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Allocations and homelessness: the key issues facing local authorities

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Tips for housing allocation

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Tip 1: Read the allocation scheme

Housing Act basics

- Section 166A(1), Housing Act 1996:

  “Every local housing authority in England must have a scheme (their ‘allocation scheme’) for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.”

- Section 166A(14):

  “A local housing authority in England shall not allocate housing accommodation except in accordance with their scheme.”

R(Nur) v B'ham no.1

- Ms Nur had a disabled adult daughter who needed adapted accommodation and after a number of years waiting had a high priority under B'ham's scheme
- Some of her bids were "skipped" because she did not have dependent children
- This led to a JR

R(Nur) v B'ham no.1

- The allocation scheme contained one rule that preference for houses with 2 or more beds would be given to families with dependent children and another that adapted properties would be allocated to people with disabilities
- B'ham argued that the first rule trumped the second
- Held: the scheme did not say this; allocating adapted properties to households without a disabled member would not make sense

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Tip 2: Know the limits of reasonable preference

Housing Act basics

- Section 166A(3), Housing Act 1996:

  “As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

  (a) people who are homeless (within the meaning of Part 7);

  (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) … or who are occupying accommodation secured by any such authority under section 192(3)

Section 166A(3) contd

(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;

(d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and

(e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).”

R(Montero) v Lewisham

- The applicant lived in overcrowded private accommodation and applied to Lewisham for rehousing
- Lewisham rejected her application to join the housing register on the basis that she had not resided in Lewisham for 5 years
- Issue: was a residence rule, disqualifying applicants who had not resided in borough for 5 years, compatible with section 166A(3)(c)?
- Held: yes

R(Montero) v Lewisham

- Section 166A(3) required that, viewed as a whole, the scheme gave reasonable preference to the specified categories of persons

- Lewisham had complied because at least two-thirds of applicants would satisfy the residence rule and residence was a legitimate housing consideration

- The decision in *R(MA) v Ealing* on this issue was wrong

Limits of reasonable preference

- Permitted grounds of disqualification:
  - Lack of residence
  - Rent arrears
  - Refusing an offer
- Not permitted:
  - Homeless but housed in TA
  - Intentionally homeless
  - Disqualifying applicants with top priority?

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Tip 3: Review the equality impact of policies

Equality Act basics

- Section 19(2), Equality Act 2010:

  "… a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

  (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

Equality Act basics

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

- Section 29(2):

"(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
(a) as to the terms on which A provides the service to B; …

(c) by subjecting B to any other detriment."

R(Nur) v B'ham no.2

- The judge found, based on statistical evidence, that households with a disabled member were less likely to include dependent children

- The judge rejected B'ham's evidence as to why bids were "skipped" and based on the contemporaneous documents found that Ms Nur's bids had been skipped on the bases that:
  - She did not have dependent children
  - The property was not adapted

R(Nur) v B'ham no.2

- The judge held that the following put disabled people at a disadvantage:
  - The rule that households requiring adaptations could only bid for adapted properties
  - Households requiring adaptations were unable to bid for adaptable properties (because no information on this was provided)
  - The rule that households with dependent children were given preference for houses

R(Nur) v B'ham no.2

- The judge found, on the evidence, that the rule that households with dependent children were given preference for houses had not been justified as proportionate, particularly since all the adapted properties on B'ham's housing register were houses

- He does not appear to have given separate consideration to the issue of whether the first and second PCPs above were justified

R(Nur) v B'ham no.2

- The judge suggested that the following might be reasonable adjustments for disabled people:
  - Removing adapted properties from the preference for an allocation to households with dependent children
  - Providing information to applicants about which properties were adaptable
  - Giving preference for an allocation of adaptable properties to households with disabled members

