cornerstone barristers

Homelessness and allocations update

Catherine Rowlands

Allocations: cases

Let’s talk about allocations

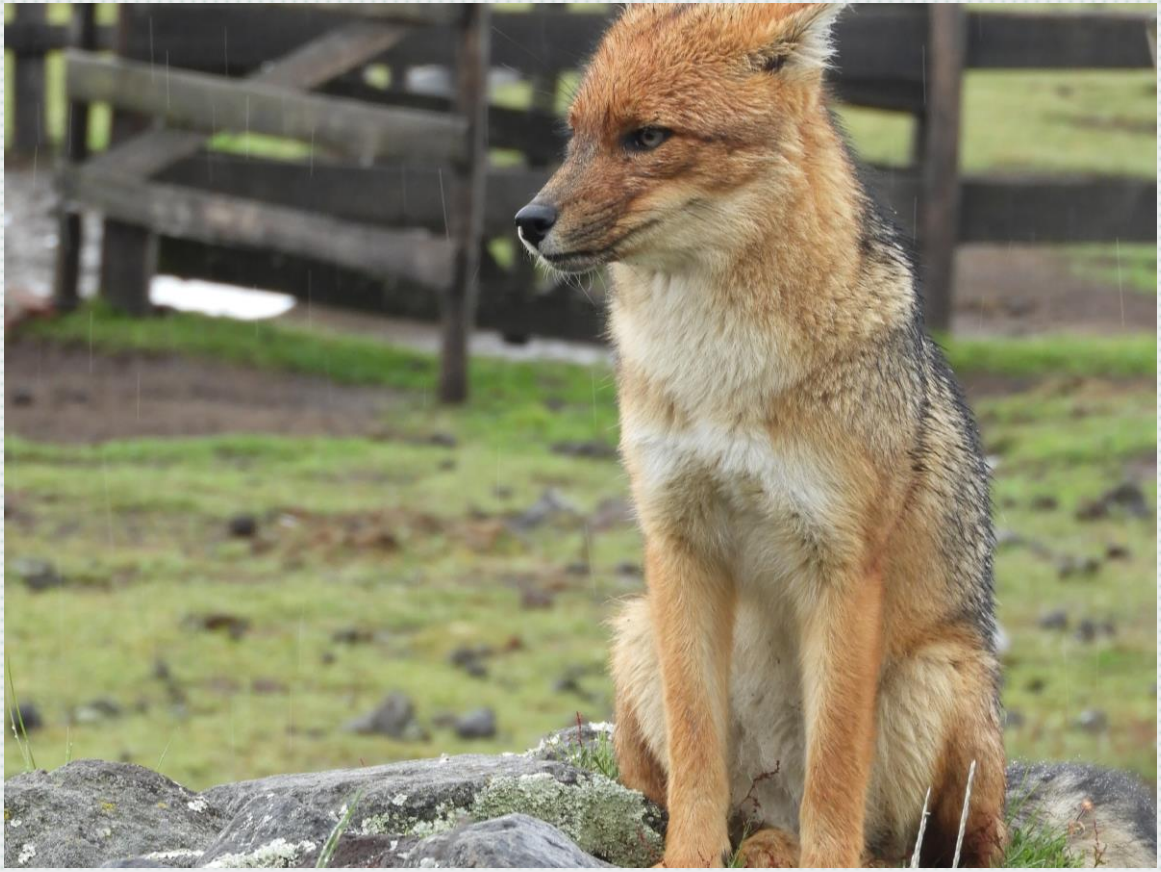
Who needs a home when you can bring your own?!

R (Osman) v Harrow LBC [2017] EWHC 274 (Admin)

- Challenge to amendment to allocations scheme that gave priority to those in overcrowded private rented accommodation over those in overcrowded secure accommodation
- There were significant differences between the two groups even though similar
- *considerable weight is to be given to the decision of the Defendant as housing authority in making decisions which Parliament has entrusted to it*

R (Osman) v Harrow LBC [2017] EWHC 274 (Admin)

66 The differences as to tenure and security between the transfer and homeseeker groups are not in dispute and are on any view significant in terms of the willingness or realism of moving from one group to another. As Mr Allen explains in his witness statement, it had become apparent that applicants were not coming forward to be assisted with overcrowding through the homelessness route, which meant that children were remaining in overcrowded conditions for longer than they need, because applicants were declining properties in the hope of obtaining a secure tenancy under the Original Scheme. The intention was that by reducing the priority preference to the same as homeless cases the incentive to decline offers through that route would be removed. There is no evidence before the court to challenge that advice or its basis as reported by the officers. Moreover that was in my judgement a legitimate aim for the purposes of article 14 and otherwise.



