsible for the maladministrative acts of their agents, the Housing Association. As the Ombudsman has made clear in a number of other decisions, councils remain responsible for the maladministration of their delegates. In this case, the Ombudsman described the position as follows:

> "by delegating or out-sourcing its statutory duties in this way, the Council cannot abrogate responsibility for fault by its agent. That agent acts on behalf of the Council and so its administrative actions fall within my jurisdiction. And any maladministration causing injustice to a complainant will require remedy by the Council itself. For this reason alone, councils delegating their functions must ensure that the effectiveness of the delegation is routinely monitored; and that any complaint about the operation of the delegation is properly investigated and, if necessary, reasonably resolved";

(iii) the Housing Association's failure to inform Mr W of any of the homelessness decisions made about him, or his right to challenge those decisions, was described as "serious maladministration" and its record keeping in respect of homelessness decisions as "wholly inadequate". The Ombudsman went on to say that:

> "being homeless or threatened with homelessness is one of the most serious situations a person can face. It therefore follows that dealing with homelessness is one of the most significant responsibilities councils have. It is vitally important that people who might be homeless or facing homelessness know of councils' decisions about their status and their right to challenge those decisions. In my experience, most councils, when writing to applicants with homelessness decisions, automatically include in the letter an explanation of the review and appeal rights given to applicants by law";

(iv) as well as describing the awarding of allocation points to Mr W as "chaotic", the Ombudsman was again strongly critical of the Association's failure to inform Mr W of the points awarded to him under the housing allocation scheme. The fact that a number of meetings were held with Mr W to discuss his points did not fully mitigate this failure – he should have been given an explanation in writing on each occasion on which his points total was changed;

(v) the Association agreed that it should not have written to Mr W soon after placing him on the Housing Register saying that he could expect an offer in a "reasonable time". That was too vague an expression to use and it had unfairly heightened Mr W's expectation that an offer was imminent when it was not;

(vi) the Ombudsman also expressed "concern" that decisions as to the medical points allotted to housing applicants were taken without any qualified medical input;

(vii) the council was guilty of stand alone maladministration (that is not via its agent) for failing to ensure that the Association made it clear to applicants that they could request reviews of decisions as to the points awarded under the allocation scheme

(viii) the Ombudsman was strongly critical of the Council for failing to address complaints handling in the agreement by which it contracted out to the Association its functions in relation to homelessness and allocations:

> "When the Council appointed the Housing Association to deal with homelessness and housing register matters, it could reasonably have anticipated that from time to time members of the public would complain about housing and homelessness matters. It is important that there are clear procedures for dealing with complaints. So I consider the Council was at fault in not making any provision about how to deal with complaints in its agreements with the Housing Association. The Council is also at fault for not ensuring clear information was available to service users about how to complain. The Housing Association's leaflet and written advice to Mr W both indicated that complaints could go to the Housing Ombudsman Service [for Registered Social Landlords]. But that information was incomplete and misleading because the Housing Ombudsman Service cannot investigate complaints about matters that are councils' responsibilities. I welcome the steps the Council is taking to improve information for housing applicants. My officers are happy to give advice to councils about complaint-handling. But the Council should have been aware of its responsibilities for complaints about such important local authority functions and the failure to ensure there were proper procedures here was maladministration."

The Ombudsman recommended that the Council:

(i) pay £1,000 compensation to Mr W;

(ii) review the operation of its contracting out arrangements with the Housing Association;

(iii) "devise a clear protocol with East Dorset Housing Association for dealing with complaints about Council functions and for ensuring that complainants have accurate information about whom to complain to".

The Local Government Ombudsman for England gave his decision on complaint no. 05/B/8409 against East Dorset District Council on 22 June 2006.

MEDICAL NEEDS

The High Court, in R (Ghandali) v Ealing LBC, holds that a local authority acted unlawfully by failing to give proper consideration to evidence of the effect upon a re-housing applicant's mental health of her current accommodation

In this case an applicant who said that her mental illness was being exacerbated by unsuitable accommodation applied for an allocation of a council property. Her priority for such housing depended upon which of the council's allocation scheme's 'bands' she fell into. One determinant of this was the effect of her medical condition upon her housing needs. The applicant challenged the manner in which her medical condition was assessed for this purpose. The challenge was successful. In particular, it shows that authorities should be alive to the need to alter their conclusions as to an applicant's medical need for new housing in the light of new evidence or a new development as regards an applicant's health.

THE FACTS

Ms G, a refugee, suffered from post-traumatic stress disorder (PTSD) as a result of having been imprisoned and raped in her native country of Iran. She lived in a bedsit within the London Borough of Ealing. She applied to Ealing for an allocation of housing; in particular, she desired self-contained accommodation.

Ealing concluded that Ms G fell within Band D of their housing allocation scheme (the lowest of their 4 bands) and therefore concluded that she had "no recognised housing need". Ms G's case was that she should have fallen within a higher priority band, either B the "medical hardship" band or C the "medical need" band. An applicant qualifies for Band B if "current housing conditions are having a major adverse effect on the medical condition of the

homeseeker" and for C if housing conditions are having an "adverse affect" on a homeseeker's medical condition which creates a "particular need" for the person to move.

Following the initial Band D decision, Ms G submitted further medical evidence. This evidence said that, in addition to PTSD, she suffered from a depressive disorder of moderate severity "characterised by depressed mood and suicidal ideations with psychotic symptoms".

Ealing sought advice from their medical assessor. He accepted the description given of Ms G's mental health but concluded that her accommodation did not impact on her mental health. Acting on this advice, Ealing maintained Ms G within Band D.

Some four months later, a mental health social worker submitted new evidence on Ms G's behalf. This described a significant deterioration in her condition. It stated that her psychotic depressive illness was exacerbated by her current accommodation because it reminded her of the prison cell in which she had been incarcerated in Iran. Further, the new evidence also explained that, following a recent refusal to move Ms G up a band, she took an overdose and was taken to A&E where Ms G explained to the medics that she had taken the overdose because she just couldn't stay in "that flat". This new evidence was passed to Ealing's medical adviser who stamped the report "N.C", that is no comment.

Ms G also submitted new evidence from an independent social worker who explained that the excessive noise in Ms G's accommodation (which comprised a number of bedsits) was affecting her mental health. In particular, there was a single doorbell for all of the bedsits which meant she would be disturbed whenever someone called to see any of the residents. Ealing's medical assessor did respond to this evidence but only to express the opinion that the level of noise was not "unreasonable" in a multi-bedsit property. Ms G claimed judicial review in the High Court.

THE HIGH COURT'S DECISION

The High Court allowed the claim for judicial review and quashed Ealing's decision that Ms G was a Band D case. Their decision was fatally tainted by their medical assessor's response to the most recent evidence from the two social workers. This he failed to assess against Ealing's own description of when a person would fall within Band B or C. In particular, he failed to address the subjective question of whether housing conditions were having an adverse affect on *this* applicant as was shown by his comment that the conditions in the bedsit were not 'unreasonable' for this sort of property. Accordingly, Ealing's banding decision, based on his advice, was unlawful.

COMMENT

The Court's decision does not mean that Ealing have to accept that Ms G is a Band C or B case, much less does it mean that Ealing are now obliged to offer her accommodation. What it means is that Ealing will have to consider properly her application and the new evidence submitted in support of it against the criteria they have themselves devised. It is not a foregone conclusion that they will have to accept the evidence of the social worker. It might be possible for them to disagree with those conclusions and to have defensible (rational) reasons for doing so. If they do have such reasons, they have acted within the law.

Even if Ealing do re-band Ms G as a Band B or C case, that does not mean she will be re-housed. It will just mean she has a greater priority for re-housing. Whether or not she gets re-housed will depend on the number of other persons within her band, or higher bands, how long they have waited and on questions of relative need.

The High Court (Leveson J) gave its decision in R (Ghandali) v the London Borough of Ealing on 11 July 2006: [2006] EWHC 1859 (Admin).

POSSESSION

SERVICE

Nelson & Hanley v Clearsprings Ltd – tenant who was not served with possession claim form does not have an absolute right to have the resultant possession order set aside

This is the latest in a mini-run of cases to consider the consequences of a possession order being made against a person who was unaware that a possession claim had been made. In this case, the tenant had not been served with the possession claim in accordance with the Civil Procedure Rules (CPR) and, accordingly, in the words of the Court of Appeal, he was a "stranger" to the proceedings. This did not mean, however, that he had an absolute right to have the possession order set aside. In contrast to the position prior to the advent of the CPR, in exceptional cases it is possible for the courts lawfully to refuse to set aside a possession order made against a person who had not been served with a possession claim.

The present case is to be distinguished from the more common situation where a person is *deemed* to have been served with a possession claim but did not, as a matter of fact, physically receive the claim form, e.g. where a claim is properly served merely by being left at a person's last known residence. In these cases, life is more difficult for the tenant who subsequently wishes to set aside the possession claim. This point was recently considered by the Court of Appeal in the case of *Akram v Adam* [2004] EWCA Civ 1601, which we considered in issue 19(**a**).

THE FACTS

A simple error was at the heart of this case. The premises, possession of which was sought, were located at a 28 Brook Road. However, the claim form was addressed to the tenant at 26 Brook Road. As a result, the claim form was not received by the tenant. Further, none of the provisions of the CPR concerning deemed service were applicable. For CPR purposes, therefore, the tenant had not been served with the claim.

