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Homelessness appeals: Top tips for an effective local authority response

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15 June 2022

Your presenters

Introduction

- Homelessness - a multi-faceted and complex area of law and practice, with wide scope for potential error
- Statutory appeals under section 204, Housing Act 1996 – a time-consuming and often costly process
- Key to mitigating the risks of appeal and related time and cost? An effective and efficient local authority response
- Focus of this webinar? Practical tips for local authority officers and solicitors responding to section 204 appeals
    - Note: This is not a complete guide to homelessness appeals, but a focus on particular aspects of homelessness law and practice, to enable a more effective and cost-efficient local authority response

Content

- Content will include –
  - Key aspects of the appeal: Understanding s.204 appeals and the authority's role
  - Prevention is better than cure: The importance of the section 202 review
    - Common local authority errors
    - Use and treatment of medical evidence
    - The role of minded-to letters
  - Mitigating risk when prevention fails:
    - Early merits reviews
    - Settlement options
  - Minimising liabilities:
    - Relief
    - Costs

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Key aspects of the appeal

Understanding s.204 appeals and the authority's role

- "Let's start at the very beginning …"

204.— Right of appeal to county court on point of law.

(1) If an applicant who has requested a review under section 202 — (a) is dissatisfied with the decision on the review, or (b) is not notified of the decision on the review within the time prescribed under section 203, he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision.

(2) An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review.

(2A) The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied — (a) where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time; or (b) where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission.

(3) On appeal the court may make such order confirming, quashing or varying the decision as it thinks fit.

Understanding s.204 appeals and the authority's role

"Although the County Court's jurisdiction [under section 204] is appellate it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under section 204(3) 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."

Runa Begum v Tower Hamlets LBC [2003] 2 AC 430, per Lord Bingham at para.7

Understanding s.204 appeals and the authority's role

- "Point of law"?

"… "a point of law" includes not only matters of legal interpretation but also the full range of issues which would otherwise be the subject of [a] judicial review, such as procedural error and questions of vires, to which I add, also of irrationality and (in)adequacy of reasons."

Nipa Begum v Tower Hamlets LBC [2000] 1 WLR 306, per Auld LJ at 313

- "… arising from the review decision"?

"… the correct interpretation of section 204 … is that a point of law arises from a decision if it concerns or relates to the lawfulness of the decision. … [It is] not limited to points of law that might broadly but imprecisely be described as "points of housing law" but extends to the full range of issues that would otherwise be the subject of an application to the High Court for judicial review.

James v Hertsmere BC [2020] 1 WLR 3606, per Peter Jackson LJ at [31]

- No fact-finding jurisdiction: With few exceptions, matters of fact are for the authority

Bubb v Wandsworth LBC [2012] PTSR 1011 (see also *Adesotu v Lewisham LBC* [2019] 1 WLR 5637)

Understanding s.204 appeals and the authority's role

- So, court exercises a supervisory jurisdiction
- Judge is required to consider two questions in particular:
  - Does the authority's review decision involve a public law error?
  - Does that error vitiate the authority's decision?
- Burden of proof lies with the appellant, as with the judicial review claimant
- Parameters of the appeal are defined by the grounds of appeal and "set the agenda"
  - *Cramp v Hastings BC* [2005] HLR 48, per Brooke LJ at [72-73]
- Role of the respondent authority defined by (a) the questions for the judge and (b) the grounds of appeal –
  - To demonstrate that the review decision does not involve the alleged public law error(s)
  - Where appropriate, to demonstrate that the error(s) does (do) not vitiate the decision

Understanding s.204 appeals and the authority's role

- Tips:
  - Check limitation (and take a realistic view if there is clearly a good reason for lateness)
    - See section 204(2), above, and *Al Ahmed v Tower Hamlets LBC* [2020] EWCA Civ 51
  - Ensure the appeal raises only "points of law" that "arise from" the relevant decision (usually the review decision)
    - See *James v Hertsmere BC*, above
  - If the grounds of appeal have merit, consider whether the facts militate against a grant of relief, or support a variation rather than quashing of the decision (see below)
  - Keep the appellant and, where possible, the court to the "agenda"
    - See *Cramp v Hastings BC*, above (though note the court's discretion to permit amendments)

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Prevention is better than cure

The importance of the statutory review

- Prospects of successfully opposing an appeal are generally only as good as the review decision
  - Appropriate resourcing and effective making of review decisions essential
- Common local authority errors
  - Deficiencies or irregularities in original decision, and the need for a minded-to letter
  - Inquiries
  - Equivalence of medical evidence and reasons for preference
  - Over-complication of decision