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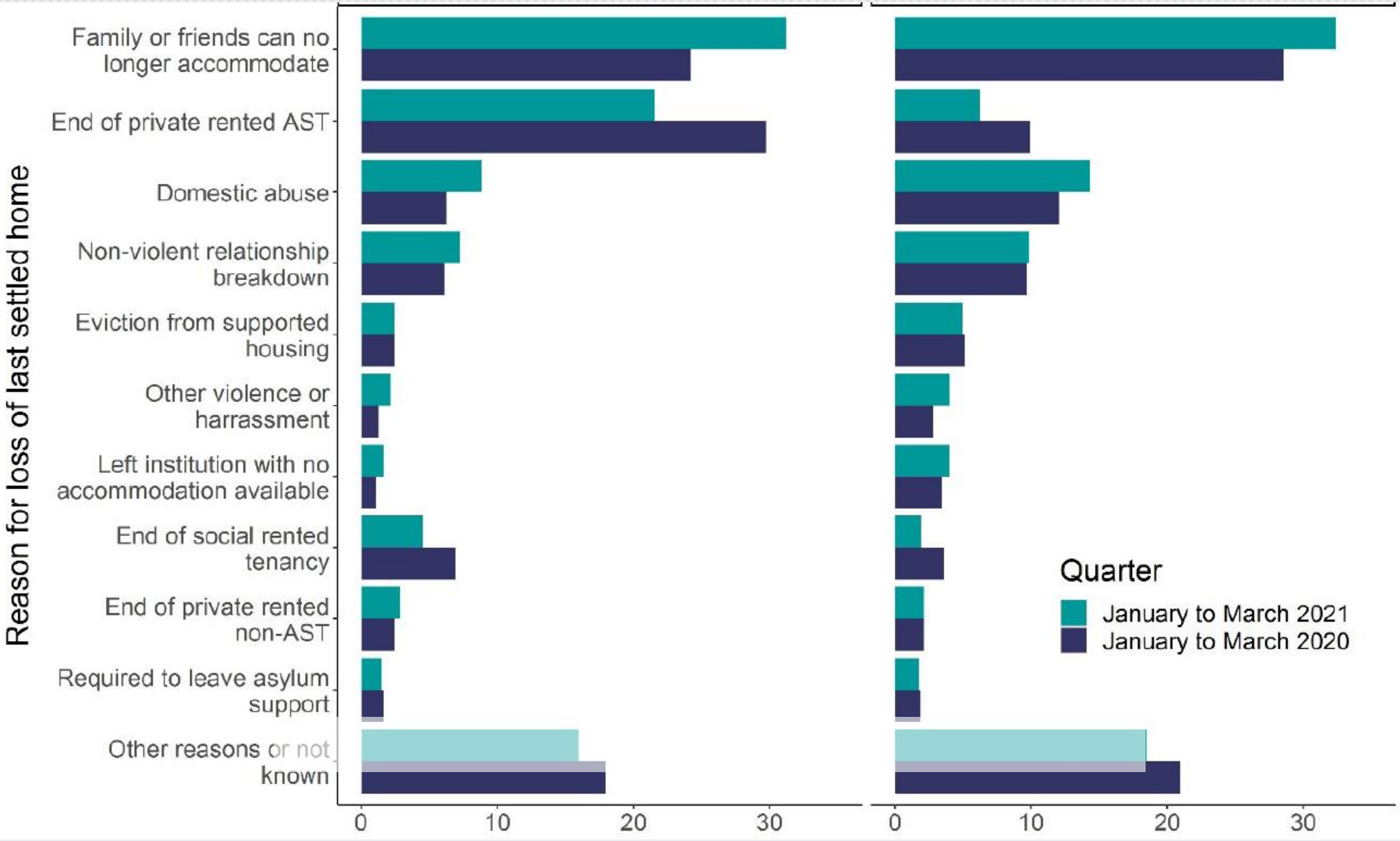
Homelessness

Catherine Rowlands

The impact of the pandemic

- Govt statistics [Mar 21]
- Everyone In – ended[?]
  - 24% increase in single men in temporary accommodation (but fewer families)
- Moratorium on possession proceedings [backlog?]
  - 45% drop in threatened homelessness
- Increase in referrals from prison
- Increase in domestic violence


Reason for loss of last settled home
Family or friends can no longer accommodate
End of private rented AST
Domestic abuse
Non-violent relationship breakdown
Eviction from supported housing
Other violence or harrassment
Left institution with no accommodation available
End of social rented tenancy
End of private rented non-AST
Required to leave asylum support
Other reasons or not known
0
10
20
30
Quarter
January to March 2021
January to March 2020