This error was not spotted. The claim proceeded to a hearing at which the tenant did not of course appear. The County Court granted the landlord his possession order together with a money judgment in respect of alleged rent arrears.

When the tenants became aware of the judgment, they sought to have it set aside. The issues of whether, and how, this could be achieved within the framework of the CPR found its way to the Court of Appeal.

THE COURT OF APPEAL'S DECISION

Rule 39 (setting aside order where defendant did not attend trial) does not apply

The Court of Appeal rejected the landlord's argument that Rule 39.3(3) of the Civil Procedure Rules applied in a case such as the present. This Rule permits a Defendant who failed to attend a hearing to apply for the resultant judgment or order to be set aside. The difficulty for the tenant in this case, if Rule 39.3(3) were held to apply, was that Rule 39.3(3) cannot be invoked as a formality. Some reasonably strict tests have to be met in order to activate the court's power to set aside. They are that: (a) the defendant must have acted promptly upon finding out that an order had been made; (b) s/he must have had a good reason for not attending the trial; and (c) s/he must have a reasonable prospect of success at trial.

The relative strictness of these tests led the Court of Appeal to conclude that Rule 39 was designed to cater for those defendants who had been properly served, or had been deemed to have been properly served, with claims yet, despite that proper service, had failed to attend trial. It was not designed for persons such as the tenants in this case who had never been served with a claim form and were therefore "strangers" to the proceedings (in other words, it was not designed to cater for "irregular judgments"). The Court also pointed out that, if Rule 39 applied, then interest on any money sum awarded by the 'irregular judgment' will be payable as from the date of that judgment. This "unjust result" was a further pointer to the conclusion that Rule 39.3(3) did not apply.

Must an 'irregular' judgment be set aside?

The Court of Appeal proceeded to consider whether a defendant against whom such an irregular judgment is given has the right, on application, to have the judgment set aside. The Court ruled that there is no such absolute right, but that only in exceptional cases would it be proper to refuse an application to set aside in such a case. Helpfully, the Court of Appeal summarised its conclusions on this aspect of the case as follows:

> "(i) If the defendant can show he has not been served (or is not deemed to have been served) with the claim form at all, then he would normally be entitled to an order setting the judgment aside and to his costs in making the application.
>
> (ii) If, when the claimant is served with an application to set aside such a judgment, he believes that he can show that the defendant has no real prospect of successfully defending the claim, then he may apply to the court for orders dispending with service of the claim form, permission (under CPR 24.4(1)) to apply forthwith for summary judgment, and for summary judgment on his claim.
>
> (iii) If such an application and cross-application are made the court should make such order as it considers just.
>
> (iv) If the claimant can show that the defendant has been guilty of inexcusable delay since learning that the judgment has been entered against him, the court would be entitled to make no order on the defendant's application for that reason. The judgment would then stand (subject to any direction made by the court, whether in relation to statutory interest accruing due on the judgment or otherwise)."

(a) It should be noted that in the present case the Court of Appeal pointed out that there was a misunderstanding as to the applicable rule of the CPR on the part of the sitting of the Court of Appeal that heard *Akram v Adam*. It appears that the application to set aside should have been made under Rule 39 (as considered in the above text). The misunderstanding was described as follows by the Court of Appeal in the present case:

> "[In Akram] the claimant issued proceedings for possession. The claim form was posted to the defendant at his usual residence and was not returned undelivered. It was held to have been properly served under CPR 6.5(6). The claim form contained a notification that the claim would be heard on a particular date. The defendant was however unaware of the proceedings and, unsurprisingly, he did not attend the hearing. A possession order was made against him. He subsequently learned of it and applied for an order setting aside the judgment. It appears that the application in *Akram v Adam* was made under CPR 13.3, presumably on the basis that a default judgment had been given under Part 12. Nobody drew the court's attention to the fact that the case should have been treated as a case to which Part 55 applied, and this consideration was not noticed by anybody before judgment was given. As stated above, in the instant case it is common ground that judgment was given, not in default under Part 12, but after a hearing under Part 55."

The Court of Appeal gave its unanimous decision in Nelson and Hanley v Clearsprings (Management) Ltd. on 22 September 2006: [2006] EWCA Civ 1252. The Court was comprised of Sir Anthony Clarke MR (who gave the judgment of the Court) and Brooke and Waller LJJ.

GENERAL HOUSING ISSUES

RACE EQUALITY

The CRE's Statutory Code of Practice on Racial Equality in Housing – the key implications

In September, the Commission for Racial Equality published the "Statutory Code of Practice on Racial Equality in Housing: England". A separate Code was also published for Wales. The legal status of the Code is that the courts must take its provisions into account when hearing claims under the race relations legislation. The CRE says that "anyone with the responsibility for the activities and decisions of a housing organisation...should be able to defend themselves better in any case of alleged racial discrimination brought against the organisation, if they have followed the Code's recommendations".

The areas dealt with by the Code that are of particular interest to this publication are as follows.

Governance

- Procedures for recruiting board members should ensure equality of opportunity
- Board members/councillors should take responsibility for mainstreaming race equality throughout their organisations
- Frequent progress reports should be made to organisational "leaders" on progress against the organisations strategy for race equality

Building new homes and improving existing ones

New housing projects should be assessed for their likely impact on racial equality, and their actual effect monitored thereafter
Strategies for assessing area housing need should address information provided by different racial groups, any area preferences of different groups and special racial design considerations
Housing organisations should consider whether positive action is needed in some cases to address housing need. This is a reference to the making of special housing provision for a particular racial group (sheltered housing provision for Chinese elders is one example given in the Code) in accordance with s.35 of the Race Relations Act

Sales and lettings

The Code expresses the CRE's opinion that "it is unlawful to segregate people in the way housing is provided even if the segregation leads to better living conditions for those who have been segregated. However, the segregation of racial groups as a consequence of individuals' and households' mobility or congregation over time would not be unlawful".

The Code points out that informal, such as 'word of mouth', means of spreading information about vacancies can exclude particular racial groups
Ethnic minority households should be "proportionately represented" on housing lists. If they are not, the housing provider should be ready to justify any significant disparity

This section also points out that the CRE has recently conducted an investigation into a local authority's choice-based lettings scheme which concluded that the operation of the scheme led to the landlord failing to discharge its duty to promote racial equality. The particular failings were:

(i) no race equality impact assessment of the scheme had been carried out;

(ii) inadequate community consultation as regards the framing of the scheme;

(iii) poor monitoring of the ethnicity of applicants and those allocated properties;

(iv) information about the scheme was not available in community languages.

Homelessness and Housing Advice

- "housing organisations should make sure that, where relevant, their racial equality strategies cover issues concerning homelessness" and local authorities "should make sure their homelessness strategies cover racial equality issues, and may wish to consider developing a separate strategy to cover both ethnicity and homelessness"

- "housing organisations should review the communication needs of people from ethnic minorities who are homeless or at risk of homelessness, assess whether their current arrangements are effective and consider how to fill any gaps"

- "housing organisations responsible for providing advice or assistance to people accepted as homeless should make arrangements to monitor, by racial group, the way their policies are working"

- "housing organisations should take steps to deal with any significant racial disparities revealed by monitoring; for example by supporting measures to increase the supply of suitable housing and to reduce overcrowding"

- there should be "year on year reductions in any significant over-representation of particular racial groups among those accepted as homeless or threatened with homelessness"

Neighbourhood Regeneration and Integration

- "the discipline of carrying out race equality impact assessments should be an essential part of the process of developing new public housing policies and programmes, including the individual phases of larger housing development programmes"

- "housing organisations should have a communications strategy, particularly for large developments"

- "training on racial equality, especially for staff involved in development and neighbourhood renewal work, should cover the question of integration"

Tenancy and Housing Management

- caretaker staff should be trained to deal with racist incidents

- racist graffiti should rapidly be removed

- information on benefit entitlement should be available in community languages

- Often overlooked groups "such as Gypsies or Irish Travellers" should be consulted about the housing organisation's proposals

- "housing organisations should make sure the contractors they use for repairs or maintenance have racial equality policies that complement those of the organisation and understand that discriminatory behaviour or harassment of tenants is unlawful and will not be tolerated"

- "repairs needed as a result of harassment or anti-social behaviour should be given a priority commensurate with their seriousness"

- "housing organisations should monitor their principal housing services, including rent arrears, eviction, repairs, advice and benefits, and complaints about their services. The information should be analysed, and steps taken to deal with any significant disparities between racial groups"

- Projects should be developed to meet the needs of people from different racial groups for sheltered housing and related care services

Contractors and Procurement

"Contractors must not discriminate unlawfully on racial grounds, but they do not have the same legal obligation as a listed public authority to promote equality of opportunity and good race relations. This means public authorities need to make sure racial equality questions are considered during the procurement process, so that all functions that are relevant to the promotion of racial equality meet the requirements of the Race Relations Act regardless of who is carrying them out"

Contractors should be able to demonstrate their commitment to racial equality and this should also be monitored during the life of the contract Tendering processes should be organised so that they do not exclude ethnic minority businesses, and such businesses should be encouraged to put in tenders

Involvement of Residents and Tenants

Housing organisations should draw up strategies for involving all racial groups in their decision-making processes and positive steps should be taken to encourage such groups to become involved.
"housing organisations should include among the criteria for granting recognition to residents' and tenants' organisations, a requirement that they are truly open to all racial groups"

Cross cutting issues

The Code stresses, in relation to all aspects of housing work, the importance of training, monitoring and race equality impact assessments. Chapter 4 of the Code gives detailed advice on the setting up of training programmes, the carrying out of ethnic minority monitoring and the production of race equality impact assessments (including an explanation of which organisations are under a legal duty to carry out assessments).

