

HOMELESSNESS AND ALLOCATIONS: CASE LAW UPDATE

A review of the 2016 case law relating to the allocation of social housing and homelessness under Parts VI and VII Housing Act 1996

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PART 1: HOMELESSNESS

1. In April-May 2015 the Supreme Court gave judgment in three landmark homelessness cases:
 - i. *Hotak v Southwark LBC, Kanu v Southwark LBC & Johnson v Solihull MBC* [2015] UKSC 30, [2015] 2 WLR 1341 – on the correct approach to vulnerability under s189(1)(c) Housing Act 1996 and the relevance of the public sector equality duty under s149 Equality Act 2010.
 - ii. *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] HLR 22 – on out of borough placements and the ‘best interests of the child’ principle.
 - iii. *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] HLR 24 – on intentional homelessness.

2. In 2016, the dust has begun to settle in the aftermath of these decisions as local housing authorities, lawyers and the courts have begun to grapple with how the principles set down by these cases should be applied in practice. The purpose of this first part of the paper is: (i) to discuss some of these recent developments and emerging themes following *Hotak*, *Haile* and *Nzolameso*; and (ii) provide an overview of the other key homelessness cases decided in 2016.

ONE YEAR ON FROM HOTAK, HAILE AND NZOLAMESO

Vulnerability – one year on from *Hotak*

3. One year on from the decisions in *Hotak*, *Kanu* and *Johnson* we do not yet have any further guidance from the Court of Appeal about how the relevant principles are to be applied. But what we do have is a number of decisions of the High Court and the County Court, as well as permission decisions from the Court of Appeal, which give an indication of the points of dispute which are emerging:
 - i. *Hosseini v Westminster CC*, Central London County Court, *Legal Action*, October 2015, p42
25/6/15

Successful s204 appeal. Fact that son had provided support for father in past did not mean he would do so in future, at level sufficient to ensure father would not be vulnerable. Breach of PSED as reviewing officer had not made inquiries of son.

- ii. *R (Barrett) v Westminster CC* [2015] EWHC 2515 (Admin)

28/7/15

See PSED section below.

- iii. *HB v Haringey LBC*, Mayors and City County Court, *Legal Action*, January 2016, p46

17/9/15

Successful s204 appeal. Unable to tell from review decision what attributes had been assigned to the ordinary person and where on a spectrum between noticeable and substantial, reviewing officer had placed 'significantly'.

- iv. *Barrett v Westminster CC*, Central London County Court, *Legal Action*, February 2016, p45

2/10/15

Successful s204 appeal. No consideration of applicant's specific health problems. No consideration of what toilet and laundry facilities available in area (relevant as applicant had bowel problems). No finding on whether applicant disabled so not possible to identify what steps necessary to meet her needs and hence breach of PSED.

- v. *R (Omar) v Wandsworth LBC*

11/11/15

Unsuccessful judicial challenge to refusal to provide s188(3) Housing Act 1996 accommodation. Fleeting reference within judgment to the approach to vulnerability post *Hotak*.

- vi. *Ryan v Westminster CC* [2015] EWCA Civ 1448

17/11/15

Whether reviewing officer had properly weighed up difference in opinion between Now Medical and applicant's doctor and had erred in applying wrong comparator. Permission to appeal refused.

- vii. *Hemley v Croydon LBC* [2015] EWCA Civ 1519

19/11/15

Arguable that judge, in quashing a review decision on vulnerability, had substituted her own view for that of the reviewing officer. Permission to appeal granted to Croydon.

- viii. *Mohammed v Southwark LBC*, Central London County Court, *Legal Action*, July/August 2016, p48

18/12/15

Successful s204 appeal. In the absence of guidance from *Hotak* as to the meaning of the term significantly, by analogy with the use of the word ‘substantial’ in the context of the Equality Act 2010, the word meant ‘more than minor or trivial’.

- ix. *Taani v Hackney LBC* [2016] EWCA Civ 216

25/1/16

Argument that reviewing officer had misapplied the *Hotak* test in using the phrase ‘fend for yourself’. Permission to appeal refused: ‘[t]o seize on that phrase as supporting an appeal is simply linguistic opportunism.’

- x. *Ward v Haringey LBC*, Central London County Court, *Legal Action*, September 2016, p38

17/2/16

Successful s204 appeal. Judge found that reviewing officer had misapplied *Hotak* test. On the meaning of ‘significant’: ‘I am not convinced that the term merits further definition. The search for precise meaning by reference to synonyms (for example ‘serious’ or ‘substantial’) or by reference to the opposite (‘not significant’) seems a fruitless search for unachievable certainty of meaning for a word of indefinable scope and penumbra. Moreover, ‘significant’ is a word whose meaning varies with context. A search for meaning by reference to use in other contexts threatens error through analogy from inapposite and very different context. Suffice to say that I consider that the information available to the reviewer, on a fair and reasonable reading, indicates that the degree of significance of ES’s vulnerability is well within the core meaning of the word significant’.

- xi. *R (Abdusemed) v Lambeth LBC*

19/2/16

Unsuccessful challenge to refusal to provide s188(3) accommodation. A local housing authority had not erred in refusing to provide accommodation pending review to homeless woman challenging decision as to whether she was vulnerable, notwithstanding diagnosis of moderately severe PTSD and fact she was sleeping in Mosque at night and wandering streets by day.

- xii. *Shaja Butt v Hackney LBC*, unreported, Central London County Court

22/2/16

Successful s204 appeal. Failure to give sufficient reasons as to the meaning of the word ‘significantly’.