Impact of Brexit - eligibility

- Official estimate was that 3.4m people would be eligible for settled status
- but as at 31.3.21 5.3m had applied
  - 53% settled status, 44% pre-settled
  - About 10,000 derivative applications – about ¼ refused
- Estimated 900,000 EU national children in the UK before Brexit – but only 787,680 applicants
  - Of 3,660 care leavers eligible to apply, 67% applied

Settled and Pre-settled individuals and eligibility (1)

- Grace period for applying for [pre-]settled status expired on 30 June 2021 (subject to a residual discretion)
- Those with **settled status** are now subject to immigration control but, by operation of reg 3(c) and reg 5(c) of the Eligibility regs they are **Class C** persons and therefore are eligible for an allocation of housing accommodation and housing assistance.
- See also (para 7.10, Ch.7, Homelessness Code of Guidance).

Settled and Pre-settled individuals and eligibility (2)

- **Pre-settled** individuals **eligible** for housing allocation/assistance post 30 June 2021 (end of the 'grace period') if they meet the criteria set out at regs 4(2) and 6(2) of the old Eligibility regulations.
- Example: A person who was living and working in the UK for a year prior to 31 December 2020 (end of the transition period) will be afforded **pre-settled** status. He will be eligible for housing assistance (as he is a worker) by virtue of reg 6(2)(a) of the Eligibility regs.
- Grant of [pre-]settled status can be proved digitally https://www.gov.uk/view-prove-immigration-status

Domestic abuse (violence)

- Domestic Abuse Act 2021
- (3)Behaviour is “abusive” if it consists of any of the following—
  - (a)physical or sexual abuse;
  - (b)violent or threatening behaviour;
  - (c)controlling or coercive behaviour;
  - (d)economic abuse (see subsection (4));
  - (e)psychological, emotional or other abuse;
- and it does not matter whether the behaviour consists of a single incident or a course of conduct.
- Where the people involved are *personally connected* to each other – relationship, parents of same child, related

Domestic abuse (violence)

- Domestic Abuse Act 2021 section 78
- Amends section 177
  - It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to ~~“domestic violence or other violence”~~ = violence or domestic abuse against him…

Domestic abuse

- Domestic Abuse Act 2021 section 78
- Amends section 189 to add a new category of those who are automatically in priority need
  - “(e)a person who is homeless as a result of that person being a victim of domestic abuse.”
  - Last year: 10,470 – could increase given wider definition

Repeat applications

- *R (Minott) v Cambridge City Council*
- [2021] EWHC 211 (Admin)
- A applied to Cambridge and was provided with temporary accommodation. Cambridge referred him to Sandwell who accepted he had a local connection. He requested a review of this and asked for accommodation pending review, which was refused. However, he stayed in the temporary accommodation despite CCC trying to change the locks. He knew that he would acquire LC if he stayed in Cambridge long enough and this was his avowed intention. He made a fresh application as soon as he had been in Cambridge for 6 months.

Repeat applications

- *R (Minott) v Cambridge City Council*
- *Held:* Cambridge had been entitled to reject the fresh application. His only "new fact" was that he had been in the temporary accommodation for 6 months, despite not being owed any duty. That did not amount to local connection.
- "*…in the circumstances of this case the simple passing of time and the unlawful occupation of the accommodation cannot amount to a new fact for the purposes of a new application under the HA 96".*
- His conduct was **tantamount to a manipulation of the homeless statutory regime.**

Repeat applications

- *R (Ibrahim) v Westminster City Council*
- [2021] EWHC 2616 (Admin)
- *C* refugee from DRC with mental health problems . Provided with NASS accommodation until granted asylum. Had tenancy of a flat in Middlesbrough, but her neighbour broke in – Police view was that he intended to rape/kill her - so she left. Stayed with a friend, until asked to leave. Applied as homeless to WCC who gave her temporary accommodation. She had a medical report showing that she had PTSD and could not return to Middlesbrough.
- On 5/8/18 WCC decided she was intentionally homeless. Decision upheld on review. Did not appeal (although C was being assisted by a charity, they apparently did not pass the papers to a solicitor in time).