Links

www.cre.gov.uk/downloads/housing_code_england.pdf - the Code for England is available here.

The Code for Wales is very similar save that it includes an explanation of the role of the National Assembly for Wales in Welsh housing matters and includes new material about the possible race equality implications of rural affordable housing schemes which favour local residents over persons from out of area. It is available here:

www.cre.gov.uk/downloads/housing_code_wales_english.pdf

DISABILITY ISSUES & HOUSING

MENTAL HEALTH ACT HOUSING

R (B) v Lambeth LBC – anti-social behaviour of tenant formerly detained under the Mental Health Act did not affect council's duty to accommodate her

This case is a reminder of the special accommodation position of, and protection afforded to, persons who use to be detained under the Mental Health Act 1983 (MHA). The social services arm of local government can come under an absolute obligation to provide accommodation for such persons regardless of whether they would be entitled to accommodation under the housing legislation. For example, the fact that such a person might be deemed intentionally homeless under the homelessness legislation (and so not owed the main housing duty) does not alter the obligation to accommodate that arises by virtue of the MHA.

THE FACTS

Ms S had been compulsorily admitted to hospital under s.3 of the MHA for treatment for mental illness (schizophrenia). Following discharge from hospital, Ms S lived in a flat owned by Lambeth LBC ("Lambeth"). However, they issued a claim for possession of the flat relying on the nuisance/anti-social behaviour ground for possession of a dwelling let under a secure tenancy.

Ms S's local authority, Lambeth LBC, accepted that she was owed the 'after care' duty provided for by s.117 MHA (looked at in more detail below). The possession claim precipitated a reassessment of her needs for community care services including after care services under s.117 MHA. The assessment concluded that "the situation with regards to her neighbours is now insoluble" because she had "incorporated her neighbours into her delusional belief system". It concluded that she and her son "clearly need to be found appropriate accommodation" if evicted from the flat in which they were then living.

Lambeth duly made a claim for possession of Ms S's flat. They agreed that, if she were evicted, she would be re-housed by them. They refused, however, to re-house her in advance of any possession order being made. It appears that this decision flowed from one of Lambeth's general housing policies. Ms S claimed judicial review in which she argued that Lambeth were in breach of their obligations under s.117 by taking possession proceedings without making alternative arrangements for her accommodation in the event that, as a result of those proceedings, she were evicted.

THE LEGAL NATURE OF THE s.117 MHA AFTERCARE DUTY

S.117(1) MHA confers obligations upon local (social services) authorities and the NHS in relation to persons who have been detained under a number of different provisions of the MHA. The s.117 duty is to provide "after-care services" until such time as the relevant NHS body and local authority are satisfied that "the person concerned is no longer in need of such services".

It has been established that accommodation may be provided as a s.117 aftercare service, and therefore must be provided if a qualifying individual has been assessed as requiring accommodation as an after care service (*Clunis v Camden and Islington Health Authority* [1998] QB 978). It should also be noted that a local authority may not levy charges for s.117 services (*R v Manchester City Council, ex parte Stennett* [2002] UKHL 34).

THE HIGH COURT'S DECISION

It is not clear if Lambeth appreciated that their housing department's allocations policy could not in any way dilute the duty owed to Ms S under s.117 of the MHA. The High Court was certainly unimpressed by their policy of waiting until a possession order had been granted before re-housing her. The High Court judge said that he "failed to understand the legal logic behind that" and that Lambeth were "simply seeking to put off to another day an important decision". He went on to declare that Lambeth were in breach of their duty to provide aftercare services under s.117 MHA, namely suitable accommodation. The Court went on to state that this declaration meant there would be an "insuperable case" for adjournment of the possession proceedings (and directed that its judgment be forwarded to the County Court judge hearing those proceedings) in order for Lambeth to take the necessary steps in finding new accommodation and preparing Ms S for a move so as to discharge the s.117 duty owed to her.

The High Court (Judge Gilbart QC, sitting as a Deputy High Court judge) gave its decision in R (B) v Lambeth LBC on 20 September 2006: [2006] EWHC 2362 (Admin.).

WELFARE BENEFITS FUNDING: SHELTERED HOUSING

Social Security Commissioner case CPC 1820 2005 – meeting the costs of a warden service under an award of State Pension Credit

This was an important decision for the funding of sheltered housing schemes (in particular charges levied for warden services) where residents of the schemes are in receipt of State Pension Credit (the income maintenance benefit for pensioners). The decision shows that provided the landlords of such schemes are willing to spend time supplying evidence as to the nature of the work actually done by wardens, a proportion of the costs levied in respect of the warden should be met by residents' State Pension Credit awards.

KEY POINTS

- Service charges can be met under an award of State Pension Credit provided that they relate to services provided in connection with the provision of adequate accommodation
- It should not be assumed that because an activity is not funded by Supporting People it must be a service in connection with the provision of adequate accommodation
- It is for claimants (with the assistance of landlords) to provide evidence to prove that a warden is providing a service in connection with the provision of adequate accommodation
- The Social Security Commissioner suggested a less time-consuming way of providing the necessary evidence than had been advised in an earlier Commissioner decision

BACKGROUND FACTS

This case concerned claims for State Pension Credit (SPC) made by two 80 year old claimants who lived in leasehold sheltered accommodation. Service charges were payable in respect of the accommodation being charges which were referable to: (i) the services provided by an on-site warden; and (ii) general administration and management. Both claimants, by virtue of their low incomes, were entitled to the guarantee credit element of SPC and were therefore entitled to have their eligible housing costs met as part of their SPC award. The point of dispute was to what extent the service charges were eligible housing costs and, therefore, to be met under the claimants' SPC award.

THE LEGAL ISSUE

An award of SPC (guarantee credit element) also entitles the recipient to an amount in respect of certain housing costs that the claimant (or partner) is liable to pay in respect of the home occupied by the claimant. The housing costs so allowed are specified in Schedule 2 to the State Pension Credit Regulations 2002. In so far as relevant for present purposes, the somewhat complex rules in Schedule 2 work as follows:

(i) the general position is that "service charges" are allowed (paragraph 13(1)(b) of the Schedule);

(ii) para. 13(2) of the Schedule sets out the deductions to be made from a claimant's service charges. The amount to be met by the award is the amount of service charges that remain following the para. 13(2) deductions;

(iii) one deductable category are payments in respect of "ineligible service charges". The meaning of "ineligible service charge" is to be found in the Housing Benefit Regulations. Those regulations list a number of services charges which are ineligible, the most relevant for present purposes being:

> (a) "charges in respect of general counselling or other support services". This item was added to the list of ineligible charges in April 2003 when the Supporting People scheme went live. This was because as from that date such services were funded by local authorities under the Supporting People scheme and not via enhanced payments of various income-related benefits; and
>
> (b) any other service charges "which are not connected with the provision of adequate accommodation";

(iv) the above is really a roundabout way of saying that, generally, the only service charges which are payable under an award of State Pension Credit are those which are connected with the provision of adequate accommodation;

(v) there are special rules about separating out ineligible service charges from eligible service charges:

> (a) where the housing costs payable by the claimant are inclusive of ineligible service charges, the amounts attributable to those ineligible charges is to be deducted; or
>
> (b) where the amount attributable to the ineligible charges is not separately identified within the housing costs payable by the claimant, what must be deducted is such part of the costs as is "fairly attributable" to the provision of the ineligible services "having regard to the costs of comparable services" (para. 13(2)(b)).

THE DECISIONS UNDER APPEAL

The SPC decision maker (within the Pensions Service) allowed a proportion of the general management charges claimed by the claimants but decided that all the charges levied in respect of the scheme warden were ineligible and therefore would not be met under the claimants' SPC awards. The claimants, with the assistance of the housing association that managed their supported housing scheme, appealed to an appeal tribunal against that part of the decision that concerned charges in respect of the warden service.

On appeal, the housing association that ran the sheltered housing scheme supplied evidence to the appeal tribunal about the work undertaken by the scheme warden. However, this evidence was rather limited. It consisted of documentation produced in the run-up to the implementation of the Supporting People scheme in order to illustrate how much of the warden's time was spent on general counselling and support (29%). This then formed the basis of the housing association's Supporting People contract (which funds the warden's general counselling and support activities). The tribunal's approach was to say that because 29% of the warden's time was spent on general counselling and support then the rest of his time must be spent providing services charges which were eligible. On this basis, the tribunal decided that 71% of the service charges levied upon the claimants were eligible and therefore to be met under their SPC awards. The practical affect of this was to increase the claimants' awards by around £20 per month.

The local authority appealed to a Social Security Commissioner arguing that the tribunal had erred in law.

