

# Shelter's housing law update

A monthly bulletin for housing advice specialists

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*Shelter's housing law update (SHLU)* is an invaluable monthly information bulletin for housing practitioners and advice workers.

It summarises recent court, Upper Tribunal and Ombudsman decisions and contains details of new articles and publications from a wide variety of sources. It also has a news page with up-to-date information about main developments in housing law and policy.

Some cases reported in *SHLU* carry greater weight than others. Cases decided in the Supreme Court, Court of Appeal and High Court set precedents that lower (and same level) courts are bound to follow. Those decided in the county courts can only give guidance and are included, in the absence of binding authority, as they are illustrative of how a court interpreted the law. Cases where permission to apply for judicial review has been granted or refused may also be reported as, again, in the absence of binding authority, they are illustrative of what the law may require.

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If you have details of a court case that could be of interest to *SHLU* readers, or you have any queries or comments about the content of *SHLU*, please contact [Anna\\_Socci@shelter.org.uk](mailto:Anna_Socci@shelter.org.uk) or [Tony\\_Benjamin@shelter.org.uk](mailto:Tony_Benjamin@shelter.org.uk)

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## Allocations

The Department for Communities and Local Government (DCLG) is seeking views on new statutory guidance on social housing allocations for local authorities in England. This is intended to help authorities to take advantage of the provisions in the Localism Act 2011 and will replace all the following:

- Code of guidance on the allocation of accommodation, issued in 2002
- Code of guidance on choice based lettings, issued in 2008
- Circular 04/2009: Housing allocations – members of the Armed Forces
- Fair and flexible: statutory guidance on social housing allocations, issued in 2009.

The DCLG is also consulting on two sets of draft regulations relating to the Armed Forces. These will ensure that former Service personnel who have urgent housing needs are given ‘additional preference’ for social housing and that Service personnel are not excluded from an allocation by reason of a scheme’s residence criteria. The deadline for responses is 30 March 2012. The consultation paper and the draft regulations can be downloaded at [tinyurl.com/DCLGallocs](http://tinyurl.com/DCLGallocs)

## Tenancy strategies

On 15 January 2012, the Localism Act 2011 (Commencement No. 2 and Transitional and Saving Provision) Order 2012 brought section 150 of the Localism Act 2011 into force, which provides that local authorities must prepare and publish a tenancy strategy within 12 months. The strategy must set out matters which all registered providers of social housing in its area, including the authority itself, should have regard to when framing their policies on types of tenancies they will grant, the circumstances in which they will grant particular types of tenancies and the length of fixed-term tenancies they elect to grant.

## Tackling tenancy fraud

The DCLG is consulting on proposals to help social landlords reduce tenancy fraud within their housing stock. Tenancy fraud includes unlawful subletting and key selling. The proposed measures include a new criminal offence. The deadline for responses is 4 April 2012. The consultation paper can be downloaded at [tinyurl.com/DCLGfraud](http://tinyurl.com/DCLGfraud)

## Right to reside

The Department for Work and Pensions (DWP) has issued two further memos concerning ‘persons from abroad’:

- *DMG Memo 34/11* provides that an EEA national who claims income support, employment support allowance (income-related) or state pension credit should be treated as being registered as a jobseeker where s/he has declared on the claim form, or otherwise in the course of making a claim, that s/he is looking for work.
- *DMG Memo 35/11* follows the Upper Tribunal decision in *Secretary of State for Work and Pensions v RR (IS)* [2011] UKUT 451 (AAC) which held (following the European Court of Justice decision in *Zambrano*) that an EU national who was not a worker had a right to reside as her dependent child was a UK citizen. The DWP has advised its decision makers to stay making a decision for claimants in ‘lookalike cases’ pending the outcome of its appeal to the Court of Appeal.

Both memos can be found under ‘Letters and memos’ at [tinyurl.com/dwppdmg](http://tinyurl.com/dwppdmg)

## Shared accommodation rate

The DWP has issued *HB/CTB Circular A14/2011* which provides further guidance (to that in *HB/CTB Circular A12/2011 (Revised)*) on the new exemptions from the shared accommodation rate for ex-offenders and homeless people aged 25 to 34. The circular is available at [tinyurl.com/circulars2011](http://tinyurl.com/circulars2011)

## Bankruptcy and DROs

The DWP has issued *Urgent Bulletin HB/CTB U6/2011* with guidance for HB departments in relation to overpayment recovery where a claimant is subject to a debt relief order or a bankruptcy order. This follows the decision of the Supreme Court in *Secretary of State for Work & Pensions v Payne & Anor* [2011] UKSC 60. The bulletin is available at [tinyurl.com/bulletins2011](http://tinyurl.com/bulletins2011)

## Separated children from abroad

The Coram Children’s Legal Centre has published *Seeking Support: A Guide to the Rights and Entitlements of Separated Children* which provides advice for professionals on how to access those entitlements. The guide can be downloaded at [tinyurl.com/CLCminors](http://tinyurl.com/CLCminors)

## Article

### **First steps towards abolition of UK right to reside test?**

by Pamela Fitzpatrick

Why the UK's right to reside test breaches EU law.

Source: *Legal Action*, January 2012.

## Cases

### **Bubb v Wandsworth LBC**

*The county court, when deciding a section 204 appeal, is exercising substantially the same decision making process as that of judicial review. It was for the review officer to determine factual disputes, the role of the county court was to consider appeals on points of law and not make findings of fact.*

Court of Appeal

9 November 2011

Source: Transcript [2011] EWCA Civ 1285.

Ms Bubb (B) made a homeless application to Wandsworth LBC after fleeing domestic violence with her young son. The Council accepted the full housing duty under Part 7 of the Housing Act 1996. In September 2008, the Council placed B in temporary accommodation at Trayfoot Lodge. In March 2009, the Council moved her to Clarkson House.

On 5 August, the Council sent B a letter offering her permanent accommodation at Alfreda Court. The Council sent the letter to Trayfoot Lodge but when it realised that this was not B's current address it stated that a further letter was hand delivered to Clarkson House on 11 August. This letter was headed 'Final Offer of Accommodation' and stated that the offer would be withdrawn if B did not contact the Council by 14 August to make arrangements to view the property and that it was a final offer for the purposes of section 193(7) of the 1996 Act. The letter also stated that if B was unhappy with the property she had 21 days in which to request a review of the suitability of the property.

B viewed Alfreda Court and, on 2 September, she refused the offer. On 23 September, the Council wrote to B stating that it had discharged its homelessness duty to her under section 193(7) of the 1996 Act, which provides that:

'The local authority shall ... cease to be subject to the duty under this section if the applicant, having been informed of the possible consequences of

refusal and of the right to request a review of the suitability of the accommodation, refuses a final offer of accommodation'.

B sought a review of this decision alleging that she had never received the letter of 11 August so the Council had not discharged its duty. However, after conducting an investigation the Council determined that B had received the letter and that the property was suitable.

B appealed to the county court under section 204 of the 1996 Act. The court dismissed her appeal and held that the Council's reviewing officer had set out detailed reasons for finding that B had received the letter and 'it was a conclusion that he was perfectly entitled to reach'.

B appealed to the Court of Appeal arguing that:

- (1) whether she had received the letter of 11 August was not an assessment involving a value judgment for the Council but a question of hard fact to be determined by the county court, and
- (2) the court, in doing so, should have considered oral evidence from witnesses, and
- (3) even if the court approached its decision-making process on a judicial review basis, it had reached the wrong conclusion.

### **Appeal dismissed**

(1) The Court of Appeal observed that 'under Part 7 of the 1996 Act, a number of questions which fall to be considered can be said to involve value judgments which are expressly assigned to the local authority (e.g. whether an applicant is homeless ..., whether an applicant has priority need ...), whereas the question whether an applicant received notification which satisfies section 193(7) can be said to be a "true or false" issue whose determination is not expressly assigned to the authority. However, even this division of issues into two types is not as clear-cut as it might first appear. The former type of question may involve the determination of hard facts (e.g. whether an allegedly homeless applicant's former home has or has not been relet), and the latter question may involve a value judgment (e.g. whether the applicant is a honest person with a clear recollection)'. However, the essential point was that it was for the review officer to determine factual disputes, the role of the county court was only to consider appeals on points of law and there was 'no jurisdiction under the statutory scheme for

the County Court to set itself up as a finder of the relevant primary facts for itself’.