Deficiencies, irregularities and the minded-to letter

- Deficiencies and irregularities in the original decision
  - Homelessness (Review Procedure etc) Regulations 2018, regulation 7
- Deficiency and irregularity?
  - Widely construed: *Hall v Wandsworth LBC* [2005] HLR 23, per Carnwath LJ at [27-29]
  - Deficiency: “something lacking”; not limited to failings amounting to a ground of appeal but must be sufficiently important to fairness of process to require a minded-to letter
  - Irregularity: something lacking in the manner in which the original decision was made, i.e. a procedural flaw or error
- If in doubt, send one out!
  - But keep an eye on statutory time limit for notification of section 202 review decision: regulation 9, 2018 Regulations, above

Sufficiency of inquiries

- An authority with reason to believe that an applicant may be homeless has a duty to make such inquiries as are necessary to satisfy itself whether the applicant is eligible for assistance and, if so, what duty is owed them: s.184(1)

- What inquiries are considered necessary, including their scope and scale, is a matter for the authority: *R. v Kensington and Chelsea RLBC Ex p. Bayani* (1990) 22 HLR 406

- An authority which has made inquiries can only be attacked for failing to make more if it has failed to make an inquiry which no reasonable authority could have failed to regard as necessary: *R. v Nottingham City Council Ex p. Costello* (1989) 21 HLR 301 at 309

- The court should be wary of imposing on the reviewing officer a duty to inquire into matters that were not raised by the applicant: *Cramp v Hastings BC* [2005] HLR 48 at [14]; *Ciftci v Haringey LBC* [2022] HLR 9 at [35]

Sufficiency of inquiries

"First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge…, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken…. Thirdly, the court should not intervene merely because it considers that further ***inquiries*** *would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the* ***inquiries*** *made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further* ***inquiries*** *if no reasonable authority possessed of that material could suppose that the* ***inquiries*** *they had made were sufficient."*

R. (Balajigari) v Secretary of State for the Home Department [2019] 1 WLR 4647, per Underhill LJ at [70]

Common issues in the treatment of medical evidence

- An authority is entitled to obtain its own expert evidence - *Hall v Wandsworth LBC*, above - **but** issues of vulnerability, suitability etc are to be determined by the authority decision-maker who will need to explain **his or her** reasons for any negative decision
- Applicants frequently present their own medical evidence, which must be given proper consideration and regard: *Osmani v Camden LBC* [2005] HLR 22. If necessary, questions can be raised with the applicant's medical adviser.
- Where there is a conflict in the available medical evidence, the authority should consider the qualifications of the medical experts and whether or not their opinions are based on an examination of the applicant: *R. v Westminster CC Ex p. Bishop* (1993) 25 HLR 459
- In *Shala v Birmingham CC* [2008] HLR 8 it was held that: **(i)** housing officers should not be expected to make their own critical evaluation of applicants' medical evidence and should have access to specialist advice; **(ii)** the function of an authority's medical adviser is to enable housing officers to understand the medical issues and to evaluate for themselves the expert evidence; and, **(iii)** absent an examination of the patient, the medical adviser's evidence cannot itself ordinarily constitute expert evidence

Over-complication of the review decision

- Avoid unnecessary length and complication
- Lengthy, repetitious and overly-legalistic review decisions –
  - are often written not so much for the applicant but for his/her solicitor
  - go further than the duty to give reasons requires: see e.g. *R v Croydon LBC, ex parte Graham* (1993) 26 HLR 286 CA
  - increase the potential for inconsistency and error
- Complicated decision; simple structure:
  - Identify the relevant issues at the beginning of the decision
  - Isolate and address each of them
  - Identify the law, guidance etc applicable to each
  - Identify and, where necessary, determine the material facts
  - Give reasons for the resulting decision
  - Do not return to the issue again, save to summarise the decision and its constituent parts

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Mitigating risk

When prevention fails …

- Early merits reviews
  - Good practice and an effective way to limit the cost of undefendable or vulnerable decisions
- Settlement options
  - Protect the authority's position and encourage appellant to reconsider position
  - Early and reasonable offers to settle
    - Part 36, Civil Procedure Rules 1998
    - Part 36 costs protection and interest provisions
  - Appellant's obligation to the Legal Aid Agency

Early merits reviews

- Don’t be the ostrich respondent!
- Early merits reviews save time and money; and delays often prove costly
- Often, two opportunities for early assessment:
  - Pre-appeal: letter before action or other intimation of appeal grounds
    - Review officer and local authority solicitor assessment of grounds may be the most cost-effective option
  - Issue of appeal:
    - Consider early referral to counsel - often advisable
- Remember the two key questions (see above):
  - Does the authority’s review decision involve a public law error?
  - Does that error vitiate the authority’s decision?