THE COMMISSIONER'S DECISION

The Commissioner allowed the appeal and remitted the matter back to another tribunal for re-determination. The key points made by the Commissioner were as follows:

(i) there was insufficient evidence before the tribunal for it lawfully to have concluded that everything done by the warden, that wasn't done for Supporting People purposes, was done in connection with the provision of adequate accommodation. The Commissioner noted that "nowhere in the papers…was there any reference to what the scheme managers actually did in connection with the provision of adequate accommodation";

(ii) while there was one document before the tribunal which set out the role of the warden, some aspects of which did appear to be related to the provision of adequate accommodation, this was an improper basis for the finding that everything that was not done for Supporting People services must have been done in connection with the provision of adequate accommodation. This was because:

> (a) the tribunal did not appear to have based its decision upon that document (it was not referred to in the tribunal's decision);
>
> (b) the document did not set out how much of the warden's time was spent on the activities described; and
>
> (c) the document was not handed in until the day of the tribunal hearing. This meant the Pensions Service had no opportunity to address its contents and decide whether to make submissions about it. Therefore, if the tribunal had relied on the document, to have done so without having given the Pensions Service adequate time to address it was a breach of natural justice;

(iii) the Commissioner rejected the claimant's arguments based on the decision of the Law Lords in *Kerr v the Dep't for Social Development* (N.I.) [2004] UKHL 23. That case concerned the respective responsibilities of claimants and the benefits authorities to provide the information necessary to determine entitlement. The claimants argued that, by virtue of *Kerr*, it was for the Pensions Service to disprove their (the claimants') assertion that 71% of the warden's time was spent in connection with the provision of adequate accommodation. The circumstances in this case were quite different from *Kerr*, held the Commissioner. Evidence about what the warden did was not within the Pension Service's knowledge. It was something that only the claimants (and their housing association) could provide details of. The Commissioner held that "it is clear from the decision of the Court of Appeal in *R v. Stoke-on-Trent City Council ex p. Highgate Projects* [1997] 29 HLR 271 that the burden of proving that services charges are eligible as housing costs falls on the claimant".

The case was remitted back to a different tribunal for reconsideration.

DISCUSSION – PROVING WHICH ELEMENTS OF SERVICE CHARGES ARE ELIGIBLE

The Commissioner in this case proceeded to give guidance about how claimants/their landlords should go about proving which elements of service charges are eligible on the basis that they relate to the provision of adequate accommodation(**a**):

(i) the Commissioner made the important point that this question must be addressed by reference to the evidence of what a warden does at a particular development. This is because the legislation is claimant-specific. Averaging out over a number of different developments is not acceptable. This point is worth noting because it differs from the approach that was often taken under Supporting People to quantify the amount of Supporting People funding granted to a particular social landlord. What often happened there was that the time spent on general counselling and support across a number of different supported housing schemes was divided by the number of schemes in order to arrive at an average for each scheme and it was upon this average that Supporting People funding was based;

(ii) the Commissioner addressed the earlier guidance given in case *CIS 2901 04* about how to isolate eligible service charges. That decision caused some concern in the sector because of the time taken to perform the task said to be required(**b**). Here, the Commissioner thought it was not always necessary to follow the laborious process described in that decision. He pointed out that in some cases landlords might not be willing to perform the time-consuming task of trawling through documents in order to extract the necessary information (for example, where only 2 or 3 residents in a scheme comprised of 30 or so residents were claiming State Pension Credit) and it could appear unreasonable to expect elderly claimants to identify this information themselves. As an alternative, the Commissioner here said that:

> "I concur with the remark of the Commissioner in paragraph 9 of CPC/968/2005 that a "broad approach" is called for: for example, a decision-maker or tribunal supplied with the terms of the lease relating to services and service charges, a breakdown of the service charges, details of what service charges (if any) are met by the Supporting People programme, and a statement from the scheme manager as to how his working time is usually divided up should normally be able to make a reasoned estimate of how much of the service charges in dispute are eligible or ineligible. Each case will, however, inevitably turn on its own facts and evidential requirements will vary."

(a) For a discussion of the services which, as a matter of law, might constitute services in connection with the provision of adequate accommodation, see *R v Housing Benefit Review Board for Swansea, ex parte Littler* [1998] EWCA Civ 1214.

(b) In that case the Commissioner said:

> "... a sufficiently accurate assessment of how much of [service charge] expenditure is attributable to accommodation related services cannot be made by simply looking at job descriptions. It is necessary to establish the number of hours per week spent by the employees on providing those services. The part of the salaries bill which is attributable to the provision of accommodation related services can then be calculated. The staff administration costs such as staff advertising, employers liability insurance and personnel management attributable to accommodation related services should be calculated by applying to them the ratio of hours spent on accommodation services to hours spent on support services. That will be, I have little doubt, a very time consuming process for the management."

Social Security Commissioner Lloyd-Davies gave his decision in case CPC 1820 2005 on 28 July 2006.

ADAPTATIONS (OMBUDSMAN DECISIONS)

Recently, there have been a spate of decisions of the Local Government Ombudsman for England (LGO) in which maladministration has been found due to the way in which applications for disability adaptations have been handled. In fact, it appears that these decisions have overtaken decisions about local authority responses to anti-social behaviour to become the leading cause of adverse Ombudsman decisions against local authorities in the housing sphere.

Complaint 05/C/07195 (Northumberland CC) – maladministration because a council made no attempt to meet its own timescales for OT assessments

Ms S had spina bifida and was confined to a wheelchair. She approached her local authority, Northumberland CC, and requested that they install a stair lift in the home she shared with her parents. In the usual way, this necessitated an occupational therapy assessment. Ms S was told by the NHS Care Trust that undertook assessments on behalf of the council that it would be six to nine months before she could be assessed.

Ms S complained about this because the council's own target was for assessments to be completed within one month in urgent cases and two months in other cases. The complaint came before the Ombudsman

The LGO agreed with Ms S and found maladministration. The LGO had no problem with the council's stated prioritisation of assessments, saying that "resources are finite, and that, as assessments cannot all be done at once, some reasonable system of priority is needed". The problem with the council's approach in practice, however, was that for persons falling outside a priority category it seemed any attempt to keep to the 2 month assessment target had been abandoned.

The LGO declined to recommend that Ms S be assessed within a given period because that might afford her an unwarranted priority over others waiting for OT assessments. Instead he recommended an apology and that the council provide the Ombudsman with regular reports on its progress in tackling waiting times for OT assessments.

The Local Government Ombudsman for England (Anne Seex) gave her decision on complaint no. 05/C/07195 against Northumberland County Council on 18 April 2006.

Complaint 05/B/06334 (Stafford BC) – maladministration because a council misunderstood the statutory means test : £4,000 compensation

The Facts

Prior to May 2002, Mr A lived in his privately-owned home with his wife and their ten year old son. In that month he suffered a severe stroke and was admitted to hospital from where he was discharged to a residential rehabilitation unit and thereafter a residential care home.

Mr A's wife was keen for him to return home as soon as possible. The family home, however, was unsuitable for someone with Mr A's disabilities (a downstairs bedroom and bathroom were required). As a result Mrs A approached her local housing authority, Stafford Borough Council, and made an application for a Disabled Facilities Grant (DFG) in June 2003. The application was accepted as falling within one of the mandatory purposes for such grant set out in s.23 of the Housing Grants, Construction and Regeneration Act 1996. The sticking point was the statutory DFG means test.

Stafford informed Mrs A in November 2004 that, when her and her husband's income was aggregated, it meant that a contribution of £18,000 towards the costs of the works was required. In June 2005, however, Stafford reconsidered the regulations that provide for the statutory means test and concluded that because Mr A had been away from the family home for more than 52 weeks, he could make a DFG application in his own right (ignoring his wife's income)**(a)**. This he duly did and the result was that no contribution towards the costs of the works was required. The building works were underway at the date of the Ombudsman's decision.

Mr A's wife complained to the Ombudsman about Stafford's ignorance of the statutory DFG means test which, she argued, had unnecessarily delayed her husband's return home.

The decision

The Ombudsman decided that Stafford were guilty of maladministration. If they had properly applied the means testing rules from the outset, they would have realised that Mr A was entitled to apply for a DFG effectively as a single person. This was because by the time of the first application he had already been in hospital and thereafter residential care for over 52 weeks.

The Ombudsman's view was that Stafford's failings had delayed Mr A's return home by about a year. In respect of this delay, he recommended that Stafford pay the family £4,000 compensation. Stafford accepted that recommendation.

(a) Presumably Stafford BC arrived at this conclusion having considered regulation 9 of the Housing Renewal Grants Regulations 1996. Regulation 9(1) provides that generally a person remains a member of the same household as his partner even if temporarily living away from the other members of his family. The fact that spouses are members of the same household means that they are a "couple" under the regulations and therefore their income is aggregated for the purposes of the DFG means test. Regulation 9(2) provides an exception from the general rule under reg. 9(1). A person living away from his family is not treated as being a member of his partner's household if "his absence from the other members of his family is likely to exceed 52 weeks, unless there are exceptional circumstances (for example where the person is in hospital or otherwise has no control over the length of his absence) and the absence is unlikely to be substantially more than 52 weeks."

The Local Government Ombudsman for England (JR White) gave his decision on complaint no. 05/B/06334 (Stafford Borough Council) in July 2006.