The role of the county court is in substance the same as that of the High Court in judicial review, the House of Lords stated in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5 (see *HAU* March 2003) that a review decision may be quashed ‘not only ... if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable or ... if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact’.

(2) In the vast majority of cases it is not appropriate for oral evidence to be heard by the county court. It would only be an exceptional case where oral evidence would be appropriate and, in the current case, there were no grounds for contending that the county court should have allowed this.

(3) There was evidence to support the review officer’s finding that B had received the letter and it could not be said that he had failed to have regard to a relevant fact or misunderstood the facts when reaching this decision. As such, it was not possible to quash this decision.

### **Secretary of State for Work and Pensions v Elmi**

*An application for income support including a statement that the applicant was seeking work was sufficient to amount to ‘registration as a job seeker’ within Article 7(3) of the Citizen’s Directive.*

Court of Appeal

18 October 2011

Source: Transcript [2011] EWCA Civ 1403.

See *Financial and benefits* page 12.

### **Alarape and Tijani v Secretary of State for the Home Department and Aire Centre (Intervener)**

*The Upper Tribunal referred to the ECJ two questions on whether a parent’s right of residence derived from a child in full-time education continued even though the child was an adult and living in other accommodation, and whether both the child and the parent could derive a right of permanent residence where the child had held a right of residence through full-time education for five years.*

Upper Tribunal (Immigration and Asylum Chamber)  
10 October 2011

Source: Transcript [2011] UKUT 00413 (IAC).

See *Asylum and immigration* page 19.

## Landlord and tenant

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### Article

#### **Hard times**

by Mark Robinson

How to advise tenants in possession of a warrant for eviction.

Source: *Adviser*, January/February 2012.

### Cases

#### **Rochdale BC v Dixon**

*The county court had been entitled to make a suspended possession order against a tenant who had refused to pay water charges, collected by the Council landlord on behalf of the water company, believing the landlord had no legal right to claim the payments from him.*

Court of Appeal

20 October 2011

Source: Transcript [2011] EWCA Civ 1173.

Mr Dixon (D) had been a tenant of Rochdale BC since 1972. In 2005, the Council entered into an agreement with United Utilities (UU) under which it would collect water charges on UU’s behalf from its tenants. In February, as required by the Housing

Act 1985, the Council served on D a notice of variation of his tenancy. The notice did not state that the water charges were part of the rent, but it stated that tenants were under an obligation to pay, by weekly instalments, all charges in respect of their occupation, including water charges. Initially D paid the water charges but stopped doing so in 2007, maintaining that the agreement between the Council and UU was unlawful and that the Council had not lawfully varied his tenancy agreement. The water charges amounted to £6.20 per week and D's arrears had risen to £1,451 when the Council sought possession. The county court made a suspended possession order. D appealed to the Court of Appeal arguing that:

(1) the agreement was *ultra vires* (ie outside the powers of the relevant parties)

(2) the Council had failed to comply with the statutory requirements to vary his tenancy under section 103 of the 1985 Act, which requires that a preliminary notice must be served before the notice of variation. This notice should, among other things, specify the proposed variation and its effect and D argued that the notice served failed to do this because it did not expressly state that an eviction may follow if the water charges were not paid

(3) the purported variation was unfair under the Unfair Terms in Consumer Contracts Regulations 1999

(4) in any event, it had not been reasonable to make a possession order. The county court had erred in principle because it gave no weight to the fact that the non-payment was based on his genuine belief that the Council had no legal right to claim the money and it had not adequately considered whether an order for possession was necessary to secure payment of the amounts due.

### **Appeal dismissed**

(1) The Court of Appeal rejected the argument that the agreement was *ultra vires*. Under the agreement, UU was still the provider of water services and fixed the charges but the Council was to invoice and collect the charges. There was nothing unlawful about such an agreement.

(2) The Court also rejected D's second argument holding that, although the notice had not expressly set that the non-payment of the water charges could lead to eviction, the information given to

tenants as a whole made it clear that it could. The Council had substantially complied with section 103 of the 1985 Act.

(3) The Court moreover rejected the argument that the term was unfair under the 1999 Regulations. The insertion of the new term did not create a significant imbalance between the parties and was not contrary to the requirement of good faith.

(4) Finally, the Court rejected the argument that it had been unreasonable for the county court to make an order for possession. The court had carefully balanced all the factors of D's case and had found that the arrears were not minimal and that the making of a possession order would not be disproportionate. It had suspended the order on terms that would give D almost six years to pay the arrears. There was no error in the way the county court had exercised its discretion.

### **Holmes v Westminster CC**

*In a proportionality challenge, the court does not always need to hear oral evidence to decide the facts. The tenant should have set out his case to show that he had substantial grounds to establish the need for a hearing to find the facts.*

High Court (Queen's Bench Division)

3 November 2011

Source: Transcript [2011] EWHC 2857 (QB).

Mr Holmes (H) was owed the full housing duty as a homeless person under section 193(2) of the Housing Act 1996 and, in 2005, was granted a non-secure tenancy by Westminster CC. H had a number of mental health problems, including severe anxiety, obsessional behaviour, depression and alcohol dependence syndrome.

In June 2009, the Council, after H had twice failed to attend appointments for the inspection of his property, notified him that it had discharged duty. H was then served with a notice to quit. In August, possession proceedings were commenced but then postponed pending the outcome of H's review request of the Council's decision that it had discharged its homelessness duty. In January 2010, the Council withdrew its decision. However in February, two of its officers said they were assaulted by H at his home and the Council resumed possession proceedings.

H filed a defence with the county court. The transcript of the judgment does not say what it contained but it appears to have been a challenge to the proportionality of making a possession

order or to the service of the notice to quit or both. However, a possession order was made on a summary basis without the court hearing live evidence. H appealed to the High Court.

### **Appeal dismissed**

The High Court's view was that the procedure in Civil Procedure Rule (CPR) 55.8 was intended to provide that claims for possession should normally be decided without the need for a trial and should be based on written witness evidence, the content of the claim and the defence forms as submitted.

The Court went on to review the developments around proportionality challenges from 2006 onwards, in particular the Supreme Court decisions in *Manchester CC v Pinnock* [2010] UKSC 45 (see *SHLU* December 2010/January 2011) and *Hounslow LBC v Powell* [2011] UKSC 8 (see *SHLU* April 2011). The Supreme Court held that where there is an entitlement to possession there will be a very strong case for saying the order would be proportionate. Hence the tenant will need to set out why there are compelling factors which render it disproportionate for the court to order possession. Further, 'It is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration of the issues of lawfulness or proportionality'. (para 41, *Powell*)

As to whether the tenant can challenge factual basis of the landlord's claim for possession, the High Court cited the judgement in *Pinnock* that '... the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact' (para 49) and in *Powell*, 'Sometimes the authority will be reacting to the behaviour, or perceived behaviour of the tenant. In the latter event the authority may be proceeding on the basis of a factual assumption that is unsound. If the only reason that the authority is seeking possession is that the tenant has been guilty of bad behaviour, obtaining possession will not further the legitimate aims of the authority if that factual premise is unsound'. (para 114)

Only in the course of the appeal did H submit that he had merely lost his balance and fallen on the housing officers while attempting to tear up a document they were attempting to serve on him. However, H had not previously raised a dispute about the facts of the incident in his defence and the county court had held that there was

no seriously arguable defence based on disputed facts for it to consider. Accordingly, the county court had not been obliged to adjourn the case for a full hearing and had been entitled to order possession 'in the light of the evidence submitted to [it] and the submissions made upon it'.

When assessing proportionality, the county court will take into account the competing rights and interests of the landlord and tenant. In H's case, the Council had a legitimate concern to protect its employees from harm, one that was explicitly set out in its antisocial behaviour policy. The county court was not obliged to go through a trial process to determine whether H had committed a criminal offence, or even a civil wrong, as conduct may be regarded as unacceptable regardless.

The High Court also dismissed H's further public law arguments. Firstly, an argument that the Secretary of State's guidance addressing the rehabilitation of perpetrators and support for vulnerable groups had not been considered by the Council was rejected because the argument had not been put to the county court. Secondly, an argument that the county court ought to have held that the Council had breached its public sector equality duty under section 49A of the Disability Discrimination Act 1995 (now section 149 of the Equality Act 2010) was rejected because the county court had considered it and had said there was a need for 'cogent evidence of breach of policies or duties under statute before such a defence can carry weight'.