Settlement options

- Options for settlement limited in section 204 appeals, in part because of limit on available remedies: confirm, quash or vary
- But scope for settlement offers and consequent costs protection remains –
  - in respect of individual grounds and issues
  - in respect of the appropriate remedy, e.g. where the appellant seeks not just to quash but to vary the local authority decision
- Incorporate consideration of early settlement offer in early merits review
- Benefits?
  - Offers made in accordance with CPR Part 36 attract costs protection and potentially punitive interest provisions
  - Appellant required to inform Legal Aid Agency of any offer made, and potentially justify continuation of public funding
- In appropriate cases, consider offer outside of Part 36, e.g. Calderbank offer

Keeping the court happy

Don’t start an appeal hearing on the back foot!

- Do the “simple” things right: Comply with court deadlines or, where necessary, apply for an extension before a deadline expires
    - N244 plus relevant evidence, not just a letter to the court
- Keep the court office appraised of matters likely to affect listing or time estimates
- Keep the judge on side! A carefully structured, indexed, paginated and properly-bound bundle, legible and limited to necessary documents, goes a long way.
    - Statements of case etc: Appellant’s notice, grounds and skeleton argument; Respondent’s notice (if any) and skeleton argument
    - Court orders and notices
    - Review decision
    - Key documents, e.g. medical evidence, key correspondence
    - Homelessness file, redacted as necessary
    - Relevant *inter partes* correspondence
- Don’t forget a statement of costs!

Skeleton arguments

- There to assist the court and to promote the authority's position
- Don't over-cite authorities
- Don't be afraid to agree with an appellant's argument
- Stress the "judicial review" nature of the appeal and the high hurdle for the appellant
- Keep on point and address the appellant's arguments head-on
- Avoid extreme language
- And persuade!

Minimising liabilities

Relief: Don't forget …

- The court may refuse relief, and dismiss an appeal, even if the review decision contains a public law error -
  - if, properly directed, the local authority would inevitably reach the same decision: *Ali v Newham LBC* [2002] HLR 20 at [18], or
  - if the appeal is an abuse of the court's process because, while the review decision might contain an error of law, the appeal is in practice pointless: *O'Connor v Kensington & Chelsea RLBC* [2004] HLR 37 at [17-18] and [42]
- Further, the court should only vary a review decision, rather than quash and remit it to the local authority, if –
  - the local authority could not properly be required to make further enquiries before being satisfied that the appellant is e.g. intentionally homeless or in priority need ***and***
  - there is no real prospect of any such enquiries producing a different result

see *Deugi v Tower Hamlets LBC* [2006] HLR 28 at [42]

Costs

- Generally, an appellant who obtains some or all of the relief he or she seeks will be entitled to his/her reasonable legal costs; BUT exceptions apply where e.g.
  - the appellant fails to do better than a respondent's offer to settle
  - the appellant succeeds on only one of many grounds of appeal
  - the appellant's conduct warrants a different order
- Where an appeal settles and the court determines costs liability, it will usually favour the "successful" party, but will also consider whether the appeal caused the compromise. Here, there may be scope for argument:
  - see *R (Parveen) v Redbridge LBC* [2020] 4 WLR 53, applying *R (RL) v Croydon LBC* [2019] 1 WLR 224 and *M v Croydon LBC* [2012] 1 WLR 2607
- Otherwise, limiting costs liability will often depend on scrutinising and, where appropriate, opposing the appellant's claim for costs in the post-appeal assessment
- A note of caution: be aware of (and beware) payments on account

3 costs cases

- ***Ersus v Redbridge LBC* [2016] EWHC 1025** - A judge had been entitled to make an order of no order for costs where an appeal under the Housing Act 1996 s.204 had become academic and been discontinued as it could not be said with certainty that there had been a causal connection between the bringing of the housing appeal and the local authority's subsequent offer of suitable accommodation.

- ***Unichi v Southwark LBC* [2013] EWHC 3681** - An appellant who had withdrawn an appeal against a homelessness decision because the local authority had agreed to carry out a fresh review in light of a psychologist's report was entitled to her costs. The local authority had been aware at the time of the first review that a future report might affects its decision, but had proceeded regardless.