Complaint 05/B/00246 (Croydon LBC) – a policy of aiming to complete major adaptations within 1 year and 7 months was unreasonable: £1,250 compensation

The facts

Mr H had severely impaired mobility as a result of chronic back pain. Until 2000 he and his wife were joint tenants of a house let to them by Croydon LBC. This house was adapted to meet his needs. In 2000 Mr H's marriage broke down. His wife served a notice to quit on Croydon and, accordingly, that tenancy came to an end. In 2002 Mr H was allocated, and in July 2002 took up a secure tenancy of, an unadapted 2 storey, 2 bedroom house. This property was not suited to his needs, in particular because it lacked a stairlift. Croydon's housing department advised him that he would have to contact their social services department if he wished to have adaptations made to this new house.

In February 2003 Mr H contacted Croydon's social services department. It was eight months before Mr H's application was referred to an occupational therapist. Another six months elapsed before he was assessed and the necessary works, including the installation of a stairlift, were performed in April 2004. Croydon contended that Mr H had received a reasonable service because, under their own stated policies, major adaptations would be carried out within 1 year and 7 months of an applicant's first referral to social services. Croydon had indeed carried out the works within that timescale.

In June 2004, Croydon 'closed the file' on Mr H. Subsequently, however, Mr H had difficulty using the stairlift and on a number of occasions the manufacturers were called out to repair it. In the end, a new stair lift was fitted.

Mr H made a complaint of maladministration to the Local Government Ombudsman.

The decision

The Ombudsman decided as follows:

(i) once Mr H had been assessed, the required works were carried out with "reasonable speed" (6 months after assessment and completion of a care plan);

(ii) the Ombudsman was "not persuaded" that Croydon had acted with maladministration by closing Mr H's file too promptly or by failing to arrange for adequate repairs to be carried out to the stairlift. At the time the decision was taken to close the file, there was sufficient evidence to support the conclusion that the adaptations were satisfactory (Mr H had begun sleeping upstairs) and, as regards the allegedly faulty stairlift, Croydon did arrange for the manufacturer to carry out repairs on a number of occasions;

(iii) whilst the setting of target timescales is itself good administrative practice, those targets should (in the Ombudsman's words) "be reasonable in themselves and should assist the Council in assuring that its disabled clients obtain their adaptations within an acceptable period of time. Setting time targets which provide the potential for unreasonable delay amounting to maladministration is itself unreasonable". The problem here was that Croydon's timescales were themselves unreasonable. Mr H should not have had to have waited 8 months for his case to be allocated to an Occupational Therapist. In the Ombudsman's view, from first contact to completion of works should not in this case have taken more than 6 months, rather than the 14 months that it in fact took. This delay was maladministration;

(iv) Croydon agreed to pay Mr H £1,250 compensation in respect of the delay in making the adaptations. The Ombudsman also recommended that they prioritise resources so that normally no one has to wait more than 3 months to be assessed by an occupational therapist.

The Local Government Ombudsman for England (JR White) gave his decision on complaint no. 05/B/00246 (Croydon LBC) in July 2006.

HOUSING AND OTHER BENEFITS

HOUSING BENEFIT

Case CH 282 2006 – late notifications of changes of circumstances; when can they be excused?

THE FACTS

Ms S was in receipt of housing benefit. She came into some additional capital as a result of the sale of a property. She should have notified this to her local housing benefit authority within one month of its occurrence, in accordance with the general rule that changes of circumstances should be so notified. Once the new capital was taken into account, the amount of Ms S's housing benefit award was reduced.

Ms S failed to notify her authority within the one month period. When the authority found out, they set about superseding the award so that they could recover the overpayment caused by the fact that this new capital had not been taken into account in fixing Ms S's award. The important question for Ms S was the effective date of the change of circumstances for this purpose. She wanted the effective date to be a date later than the actual date because that would reduce the amount that potentially she would have to pay back.

KEY POINTS

- A claimant who attempts to show that it was not practicable to notify a change of circumstances due to special circumstances has to show that notification was not feasible
- It seems the concept of non feasibility anticipates cases where information was not available to a claimant or could not be conveyed to the local authority
- A claimant cannot argue that notification was not practicable because s/he was unaware of, or confused about, the duty to notify

To succeed in this task, Ms S had to bring her case within regulation 9 of the Housing and Council Tax Benefit (Decisions and Appeals) 2001. Under this provision, a claimant can, up to 13 months after the occurrence of a change in circumstance, apply for it to be treated as having occurred on a later date than it in fact occurred. Para. (3) of reg.9 requires the claimant to satisfy the local authority (or on appeal an appeal tribunal) of all the following three conditions:

> "(a) it is reasonable to grant the application;
>
> (b) the change of circumstances notified by the applicant is relevant to the decision which is to be superseded; and
>
> (c) special circumstances are relevant and as a result of those special circumstances it was not practicable for the appellant to notify the change of circumstances within one month of the change occurring."

Ms S's local authority refused her application under regulation 9. An appeal tribunal allowed an appeal against that refusal and decided that regulation 9 did apply. It found that it had not been practicable for Ms S to have notified within one month because she had been given misleading information by her local authority about her notification obligations. The local authority appealed to a Social Security Commissioner arguing that the appeal tribunal had erred in law in its application of reg.9.

THE DECISION

The general findings made by the Commissioner were as follows:

(i) the Commissioner addressed the meaning of sub-para. (c) of reg.9(3) (the special circumstances condition). He described it as follows:

> "Regulation 9(3)(c) contains three conditions. First, there must be special circumstances. Second, it must not be practicable to notify the change within one month. Third, the impracticability must be a result of the special circumstances. These are issues of fact, although the factors that are or are not relevant are matters of law."

(ii) what does "practicable" mean? The Commissioner said that "practicability 'involves a test of feasibility, not a test of desirability or convenience or anything of that sort': *Singh v Post Office* [1973] ICR 437 at 440";

(iii) what can amount to "special circumstances"? The Commissioner said that "special circumstances are not defined, but obviously they must be in some way unusual. Moreover, as the impracticability must result from the special circumstances, it follows that those circumstances must be in some way related to or affect the practicability of reporting the change of time within one month";

(iv) the Commissioner went on to suggest that ignorance on the part of a claimant as to his or her obligations under the law would not have a bearing on the question of whether notification within one month would have been practicable and that the concept was really addressed to impediments to notification. In the Commissioner's words:

> "The opinion expressed in *Dewar & Finlay Ltd v Glazier* [1973] ICR 572 was that ignorance of rights was not a relevant factor. This was based on authorities on workmen's compensation cases. By analogy, ignorance of duties should not be relevant. This accords with the context and the natural meaning of 'practicable'. The context of regulation 9 suggests that it relieves a claimant of a time limit when it would not have been possible to act within that time. And practicability too conveys ability and achievability. That suggests that regulation 9 grants relief when information could not be obtained or could not be conveyed to the local authority."

The findings made by the Commissioner on the facts of the case were as follows:

(i) the tribunal had erred by considering only whether reg. 9(3)(c) applied. It did not, for example, consider whether it would also be reasonable to allow the application, as required under 9(3)(a). If it had considered reasonableness (as well as 9(3)(c)) it would have to have addressed whether the claimant's view that she had been given inadequate instructions by her authority was a reasonable one for her to have held. Its failure to do so showed that it had not appreciated the need to consider reasonableness as well as 'special circumstances';

(ii) there were in fact in this case a number of changes to the claimant's capital over a short period of time. The tribunal should have applied the reg.9 criteria to each of these changes separately. Its failure to do so was an error of law;

(iii) applying his general finding on 'practicability', the Commissioner held that the tribunal erred by assuming that the claimant's misunderstanding as to her notification obligations (brought about by a 'confusing' number of communications from her local authority) was relevant to the question of whether it had been practicable for her to notify within the one month period;

(iv) the tribunal could also be criticised for having failed to make a causal link, for 9(3)(c) purposes, between the special circumstances found and the practicability of notification.

The case was remitted back to a differently constituted tribunal for re-hearing.

Social Security Commissioner Jacobs gave his decision in case CH 282 2006 on 27 July 2006.

Case CH 2812 2005 – an appeal tribunal can hear a housing benefit appeal even if a local authority has failed to refer the appeal to tribunal administrators

THE FACTS

This case began in the days when there was no right of appeal to an appeal tribunal against local authority housing benefit decisions. At that time quasi-independent Housing Benefit Review Boards, which were not tribunals, would review disputed decisions of local authorities. Review Board decisions could only be challenged by way of judicial review which effectively limited challenges to points of law rather than of fact.

In 2000 the relevant local authority decided that a recoverable overpayment of £20,000 had been paid to Mr X. The basis for this decision was that the rental liability to which the claim related had been designed to take advantage of the housing benefit scheme. This decision was upheld by a Review Board. A claim for judicial review was made. The High Court allowed the claim and quashed the decisions.

KEY POINTS

- An order of the High Court must be obeyed even if the Court was acting outside its powers when making the order
- The jurisdiction of the appeal tribunal is not dependent on the local authority concerned having referred the appeal to it
- Only in unusual cases, however, will it be appropriate for appellants themselves to refer their appeals to the appeal tribunal

In the meantime, new primary legislation had come into force providing for a full right of appeal against most housing benefit decisions to an appeal tribunal. The effect of the associated transitional legislation, and the High Court's decision, was that the claimant was treated as having appealed against the authority's 2000 decision to an appeal tribunal (because matters pending before review boards were treated as appeals pending before the appeal tribunal).