- xiii. *Jesse Panayiotou v Waltham Forest LBC*, CA

To be heard on 10 or 11 May 2017

Court of Appeal to consider the meaning of the word significantly.

4. From these cases, two points of general application emerge. First, there has been some ambiguity about the characteristics of the ‘ordinary person’. The answer to this may perhaps be found at [71] of *Hotak*: an ordinary person should be taken to be ‘robust and healthy’. But, if a reviewing officer takes a slightly different view (perhaps justified on the basis that there is scope for variation among robust and healthy people) then the cases suggest that adequate reasons must be given in order that an aggrieved applicant can establish what characteristics the ordinary person is endowed with and why, in order that they can, if necessary, challenge those reasons. See s203 Housing Act 1996 and *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] HLR 22 at [32] per Baroness Hale on the duty to give reasons in homelessness cases: ‘[n]or, without a proper explanation, can the court know whether the authority have properly fulfilled their statutory obligations’.
5. Second – as predicted by a number of practitioners at the time the judgment in *Hotak* was handed down – there has been some divergence as to the meaning of the word ‘significant’, in the context of assessing whether an applicant is ‘significantly more vulnerable’ than an ordinary person if made homeless. See *Hotak* at [53] per Lord Neuberger.
6. So what does the word ‘significant’ mean in this context? Does it simply mean a vulnerability that is ‘not insignificant’ i.e. one that is more minor or trivial? That would mirror the meaning of the word ‘substantial’ in the context of the Equality Act 2010. Or does it mean ‘very large’? Alternatively, is the significance of a particular vulnerability a qualitative judgment involving a factual evaluation best left to the good sense of housing officers, not readily susceptible to definition and of which further elucidation would be unhelpful?
7. My view, would be that the first of these three possible meaning accords best with the language of the statute and the judgment in *Hotak*. But whatever the answer, the divergence in approach thus far suggests that further guidance from the Court of Appeal will be welcome.
8. A third point, which does not feature in the cases above, but which I have come across in a number of review decisions post-*Hotak*, is a tendency in review decisions to judge whether an applicant is vulnerable solely with reference to how he or she has been able to manage while statutorily homeless but still with a roof over his or her head, while neglecting to fully consider the impact of having to sleep on the streets. This may flow from the fact the Supreme Court carefully avoided relying on the concept of ‘street homelessness’ in *Hotak*, as it is a phrase which can mean different things to different people.

See [40] and [42]. However, this is certainly not to say that the impact of sleeping on the streets should be ignored. Vulnerability involves consideration of the risk of harm to the applicant if he or she is not provided with accommodation. See [37] and [93]. This may encompass a range of situations and should not exclude the effects when either ‘street homelessness’ (whatever that may mean) or when living in accommodation which is not reasonable to continue to occupy.

The public sector equality duty – one year on from *Kanu*

9. The public sector equality duty has fallen for consideration, post-*Kanu*, in the following recent cases ranging from first instance to the Court of Appeal.

- i. *Hosseini v Westminster CC*, Central London County Court, *Legal Action*, October 2015, p42
25/6/15

Successful s204 appeal. Fact that son had provided support for father in past did not mean he would do so in future, at level sufficient to ensure father would not be vulnerable. Breach of PSED as reviewing officer had not made inquiries of son.

- ii. *Poshteh v Kensington and Chelsea RLBC* [2015] HLR 36, [2015] EWCA Civ 711
8/7/15

Suitability of accommodation under Part VII Housing Act 1996. P was an Iranian refugee who had been detained and tortured leaving her with post-traumatic stress disorder. She applied to Kensington and Chelsea as homeless and, in due course, was found to be owed the main housing duty. She was subsequently made an offer of accommodation in line with s193(7) Housing Act 1996. She refused the offer on the basis that the window in the property reminded her of the cell in which she had been tortured and gave her flashbacks. Kensington and Chelsea carried out a review and found that the property was suitable and (applying the law in force prior to the amendments introduced by the Localism Act 2011) that it would have been reasonable for her to have accepted the offer. As such the main housing duty came to an end. The decision was upheld on appeal and the Court of Appeal dismissed a second appeal. The reviewing officer had been entitled to find that it would have been reasonable to accept the offer and had paid due regard to the public sector equality duty. The Supreme Court granted permission to appeal on 29 February 2016.

- iii. *R (Barrett) v Westminster CC* [2015] EWHC 2515 (Admin)
28/7/15

Successful challenge to refusal to provide accommodation pending review. B was a 58 year old woman with various medical conditions including anorexia, obsessive compulsive disorder, severe irritable bowel syndrome (resulting in ‘sudden and violent emptying of stomach

contents'), panic attacks, anxiety and foot pain. Westminster refused to exercise its discretion to provide her with accommodation pending review of a decision that she was not vulnerable and did not have a priority need for the purposes of s189(1)(c) Housing Act 1996. B sought to challenge this refusal by way of judicial review. John Bowers QC, sitting as a deputy judge of the High Court, allowed her application. Westminster had paid only 'lip-service' to B's medical conditions and to the new evidence that had been submitted on her behalf, and as such had failed to carry out the 'conscientious requirements' of the public sector equality duty.

- iv. *Barrett v Westminster CC*, Central London County Court, *Legal Action*, February 2016, p45
2/10/15

Successful s204 appeal. No consideration of applicant's specific health problems. No consideration of what toilet and laundry facilities available in area (relevant as applicant had bowel problems). No finding on whether applicant disabled so not possible to identify what steps necessary to meet her needs and hence breach of PSED.