### **Shelter comment**

This case follows the judgments and guidance given by the Supreme Court in *Pinnock* and *Powell*. *Powell*, which dealt with possession actions against non secure (homeless) tenants and introductory tenants, confirmed that proportionality defences are in principle available in the county court. However, that decision left it unclear as to how busy judges will work their way through a possession list when confronted by proportionality defences, and H's case highlights the difficulties involved. H appears to have been a very vulnerable man but his vulnerabilities did not prevent a summary possession order.

H's case demonstrates the importance of a fully pleaded defence and witness statements being prepared before the hearing. If there are important factual issues that need to be determined by the court, then the factual differences between the

tenant's case and the landlord's case have to be spelt out as much as possible. H's case also highlights that where a defence is based on the breach of the public sector equality duty, the particular way in which due regard to the duty might have made a difference to the landlord's decision may need to be specified.

It appears from the transcript that it was not argued, and it could have been, that the notice to quit could not determine H's tenancy (as a matter of public law) by virtue of the fact that it was served following the Council's purported discharge of homelessness duty decision.

One final point, in respect of CPR 55.8, is that it is worth contrasting the approach in this case with that taken by the High Court in *Benesco Charity Ltd v Kanj and Anor* [2011] EWHC 3415 (Ch) which did not concern proportionality but an alleged misrepresentation. The trial judge, unimpressed by K's witness statements, granted possession summarily. On appeal however, the High Court held that where witness statements supported by statements of truth are produced alleging reasons why possession should not be granted, they 'should be not rejected at a summary stage unless the evidence is incredible. A person is entitled where there are matters raised in the witness statement unless that high threshold is reached to take the matter to trial'. Hence the correct approach on this matter is not clear.

### **Purdie and Bellwood (trading as Dolphin Finance) v Miller**

*Claim for possession on grounds of rent arrears failed because of the landlord's breach of agreement under a sale and rent back arrangement.*

Newcastle upon Tyne County Court  
20 October 2011

Source: Clark Willis Lawfirm.

Mr Purdie (P) claimed possession of a house let to Mrs Miller (M). P submitted that M occupied the property under an assured shorthold tenancy commencing in May 2008, and brought proceedings on grounds 8, 10 and 11 of Schedule 2 to the Housing Act 1988. P claimed rent arrears amounted to £2,280 when the possession claim began and had increased to £5,700 by the date of the court hearing. The background to the case was not straightforward.

The tenancy had been granted as part of a sale and rent back transaction involving the house in which M had lived for over 26 years, after M had fallen into mortgage arrears. Dolphin Finance (Dolphin) was a firm offering sale and rent back type arrangements and was a business partnership between P and Mr Bellwood (B). P visited M at least three times before documents were signed to affect the transfer of the property.

The sale price was £82,500. It was accepted that this was a proper market price for the property, ie there was no question of a sale at an undervalue. In April 2008, M signed a document titled 'Repossession Scheme'. The material terms of this agreement were that:

- (1) Dolphin would pay off M's mortgage loan, another debt, all the legal costs of the transaction and would pay M a lump sum of £4,000 following completion.
- (2) M would take a tenancy of the house under which the rent of £228 per month would be fixed for three years. The rent was below market rental value.
- (3) At the end of the three years, M would have an option to buy back the property at market value, with a deposit provided by Dolphin out of monies retained from the sale.

M also signed a 'Customer Agreement' which provided that a 'mortgage packaging fee' of £4,000 would be retained, plus an additional sum of £41,200 for 'property related costs.' The sum of £41,020 would be held for three years to cover property maintenance and, if M was able to re-purchase the property at the end of three years, the deposit and all legal costs would be paid out of that sum.

M was represented in the sale of the house by a firm of solicitors recommended by P. The property was transferred into the joint names of P and B. The possession proceedings were brought by P without any express agreement from B, who showed no interest in sorting out the debts of the partnership. By that time, the partnership between P and B (ie Dolphin) had been dissolved and the money held in its accounts used to pay off its debts. As a result, any balance of the two sums of £41,200 and £4,000 disappeared at that time.

M defended the possession claim arguing that:

- (1) the transaction was an 'unconscionable bargain' and/or that it was induced by misrepresentation

(2) M had not authorised the deduction of £41,200 from the proceeds of sale

(3) M was entitled to damages as a result of the state of repair of the property and other breaches of the agreement.

### ***Claim dismissed***

The County Court rejected M's submission that she had not authorised the deduction of the sum of £41,200 or that there had been misrepresentation on the part of P. In relation to the question of whether there was an unconscionable bargain it was necessary to consider the effect of the contract. There was a sale of the premises for £82,500, which was a fair market price. Dolphin contracted to pay off M's mortgage debt and rent the house back to her at a low rent of £228 per month. The difficult area was in the retention of the two sums of £4,000 and £41,200.

The sum of £4,000 was a fee for the specific purpose of enabling M to obtain a mortgage if she re-purchased the house after three years. M was in no position to re-purchase the house and as a result the £4,000 was repayable to her.

The sum of £41,200 was to be held in Dolphin's bank account for the specific purpose of property maintenance. There was no express obligation to repay the sum, or the balance of it, if M did not purchase the property at the end of the three year period. The agreement was silent on the point.

However, the County Court held that it was implicit in the arrangement that if the purchase did not go ahead, the balance of the £41,200 would be repaid to M. It was reasonable and necessary to imply such a term in order to give business efficacy to the contract.

The concept of an unconscionable bargain involved a purchase at a substantial undervalue from a 'poor and ignorant person' without independent advice. The basic terms of the transaction, particularly the sale price and the amount of the rent, were fair. The potential area of unfairness was the treatment of the £41,200. But if the balance of this sum (after maintenance costs) was to be repaid to M, the arrangement looked at as a whole could not be said to be an unconscionable bargain. M's defence of unconscionable bargain therefore failed.

In relation to breaches of the agreement, the Court was satisfied that the property had not been kept in proper repair and an estimate of remedial work (which would have come out of the £41,200) was £7,535. However, there were also breaches by P and B in failing to repay the sums of £4,000 and the £41,200 to M. She was entitled to an account of what costs and expenses had been incurred in respect of maintenance work. P had not provided invoices, or even estimates, in relation to any work done. The court assessed the value of the work done by Dolphin at £3,000. But Dolphin's funds had been distributed to other creditors when the partnership was dissolved. There was a breach of contract when those sums were distributed.

The court concluded that the sum of £38,200 (allowing for the £3,000 worth of maintenance work) was owed to M, in addition to the £4,000. M was not entitled to the sum of £7,535 in respect of repairs because, if this sum had been expended, it would have come out of the £41,200 in any event.

In conclusion, M was in substantial rent arrears and in breach of her contractual obligation to pay rent. However, she was entitled to set off against the arrears the total sum of £42,200 due on her counterclaim (ie £38,200 + £4,000). It followed that no sum was due in respect of rent at the date of the court hearing and the claim for possession had to be dismissed.

P was invited to file a document signed by B confirming that he consented to being a party to the proceedings. He had not done so. It was not necessary to decide whether the proceedings would have failed on that ground in any event, but in the court's view, they would have failed.

## Article

### **The Localism Act 2011: allocation of social housing accommodation**

by Tim Baldwin and Jan Luba QC

The changes introduced by the Act on the regime governing the allocation of social housing.

Source: *Legal Action*, January 2012.

## Case

### **Francis v Southwark LBC**

*A secure tenant had no entitlement to damages if his landlord had failed to comply with its duties under the Right to Buy procedure.*

Court of Appeal

1 December 2011

Source: Transcript [2011] EWCA Civ 1418.

In 1992, Mr Francis (F) was granted a secure tenancy of a flat by Southwark LBC. He had a history of rent arrears and was subject to a number of claims for possession. On 26 March 2003, F applied for the right to buy (RTB) his flat. The Council refused his application because he 'had breached the terms of a possession order'. On the same day F applied to the county court for the revival of his secure tenancy, as he was then a tolerated trespasser. This was refused by the District judge so he appealed to the Circuit judge. On 27 March, the maximum discount under RTB was reduced from £38,000 to £16,000.