The local authority concerned, however, was of the opinion that the High Court's decision was invalid (it thought the Court had been misled into quashing the decisions on an occasion when it (the authority) had not been represented in court). Because of this, the authority refused to accede to the claimant's request to refer the case to the appeal tribunal. But somehow the appeal tribunal got to know of the case and proceeded purportedly to hear, and allow, the claimant's appeal. The local authority appealed to a Commissioner arguing that the tribunal had no jurisdiction to hear the appeal.

THE DECISION

The Commissioner rejected the local authority's appeal, holding as follows:

(i) an order of the High Court is valid and binding until it is set aside, even if the Court acted outside its jurisdiction when making the order (*Isaacs v Robertson* [1985] AC 97). If the local authority in this case had wished to challenge the High Court's quashing of the review board's decision it should have done so at the time. The fact that no challenge had been brought meant that the order had to be obeyed and recognised by both the authority and the appeal tribunal;

(ii) the Commissioner next turned to consider whether the fact that the local authority in this case had not referred the appeal to the tribunal meant the tribunal did not have jurisdiction to hear the appeal. He began by analysing the nature of the local authority's role in the bringing of appeals. Under regulation 20 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, the authority is "to receive the appeal documents and to ensure, as far as it can, that they contain the necessary information" but "it has no power to decide whether the information provided is sufficient"**(a)**. The question of whether the information is sufficient is "for the legally qualified [tribunal] panel member and there is an express duty to refer the issue to that member. The local authority's function is essentially administrative";

(iii) What, then, was the effect of this local authority's failure to perform the required administrative tasks? The Commissioner said that "an administrative task need not be performed by a particular person or in a particular way. So long as there is an appeal that satisfies the conditions of regulation 20(1)[(a)], the tribunal has jurisdiction to deal with any issues that arise in respect of it, regardless of how they are brought to the tribunal's attention";

(iv) the Commissioner ended by criticising the approach taken by the authority in this case (to be more accurate, he was critical of the legal advice it had received from its legal department). If it had acted as it should, by referring the appeal to the appeal tribunal rather than by trying to force the claimant to bring fresh judicial review proceedings, much time and effort would have been saved.

COMMENT

This case should not be viewed as providing a green light to circumvention of the normal procedure whereby a local authority refers the case papers to the tribunal secretariat. It will only be in unusual cases such as the present that it will be acceptable for claimants / their representatives to refer an appeal to an appeal tribunal. This is what the Commissioner had to say on the point:

> "This does not mean that the parties are free to disregard the usual procedures at will. Claimants cannot simply bypass the local authority and lodge appeals with the tribunal. Likewise, they cannot usually expect the tribunal to deal with a case before the local authority has had a

chance to prepare the submission and assemble the papers for the parties and the tribunal. But what the tribunal is free to do is to allow matters to be handled differently if circumstances require it. The circumstances of this case did require it for two reasons. First, the local authority was refusing to refer the cases to the tribunal on the basis of an issue which the tribunal had (perhaps exclusive) jurisdiction to decide. Second, the local authority was trying to force the claimant to embark on an expensive legal procedure, which was risky in that the Administrative Court might not accept jurisdiction [- this is a reference to the local authority having told the claimant that if he was unhappy with their refusal to refer to the tribunal he should bring a judicial review claim to challenge that refusal] ."

(a) Reg. 20(1) of the Housing Benefit Decisions and Appeals Regulations provides that:

"(1) An appeal or application for an extension of time must –

(a) be in writing on a form approved for the purpose by the relevant authority or in such other format as the authority may accept;

(b) be signed by the person who has a right of appeal under paragraph 6(3) of Schedule 7 to the Act;;

(c) be delivered, by whatever means, to the relevant authority;

(d) contain particulars of the grounds on which it is made;

(e) contain sufficient particulars of the decision or subject of the application to enable that decision or subject of the application to be identified."

Social Security Commissioner Jacobs gave his decision on case no. CH 2812 2005 on 27 July 2006.

INCOME SUPPORT

R (RJM) v the Secretary of State for Work and Pensions – the automatic withdrawal of the disability premium from a mentally ill claimant without accommodation is compatible with human rights laws

The Disability Premium to an award of Income Support (currently £23.95 per week for a single person) is not payable if a person is "without accommodation". The High Court recently rejected a human rights challenge to this situation brought by a rough sleeper whose mental health meant that when he did have accommodation he was entitled to the Disability Premium.

This case was brought on discrimination grounds. The claimant argued that the difference of treatment as between him and a claimant with accommodation amounted to discrimination contrary to the Convention. This was rejected by the High Court. Even if there was a difference of treatment, this was objectively justified and so could not amount to discrimination under the Convention. The High Court said that even if the fact that the claimant was without accommodation was a "personal characteristic" so as to bring him within Article 14 (the anti-discrimination provision of the European Convention on Human Rights), he still would not have been discriminated against. This was because the policy of withdrawing the disability premium from such individuals did have an objective and reasonable justification, namely that the State "were entitled to adopt a broad approach, draw the line in they way they did in relation to Income Support and Disability Premium, and to prioritise other measures for addressing the vulnerable position in which the disabled homeless find themselves above giving them enhanced monetary benefits".

The High Court (James Goudie QC, sitting as a Deputy High Court judge) gave its decision in R (RJM) v the Secretary of State for Work and Pensions on 13 July 2006: (2006) EWHC 1761 (Admin.)

DISABILITY LIVING ALLOWANCE

A Tribunal of Social Security Commissioners, in case CSDLA 133 2005, hold that a need for cognitive assistance, such as is often provided under the Supporting People scheme, can give rise to entitlement to Disability Living Allowance

In this case a Tribunal of Social Security Commissioners (the judicial officers who make binding rulings about welfare benefits law) considered the extent to which a need with cognitive assistance might give rise to entitlement to Disability Living Allowance (the under 65s non means-tested disability benefit) and Attendance Allowance (the over 65s benefit). Why is this relevant to this publication? It is relevant because the assistance in question is of a type often provided as housing-related support under the Supporting People scheme. Accordingly, it is worth persons receiving support under that scheme making claims for DLA (or Attendance Allowance if aged over 65). Hitherto there has been some inconsistency of approach to this point amongst different social security decision makers, but now, as a result of this case, it is clear that, in principle, a need for cognitive assistance can give rise to DLA entitlement. Previously, many (for example the DWP's own guides to DLA) assumed that all that 'counted' was assistance with the physical processes of the body and, accordingly, assistance provided in order to overcome a cognitive deficit could never give rise to DLA entitlement.

KEY POINTS

- The need for a DLA claimant to require attention in connection with bodily functions can be met despite a claimant needing only cognitive assistance
- Prompting and encouragement can amount to cognitive assistance
- The assistance, however, must be "reasonably required" and be provided in circumstances where there is sufficient proximity between support worker and claimant
- The assistance must also be of sufficient quantity and quality as set out in the Disability Living Allowance legislation

Whilst this is a good decision for many claimants with cognitive disorders, for many, however, it may be something of a hollow victory. It is likely that

in many cases any DLA award will be swallowed up by the charging policies of the various Supporting People schemes responsible for funding the assistance.

THE FACTS

This was a claim by a child (but that was of no particular relevance to the key issue in the case). The child's mother made a claim for DLA on her behalf which relied on the child's behavioural difficulties, memory loss and hyperactivity and the consequent care needs. A decision maker rejected the claim.

An appeal was made. Before the appeal tribunal, there was new evidence from a neuropsychologist which stated that it had been impossible to arrive at a precise diagnosis of the child's condition, but that the best way of describing her was as "having significant learning difficulties with prominent language processing disorder and associated behavioural problems". The tribunal rejected the appeal, seemingly on the following basis:

(i) in so far as the claimant needed assistance with "communication" and "social integration", this could not amount to attention in connection with bodily functions;

(ii) similarly, the act of encouraging the child to do something could not amount to attention in connection with bodily functions because there was a distinction to be drawn between bodily functions and functions of the brain. Encouragement was attention in connection with a function of the brain and, therefore, irrelevant for the purposes of DLA entitlement.

As is explained below, a Tribunal of Social Security Commissioners subsequently concluded that this appeal tribunal had erred in law. The claim was remitted back to a differently constituted tribunal for re-determination.

THE LEGAL ISSUE

In many cases, DLA is only payable to individuals who require some form of assistance with their "bodily functions". For example:

(i) lowest rate care component (£16.05 per week) is available for a person aged under 65 who is so severely disabled physically or mentally that "s/he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods)";

(ii) a person aged under 65 who is "so severely disabled mentally or physically that, by day, he requires from another person frequent attention throughout the day in connection with his bodily functions" has an in principle entitlement to middle rate care component (£40.55). A person aged 65 or over who falls within this description has an in principle entitlement to lower rate Attendance Allowance (having met the 'day attendance' condition: £40.55);

(iii) a person aged under 65 who is "so severely disabled mentally or physically that, by night, he requires from another person prolonged or repeated attention in connection with his bodily functions" has an in principle entitlement to the middle rate of DLA care component (£40.55).

The issue for the Tribunal of Commissioners was whether the phrase "attention in connection with bodily functions" excludes care whose purpose is to overcome a cognitive deficiency. In other words, was the legislation using "bodily functions" in contrast to "mental functions".

THE COMMISSIONERS' DECISION

Because the Commissioners re-visited much of the case law on the phrase "attention in connection with bodily functions", it is simplest to locate their findings within a summary of that case law:

(i) A claimant's physical or mental disablement must impair the exercise of a bodily function. There must be a link between the two (case *CDLA 1721 2004*).