- v. *Brown v Southwark LBC*, Central London County Court, *Legal Action*, February 2016, p45
10/12/15

Successful s204 appeal. Intentional homelessness. Breach of PSED. Failure to make adequate inquiries into why person with mental health problems who dealt badly with stress, had left accommodation and failure to focus sharply on whether she was disabled.

- xiv. *Shaja Butt v Hackney LBC*, unreported, Central London County Court
22/2/16

Successful s204 appeal. Failure to spell out, in at least summary form, the conclusions reached in respect of the four matters specified in [78] of *Hotak* a breach of PSED and a failure to give sufficient reasons.

10. The decision in *Poshteb* is currently under appeal. The majority in the Court of Appeal in that case felt that the public sector equality duty did not make any real difference to the assessment of suitability on the facts of the case. It will be interesting to see whether the Supreme Court agrees.

11. More generally, whether or not the public sector equality duty adds anything to the duties of a local housing authority in discharging its functions under Part VII Housing Act 1996 will, according to the Supreme Court in *Kanu*, depend of the facts of the case in hand. See [79]. Sometime it will. Sometimes it will not. Unfortunately, mantras such as the need to 'focus very sharply' on the duty, do not always provide much in the way of practical assistance in deciding when and how the duty should be applied.

12. However, looking more closely at the facts and reasoning in *Kanu* and the cases cited therein one can see there are several practical aspects/consequences of the duty which may of relevance. (The points overlap to an extent.)

- i. *The duty to make inquiries*: where the duty applies, a local housing authority is bound to take positive steps to take account of the applicant's disability by making such inquiries as are necessary to ascertain whether an applicant is in fact disabled and, if so, whether that disability is relevant to a matter in issue. See *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] HLR 3 at [36], approved in *Kanu* at [73] and [76]-[77].
- ii. *The duty to give reasons*: in order to show that the duty has been complied with a local housing authority must provide adequate reasons. 'Throw-away' references and repetition of 'formulaic and high-minded mantras' in decision letters will not suffice. See *Kanu* at [78] and [82].
- iii. *The appropriate level of scrutiny*: in instances where the duty is engaged a court on appeal may scrutinise a review decision more closely than would otherwise be the case to assess whether the duty has been complied with. The court should not adopt a 'benevolent' approach c.f. *Holmes-Moorhouse* [2009] 1 WLR 413. See *Kanu* at [79]. And, where it is said that insufficient inquiries have been made into an application, the court is not restricted to considering whether the failure to make a particular inquiry was *Wednesbury* unreasonable. See *Pieretti* at [35]-[36] and c.f. *Cramp v Hastings BC* [2005] HLR 48.

13. The High Court and County Court decisions referred to above each involve the application of one or more of these principles which are all, in essence, procedural. This reflects that fact that the public sector equality duty requires the local housing authority to have regard to the need to achieve the results set out in s149 Equality Act 2010, as opposed to requiring a particular result. Which, in turn, reflects a Parliamentary intention that there should 'be a culture of greater awareness of the existence and legal consequences of disability'. See *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] HLR 3 at [28] per Wilson LJ, approved in *Kanu* at [74].

14. A few miscellaneous points which may of assistance in applying or relying on this duty in future:

- i. *R (Barrett) v Westminster CC* [2015] EWHC 2515 (Admin) provides illustrates the scope for the application of the duty in the context of accommodation pending review/appeal;
- ii. disability is not the only protected characteristic under Chapter 2, Part 1 Equality Act 2010;
- iii. a person with HIV, cancer or multiple sclerosis is deemed to be disabled under para 6, Schedule 1, Equality Act 2010.

Out of borough placements and the best interests of the child – one year on from *Nzolameso*

15. My experience has been that despite the guidance given by the Supreme Court in *Nzolameso*, out of borough placements are still very common. No doubt this is a consequence of the immense pressures placed on local housing authorities. And the extent to which local housing authorities have adopted policies on such placements, the quality of those policies and the regard that is being had to the interests of any children involved is variable.
16. That notwithstanding, there have been relatively few cases dealing with the issue, or dealing with the wider issue of the application of the best interests principle to homelessness cases. The following are the only cases of which I am aware:
- *Forsythe-Young v Redbridge LBC*, Central London County Court, *Legal Action*, February 2016, p46 11/11/15
Successful s204 appeal. Suitability. Failure to apply *Nzolameso* guidance in placing out of district, including failure to identify which school would be best for child.
 - *Begum v Tower Hamlets LBC*, Central London County Court, *Legal Action*, September 2016, p38 1/12/15
Successful s204 appeal. A was a single parent with four children, then aged 10, 8, 3 and 2 years old. A became homeless after fleeing long-term domestic violence at the hands of her husband and moved into a refuge in R's borough in September 2013. Her children commenced school in R's borough in October 2013. At the time of the appeal, 3 of the 4 children attended primary school in R's borough and the youngest attended nursery in R's borough. One of the children had a diagnosis of severe ADHD and A was in receipt of DLA and carer's allowance for her. R accepted that they owed the family the main homelessness duty and placed them in temporary accommodation out of borough in Bexleyheath. This location meant that the family had a daily commute of five hours to school and back each day, which was causing considerable disruption to the children's education and wellbeing. On appeal, the judge held that R's decision was unlawful for want of proper consideration of the needs and wellbeing of the children and in particular the disruption that would be caused to their education by being forced to change schools.
 - *Saleem v Wandsworth LBC* UKSC 2015/0253 22/3/16
Permission to appeal refused. Did not raise an arguable point of law.