In July 2004, F was rehoused, as his block of flats was due to be demolished, and was granted an introductory tenancy. In June 2005, the Circuit judge granted his appeal concerning the revival of his secure tenancy and declared he had been a secure tenant of his former flat from 2000 to July 2004. This meant that his RTB application would have been successful at a time when the discount that applied was set at a higher rate.

In February 2006, the Council issued possession proceedings against F due to significant rent arrears. F counterclaimed for damages for breach of the Council's statutory duty to grant him the RTB his former home (which by this time had been demolished). Because he had been deprived of the RTB, he had been unable to enjoy the maximum discount then available and had lost the opportunity to sell the flat at full market value. The county court dismissed F's counterclaim and made an order for possession. F appealed to the Court of Appeal.

### ***Appeal dismissed***

Under section 118(1) of the Housing Act 1985 the RTB is conferred on a secure tenant. The Court of Appeal held that 'Section 118, as such, does not impose any duty, express or implied, on the council. It merely states the right of the tenant, which is to be established by the procedures under the Act, leading eventually to a duty to convey under s 138'.

On receipt of a tenant's notice claiming the RTB, the landlord's duty is set out in section 124 of the 1985 Act which provides that:

'(1) ... the landlord shall, unless the notice is withdrawn, serve on the tenant ... a written notice either –

(a) admitting his right, or

(b) denying it and stating the reasons why, in the opinion of the landlord, the tenant does not have the right to buy.'

The Court cited the High Court decision in *Hanoman v Southwark LBC* [2004] EWHC 2039 (Ch) (see *HAU* October 2004) which held that 'The wording of s.124(1) could not ... be plainer: they shall give a decision which is either in favour of accepting or denying the right to buy. ... If the application is such that the information leads them to conclude that there is a doubt as to the authenticity of the application, there is therefore sufficient material in their minds, for them to deny the right to buy'. The Court held that there was nothing in the 1985 Act 'to suggest that Parliament intended to create a remedy in damages'. The remedy for F was provided by section 181 which enabled him to apply to the county court for a declaration of his RTB.

## Article

### **Housing repairs update 2011 – Part 2**

by Beatrice Prevatt

Annual review of developments in case law, legislation and policy.

Source: *Legal Action*, January 2012.

## Case

### **Haq v Eastbourne BC**

*No compensation payable where a prohibition order became operative, as occupation of the flat in question was detrimental to the health of any occupiers.*

Upper Tribunal (Lands Chamber)

10 October 2011

Source: Transcript [2011] UKUT 365 (LC).

Mr Haq (H) owned a three-storey semi-detached house. In 1975, planning permission was granted to convert the property into five holiday flatlets and a warden's flat. 'Flat 7' was shown as a communal bathroom on the plan accompanying the planning application.

In 2002, H submitted a further planning application seeking a change of use from holiday to residential flats and planning permission was then granted to allow the six flats to be used as self-contained residential flats.

After an inspection under the Housing Health and Safety Rating System (HHSRS), Eastbourne BC found that 'Flat 7' was a room of only 12.5 square metres which included a shower room of 2.5 square metres. This was being let out as a separate residential unit.

The HHSRS is intended to identify hazards and their likely impact on the health and safety of occupiers in residential premises. Under section 5(1) of the Housing Act 2004, if the Council considers that a Category 1 hazard exists it must take the appropriate enforcement action in relation to the hazard. The Council found that 'Flat 7' constituted a Category 1 hazard on crowding and space grounds and, in July 2008, served a prohibition order on H. H did not appeal against the order.

In February 2009, the Council revoked the prohibition order and replaced it with another prohibition order suspended for the duration of the existing tenancy.

On 1 October, when the tenant left 'Flat 7', the suspended prohibition order became operative preventing the room from being relet, as it was too small.

H sought compensation of £45,000 from the Council. Section 584A of the Housing Act 1985 provides for compensation to be payable where a prohibition order becomes operative. The amount of compensation is the resultant reduction in the value of the premises. The Council argued that in assessing compensation regard must be given to the six valuation rules contained in section 5 of the Land Compensation Act 1961, in particular rule 4 of that section which provides:

'Where the value of the land is increased by reason of the use thereof or any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account'.

H contended that rule 4 did not apply as 'Flat 7' was not used in a manner that could be restrained by any court or was contrary to law.

### **Claim dismissed**

The Upper Tribunal considered the applicability of rule 4 of section 5 of the 1961 Act, firstly, by reference to the lawful use of the premises and, secondly, by reference to the use of the premises in a manner detrimental to the occupier's health.

On the first issue, the Tribunal found that the use of 'Flat 7' as a separate residential unit without planning permission was a breach of planning control and unlawful.

However, for the purpose of section 5, if H could show that 'Flat 7' had been so used for a period of four years beginning with the date of the first breach, then that breach would be immune from enforcement action under section 171B of the Town and Country Planning Act 1990, even in absence of a certificate of lawfulness.

The valuation date in respect of compensation arising from the issuing of a prohibition order is the date of the coming into operation of the order. The valuation date for the first prohibition order was 21 August 2008 and the valuation date for the second prohibition order was 1 October 2009. The Court was satisfied that, on the balance of probabilities, the separate use of 'Flat 7' commenced before 21 August 2004.

In respect of the lawful use of the premises, the value of the property had not been increased by reason of the use of the premises in a manner which could be restrained by any court or contrary to law.

On the second issue, the Tribunal was satisfied that the assessment of the use of 'Flat 7' as Category 1 hazard required mandatory enforcement action by the Council.

The Tribunal held that 'the claim for compensation in this case is solely based upon an increase in the value of land which is due to the use of Flat 7 as a separate self-contained flat. That use was detrimental to the health of the occupants of that flat and, under rule 4, the increase in value shall not be taken into account'.

Accordingly, the Tribunal refused to award compensation.

## Financial and benefits

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### Articles

#### **The young are getting older...**

by Fiona Seymour

The new age threshold for the shared accommodation rate of housing benefit.

Source: *Adviser*, January/February 2012.

#### **Using peer support groups in debt advice**

by Joan Matthews and Don Rogers

One project's experience of providing an innovative approach to work with clients in debt.

Source: *Adviser*, January/February 2012.

#### **Guarantees, indemnities and the Consumer Credit Act 1974**

by Guy Skipwith

What to look for when advising a guarantor after a debtor has defaulted on an agreement.

Source: *Adviser*, January/February 2012.

### Cases

#### **Secretary of State for Work and Pensions v Payne and another**

*The power of the Secretary of State to recover overpayments of benefit or Social Fund loans was a 'remedy in respect of a debt' and could not be exercised following the making of a debt relief order or a bankruptcy order.*

Supreme Court

14 December 2011

Source: Transcript [2011] UKSC 60.

In September 2007, Ms Payne (P) applied to the Department for Work and Pensions (DWP) for a loan of £843 from the Social Fund. In August

2009, she obtained a debt relief order (DRO) listing the loan among her qualifying debts. Despite the DRO, the DWP deducted the sum of £23.59 per week (later reduced to £11.64 per week) from her benefits to repay the loan. In August 2010, the one-year moratorium period came to an end and the debt was discharged.

In Ms Cooper's (C) case, the DWP decided that she had been overpaid £1,195.07 in incapacity benefit and began to recover this from her benefits at the rate of £128.44 each month, starting in December 2009. In January 2010, C obtained a DRO which listed the overpayment as one of her qualifying debts, but the deductions continued to be made. In January 2011, the one-year moratorium ended and the debt was discharged.

In July 2010, the High Court allowed P's and C's applications for judicial review and held that the DWP's powers to make deductions from their ongoing benefits under sections 71 and 78 of the Social Security Administration Act 1992 were a 'remedy' for the purposes of section 251G of the Insolvency Act 1986 (see *R (on the application of (1) Payne (2) Cooper) v Secretary of State for Work and Pensions* [2010] EWHC 2162 (Admin)). The DWP appealed to the Court of Appeal (see *Secretary of State for Work and Pensions v (1) Payne (2) Cooper* [2010] EWCA Civ 1431, in *SHLU* April 2011) contending that its deduction powers in the case of DROs should operate in the same way as in relation to bankruptcy where it was allowed to make deductions, but the Court dismissed the appeal. The DWP appealed to the Supreme Court.