(ii) Does the operation of the brain constitute a "bodily function"? In *R v N.I. Commissioner, ex parte the Secretary of State for Social Services* [1981] 1 WLR 1017 (also known as *Packer's* case) the Court of Appeal said that the term "bodily functions" "connotes the normal actions of any organs or set of organs of the body". There has been uncertainty as to whether or not this means that the term includes mental functions. But in the present case, the Tribunal of Commissioners held without any hesitation that functions of the brain are included within "bodily functions". They also said that earlier Commissioner decisions to the contrary should not be followed.

(iii) Accordingly, where a claimant needs cognitive assistance because a mental disability has affected the functioning of his/her brain, that assistance potentially counts for DLA purposes. This is important because it means that DLA entitlement is not reserved to those who merely require assistance with the physical processes of the body. It should also be noted that the requirement for the claimant to suffer from a 'mental disability' does not require him/her to suffer from a recognised medical condition. What is required, according to the Tribunal of Commissioners that decided case *CDLA 1721 2004*, is merely for it to be proven that the claimant has a deficiency in mental functioning.

(iv) we said that cognitive assistance required because a mental disability has affected the functioning of the brain only "potentially counts" because there are limiting factors (in addition to the quantitative factors, e.g. that attention in connection with bodily functions must be required for a "significant portion" of the day: lowest rate care component) . The first is that the attention must be "reasonably required" *Mallinson v Secretary of State for Social Security* R(A) 3/94. This calls for a value judgment to be made on a case by case basis. However, it is suggested that, as a general principle, cognitive assistance, such as prompting and encouragement, that is given as part of a programme to instil and maintain independent living skills *should* be considered 'reasonably required'. This can be justified by pointing out that the State has, through various policy initiatives, decided, on the basis of solid research evidence as well as international legal principles concerned with the rights of disabled people, that such individuals should be encouraged to participate as fully as possible in community life. This point may need to be made in order to rebut the suggestion that because the underlying object of the assistance – to get a claimant to do something for him/herself – can just as easily be done by a carer, without any involvement of the disabled person, the giving of cognitive assistance is not reasonably required;

(v) "attention in connection with" is a narrower concept than "assistance with respect to". There must (in the words of the Commissioners in this case) be "sufficient proximity" as between carer and person being cared for. The key points from the higher court case law on this point are as follows:

(a) what is required is "a service of a close and intimate nature" (*Packer*). This is why merely carrying out domestic chores for a claimant does not count;

(b) further, it is necessary that there is "something more than personal service". There must be "something involving care consideration and vigilance for the person attended" (*Packer*);

(c) a further requirement is 'activeness'. In *Moran v Secretary of State for Social Services* (R(A) 1/88) it was held that "attention" denotes "a concept of some personal service of an active nature", as opposed to supervision which is "a state of passivity coupled with a readiness to intervene";

(d) it is not, however, necessary for there to be physical contact and mere talking can provide the necessary proximity (*Mallinson*). It follows, according to the Tribunal of Commissioners in this case, that "prompting and motivating are capable of constituting attention in connection with an impaired bodily function" as is "exhortation", in both cases provided that there is a genuine mental disability which leads to the need for assistance with the functioning of the brain and so, for example, "mere apathy" cannot give rise to entitlement.

It can be seen that this is not an area where clear legal dividing lines can be drawn. It is a matter for the judgement of the decision maker or, on appeal, a tribunal. It is also a fact of the statutory scheme that different tribunals can lawfully come to different decisions on similar cases. This is because a tribunal's decision may only be overturned on a point of law and, where the merits of a tribunal's decision are concerned, a decision is only defective in law if it is one that no reasonable tribunal could have arrived at. Accordingly, different tribunals can come to different decisions on cases with similar material facts yet both still be acting within the bounds of lawfulness (see *Moyna v the Secretary of State for Work and Pensions* [2003] UKHL 44). For this reason, good preparation of a claim is vital because once an award is made it may not be taken away merely because a later decision maker would have decided the claim differently

(vi) The bodily function impaired must be identified (*Mallinson v Secretary of State for Social Security* R(A) 3/94). The Commissioners in this case said "it will be necessary to identify the bodily function that is impaired with some precision so that the attention reasonably required to address the impairment can be properly identified and assessed". Whilst it is true that not every human activity can be described as a bodily function (that is as the normal action of any organ or set of organs of the body), this does not necessarily lead to the conclusion that care needs claimed in relation to a complex activity must be ignored. It is therefore, an error of law, merely to dismiss out of hand care needs said to arise in relation to complex activities such as "communication" or "social integration" (a). By way of example, the Tribunal of Commissioners explained how some "unbundling" may be required where it is said that a person's need for assistance with communication amounts to a need for attention in connection with bodily functions:

> ""Communication" is a functionally complex activity involving many organs of the body, including the mouth and vocal chords, but also the face and limbs…Even if it is unhelpful to consider communication as a single "bodily function" for the purposes of section 72…it is possible to breakdown or "unbundle" the specific functions of individual organs or smaller sets of organs and, where there is a functional deficiency, to focus on the particular function that is (or, where more than one, functions that are) deficient…as Lord Slynn in *Cockburn* made clear hearing, seeing, speaking and movement of parts of the body are all "bodily functions". In a case where the claimant's claim for benefit is based upon difficulties with communicating, it will be possible to look at the particular functional aspects that are deficient in his or her case, in order properly to assess the attention that will be reasonably required in respect of those deficiencies…we consider the failure of the tribunal to do so in the case before us to have been in error of law."

(a) It is worth noting that the Commissioners expressly accepted that assistance with communication given to a person with Asperger's syndrome could amount to attention in connection with bodily functions. They also expressly disapproved of those sole Commissioner decisions that have held that assistance with communication cannot amount to assistance in connection with bodily functions.

A Tribunal of Social Security Commissioners gave its decision in case CSDLA 133 2005 on 28 July 2006. The Tribunal was comprised of Judge Hickinbottom (Chief Commissioner), Commissioner Angus and Deputy Commissioner Burns QC.

PERSONS FROM ABROAD

FAILED ASYLUM SEEKERS

The High Court, in R (Binomugisha) v Southwark LBC, considers the obligations of a local authority to accommodate a failed asylum seeker who has made a fresh claim to be allowed to remain in the UK

THE FACTS

Mr B was a Ugandan national. In October 2002, aged 15, he arrived in the UK. He entered the UK on a false passport and, accordingly, was (and is) in the UK in breach of the immigration laws (which takes on particular relevance when we come to consider Mr B's support entitlements).

For Mr B's first year in the UK, he was entirely dependent upon the charity of the London Ugandan community. In October 2003, aged 16, he claimed asylum. He was referred to Southwark LBC who decided that they were obliged to accommodate him under s.20 of the Children Act 1989 (which sets out when a local authority must accommodate a child in need within their area, for example a child who has attained the age of 16 and whose welfare the authority consider is likely to be seriously prejudiced unless accommodation is provided).

KEY POINTS

- A failed asylum seeker who makes a new claim that to remove him/her from the UK would violate Article 8 of the European Convention on Human Rights (right to respect for private and family life) is to be treated in the same way as a person making an asylum claim
- Consequently, in advance of a decision on the claim by the immigration authorities, in many cases where the individual was previously accommodated by a local authority whilst an asylum seeker, s/he will have to be provided with accommodation by virtue of the Human Rights Act unless the purported fresh claim is manifestly unfounded
- A local authority, for the purposes of considering whether to provide accommodation, should not address whether the purported fresh claim would succeed; it should merely address whether it is manifestly unfounded

In December 2003, Mr B's claim for asylum under the Geneva Refugee Convention was refused, as was his claim that to remove him from the UK would violate his rights under the European Convention on Human Rights. This, however, had no immediate impact upon Southwark's provision of accommodation for him because the support restrictions imposed upon failed asylum seekers by Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (NIA 2002) do not apply to children. Whilst a child, therefore, Mr B remained entitled to accommodation under the Children Act 1989 on the same terms as any other child in England and Wales.

Mr B turned 18 in December 2004. At that point he ceased to be entitled to accommodation under s.20 of the Children Act 1989. This event coincided with a deterioration in Mr B's mental health. Subsequently, in August 2005 he was hospitalised for a week and, upon discharge, prescribed Olanzapine (an anti-psychotic).

But for his immigration status, Mr B's period as a looked after child would have entitled him to various leaving care services, and it would have been possible for accommodation to have been provided as such a service. However, the leaving care provisions of the Children Act 1989 are included within Schedule 3 to the NIA 2002. The general position under that Schedule is that a person falling within an ineligible category is barred from receiving support or assistance under an enactment listed in the Schedule. Mr B fell within one of the ineligible categories under that Schedule because he was no longer an asylum seeker and he was in the UK in breach of the immigration laws (as noted above, he initially entered on a false passport and was not subsequently given leave to enter or remain)(**a**). Accordingly, under the general position Mr B could not access accommodation under the Leaving Care legislation. In addition, mainstream social housing is entirely closed off to a person in Mr B's position as is entitlement to welfare benefits including housing benefit.