Intentional homelessness – one year on from *Haile*

17. In contrast to the principles in *Hotak* and *Nzolameso* which seem to crop up frequently, the decision in *Haile* has received rather less judicial attention over the last year. This is perhaps because the circumstances in which a supervening event will break the causal chain – with the exception of the settled accommodation cases with which attendees will be familiar – are relatively rare. In distinguishing *Din*, Lord Neuberger in *Haile* took the view that the causal chain had been broken because a supervening event had occurred (i.e. the birth of Ms Haile’s child) which would certainly have rendered here homeless as opposed to ‘merely a possibility that one might well have occurred’. See [79]-[80]. So to usefully rely on the decision in *Haile* a homeless applicant will need to point to an event which would certainly, and not just possibly, have rendered him or her homeless.

18. I have recently been involved in a case where the applicant was evicted from temporary accommodation, which he was occupying for his daughter, for smoking. The accommodation was B&B accommodation meaning he would not have been able to stay there beyond six weeks, and so he would have had to leave the accommodation irrespective of the alleged deliberate act. See Articles 2-4 Homelessness (Suitability of Accommodation) (England) Order 2003, SI 2003/3326. This is one situation where the principles in *Haile* may of relevance.

19. *Magoury v Brent LBC*, Central London County Court, *Legal Action*, February 2016, p46 (a successful s204 appeal at first instance) provides another example. In that case the review decision was quashed as the reviewing officer had failed to consider whether the applicant would have become homeless anyway as a result of the benefit cap.

20. Contrastingly the homeless applicant in *Cox v Brent LBC* [2015] EWCA Civ 1551 was refused permission to appeal by the Court of Appeal against a decision that he had made himself intentionally homeless from accommodation where a possession order had been granted on the basis of rent arrears, following which a fire had rendered the accommodation uninhabitable. Although superficially this might appear to the perfect case for a *Haile* type argument, the difficulty for Mr Cox, was that he was provided with alternative accommodation for a short period following the fire, and the Court of Appeal took the view that it was the latter accommodation from which he had become intentionally homeless.

OTHER RECENT HOMELESSNESS CASES

Eligibility

21. *Samin v Westminster City Council, Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, [2016] 1 WLR 481: regulations denying housing assistance and income support to the respective former workers in these cases did not result in unlawful discrimination contrary to the Treaty on the Functioning of the EU (TFEU). S was an Austrian citizen who came to the UK in 2005. He worked sporadically for ten months, mostly in part-time employment, but stopped work in 2006 owing to various physical and mental health problems. In 2010 he applied to Westminster as homeless. Westminster refused to assist him on the footing that he was not eligible for assistance within the meaning of s185 Housing Act 1996. This decision was upheld on review and on appeal. The Court of Appeal dismissed a second appeal holding that S did not have a right of residence under the Immigration (European Economic Area) Regulations 2006, SI 2006/1003: he had not retained his ‘worker’ status for the purposes of those regulations as there was no realistic prospect of his return to work and so he could not be regarded as ‘temporarily unable to work’ within the meaning of regulation 6(2)(a). S appealed, arguing that the refusal to provide him with homelessness assistance constituted ‘discrimination on grounds of nationality’ which was prohibited by article 18 TFEU and that the denial of assistance in his case was disproportionate. The Supreme Court dismissed his appeal. Article 18 did not confer a general right not to be discriminated against and was limited to ‘the scope of application of the Treaties’. An EU citizen can claim equal treatment with the nationals of an EU country only if he or she is able to satisfy the conditions for lawful residence in that country. Since S was not a worker, he was not exercising his treaty rights, did not have a right to reside under Immigration (European Economic Area) Regulations 2006 and could not avail himself of the anti-discrimination provisions. The question of proportionality did not arise.

Duty to accept application

22. *R (Edwards) v Birmingham CC* [2016] EWHC 173 (Admin): unsuccessful challenge to alleged ‘gatekeeping’ by Birmingham CC. This was a claim for judicial review involving four applicants who had sought homelessness assistance from Birmingham, all of whom claimed to be ‘homeless at home’ on the basis that they had accommodation but that it was not reasonable for them to continue to occupy. The challenge was primarily directed at the general practices and policies which Birmingham had in place to deal with homeless applications which, it was said, gave rise to an unacceptable risk that applicants would not be dealt with lawfully and failed to reflect the immediate and urgent nature of the duties to make inquiries and provide interim accommodation. Hickinbottom J dismissed the claim for

in two cases (where permission had been granted) and refused permission in the remaining two. Whether the conditions for making inquiries into a homeless application and providing interim accommodation were satisfied were matters for the local housing authority to determine subject to review on conventional public law grounds, as opposed to a matter of precedent fact for the court to decide. On the facts of the individual cases Birmingham had, for the most part, not acted in breach of its statutory duties and where errors were made, they were rectified quickly meaning that relief was not warranted. As such the cases under consideration did not provide sufficient evidence for the claim that Birmingham was guilty of systemic failings.