### **Application allowed**

Under section 251G of the 1986 Act:

‘(1) A moratorium commences on the effective date for a debt relief order in relation to each qualifying debt specified in the order (“a specified qualifying debt”).

(2) During the moratorium, the creditor to whom a specified qualifying debt is owed

a) has no remedy in respect of the debt ...’.

Lady Hale, giving the leading judgment, said that Social Fund loans and benefit overpayments were ‘qualifying debts’, as they were not excluded from that category by legislation. As such, ‘the creditor “has no remedy in respect of” them during the moratorium period and they are discharged after [the DRO] has run its course’. The issue was therefore whether recovery by deduction from benefits (or tax credits) is a ‘remedy in respect of the debt’ for this purpose.

In *R v Secretary of State for Social Security ex parte Taylor and Chapman* [1997] BPIR 505, the High Court had held that where the claimant had been declared bankrupt, the Secretary of State’s right to recover an overpayment of benefit and a Social Fund loan by deduction from ongoing benefits was not a remedy against the property or person of the bankrupt in respect of [a] debt under section 285(3) of the 1986 Act and that the Secretary of State was simply refraining from making a payment. The right to recover by deduction was just one element in the calculation of the benefit to which the claimant was entitled.

Before the Supreme Court, the Secretary of State argued that similarly the statutory power of deduction in case of DROs is not a ‘remedy’, but an adjustment to the level of benefit which the claimant is entitled to receive. Overpayments and Social Fund loans should be regarded as advanced payments of future social security benefits. The claimant is only ever entitled to the net amount. This was referred to as the ‘net entitlement principle’.

Lady Hale stated that, in her view, there was no such thing as the ‘net entitlement principle’. In any ordinary use of language, the Secretary of State’s power to recover the debt by deduction from benefit is a ‘remedy in respect of the debt’. There would be no sense in a scheme which prohibits recovery of the debt by one method (for example, by court action) but allows it by another.

Further, there was no reason to distinguish between the DRO scheme and bankruptcy in this respect. The power of recovery is just as much a ‘remedy against the property ... of the bankrupt’ as it is a remedy in respect of a debt listed in a DRO. The Supreme Court held that the Secretary of State loses the power to recoup overpayments and Social Fund loans on the making of a bankruptcy order, just as he does on the making of a DRO. The case of *Taylor and Chapman* was wrongly decided.

Lady Hale pointed out that the impact of this decision was not as great as might have been thought, because it only applies to the power to deduct during the moratorium period for a DRO or the period of the bankruptcy. The debts are, in any event, wiped out at the end of the moratorium period and on discharge from bankruptcy.

Lord Mance expressed misgivings at the Supreme Court’s decision, as did Lord Brown, since it had the effect that those who have become bankrupt or subject to a DRO will receive larger social security benefits than others who are also subject to deductions but who have avoided bankruptcy or a DRO. It would also diminish the amount available in the Social Fund for the benefit of all potential claimants. It must be for Government to consider whether or not to achieve a different result by amending the legislation.

### **Secretary of State for Work and Pensions v Elmi**

*An application for income support including a statement that the applicant was seeking work was sufficient to amount to ‘registration as a job seeker’ within Article 7(3) of the Citizen’s Directive.*

Court of Appeal

18 October 2011

Source: Transcript [2011] EWCA Civ 1403.

In September 2005 Ms Elmi (E), a French national, came to the UK with her young child. She started work but was made redundant after six months and, in June 2006, she claimed income support. She completed the application and ticked the box on a form to state she was seeking work.

The Department for Work and Pensions (DWP) refused her claim on the basis that she was a person from abroad and therefore ineligible for the benefit. E appealed successfully to the First-tier Tribunal arguing that she had retained worker status and was therefore entitled to income support. Paragraph 4 of regulation 21AA of the

Income Support (General) Regulations 1987 gave categories of people who were not to be regarded as persons from abroad. One of those categories covered people who had retained worker status for the purposes of Directive 2004/38/EC, known as the Citizen's Directive.

The Upper Tribunal dismissed the Secretary of State's appeal against that decision. The Secretary of State appealed to the Court of Appeal.

### **Appeal dismissed**

The relevant part of the Citizen's Directive was Article 7(3)(c). This provides that an EU citizen who was no longer working would retain the status of worker if s/he became involuntarily unemployed during the first twelve months of her/his employment and s/he had registered as a job seeker with the relevant employment office. There was no dispute that E was in duly recorded unemployment after having become involuntarily unemployed during the first 12 months. The arguments revolved around whether she had registered as a jobseeker.

The Secretary of State's argued that, in order to be registered as a jobseeker, E had to have applied for jobseeker's allowance (JSA) and subjected herself to the regime which applied to claimants of that benefit. The JSA rules were designed to ensure that claimants made a genuine effort to find work and it was a condition of entitlement that they registered as actively seeking work.

The Court of Appeal rejected the Secretary of State's argument and held that it was not correct that only an applicant for JSA was 'registered as a job seeker' within Article 7(3) of the Directive. Parliament could have legislated to make that the case, but had not done so.

The Secretary of State accepted that, apart from the issue of whether she was a person from abroad, E as a lone parent with a child aged under seven satisfied the criteria for income support. Had she been awarded income support, she would have received the same sum as if she had been awarded JSA. E's evidence, which was unchallenged, was that she had applied for income support rather than JSA because that was what the officer at the Jobcentre had invited her to do. She had simply submitted the forms which included her explanation that she had become involuntarily unemployed and the statement that she was seeking work. There was nothing on

the forms to indicate that, as a work seeker, she needed to apply for JSA and not income support.

### **Further information**

Following this case, the DWP has issued guidance in *Memo DMG 34/11*. This sets out that an EEA national, who claims income support, employment support allowance (income-related) or state pension credit, should be treated as being registered as a jobseeker where s/he has declared on the claim form, or otherwise in the course of making a claim, that s/he is looking for work.

### **Secretary of State for Work and Pensions v Mohammad**

*Claimant was not entitled to income support to meet her housing costs because she had not taken out, or taken over, a loan to acquire an interest in the property.*

Court of Appeal

23 November 2011

Source: Transcript [2011] EWCA Civ 1358.

Mrs Mohammad (M) lived with her disabled son in a property purchased by her then husband (H) in 1987. In 2002, H took out a mortgage loan of £114,000 from the Woolwich Building Society (the Woolwich), which was secured against the home.

In 2003, M separated from H and remained in the home with her son. She then claimed and received income support. However, her claim to have her housing costs covered as part of her income support was refused by the Department for Work and Pensions (DWP). Due to mortgage arrears the Woolwich commenced possession proceedings but these were subsequently averted, as M was able to meet the mortgage interest payments with the help of her family.

In March 2007, M and H got divorced. An order was made in the matrimonial proceedings for her ex-husband to transfer the property to M. In exchange, M undertook to obtain her ex-husband's release from the mortgage and to indemnify him in relation to the mortgage liabilities.

It was not until September 2008 that property was transferred into M's name. However, as she was unable to obtain alternative funding, the Woolwich would not transfer the mortgage into her name. M continued to meet the monthly mortgage payments and, in October 2008, applied again for income support to meet her housing costs. The DWP refused her claim.

M successfully appealed to the First-tier Tribunal. The DWP's appeal to the Upper Tribunal was dismissed. The DWP then appealed to the Court of Appeal arguing that, under paragraph 15 of Schedule 3 to the Income Support (General) Regulations 1987, a loan that was not taken out to acquire an interest in the property did not qualify for income support. M argued that the concept of taking out a loan should be given a wider meaning and should include taking over a loan.

### **Appeal allowed**

The Court of Appeal held that when in 2007, as part of the matrimonial proceedings, M took over the responsibility for the mortgage payments, the Woolwich did not transfer the mortgage to her name and the loan remained H's throughout. Although the 1987 Regulations do allow for a partner to be treated as liable for housing costs when the borrower no longer lives in the home, in M's case the only loan that had been taken out in relation to the home was H's loan in 2002. That loan was not taken out to acquire an interest in the property and, under paragraph 15 of Schedule 3 to the 1987 Regulations, the housing costs were not eligible to be covered by income support.

The Court added that even if M had been successful in arguing that she 'took over' H's loan to acquire the property, she would have not qualified for help with housing costs as paragraph 4 of Schedule 3 to the 1987 Regulations disqualifies loans incurred when the claimant was in receipt of income support, and M had been in receipt of income support since 2003.