Repeat applications

- *R (Ibrahim) v Westminster City Council*
- January 2019, fresh application. Further report indicated her PTSD had been exacerbated by being required to move out of her interim accommodation. WCC held no new facts. C sought a review, and obtained report #3, which she dropped off at WCC's offices. It was not passed to the homelessness team, however. C instructed solicitors to deal with the review, but they did not respond to WCC's minded to letter. Decision upheld on 28/8/20 but herself did not receive it until 17/9/20 in an email from her solicitors, who also said that they could not help her as they were no longer doing housing work.
- 30/10/20: requested WCC to withdraw decision in light of the report that had not made its way onto the file. WCC refused to do so, and refused a further request that a fresh application be accepted.

Repeat applications

- *R (Ibrahim) v Westminster City Council*
- Held: WCC should have accepted this as fresh application. Although the new report pre-dated the decision, it was not necessary that any new material should postdate the decision. It is the facts known to the local authority at the time of the decision that matters. The fact that C's solicitors had not made relevant submissions is also irrelevant as the issue of whether it would have been reasonable for C to continue to occupy her flat was an obvious matter.
- WCC would have to consider her fresh application.

Repeat applications

- *R (Ibrahim) v Westminster City Council*
- Held: the C did not have any grounds for judicial review of the refusal to withdraw the decision. Absent very exceptional circumstances, the remedy is an appeal to the County Court.
- The Court also considered the PSED but although there had been a breach, this was not an independent ground for judicial review.

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Homelessness – 4 topics

Michael Paget

WHAT THIS SESSION WILL COVER

- Who can apply as homeless?
- Was the last settled accommodation affordable?
- What is suitable accommodation?
- What error founds a successful County Court appeal?

Who can make a homelessness application?

Initiating the application

- Does not need to be in formal document.
- Avoid gatekeeping
- But needs to be capacitous person – the capacity to decide where to reside.
- Old cases had excluded children and a person lacking capacity - *R v Tower Hamlets LBC ex p Ferdous Begum* (1993) AC 509, decided that a person who lacked capacity to decide where to live could not make a homelessness application.

Begum

- As Lord Griffiths explained:

In my view it is implicit in the provisions of the Act that the duty to make an offer is only owed to those who have the capacity to understand and respond to such an offer and if they accept it to undertake the responsibilities that will be involved.

- OK – seems logical but what does that actually mean in practice?

Begum consequences

- Housing legislation provides for the vulnerable (and deserving) to be accommodated by the state; how can it possibly be correct that one class of vulnerable people are completely excluded from protection?

- Do the Human Rights Act 1998; the Mental Capacity Act 2005 and the Equality Act 2010 change the position?

B v W District Council

- It was argued that *Begum* had been wrongly decided and that the Housing Act 1996 should be read in a way that was compatible with the applicants Article 8 and 14 rights.

- Court of Appeal said no. Could not hold *Begum* was wrong because, knowing that *Begum* excluded incapacitous applicants, Parliament had not felt the need to include them when enacting the Housing Act 1996.

B v W District Council

- The Mental Capacity Act 2005 has armed the incapacitous person with other tools. An application can be made to the Court of Protection for a personal welfare Deputy to be appointed for P. The Deputy can then, under sections 17-19 MCA 2005, make the homelessness application for P.

Correct steps for local authorities

- To avoid any suggestion that there has not been compliance with Equality Act 2010. Explain who can and who cannot make homelessness application
- Still has donor capacity?
- Someone who can be Deputy?

Was the last settled accommodation affordable?

What needs to happen?

- Under sub-section 191(1) of the Housing Act 1996 an applicant can only have become ‘intentionally homeless’ if it would have been “reasonable for [her] to continue to occupy” the accommodation from which she had become homeless

- Article 2 of the Homelessness (Suitability of Accommodation) Order 1996 sets out a number of matters that local authorities must take into account in assessing reasonableness under section 191(1), including the affordability of the accommodation

The calculation

- In assessing affordability it is mandatory for local authorities to take into account the applicant's reasonable living expenses, as well as their housing costs. Reasonable living expenses include the "ordinary necessities of life, such as food, clothing, heating, transport and so forth".