23. *R (H) v London Borough of Southwark* [2016] EWHC 1665 (Admin), 8 July 2016: H was a 58 year old woman with a long history of mental health problems and a diagnosis of depression. She applied to Southwark as homeless in June 2015. It was decided that although she was homeless, she did not have a priority need. On 1 October 2015, H then made a second homeless application. New evidence was submitted on her behalf, from a clinical psychologist, referring to previous suicide attempts, suicidal ideation and assessing H as ‘quite a high suicide risk’. Again, she was found not to have a priority need. This decision was upheld by a review decision issued on 3 February 2016. On 23 February 2016, H was advised that she could not appeal this decision. Her temporary accommodation was due to end a week later. The following day, H (by her account) formed the intention of killing herself, and embarked on a plan to do so, taking a bus toward Blackfriars Bridge, intending to either jump from the bridge or throw herself under a train. While she was on the bus, H received a call from her GP – who was concerned for her health – who managed to persuade her to attend the surgery. She did so, and while there contemplated throwing herself out of the window. She was seen by the GP who recorded her as having ‘clear suicidal ideation’. Following this she was referred urgently to the mental health team who noted that she was having active suicidal thoughts with plausible evidence of plans and intent, stemming from her accommodation situation. On 1 March 2016, H made a further homeless application based on these circumstances. Southwark refused to accept the application asserting that there had been no material change in the circumstances and the facts which led to the previous adverse decision. Amanda Yip QC (sitting as a Deputy Judge of the High Court) allowed H’s application for judicial review. In deciding whether the duty to accept the application had arisen the question was whether it was based on exactly the same facts as the previous application. See *R v Harrow LBC Ex p. Fabia* [1998] 1 WLR 1396, (1998) 30 HLR 1124 and *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340, [2005] HLR 34. In this instance, the events of 24 February 2016 marked a new development

which resulted in new medical evidence. As such the application did not raise exactly the same facts and Southwark had erred in failing to accept it.

24. *R (Abdulrahman) v London Borough of Hillingdon* [2016] EWHC 2647 (Admin), 28 October 2016: From June 2012 the Claimant, A, lived in a property in Hayes, Middlesex together with her husband and their nine children. They occupied the property under an assured shorthold tenancy. At the time of obtaining the tenancy, A's husband wrongly informed the landlord that nine people – rather than 11 – would be occupying the property. In or around October 2013, the family were evicted from the property and following this, on 28 October 2013, A and her husband applied jointly to the Defendant, Hillingdon LBC as homeless. By a s184 decision communicated on 30 December 2013, Hillingdon concluded that A and her husband had become homeless intentionally. It was said that A's husband had obtained the tenancy in Hayes by deception and that by allowing extra people to stay at the property without the landlord's consent, they had failed to keep the property in good repair. A's husband sought a review of this decision. The review decision was issued on 18 February 2014. The finding of intentionality was upheld. A's husband then appealed, but the appeal was subsequently abandoned when he left the country and moved back to Somalia (where he and A had come from, to the UK, in around 2008). In the meantime, Hillingdon had been accommodating the family in Bed and Breakfast accommodation. But in March 2016, sometime after the appeal was compromised (the exact timing is not entirely clear), this was brought to an end and the remaining family members dispersed. A, together with her two youngest children, stayed with various friends and relations. While the older children made alternative arrangements. Then, on 28 March 2016, and several times thereafter, A sought to make a fresh homeless application to Hillingdon. This was refused. A instructed solicitors who sought to make a further application on her behalf arguing that the application should be considered afresh as her husband had returned to Somalia and her three older children no longer lived with her. This was also refused, with Hillingdon stating that the application was 'based... on the same facts as the previous one made on 28 October 2013'. Neil Cameron QC sitting as a Deputy High Court judge allowed A's application for judicial review. Although Hillingdon had applied the correct legal test, the decision that the application was based on the same facts as the previous one was irrational.

Interim accommodation

25. *R (Abdusemed) v Lambeth LBC*, 19 February 2016: unsuccessful challenge to refusal to provide s188(3) accommodation. A local housing authority had not erred in refusing to provide accommodation pending review to homeless woman challenging decision as to whether she was vulnerable,

notwithstanding diagnosis of moderately severe PTSD and fact she was sleeping in Mosque at night and wandering streets by day. Some discussion (apparently) of ‘street homelessness’.

Intentional homelessness

26. *Huda v London Borough of Redbridge* [2016] EWCA Civ 709, 12 July 2016: H applied to Redbridge as homeless in October 2008 and was placed in temporary accommodation under s188(1) Housing Act 1996. He occupied the accommodation under a licence granted by a third party. In due course Redbridge, by a decision under s184 Housing Act 1996 found H to be homeless, eligible and to have a priority need, but to have become homeless intentionally. This decision was upheld by a review decision issued on 13 January 2010. Following this decision, H remained in the temporary accommodation pursuant to s190(2): the duty to provide accommodation for a ‘reasonable’ period to those in priority need who have become homeless intentionally. But as a result of an administrative oversight, no action was taken to remove him from the property, and he remained there for a further two years. On 12 July 2012 – by which point H had been in the accommodation for nearly four years – H’s solicitors wrote to Redbridge asserting that his being allowed to remain in the property had rendered it settled accommodation meaning that he could no longer be regarded as having become homeless intentionally. This was treated as a fresh homeless application. By decision dated 17 July 2012, H’s argument was rejected. This decision was upheld on review. The temporary accommodation, it was said, was not settled accommodation and so was not sufficient to remove H’s ‘self-imposed disqualification’. The reviewing officer held that ‘accommodation under this provision is simply not capable of being settled’. In addition, the accommodation was held to have been precarious and with little security of tenure, principally on the basis that H’s continued occupation was under a licence, was always contingent on the mistake of his occupation being overlooked, and that action might have been taken to remove him at any time. The Court of Appeal dismissed H’s appeal. The reviewing officer’s finding that H’s occupation had been under a licence was a finding of fact and was not perverse. The fact that the s190(2) duty came to an end did not change the nature of the permission to occupy (i.e. the licence was unaffected). Whether accommodation is settled is a question of fact or degree. There is no rule of law that only circumstances outside the occupation agreement are relevant to whether accommodation is settled. Overall the conclusion of the reviewing officer was open to him on the facts.