### **Reeder v (1) West Dorset DC (2) Secretary of State for Work and Pensions**

*The temporary absence rules applied when the claimant was required to live away from his caravan for a period of less than 13 weeks each winter.*

Upper Tribunal (Administrative Appeals Chamber)  
24 October 2011

Source: Shelter Dorset.

In 2008, Mr Reeder (R) bought a static caravan on a private site in West Dorset where he lived with his son. Because of planning conditions, he could not live in the caravan for a nine-week period between December and March (the 'closed period'), although amenities on the site were available throughout the year and R was allowed to visit the caravan. The annual site fee was £5,040.

In March 2008, R applied to West Dorset DC for housing benefit. His claim was accepted but did not cover the 'closed period' when R rented alternative accommodation. During the 2009/10 winter, R decided to stay with his parents for the 'closed period', although he visited his caravan during the day. The Council decided that R was not entitled to housing benefit from 22 December 2009 to 2 March 2010, as he was not in occupation of the caravan because he was not allowed to remain to sleep on site.

Under regulation 7(13) of the Housing Benefit Regulations 2006, 'a person shall be treated as occupying a dwelling as his home while he is temporarily absent from there for a period not exceeding 13 weeks beginning from the first day of that absence from the home, only if:

- he intends to return to occupy the dwelling as his home; and
- the part of the dwelling normally occupied by him has not been let or, as the case may be, sub-let; and
- the period of absence is unlikely to exceed 13 weeks'.

The Council refused to apply the temporary absence rules for the period he was staying with his parents and R's benefit stopped.

R appealed to the First-tier Tribunal and argued that regulation 7(13) applied, and that:

(1) he always intended to return to the property which he owned

(2) the property was never let or sublet in his absence

(3) his period of absence was less than 13 weeks and he was only absent for the nine weeks imposed by the site terms

(4) he normally occupied the caravan. He was registered to vote and with a GP from the caravan address, the majority of his personal belongings remained in the caravan during the 'closed period' and he only slept away from the caravan for the minimum period he had to be away from the site. There was no statutory definition of 'normally occupied', however, in the Social Security Commissioner's decision CH/1085/2002, the Commissioner pointed out that normally occupied was a lower standard than permanently occupied.

The First-tier Tribunal held that during the 'closed period' R's parents' home was his main home as the caravan could not, by law, be occupied and could not therefore be his main home. R was not entitled to rely on the temporary absence rules which were in place for people on holiday etc who could immediately, and for whatever reason, return to the property.

R appealed to the Upper Tribunal and the Secretary of State for Work and Pensions joined the Council in the proceedings.

### **Appeal allowed**

The Upper Tribunal held:

(1) the site rent payable for the caravan fell within regulation 12(1)(g) of the 2006 Regulations, as R was contractually liable to pay rent for the pitch for the complete year

(2) the question of whether the caravan was the dwelling which R normally occupied as his home

was a question of fact in each case. On the facts of R's case, it was clear that he did normally occupy it as his home

(3) the First-tier Tribunal erred when it decided that because R was precluded from occupying the caravan during the 'closed period' it was inevitable that the caravan was not his normal home.

### **Further information**

Although this was a positive decision, the Upper Tribunal's decision awarding housing benefit from 22 December 2009 to 1 March 2010 was not made until 24 October 2011. By this time, R had arrears of site rent of more than nine weeks, largely as a result of this dispute over the 'closed period'. The site owner took steps to evict him. Because of his personal circumstances, R had to sell his caravan at a loss in order to prevent it being seized by the site owner.

## Community care

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### Article

#### **Community care law update – Part 1**

by Karen Ashton and Simon Garlick  
Policy and legislative developments in adult social care.

Source: *Legal Action*, January 2012.

### Cases

#### **R (on the application of (1) Rajput (2) Shamji) v Waltham Forest LBC: R (on the application of Tiller) v East Sussex CC**

*Clarification of certain legal and procedural issues arising from section 49A of the Disability Discrimination Act 1995, now section 149 of the Equality Act 2010.*

Court of Appeal  
20 December 2011

Source: Transcript [2011] EWCA Civ 1577.

These two appeals concerned the application of section 49A of the Disability Discrimination Act 1995 which provided that:

'(1) Every public authority shall in carrying out its functions have due regard to–

- (a) the need to eliminate unlawful discrimination and victimisation;
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
- (c) the need to promote equality of opportunity between disabled persons and other persons;
- (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons'.

Similar obligations now arise under section 149 of the Equality Act 2010, which has repealed and replaced section 49A of the 1995 Act.

#### **Rajput & Shamji**

Dr Rajput (R) suffered from dementia and was a wheelchair user; Mr Shamji (S) had sustained a serious spinal cord injury. Both used a day centre in Stratford, which Waltham Forest LBC decided

to close. The Council said R and S could use an alternative day centre, but they said it was inferior in various respects and sought permission to apply for judicial review of the Council's decision to close the Stratford centre.

Before making its decision, the Council's Cabinet had before it a report which included an equality impact assessment and which included an express reference to the duty upon the decision makers 'to promote the interests of disabled people'. R and S argued that the report was inadequate because it did not specifically highlight the potential negative consequences of the closure of the day centre on some disabled people. They argued that the Council instead simply 'proceeded on the basis of an unwarranted assumption that all negative impacts of the proposed decision could be sufficiently mitigated'.

In January 2011, the High Court refused permission to apply for judicial review and freed the Council from an undertaking it had given earlier in the proceedings that it would not use the Stratford day centre for other purposes. The Council then spent significant sums in equipping the building as a resource centre and new occupiers moved in from July. It wrote to R and S on several occasions explaining its intentions for the building, but received no reply.

R and S appealed to the Court of Appeal but were late in doing so and at no stage sought a stay on any proposed change of use of the day centre.

### **Tiller**

Mr Tiller (T) was a wheelchair user as a result of having had his leg amputated. In October 2006, he moved into sheltered accommodation owned by Lewes DC. Support was provided to residents by East Sussex CC (ESCC), which included a 24/7 non-residential warden service. T moved into the accommodation because this was a higher level of support than that offered at other sheltered housing schemes.

In mid-2008, ESCC convened a project group, which included resident's and carer's representatives, to look at possible changes to the level of support provided. The group met every month for over a year and there were other forms of consultation about the proposed changes. All residents were offered a full assessment of their needs. However, maintaining the current level of support was not an option on cost grounds.

In October 2009, the project group recommended an on-site warden at the scheme during weekday office hours, with telephone cover via a personal alarm issued to all residents for use at nights and weekends. The recommendation was implemented by ESCC. Those residents whose care needs exceeded the revised level of support and who wanted to move were offered alternative accommodation at a new sheltered housing scheme which provided more care than had been on offer in their current residence.

T applied for judicial review of the decision arguing that ESCC had breached its duties under section 49A of the 1995 Act. Witness evidence from two other residents described how the lack of weekend/night on-site warden meant that there was no one there from ESCC when they became ill. ESCC's argued that it was fully aware of its section 49A duties.

The High Court asked what else ESCC should, or could, have done in discharging its 'due regard' obligation under section 49A. It accepted that the duty required a balancing exercise between the stated aims of promoting equality of opportunity, taking account of disabled persons' disabilities, and the countervailing factors (ie the need to promote a more equitable use of limited resources and to save money) and held that had happened. The Court held that the Council had had proper regard to section 49A even though it had not referred to the section specifically in its documents. T's application for judicial review was dismissed. He appealed to the Court of Appeal, arguing that the ESCC decision maker had insufficient information before him from the project group to satisfy the section 49A duty imposed on the Council, and that a lack of specific reference to section 49A in the decision-making process undermined ESCC's claim that it had had proper regard to the legal duty.

### ***Appeals dismissed***

#### **Rajput and Shamji**

The Court of Appeal held that R's and S's delay in appealing, their failure to respond to letters from the Council explaining the proposed change of use, their failure to seek a stay on any change of use, and the intervening refurbishment and reletting carried out by the Council were fatal to any appeal.

Judicial review was, after all, a remedy granted at the discretion of the Court. However, the Court of Appeal did indicate that R's and S's initial point was in itself arguable enough to have justified permission for judicial review of the Council's decision.