Andean Fox

R (XC) v Southwark LBC [2017] EWHC 736

- Judicial review of S's allocations policy on basis it indirectly discriminated against disabled people
- "priority star" scheme for community contributions: C, disabled and caring for disabled son, couldn't contribute by voluntary work
- Had already complained to LGO
- Complained that local authority's response to her letter before action was to say she could do voluntary work

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R (XC) v Southwark LBC [2017] EWHC 736

- Response to letter before action was not a decision susceptible to challenge
- Although the letter was unfortunately grumpy in tone, that was because C was a repeat complainer

R (XC) v Southwark LBC [2017] EWHC 736

- Discrimination: Southwark argued need to look at the scheme in the round
- Judge referred to H v Ealing at first instance and agreed
  - In my judgement, it is perfectly plain that the effect of the priority star scheme in the present case is indirectly to discriminate against those with disabilities and against women. It is beyond argument, in my view, that to make available a benefit, here a “star” which increases the prospect of achieving preferential housing, which can more readily be acquired by those without a disability, is to discriminate against the disabled by subjecting them to a detriment.

R (XC) v Southwark LBC [2017] EWHC 736

- Discrimination: Southwark argued justification
- Common ground that 1) the policy had a legitimate aim, namely creation of sustainable and balanced communities and encouraging residents to make a contribution to the local community; 2) the priority stars had a rational connection to that objective.
  - “it is legitimate for local authorities to seek to ensure that their communities include a reasonable proportion of working members, people able to make a financial contribution to the maintenance of the community, and to encourage those willing to provide voluntary assistance to others in their neighbourhood. Giving a measure of priority to working households and to those who provide community services helps achieve those objectives.”

R (XC) v Southwark LBC [2017] EWHC 736

- Justification
  - *86 The real question is whether a priority scheme like the defendant's was the least intrusive measure which could be used without unacceptably compromising the objective. In my judgement it was.*
  - 92 Determining those matters in the context of housing allocation schemes is especially difficult. Every tweak to the scheme to benefit one individual or one class of applicant is likely to have an adverse effect on another; every exception to the operation of a preference may damage the achievement of the objective. The court inevitably concentrates on the circumstances of the claimant in front of it and it is easy to recognise the disadvantage that a claimant may suffer. But the local authority has to consider the position of all applicants and the court can have only the most attenuated understanding of their position.

Night heron

Subject to indirect discrimination?

R (H) v Ealing LBC [2017] EWCA Civ 1127

- 1 This appeal concerns the lawfulness of the housing allocation policy ("the Housing Policy") of the defendant Council ("Ealing") insofar as it sets aside a small but not insignificant proportion of lettings for "working households" and "model tenants". It is said that the working household priority scheme ("the WHPS") discriminates indirectly against women, the elderly and the disabled, and that the model tenant priority scheme ("the MTPS") (together "the two Priority Schemes") directly discriminates against non-Council tenants.
- 2 There are two questions for this Court. First, whether section 2 paragraph 2 of the Housing Policy was unlawfully discriminatory contrary to sections 19 and 29 of the Equality Act 2010 ("EA 2010") and Article 14 in conjunction with Article 8 of the European Convention on Human Rights ("the Convention"). Second, whether in adopting and maintaining the two Priority Schemes, Ealing was in breach of its public sector equality duty ("the PSED") under EA 2010 s.149 , as well as section 11 of the Children Act 2004 ("CA 2004").

R (H) v Ealing LBC [2017] EWCA Civ 1127

- "2. Applicants who work or adhere to the rules in conducting their Council tenancy
- 20% of lettings will be made available to applicants from working households and those Council tenants who comply with their tenancy agreement and pay their rent and council tax.
- Working households will only qualify if they have been employed for a minimum of 24 hours a week and for 12 out of the last 18 months. Evidence of employment will be required in the form of tax returns, copy of employment contract and/or any other suitable proof as requested.
- Ealing Council has a scheme which rewards good tenants who want the opportunity to seek a transfer. These transfer applicants are existing tenants who have demonstrated that they are "model" tenants by complying with their tenancy agreement for a specified period of time.
- In order to bid successfully for properties advertised as part of this scheme, Households:-
- a) Must not have rent arrears for the previous 12 months.
- b) Must not have breached their tenancy conditions for the previous two years.
- c) Must not have any anti-social behaviour record.
- Once tenants have been accepted for the scheme they must continue to comply with the above criteria until they are rehoused in order to remain with the scheme.
- Applications will be prioritised by band and date within that band…"

R (H) v Ealing LBC [2017] EWCA Civ 1127

- First ground of appeal:Judge took incorrect approach to establishing whether there was prima facie indirect discrimination for the purposes of section EA 2010 s.19 because he should have considered the Housing Policy "in the round".
- Ealing argued their Housing Policy contains a number of "safety valves", the effect of which is that each of the Protected Groups as a whole is not disadvantaged by the WHPS.