Assessment of needs

27. *R (Smajlaj) v London Borough of Waltham Forest* [2016] EWHC 1240 (Admin): GS was a single woman of Albanian origin who had been trafficked to the UK in May 2014. She spoke limited English and had a

number of mental health problems and particular needs arising from her history of being trafficked, including symptoms consistent with post-traumatic stress disorder. In October 2015, GS applied to Waltham Forest as homeless. During the course of her application, representations were made on her behalf by her solicitors, drawing attention to some of GS's particular needs including the need for her to be accommodated somewhere where the specialist treatment she was receiving from the Helen Bamber Foundation could continue, and where she would not be at risk of isolation. On 5 November 2015, Waltham Forest issued a decision under s184 Housing Act 1996 finding that GS was homeless, eligible for assistance and had not become homeless intentionally, but that she was not vulnerable and so did not have a priority need. The decision letter acknowledged that, in view of this, Waltham Forest were under a duty under s192(2) Housing Act 1996 to provide GS with advice and assistance to help her find accommodation, advising her to: 'Kindly refer to the copy of the information booklet Housing Advice and Options in Waltham Forest that was given to you to assist you in your securing alternative accommodation'. The letter indicated that GS's interim accommodation would be terminated in seven days. GS requested a review of the decision and accommodation pending review. In the alternative, Waltham Forest were asked to accommodate her under s192(3) Housing Act 1996, which contains a power to accommodate those to whom s192 applies. Waltham Forest refused both requests for accommodation. GS sought judicial review. Judge A Grubb (sitting as a Deputy High Court Judge) allowed her claim. Under s192(4) Housing Act 1996, a local housing authority is required to carry out an assessment of a homeless applicant's housing needs prior to providing advice and assistance under s192(2). An authority may discharge this duty by gathering the relevant information during the decision making process. That is, a distinct assessment is not necessarily required providing that the 'nuts and bolts' of the applicants housing needs have been ascertained already. See *R (Savage) v Hillingdon LBC* [2010] EWHC (Admin). While the legislation does not expressly provide that the assessment should be carried out prior to any decision whether to exercise the discretion to accommodate under s190(3), the requirement was implicit. In this case, Waltham Forest had failed to assess the nuts and bolts of GS's very particular accommodation needs. As such the advice and assistance offered under s190(2), and the refusal to exercise the discretion to accommodate her under s190(3), were unlawful.

Local connection

28. *R (Tanushi) v Westminster CC and Hillingdon LBC*, 22 January 2016: accommodation pending referral under local connection provisions. T applied to Westminster as homeless. Westminster accepted the main housing duty but referred her case to Hillingdon under the local connection provisions. Westminster agreed to accommodate T until the referral had been accepted. A disagreement then arose

between Westminster and Hillingdon and both refused to provide accommodation. The court granted T permission to apply for judicial review of both authorities, finding she had a strong case against Westminster and that Westminster had an arguable case that the obligation had passed to Hillingdon. Westminster ordered to provide interim relief.

Costs

29. *R (Lopes) v London Borough of Croydon* [2016] EWCA Civ 465, 24 May 2016: L lodged an appeal in the county court under s204 Housing Act 1996. Further evidence was submitted on her behalf during the course of the appeal, following which the parties agreed, that the appeal should be withdrawn. A consent order was drawn up. But it was not approved in time for the hearing, and the parties were required to attend. The Circuit Judge approved the order, which provided for both parties to make written submissions on costs. Submissions were duly filed and another Circuit Judge, on the papers, awarded L 85% of her costs. Croydon appealed against the costs order. A question arose as to the correct destination for such an appeal, and whether the ‘second appeal test’ should be applied. Considering the matter together with a number of costs appeals that had arisen in other civil proceedings, the Court of Appeal gave the following guidance, applicable to homelessness appeals and appeals from decisions of district judges, at [54]:

- If the county court judge has heard the appeal and ruled on the issues determined by the district judge (including the validity or otherwise of the claims, the relief to be granted and the costs of the hearing before the district judge), any appeal will lie only to the Court of Appeal. Permission must be sought from the Court of Appeal and the second appeal test will apply.
- In respect of the costs of the appeal to the county court, any appeal will lie to the Court of Appeal;
- It would be open to the county court judge to grant permission to appeal to the Court of Appeal in respect of the costs of the appeal to the county court and the normal test for permission will apply. It would also be open to the Court of Appeal to grant permission applying the same test.
- If there has not been what can properly be regarded as a hearing of the appeal, any appeal (which is almost certainly to be one on costs) is to the High Court judge and the normal test will apply.

30. Since the judge in this instance had not heard the homelessness appeal, the subsequent appeal on the issue of costs lay to the High Court and the second appeals test was not applicable.