But for Mr B's immigration status, another option would have been the provision of accommodation under s.21 of the National Assistance Act 1948 (NAA) (which is the provision we have considered at length in earlier editions and is the usual legal basis for the provision of local authority accommodation to vulnerable asylum seekers and certain vulnerable failed asylum seekers: see issue 32 for a full run down of the use of s.21 NAA in this context). This is another provision included within Schedule 3 to the 2002 Act and so Mr B was, on the face of it, also ineligible for s.21 NAA accommodation.

The Schedule 3 NIA 2002 bar on the provision of support and assistance is lifted in certain circumstances. Of relevance for present purposes is that Schedule 3 does not prevent the provision of support or assistance to the extent necessary to avoid a breach of a person's rights under the European Convention on Human Rights ("the Convention"). Mr B's case was that he had to be provided with accommodation in order to avoid a breach of his rights under the Convention and, accordingly, the prohibition on providing him with accommodation under either the leaving care legislation or s.21 NAA should be lifted.

After intermittently providing accommodation for Mr B following his eighteenth birthday, in March 2006 Southwark squarely addressed the application of Schedule 3 to the NIA to his circumstances. By this time, Mr B's solicitors had made a further application to the Immigration Service for leave for Mr B to remain in the UK. The application was made on the basis that to deport Mr B would amount to an unjustified interference with his rights under Article 8 of the European Convention on Human Rights (his right to respect for his private and family life). At the date of Southwark's decision, this application was un-determined. Southwark's conclusion was that it was not necessary for them to provide accommodation in order to avoid a breach of Mr B's Convention rights. They concluded that Article 8 did not prevent Mr B's removal from the UK. Flowing from this, they decided that because it was open to Mr B to access National Asylum Support Service (NASS) accommodation under s.4 of the Immigration and Asylum Act 1999, any deterioration in his physical or mental condition through lack of accommodation would not be due to anything that Southwark had done or refused to do and, accordingly, it was not necessary for them to provide accommodation to avoid a breach of Mr B's human rights. S.4 accommodation would have been made available to Mr B if he were "taking all reasonable steps to leave the UK" (regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (in other words, if he were making himself available for deportation).

Mr B claimed judicial review of Southwark's refusal. Pending the determination of the claim, an interim order required Southwark to provide him with accommodation.

THE HIGH COURT'S DECISION

The High Court quashed Southwark's decision and ordered them to reconsider B's application for assistance. The key points in the Court's decision were as follows:

(i) the Court began by referring to the recent High Court decision in *R (AW) v Croydon LBC* [2005] EWHC 2950 (QB) (which we considered in issue 30). That case concerned the support position in relation to failed asylum seekers who try to make a fresh claim for asylum in advance of a decision from the immigration authorities as to whether to accept it as a fresh claim. The High Court in that case held that where the supposed fresh grounds for asylum were "manifestly nothing of the sort" then a local authority considering whether an applicant's human rights required accommodation to be provided (i.e. when considering whether the Schedule 3 NIA 2002 bar was to be lifted) could in limited cases ignore the purported new claim and operate on the assumption that there is no impediment to the individual leaving the UK. However, it went on to say that "it is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis of the manifest inadequacy of the purported fresh grounds". It seems that where the purported new asylum claim cannot be ignored then the support position is similar to that which applies in respect of asylum seekers proper: in *R (Adam) v the Home Secretary* [2005] UKHL 66 the Law Lords held that sooner or later a destitute asylum seeker would have to be provided with support in order to avoid a breach of Article 3 of the European Convention on Human Rights, the right not to be subjected to inhuman or degrading treatment. In this case the High Court held that the *Croydon* approach applied despite the fact that B was not making a fresh claim for asylum (he was making a claim to the immigration authorities that to remove him from the UK would unjustifiably interfere with his rights under Article 8 of the Convention, his right to respect for his private life here in the UK);

(ii) when Southwark considered B's application for assistance, they came to their own view as to whether his rights under Article 8 would prevent his deportation from the UK (and decided that they would not). This was an error of law. Southwark should have restricted themselves to considering whether or not B's Article 8 claim was manifestly unfounded;

(iii) the High Court did not accept that to remit the matter back to Southwark would be pointless because they would inevitably find that B's Article 8 claim was manifestly unfounded. This was for the following reasons:

> there were unresolved questions as to the nature of the psychotic episode that led to B's hospitalisation, in particular as to whether it was constitutional in origin or had been precipitated by excessive cannabis consumption. Allied to this, there had been no investigation of what mental health services might be available to B in Uganda;

at a relatively late stage in proceedings, it became apparent that B also had hypertension which is unusual in one so young. His consultant's opinion was that it would be unsafe for him to leave the UK until his blood pressure had been reduced;

an immigration hearing in 2004 had concluded that to deport B would amount to an interference with his right to respect for his private life given the community ties he had developed in the UK and the lack of such ties in Uganda. Whilst the immigration judge had on that occasion decided that the interference occasioned by deportation would be justified, the fact that the judge had decided that B's Article 8 rights were then engaged was an "important factor" to be taken into account when deciding if B's current immigration claim was manifestly unfounded particularly in the light of the fact that over the last two years B's attachment to the UK, and the connections he had made here, had, if anything, grown stronger;

under Article 8, for an interference with a person's right to respect for his private or family life to be justified it must be proportionate. The High Court pointed out that this is essentially a judgement to be made by the immigration authorities. It said that "there is no doubt that part of the immigration policy which the Home Office operates is concerned with the burden which would be placed on local authorities if people without resources of their own were granted leave to enter or remain. But this is only part of a wider picture. Taking a view about these matters is quintessentially a task for the immigration authorities rather than local authorities. This is further support for the proposition…that a local authority such as Southwark should only make its decisions on the basis that a person such as the Claimant is free to go back to his own country if an outstanding human rights claim to remain in the UK is manifestly unfounded."

(iv) if B's human rights do call for him to be provided with accommodation, who is to provide it? This was not the subject of a ruling by the High Court in the present case but it seems likely that it would be Southwark. A failed asylum seeker can potentially access what is called 'hard cases' National Asylum Support Service accommodation (provided under s.4 of the Immigration and Asylum Act 1999(**b**)). Where the failed asylum seeker's human rights call for the provision of accommodation, therefore there are potentially two sources of support – local authority and hard cases. In the *Croydon* case, the High Court held that in respect of persons who, as adult asylum seekers, were accommodated by local authorities under s.21 of the National Assistance Act 1948 on account of their vulnerability ('destitution plus' cases) it is for local authorities and not NASS to provide the accommodation necessary in order to avoid a breach of Convention rights. Given B's mental health history, it would appear, regardless of the leaving care legislation, that B is a 'destitution plus' case and so, in accordance with *Croydon*, entitled to be accommodated under s.21, rather than by NASS under s.4 of the 1999 Act, if his human rights call for the provision of accommodation. This probably explains why Southwark's counsel informed the High Court in the present case that it would not seek to argue that NASS should accommodate B if his human rights called for someone to provide him with accommodation.

DISCUSSION – WHEN IS A CLAIM MANIFESTLY UNFOUNDED?

To permit a local authority (with social services responsibilities) to ignore a "manifestly unfounded" claim does not actually make life any easier for the authority. Leaving aside the obvious case of a purported fresh claim which relies on materially the same grounds as an earlier rejected claim, in order for an authority to decide whether a claim is manifestly unfounded, the authority must have an idea of what amounts to a good claim.

What are the categories of fresh claim that are likely not to be manifestly unfounded?

Obviously, something must have changed as between the decision on the initial claim and the date of the purported fresh claim in order for it truly to be a fresh claim. This may be a change in the circumstances of the applicant's home country such as to raise questions as to whether the Geneva Convention on refugees might now be applicable. Perhaps more commonly encountered would be a change in the personal circumstances of the applicant over the period since the initial rejected claim. The well-documented relaxed attitude of the immigration authorities to enforcement over recent years may come to assist claimants in this respect. As roots are established and social and family connections are made and/or deepened in the period following a rejection of an immigration claim, the Article 8 (the right to respect for private and family life) picture alters. In such cases it may well be difficult for a local authority to style an Article 8 claim as manifestly unfounded: the present case is a good example of that. This is not to say that the immigration claim based on Article 8 will ultimately succeed, that is a different question to be decided in due course by immigration decision makers. Another reasonably common change of circumstances relates to a deterioration in an applicant's health, whether physical or mental, a feature also present in this case. Such a change will make it difficult for a local authority to reject the purported fresh claim as manifestly unfounded. Again, this is not to say that such a change is likely to lead to a successful immigration application, but merely that it makes it difficult for a local authority to proceed for support purposes on the basis that the purported fresh claim is manifestly unfounded and therefore can be ignored.

(**a**) If Mr B had claimed asylum as soon as he arrived in the UK back in 2002 he would not have fallen within an ineligible category upon becoming a failed asylum seeker. A person who claims upon arriving in the UK is not in the UK in breach of the immigration laws (as was explained in the *Croydon* case). This means s/he does not fall within an ineligible category until such time as s/he fails to comply with removal directions.

(**b**) The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 set out the cases in which s.4 'hard cases' support is to be provided. They include the case where "the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights".

The High Court (Andrew Nicol QC, sitting as a Deputy Judge of the High Court) gave its decision in R (Binomugisha) v Southwark LBC on 18 September 2006 [2006] EWHC 2254 (Admin.).

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Telephone: 0800 783 3656 Facsimile: 0800 783 6871
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