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Held:

  “it is contradictory of Ealing to concede, on the one hand, that for the purposes of EA s19(2) the WHPS is a PCP, and, on the other hand, to seek to rely on Ealing’s Housing Policy as a whole to rebut the PCP’s discriminatory impact on the relevant Protected Groups. What this highlights is that the matters on which Ealing relies, the so-called safety valves, are matters which properly are relevant to justification under EA 2010 s. 19(2)(d) rather than the existence of indirect discrimination under EA 2010 s.19(2)(a)-(c) .”

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Justification:
  - Ealing has a legitimate aim in encouraging tenants to work and to be well-behaved in relation to their tenancy, and the WHPS and the MTPS are rational means of achieving that aim.
  - it is necessary to take into the balance, when considering achievement of the legitimate aim of the WHPS, the effect on the Protected Groups as a whole under the entire Housing Policy for all Ealing's housing stock.

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Remaining grounds dismissed:-
  - Article 14 and article 8 challenges not made out
  - PSED: Ealing accepted some problems but major review under way
  - CA s.11: statistics used to show no adverse effect

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

1 In many parts of England and Wales there is an imbalance between the supply and demand for social housing. This is particularly acute in many of the London boroughs, including the London Borough of Islington, (hereinafter "the defendant"), where the supply is far outstripped by the demand for this type of housing accommodation. Inevitably, in these circumstances, local housing authorities can face difficult decisions when seeking to allocate social housing in a fair and appropriate manner.

2 Part VI of the Housing Act 1996 , as amended, (hereinafter "the 1996 Act"), makes provision for the allocation of social housing, and s.159(1) obliges local housing authorities to comply with those provisions. However, subject to those provisions, subs.(7) makes it clear, that a local housing authority may allocate this type of housing accommodation in such manner as it considers appropriate.

3 In addition, local housing authorities owe various statutory duties to homeless individuals within their area, under Pt VII of the 1996 Act. If the local housing authority is satisfied that an individual is homeless, eligible for assistance, has a priority need, and is not satisfied that he became homeless intentionally, then, under s.193(2) , it is under a duty to secure that accommodation is available for occupation by him.

4 However, just as there is no statutory duty to provide an applicant with social housing under Pt VI of the 1996 Act, likewise, there is no statutory duty to provide social housing to a homeless individual; albeit, s.166A(3)(a) obliges a local housing authority to frame its allocation scheme so as to secure that reasonable preference is given to people who are homeless. Therefore, unless the local housing authority decides to accommodate a homeless person by providing her with social housing, its duty is limited to securing that accommodation is available for occupation by her.

5 As social housing is, in general terms, let either under the secure tenancy provisions of the Housing Act 1985 , or the assured tenancy provisions of the Housing Act 1988 , it is understandably perceived, by those seeking to be accommodated by a local housing authority, to be the gold standard, whilst accommodation provided under Pt VII , is considered to be second best.

6 Inevitably, because of the imbalance between the supply and demand of social housing, those who are accommodated under Pt VII of the Housing Act 1996 may spend prolonged periods in such accommodation, which can lead to disputes in relation to the allocation of social housing. This case concerns one such dispute.

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- C, profoundly deaf, victim of domestic violence, moved into refuge with 3 children
- Was not awarded welfare points as being in need of settled accommodation ie council accommodation
- Argument rejected. Settled accommodation can be private sector – question of fact. Where she was living was sufficiently permanent to be settled.