PART 2: ALLOCATIONS

31. The current statutory framework for the allocation of social housing came into effect in 1997. In the years that followed a number of successful challenges were brought by way of judicial review against local housing authority allocation schemes and to the priority which individuals had been given on those schemes. The decision of the House of Lords in the 2009 case of *R (Abmad) v Newham LBC* [2009] UKHL 14, [2009] HLR 31, brought this trend to a rather abrupt halt. In the words of Lord Neuberger: ‘as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies’.
32. But the law has moved apace since the decision in *Abmad*. On 1 October 2010, the Equality Act 2010 came into force; the legislative embodiment of a Parliamentary intention that there should be a culture of greater awareness of the existence and legal consequences of disability, alongside the other protected characteristics. See *Hotak, Kanu and Johnson* [2015] UKSC 30, [2016] AC 811 at [74] per Lord Neuberger. Then, on 18 June 2012, amendments to the Housing Act 1996 made by the Localism Act 2011 came into effect. These amendments made significant changes to the principles on which local housing authorities could frame their allocation schemes.
33. Meanwhile, pre-existing legal principles such as the ‘best interests of the child’ principle, and the anti-discrimination provisions contained in the ECHR, have been discussed and developed in other contexts. Against this backdrop, the tide seems to have turned once more, and the High Court has been willing to entertain, and in a number of cases has upheld, a spate of challenges to allocation schemes over the last two years. The purpose of this part of the paper is to consider these recent developments.

***R (Jakimaviciute) v Hammersmith & Fulham LBC* [2014] EWCA Civ 1438, [2015] HLR 5**

34. Although not the first post-*Abmad* challenge to an allocation scheme, *Jakimaviciute* marked the first of the successful run of challenges, grappling with the limits of a lawful scheme following the Localism Act 2011 amendments. Pursuant to those amendments, Hammersmith and Fulham had adopted a new allocation scheme in April 2013, ostensibly exercising the power under s160ZA(7) Housing Act 1996 to exclude from the scheme homeless applicants placed in long term, suitable, temporary accommodation under the main homelessness duty. Ms Jakimaviciute, who fell within this class, challenged the scheme by way of judicial review. Permission was refused in the High Court, but granted by the Court of Appeal, who retained the case. The Court found the scheme to be unlawful. The power under s160ZA(7) to designate classes of people who qualify for an allocation is subject to the duty under

s166A(3) to secure reasonable preference to the five statutory categories set out in that section, including (under s166A(3)) ‘people who are homeless within the meaning of Part 7’. The disqualification in Hammersmith and Fulham’s scheme was fundamentally at odds with this requirement. Further, no reasonable authority could have concluded that the criterion, which excluded 87% of homeless applicants, gave this group reasonable preference.

***R (Alemi) v Westminster CC* [2015] EWHC 1765 (Admin), [2015] PTSR 1339**

35. Ms Alemi, together with her husband and children, was accommodated by Westminster under s193(2) Housing Act 1996. When she sought an allocation of social housing she found herself excluded by the provision in Westminster’s allocation scheme whereby homeless applicants were not permitted to bid for social housing for the first 12 months following the acceptance of a duty toward them.
36. Ms Alemi sought to challenge Westminster’s scheme arguing that it failed to give reasonable preference to homeless applicants in contravention of s166A(3) Housing Act 1996. Westminster countered that whether or not a particular group were accorded a reasonable preference should be measured over a reasonable period of time rather than taking a ‘snapshot’ at a particular moment in time, and that since the exclusion only affected around 15% of those on the register (all of whom fell into one or other of the reasonable preference categories) the scheme as a whole afforded reasonable preference to the statutory classes.
37. HHJ Blair QC allowed Ms Alemi’s claim. The effect of the exclusion was to ensure that homeless applicants had no opportunity to obtain an allocation within the first 12 months and this did not amount to a reasonable preference. The reasonable period of time over which Westminster claimed the scheme should be judged was arbitrary and had no connection with the statutory purpose of allocating social housing, and so could not affect the legality of the exclusion. Section 166A(3) does not permit the exclusion of an entire subgroup who are required to be given a reasonable preference by means of a time bar.

***R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16**

38. HA fled from the London Borough of Hounslow, together with her five children, to escape domestic violence. She applied to Ealing as homeless, was found to be owed the main housing duty and was housed in temporary accommodation. She then applied for an allocation of social housing but her online application was rejected automatically and she was issued with a pro forma refusal letter, stating that she was ineligible for an allocation as she had not been resident in the borough for five years. Goss

J allowed her application for judicial review. While a residence requirement was, in principle, lawful, the scheme in the instant case unlawfully precluded those who fulfilled the reasonable preference criteria set out in s166A(3) Housing Act 1996 from an allocation of social housing, contrary to the statutory scheme. The scheme also discriminated unlawfully against women who were victims of domestic violence, contrary to Articles 8 and 14 ECHR and ss19 and 29 Equality Act 2010 and had not been formulated with regard to s11 Children Act 2004. A residual discretion within the scheme, available in exceptional circumstances, was not sufficient to remedy these flaws.

R (A) v Ealing LBC, unreported (QBD)

39. The Claimant in *R (HA) v Ealing LBC* [2015] EWHC 2375, brought a fresh judicial review seeking a mandatory order that Ealing should place her on its housing register. Ealing had refused to do so on the footing that she did not meet the residency requirement (which the court had previously found to be unlawful) and that it was appealing the court's earlier decision.
40. The court granted the Claimant's application for judicial review and quashed the relevant decisions, though a mandatory order was not granted. The allocation scheme had been found by the court to be unlawful, and Ealing had not sought a stay when applying for permission to appeal against that decision.

***R (H) v Ealing LBC* [2016] EWHC 841 (Admin), [2016] HLR 2**

41. Ealing's scheme had also removed 20% of available lettings from the general pool, and reserved them for 'working households' (those where a member of the household worked for 24 hours or more per week) and 'model tenants' (existing council tenants who had complied with the terms of their tenancy and were applying for a transfer). HHJ Waksman QC found that the scheme: gave rise to unlawful discrimination against women, disabled and elderly persons contrary to ss19 and 29 Equality Act 2010; resulted in unlawful discrimination against women, children, disabled and elderly persons and non-council tenants contrary to Articles 8 and 14 ECHR; and had been adopted and maintained without adequate regard to the public sector equality duty and s11 Children Act 2004.