### *Tiller*

The Court of Appeal adopted the interpretation of the section 49A duty as set out by the High Court in *Brown v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), which held that:

- (1) the authority must correctly understand the duty
- (2) the duty imposed by section 49A is not a duty to achieve results, it is a duty to have 'due regard' to the 'need' to achieve the identified goals; 'due regard' means the regard appropriate in all the particular circumstances in which the public authority is carrying out its function
- (3) the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. It is not enough to justify a decision after it has been made
- (4) the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of 'ticking boxes'
- (5) while it is good practice for the decision maker to specifically refer to the section 49A duty there is no requirement to do so – what matters is the substance of the decision making process
- (6) the duty is non-delegable and is continuing
- (7) proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1).

In *R (on the application of McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, the Supreme Court had held that 'where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely

superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section'. The Supreme Court had suggested that different issues may arise where the particular legal framework within which the decision was being made was not specific to disability, for example when discharging its duties under Part 7 of the Housing Act 1996 towards a homeless applicant (see for example *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, in *SHLU* December 2010/January 2011).

Even though the ESCC decision-maker's reasons could have been more detailed, the Court of Appeal followed the decision in *McDonald* and held that the High Court had been entitled to conclude that ESCC had discharged its section 49A duties. An express reference to section 49A was good practice rather than a legal obligation.

### **Shelter Comment**

These decisions are valuable for a number of reasons. Firstly, in *Tiller*, the Court of Appeal has approved the practical and theoretical guidance to section 49A of the 1995 Act given by the High Court in *Brown*; secondly, they emphasise that in cases such as these, the wider context in which the decision is taken is crucial – whether that is the factual context as in *Rajput and Shamji*, or the statutory context as in *Tiller*. More broadly, the interplay between the Equality Act 2010 and housing law is in a state of evolution and these cases help to illuminate that developing law.

Readers will note that *R (on the application of JM and NT) v Isle of Wight Council* [2011] EWHC 2911 (Admin) (see below) is a decision on a similar point to that advanced by R and S above (ie a failure to spell out in sufficient detail the potential negative consequences of a decision for disabled people made it impossible for the Council to lawfully carry out its section 49A duty).

### **R (on the application of JM and NT, by their litigation friends) v Isle of Wight Council**

*The Council acted unlawfully by adding its own criteria to those set out in the statutory guidance for determining priorities for adult social care services and breached its duties under section 49A of the Disability Discrimination Act 1995 by conducting an inadequate equality impact assessment.*

High Court (Queen's Bench Division)  
11 November 2011

Source: Transcript EWHC 2911 (Admin).

In September 2010, faced with pressures on its services and budgets, the Isle of Wight Council proposed to raise the eligibility threshold for the provision of adult social care services to clients re-assessed as 'critical' while for those people assessed as 'substantial' it would only meet those areas of need that placed people at greatest risk of not being able to remain at home and be safe. It was calculated that this proposal would save the Council significant sums. It proposed that the new system would be in line with the *Fair Access to Care Services* (FACS) guidance issued by the Department of Health (DoH) in 2003, which was replaced by further guidance entitled *Prioritising Needs in 2010*.

In February 2011, after a period of consultation, the Council adopted its new scheme which involved re-prioritising many existing users of adult social care services.

JM and NT were two severely disabled adults who were receiving social care services. They applied for judicial review of the new policy, firstly, on the basis that within the 'substantial need' band, the Council was giving favour to applicants whose 'substantial' needs put them at risk of not being safe or not being able to remain at home over other applicants with the same level of need for services but who faced other risks, for example an inability to access or maintain education, training or employment. They argued that this was in breach of the underlying principles of the DoH guidance, which said that Councils should not adopt their own criteria to split broad bands of need such as 'critical' or 'substantial' into sub-bands.

Secondly, on the same basis, they also challenged the new scheme because it allowed the Council to take into account not only the level of need for services but also how frequently that need arose and for how long.

Although it was under no statutory duty to do so, the Council had conducted an equality impact assessment (EIA) to support its decision. JM and NT challenged it as being inadequate and defective and argued that the Council was, as a result, in breach of section 49A of the Disability Discrimination Act 1995.

### **Application allowed**

The High Court held that the Council's new criteria breached the DoH guidance in creating an 'unlawful hierarchy of needs' and 'an over elaborate

set of additional criteria'. The Court provided a helpful summary of the relevant statutory provisions (at paras 38–41), as well as relevant guidance provisions (at paras 42–52).

The Court also examined the EIA in detail and applied the decision in *R (on the application of W) v Birmingham CC* [2011] EWHC 1147 (Admin) that 'impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact'.

It held that the EIA:

- (1) contained no evidence-based information about the specific impact on disabled people of the proposals
- (2) did not explain the nature of the 'Substantial' needs that would be excluded from funding by the revised eligibility criteria
- (3) did not explain what the detriment would be to disabled people
- (4) did not state how many disabled people would be detrimentally affected
- (5) contained suggestions for mitigating the effects of the proposal that were made without a proper understanding of the potential detriment.

Further, the EIA was carried out in relation to a version of the scheme which differed significantly from the final version which was introduced.

The Court concluded that 'it was not possible for Members [of the Council] to weigh in the balance the adverse impact on disabled users if they were not told in practical terms what the adverse impact was likely to be'. While it was 'self-evident' that the Council had the needs of disabled people in mind when adopting a new adult social care policy, that was not the same thing as considering the impact of a proposed decision, which is what section 49A required, along with consideration of whether that proposed impact would be consistent with the section 49A duty to pay due regard to the principles of disability equality.

The Court held that 'for the reasons set out above, the Council did not conduct the rigorous analysis and consideration required in order to satisfy the 'due regard' duty under s.49A of the DDA 1995, principally because it did not gather the information required to do so properly'.

### Shelter Comment

The facts of the case are not straightforward – for example, the Council produced five versions of the new policy before starting to implement it – and the Court’s judgment is not short. However, this is a significant case because it examines the link between a defective EIA and breach of section 49A of the 1995 Act (now section 149 of the Equality Act 2010) and emphasises the need for negative

consequences of policy decisions to be spelt out in sufficient detail.

In this regard the decision overlaps with *R (on the application of (1) Rajput (2) Shamji) v Waltham Forest LBC: R (on the application of Tiller) v East Sussex CC* [2011] EWCA Civ 1577 (see page 15) and its comprehensive scope makes it a good summary of the relevant provisions of community care law.

## Asylum and immigration

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### Articles

#### Support for migrants update – Part 2

by Sue Willman and Sasha Rozansky  
Case law update on welfare provision for asylum seekers and other migrants.

Source: *Legal Action*, January 2012.

### Case

#### Alarape and Tijani v Secretary of State for the Home Department and Aire Centre (Intervener)

*The Upper Tribunal referred to the ECJ two questions on whether a parent’s right of residence derived from a child in full-time education continued even though the child was an adult and living in other accommodation, and whether both the child and the parent could derive a right of permanent residence where the child had held a right of residence through full-time education for five years.*

Upper Tribunal (Immigration and Asylum Chamber)  
10 October 2011

Source: Transcript [2011] UKUT 00413 (IAC).

In 2001, Ms Alarape (Ms A) and her son Mr Tijani (T) (born in 1988), both citizens of Nigeria, arrived in the UK illegally. In 2003, Ms A married Mr Salama (S), a French citizen. In 2004, Ms A and T were granted five years’ residence as family members of S on the basis that he was exercising EU Treaty rights in the UK. In 2006, S left the matrimonial home. In February 2009, Ms A and T’s grant of residence came to an end. They then applied for permanent residence on the basis that they were family members of S who had exercised Treaty rights in the UK for a continuous

period of five years under regulation 15(1)(b) or (f) of the Immigration (EEA) Regulations 2006. In January 2010, the Secretary of State for the Home Department refused to grant them a permanent residence card.

Ms A and T appealed. By the time of the hearing on 20 May 2010, Ms A’s marriage had been formally terminated by divorce (on 16 February). The First-tier Tribunal dismissed their appeals having found that they had failed to prove that S had been exercising Treaty rights in the UK for a continuous period of five years prior to the divorce, as the documents submitted only established that he had been employed between 2004 and 2006.

Ms A and T appealed to the Upper Tribunal where they reiterated their arguments that they should qualify for permanent residence under regulation 15. They also raised an argument based on Article 12 of EC Regulation 1612/68.