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- Unlawful procedure for making direct offers
- Only came out in the course of submissions that in fact only 100 points needed for a direct offer
- Not clear that C had been considered for direct offer
- Ground upheld

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- Unlawful lettings policy: discrimination against homeless, victims of domestic violence, women
- Breach of s11 CA2004
- In comparison to those under the local lettings policy, C was disadvantaged
- It is for the court to determine proportionality
- LLP not complete bar to someone from outside
- Discriminatory effect recognised and monitored
- LLP could not be less intrusive and still achieve its aim

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- PSED had been sufficiently considered
- S11 was not breached by the introduction of the LLP as it had increased the supply of accommodation

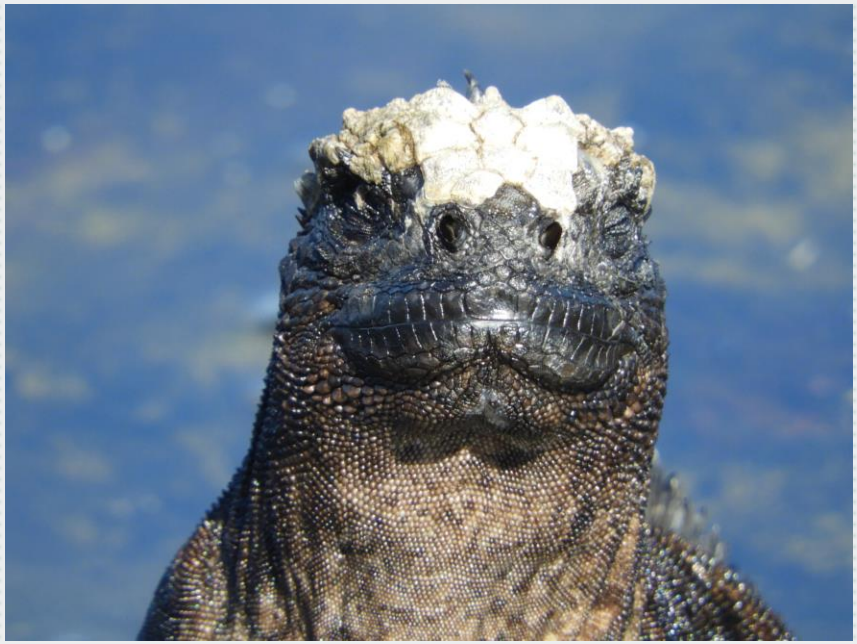
- D ordered to pay 60% of C's costs

Cotopaxi

Homelessness update

Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Another SC homelessness decision!
- SC goes against Strasbourg jurisprudence!!
- *Runa Begum* was correctly decided [phew!]



Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Review of Suitability of accom
- Should A be entitled to an independent review of the decision in light of article 6 ECHR and *Ali v BCC*?
- As *Ali* was not a Grand Chamber decision, there was no need to depart from previous decision of the SC
- *Holmes-Moorhouse* warning against nit-picking re-iterated

Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Nothing has changed
- …at least as far as homeless appeals are concerned…

LB Hackney v Haque [2017] EWCA Civ 4

- After *Hotak et al* what about the PSED?
- A had mental health problems, sought review of suitability of temp accom
- Review rejected but did not spell out whether A was disabled
- HHJ Luba QC allowed appeal on this ground
- Held:
  - What emerges as a general principle is the sharp focus required of the decision maker upon the relevant aspects of the PSED where it is engaged by the contextual facts about each particular case.

LB Hackney v Haque [2017] EWCA Civ 4

- The next question is what, in that context, does the PSED as set out in s.149 of the Equality Act require of the reviewing officer on the particular facts of this case? In my judgment, it required the following:
  - i) A recognition that A suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s. 6, and therefore had a protected characteristic.
  - ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him.
  - iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments (see s. 149(3)(a)).
  - iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: see s. 149(3)(b) and (4).
  - v) A recognition that A's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see s. 149(6).
  - vi) A review of the suitability of Room 315 as accommodation for A which paid due regard to those matters.

LB Hackney v Haque [2017] EWCA Civ 4

- RO was not bound to take A's assertions at face value
- He was not bound to ask whether A could be found more suitable accom
- Other issues than disability are still relevant
- There was no need to spell out whether A was disabled as long as letter shows sufficient recognition of that fact

LB Hackney v Haque [2017] EWCA Civ 4

Judicial notice can be taken of the fact that housing authorities experience grave constraints in finding appropriately located suitable accommodation for those applicants demonstrating priority need, and that many of them deserve more favourable than purely average treatment by reason of vulnerabilities, including protected characteristics of a type which engage the PSED. The allocation of scarce resources among those in need of it calls for tough and, on occasion, heartbreaking decision-making, but having to say no to those deserving of sympathy by no means betokens a failure to comply with the PSED.

Frigate bird and blue footed booby

Where else do your lectures on homelessness include pics of boobies?