***R (Woolfe) v Islington London Borough Council* [2016] EWHC 1907 (Admin)**

42. Ms Woolfe was accommodated with her baby daughter in a studio flat provided to her by Islington, as a homeless person. Shortly after applying to Islington as homeless she applied for an allocation of social housing. Islington operated a points based allocation scheme providing, among other things, that

applicants with less than 120 points would not be able to bid for properties. Ms Woolfe was awarded 110 points overall with the effect that she was not able to bid. She sought judicial review. Holman J allowed her claim on the basis that Islington had not properly applied the scheme on the facts of her case. But a more general challenge to the legality of the points threshold, on the footing that it precluded a proportion of applicants who fell within the ‘reasonable preference’ categories bidding, failed. Unlike *Jakimaviciute*, *Alemi* and *HA*, Ms Woolfe was not prevented from registering on the scheme completely. Rather she was registered on the scheme but was prevented from bidding until she accrued a certain number of points. She had been accorded some preference on the basis that she was homeless. Whether this was reasonable was a matter for Islington. A challenge based on an alleged failure to have regard to s11 Children Act 2004 also failed. Consideration had been given to Ms Woolfe’s child both at the time of providing the accommodation in which the pair were accommodated and at the time of considering the points the household should be awarded under the scheme on welfare grounds.

***R (YA) v Hammersmith and Fulham London Borough Council* [2016] EWHC 1850 (Admin)**

43. YA, was a young person who had spent a number of years in the care of Hammersmith and Fulham. Between the ages of 12 and 15 he had been convicted of a number of criminal offences including theft and fraud. At the age of 19, YA applied for an allocation of social housing under Hammersmith and Fulham’s allocation scheme. The relevant provisions of the allocation scheme provided that applicants who had unspent convictions for housing or welfare benefits related fraud would not qualify for registration on the scheme until the qualification was spent. In addition, those who had been ‘guilty of unacceptable behaviour which makes them unsuitable to be a tenant’ would not qualify. Separate to the allocation scheme, Hammersmith and Fulham also operated a ‘Care Leavers’ Quota’, whereby a quota of units of social housing were set aside each year for the ‘most vulnerable of care leavers’ who could be nominated for an allocation by the Care Leavers Housing Panel, even if they did not meet the normal criteria. YA was nominated for an allocation by the panel but his application was subsequently refused by the Director of Housing Options on the basis of his offending history.
44. YA sought judicial review arguing that it had been contrary to s4(1) Rehabilitation of Offenders Act 1974 to have regard to his convictions, which were spent by this time, and that the decision resulted in indirect discrimination against him as a care leaver, contrary to Articles 8 and 14 ECHR. The first ground was allowed. Hammersmith and Fulham did not have any information before them relating to the behaviour underpinning YA’s convictions and so the only possible interpretation was that the

existence of those convictions had, impermissibly, been held against him. In relation to the second ground, the judge accepted that Article 8 was engaged, that being a care leaver amounted to ‘other status’ within the meaning of Article 14 and that the allocation scheme indirectly resulted in care leavers being treated less favourably than others, since (the evidence suggested) they were more likely to have criminal convictions or have behaved in a way that would disqualify them from the allocation scheme. However, the discriminatory effect of the scheme fell within the margin of appreciation afforded to the state in matters of social welfare and was justified.

***R (Jones) v Luton Borough Council* [2016] EWHC 2036 (Admin)**

45. In 1997 the Claimant’s mother and father were granted a joint tenancy of 33 Duncombe Close, Luton by the Defendant, Luton Borough Council. The property had two bedrooms. The Claimant, JJ, who was 14 at the time, moved into the property with his parents.
46. In 2011, JJ entered into a civil partnership with PT. JJ and PT jointly cared for JJ’s mother, who was terminally ill with lung cancer, and his father, at the property. JJ’s mother passed away in 2012 and his father became the sole tenant of the property by survivorship. In March 2015, PT’s brother JT – who himself had a number of health problems – moved into the property too. In May 2015, JJ’s father passed away. Luton swiftly served a notice to quit bringing the subsisting contractual tenancy to an end.
47. JJ then applied to Luton for a tenancy of the property relying on the provisions of Luton’s allocation scheme dealing with ‘non-successors’ i.e. members of a former tenant’s household who had no statutory right to succeed to the tenancy.
48. Luton refused to grant JJ a tenancy of the property but, in view of his personal circumstances and the care he had provided to his parents, offered a tenancy of a one-bed property to JJ and PT. In reaching this decision Luton took the view that JT was not a ‘relevant member of the household’.
49. JJ sought judicial review of the decision arguing, among other things, that Luton had failed to adequately consider JJ, PT and JT’s rights under Article 8 ECHR.
50. Mr Ter Haar QC (sitting as a Deputy High Court Judge) rejected the claim. On the evidence. Luton had been entitled to conclude that JT was not a dependent member of JJ’s family or a member of the household. As such, the decision was one which was open to Luton on the facts.

Conclusion

51. The House of Lords decision in *Abmad* set down limits on the justiciability of local authority allocation schemes. The extent and nature of those limits is starting to be tested. It remains to be seen in what direction the law will move if and when these cases begin to fall for consideration by the Court of Appeal. But the cases outlined above should hopefully give a flavour of the current issues in this rapidly moving area.

CONNOR JOHNSTON
GARDEN COURT CHAMBERS
30 NOVEMBER 2016