- ***R (on the application of M) v Croydon LBC* [2012] 1 WLR 2607** - Where a local authority had conceded a claim made by an asylum seeker in relation to his age, the judge had been wrong to make no order as to costs, as such it was appropriate to order the local authority to pay 50 per cent of the asylum seeker's costs until the issue of proceedings and 100 per cent thereafter. The court gave general guidance on costs issues in relation to Administrative Court cases which settled on all issues save as to costs.

Questions

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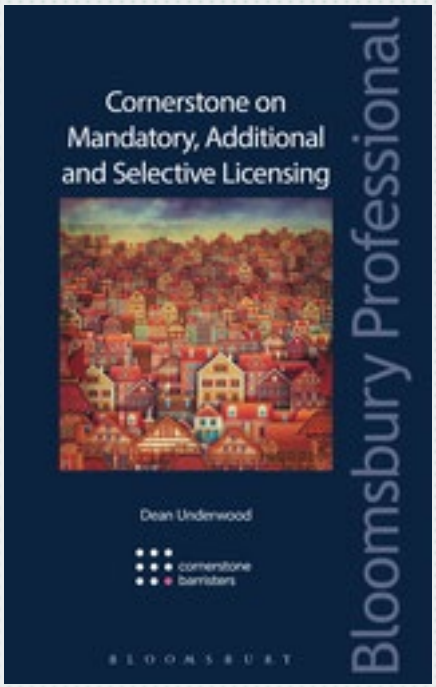

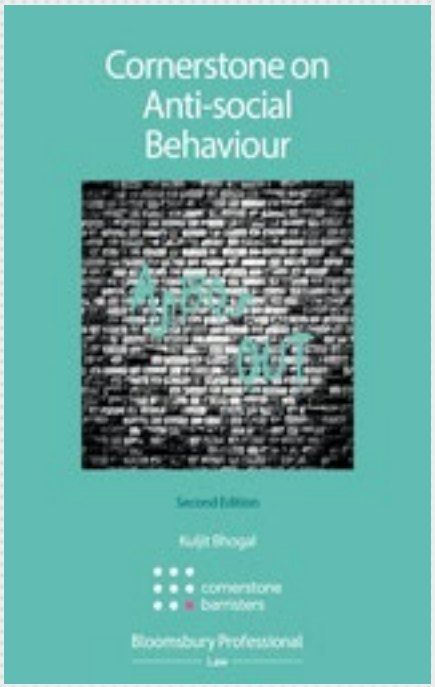

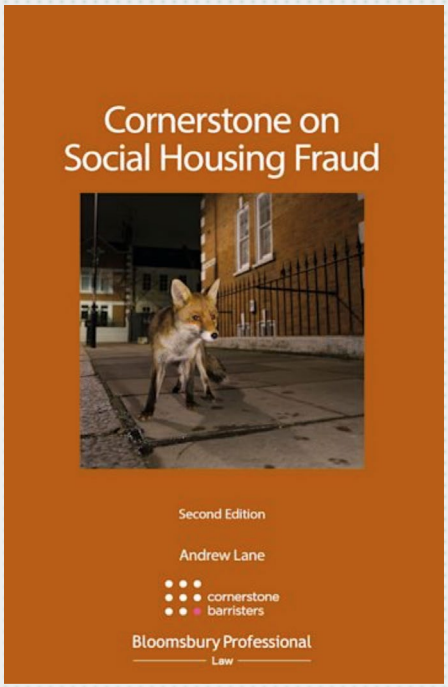

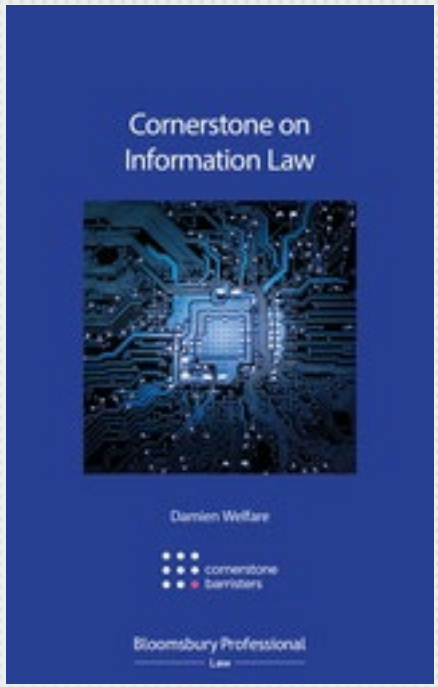

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