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- When is it possible to re-visit a s184 decision?
- Brent decide A is homeless, eligible, PN and NIH
- But has LC to Waltham Forest
- WF refuse the referral
- Brent then decide he's not eligible after all!
- A seeks judicial review of B's decision to re-open the s184 decision

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- Held: a local housing authority is entitled to revisit a decision where either
  - (a) it has not completed its enquiries under section 184 of the Act
  - (b) it has made no final decision as to the nature of the duty it owes to A (*Crawley v B)*
  - (c) there had been fraud or deception or
  - (d) there had been fundamental mistake of fact

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- Whether a final decision has been made is a question of fact – here it had
- There had not been a fundamental mistake of fact
- Query – how does this sit with the ban on assisting someone who is not eligible??

Cock of the Rock

Where else do your homeless lectures include …??

Trindade v LB Hackney (2017) EWCA Civ 942

- Good faith and ignorance of a relevant fact
- A left her own home in Sao Tome to move into precarious accommodation in London
- After sister lost her accommodation, A applied to Hackney and was found IH
  - *There is nothing to suggest that your client had an expectation that when she left Uba Flor for London she would have permanent housing in the UK. There was no offer of permanent housing made to your client by her sister*

Trindade v LB Hackney (2017) EWCA Civ 942

- Prospects of future housing (or job, etc) can only be a “relevant fact” if sufficiently sure, not mere aspiration
- The question of “good faith” is limited to matters which relate to her housing and prospects of accom – the fact A in good faith wanted medical treatment for her daughter is not relevant
- Anyone who acts in genuine ignorance of relevant fact will almost invariably have acted in good faith in relation to sorting out their housing needs.

Dacorum Borough Council v Bucknall (aka Acheampong) [2017] EWHC 2094 (QB)

- When do you need to comply with the Protection from Eviction Act 1977 to regain possession of temporary accom?
  - *R (N) v Lewisham London Borough Council:* SC held that section 188 temporary accommodation is not 'occupied as a dwelling' so PfEA did not apply
  - Dacorum had accepted full duty to A so this was accommodation provided under s193 to be occupied until permanent accommodation found

Dacorum Borough Council v Bucknall (aka Acheampong) [2017] EWHC 2094 (QB)

- The accommodation was more than merely “transient” and therefore occupied as a dwelling
- The Notice to Quit was invalid
- (She had refused suitable accommodation and Dacorum had discharged duty)

Darwin’s Finch

Evolve or perish

Hemley v Croydon LBC

- No transcript yet available, permission judgment on Bailii
- Pre-*Hotak* decision on vulnerability on A with chronic pain syndrome
- Both parties acknowledged that the decision in *Hotak v Southwark LBC* had changed the test for vulnerability established in *Pereira*. R contended that the review officer had, therefore, applied the wrong legal test. The local authority submitted that the judge had been overly critical of the review officer's decision and that, given his findings, the review officer would have come to the same conclusion even if he had applied the test in *Hotak* . It argued that the review officer had, accordingly, made no material error, and that his decision should be restored.

Hemley v Croydon LBC

- **Held:** Appeal dismissed.
- The Supreme Court's decision in *Hotak* had substantially modified the test in *Pereira* . *Hotak* established that a person might be vulnerable even if he could fend for himself; "vulnerable" for the purpose of s.189(1)(c) meant significantly more vulnerable as a result of being homeless; the correct comparator was not, per *Pereira* , an ordinary homeless person, but an ordinary person if they had been made homeless, *Hotak* followed, *Pereira* doubted.

Hemley v Croydon LBC

- Even the strongest person was likely to decline if made homeless, but to be vulnerable a person had to be more at risk of harm than ordinary people generally if they were made homeless, *Hotak* followed. Despite the care with which the review officer had considered the respondent's case, he clearly had applied the wrong legal test. His decision letter was replete with references to the respondent's ability to fend for herself compared to an ordinary homeless person, not an ordinary person. The instant court was not satisfied that the review officer was bound to have reached the same conclusion if he had applied the *Hotak* test.

Hemley v Croydon LBC

- It might be that a fresh consideration would lead to the same result for the respondent. The errors identified by the judge were contrary to the well-established principle that a benevolent approach should be adopted to such decision letters, and that nit-picking was not appropriate, *Holmes-Moorhouse v Richmond upon Thames LBC [2009] UKHL 7* considered. But for the substantial modification of the legal test, the appeal would have been allowed. However, since the court was not sufficiently confident that the review officer would have reached the same decision on the basis of the correct test, the matter had to be remitted for reconsideration.

Any questions?

Don’t be a booby – ask now!