Ms A had been working in the UK on a part-time and self-employed basis and had a monthly income of approximately £1,600. T had been in full-time education since his arrival in the UK. In July 2008, he obtained a BSc degree and, in November 2009, he was awarded a Masters degree. From 2006 to 2008, he also did part-time work and spent the money he earned on books for his studies. He had been accepted to study for a PhD course at Edinburgh University starting in September 2011. While in the longer term it was possible that Ms A would consider moving to Edinburgh, along with his two other siblings, T had made arrangements to live with a University lecturer in Edinburgh during term time.

Ms A's two other children, who came to the UK in 1990 and 1992 respectively, were also in further education. Their precise citizenship and immigration status was not entirely clear, but their status was not relevant to this appeal.

### **Case referred to ECJ**

The Upper Tribunal considered that in order to decide whether the First-tier Tribunal had erred in law, it had to decide three main issues:

(1) whether Ms A and T were entitled to a right of residence/permanent residence under the 2006 Regulations or Directive 2004/38/ EC (known as the Citizen's Directive) by virtue of being able to show a continuous period of residence for five years in accordance with the conditions laid down in the Directive

(2) whether T was entitled to an EU right of residence under Article 12 of Regulation 1612/68

(3) whether Ms A could derive an Article 12-related EU right of residence from her son T, as his primary carer.

A further issue also arose as to:

(4) whether T and A could derive rights of permanent residence from T having spent five years in full-time education in exercise of his Article 12 rights.

#### *(1) Right of permanent residence*

The burden of proving that S had been exercising Treaty rights for the requisite period of five years rested on Ms A and T. They had not been able to prove that S was exercising Treaty rights except between February 2004 and April 2006. They were not able to show that either (a) S ever exercised Treaty rights for a continuous period of five years prior to the termination of the marriage; or (b) he was exercising Treaty rights at the date of termination of the marriage (this being a condition for Ms A and T to have acquired a retained a right of residence). It was true that Ms A herself had been granted a residence permit for five years between February 2004 and February 2009, but this document did not prove the continuation of the underlying right of residence for the period of validity of the permit. There was accordingly no material error of law on the part of the First-tier Tribunal in finding that Ms A and T had failed to show that they were entitled to permanent residence on this basis.

#### *(2) T's rights under Article 12*

The second and third issues both revolved around Article 12 of Regulation 1612/68, as interpreted by the European Court of Justice (ECJ) in *Ibrahim (European citizenship)* [2010] EUECJ C-310/08 and *Teixeira (European citizenship)* [2010] EUECJ C-480/08 (see SHLU April 2010). The Tribunal considered that the First-tier Tribunal may have erred in law in failing to address whether Ms A and T were entitled to an EU right of residence under Article 12 of Regulation 1612/68: T, on the basis that he was still in full-time education; and Ms A, on the basis that she was T's primary carer.

Article 12 of Regulation 1612/68 states that:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions'.

With effect from 25 April 2011, Article 12 has been replaced by Article 10 of Regulation (EU) 492/2011, the wording of which is identical, but it is Article 12 which is referred to in this appeal.

On the issue of whether T qualified for a right of residence on the basis of Article 12, the Tribunal held that if T fell within the meaning of 'child' in Article 12, then he had a right of residence for as long as he remained in full-time education. The ECJ in *Baumbast and R (Free movement of persons)* [2002] EUECJ C-413/99 had observed specifically that such a right of residence was not affected by his parents' divorce.

The only unresolved matter concerning the application of Article 12 to T, therefore, related to whether he was a child. T was not the natural child of S but a stepchild. The text of Article 12 does not contain a definition of the term 'children', but again in *Baumbast*, both of the children of the spouse of Mr Baumbast, including the one who was a stepchild, were accepted as coming within the ambit of Article 12 and this put the matter beyond doubt.

The fact that T was now over 21 was not in itself a reason why he could not qualify as a child for

the purposes of Article 12 because the ECJ had held that the right was intended to continue until the completion of full-time studies (see *Nordrhein-Westfalen v Gaal* [1995] EUECJ C-7/94) nor was it necessary that the child should still be dependent on his parent(s).

The Tribunal was satisfied that T qualified as a child for the purposes of Article 12 of Regulation 1612/68. On the evidence, he had held an EU right of residence since February 2005 (ie the first date on which S had employment in the UK). As T had been in full-time education ever since and was about to commence full-time PhD studies, he continued to benefit from that right.

### *(3) Ms A's rights under Article 12*

Ms A's argued that she also qualified for an Article 12 right of residence derived from that of T, as she was his primary carer. The Secretary of State maintained that Ms A did not qualify for such a right because the ongoing support which she provided to her son, now aged 25, could not properly be described as 'care'.

In *Teixeira*, the ECJ stated that:

'the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education'. (para 87)

By using the terms 'presence and care', the Court must have had in mind the need to show some ongoing connection of a particular quality between the child in education and the parent. The terms would appear to mean more than the provision of financial support by the parent. They would also appear to mean more than the mere provision by the parent of a home or household for the child to go to when he is not engaged in full-time studies in another city.

The Tribunal had considered that it could not with complete confidence interpret the meaning of the term 'primary carer'. Accordingly, it decided that it should make a reference to the ECJ aimed primarily at obtaining clarification as to the scope and meaning of the term 'primary carer' in this context.

(4) Deriving of permanent right of residence from exercise of Article 12-derived rights of residence

As the Tribunal found that T had held a right of residence since February 2005, as he had been in full-time education ever since, the question arose as to whether T thereby possessed a permanent right of residence under the Citizen's Directive and so must be issued with a permanent residence card on the basis that he had held a right of residence for over five years continuously.

On one interpretation, T's right of residence was not within the scope of the Citizen's Directive and, hence, he could not qualify for a right of permanent residence under that Directive. That was the approach taken by the Court of Appeal in *Okafor v Secretary of State for the Home Department* [2011] EWCA Civ 449 (see *SHLU* June 2011). An alternative interpretation would be to treat the fact that T had held legal residence under EU law as sufficient to qualify him under Articles 16 and 17 of the Directive. Further support for this alternative interpretation was to be found in the principle of equal treatment as enshrined in both the Directive and primary EU law.

This further matter of interpretation was also one which the Tribunal could not decide for itself.

### *Schedule of questions to be referred to the ECJ*

The Tribunal was therefore unable either to decide whether the First-tier Tribunal materially erred in law, or to proceed any further without guidance from the ECJ. Its further consideration of the case would be adjourned to await a ruling from the ECJ.

The following questions were referred to the ECJ:

- (1) For a parent to qualify as a 'primary carer' so as to derive a right of residence from a child over 21 exercising a right of access to education under Article 12 Regulation 1612/68, is it necessary for that child to be (i) dependent on such a parent, (ii) residing in that parent's household, and (iii) receiving emotional support from that parent?
- (2) If in order to qualify for such a derived right of residence it is unnecessary for a parent to show that all three of the above circumstances obtain or is it sufficient to show that only one or two obtains?
- (3) In relation to (1)(ii), can there continue to be residence on the part of an adult student child with his parent(s) even when the student is living away

from home for the duration of his studies (save for holidays and occasional weekends)?

(4) In relation to (1)(iii), is it necessary for the emotional support provided by the parent to be of a particular quality (ie close or physically proximate) or is it sufficient if it consists in a normal emotional tie between a parent and an adult child?

(5) Where a person has held an EU right of residence under Article 12 of Regulation 1612/68 for a continuous period of more than five years, does such residence qualify for the purposes of acquiring a right of permanent residence under the Citizen's Directive and being issued with a residence card under Article 19 of the same Directive?

## Legal practice

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### Articles

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by Carol Storer

Top ten tips for legal aid firms when planning for the future.

Source: *Legal Action*, January 2012.

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by Vicky Ling

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Source: *Legal Action*, January 2012.

#### **Making the polluter pay**

by Tom Royston

Why Tribunals should be given the power to award costs against public authorities.

Source: *New Law Journal*, 13 January 2012.

## Legislation and general

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### Articles

#### **Recent developments in housing law**

by Nic Madge and Jan Luba QC

Monthly update of housing case law and legislation.

Source: *Legal Action*, January 2012.

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by Malcolm Keen

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


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