Samuels v Birmingham

- Methodical and mathematical approach
- The Supreme Court has given guidance in *Samuels v Birmingham City Council* [2019] UKSC 28 about how to approach affordability in a more ‘objective’ way.

Samuels v Birmingham

- Reviewing officers must:

- On the one side, take into account all sources of income;
- On the other side, take into account an assessment of all reasonable living expenses *other than* accommodation costs, having regard to the needs of any children; and
- In consequence of a comparison between those two figures, consider whether the remaining income could have met the accommodation costs.

What should happen in practice?

- Affordability has much easier for an officer to calculate.
- 1) the applicant will state what their income is. If they do not the officer will be entitled to calculate the social security benefits they could get.

- 2) the officer can take off the expenditure a universal credit recipient would incur – which will be the universal credit standard allowances.

What should happen in practice?

- 3) the applicant must highlight unusual reasonable living expenses – for example high travel costs because the property was isolated.
- 4) the officer must decide if he or she accepts that those items are reasonable (I can’t see how this could be anything but subjective in practice).
- 5) the officer will compare the remaining funds to the rent costs. If the rent costs are covered the property was affordable.

What should happen in practice?

- Where an applicant was in social sector housing it will be affordable unless the applicant has some extreme circumstances.
- Where an applicant was in private sector accommodation the affordability (where housing benefit is in payment) will depend on if there is a shortfall between Housing Benefit (including discretionary payments) and rent.

Patel v Hackney

- In *Samuels* there was a monthly shortfall of £37 with income coming solely from benefits.
- In *Patel v Hackney* the original calculation by the housing officer had allowed essential expenditure of £32 per week for replacement white goods but had still found former accommodation affordable.
- On review the officer had reconsidered income (increased when bank statements analysed) and expenditure and excluded white good costs but still found accommodation affordable.

Patel v Hackney

- Was there a breach by totally excluding weekly white good expenditure?
- Court of Appeal said no.
- *Re-calculations of income and expenditure of this kind are routine in many homelessness applications. They must be evidence-based and have regard to the points raised by the applicant but in many cases there will be inadequate or incomplete documentation to support particular items, or the amounts claimed will be inconsistent with some of the documentation which is disclosed*

Patel v Hackney

- *The present case is no exception. Mr Patel's own assessment of his income was found to be too low when compared with the bank statements; some of his estimates of expenditure were rejected as excessive; but others were in fact increased by the housing officer who considered them to be too low and unrealistic. Provided that the officer making the assessment has paid due regard to the relevant guidance and has reached a conclusion open to him or her on the material available then there are no grounds for interfering with the decision which is reached. It is not for the County Court on a statutory appeal on a point of law under s. 204 HA 1996 to review the multifactorial assessment which the housing or the review officer has carried out. Unless it can be shown that the officer materially misdirected himself or failed to take relevant matters into account there is no error of law.*

Patel v Hackney

- Review officer had not excluded white good expenditure but had found sufficient flexibility in finances to cope with occasional expense.

- No logic to £32pw. Association of Housing Advice Services (AHAS 2013/2017) calculates that for families on universal credit a total white goods allowance of £8 per week.
- What if excess income is very similar to £8?

What is suitable accommodation?

Suitable accommodation

- Out of borough placements need to be very careful that there is no nearer accommodation.

- In *Bromley v Broderick* successful applicant was offered accommodation in Gillingham. This would be 30 miles away from her family. Risk of aggravating depression so refused and sought review.

Bromley v Broderick

- Review concluded that at time offer was made only other accommodation available for Bromley was in other towns in mid-Kent or Medway towns.

- County Court judge allowed appeal. Bromley could have reconsidered the accommodation situation at the time of the review and leading up to it.

Bromley v Broderick

- Court of Appeal. Yes there are some situations that need reconsideration of the facts at the time of the review – *Mohamed v Hammersmith*.
- That will include reconsideration of accommodation where it has been accepted. In *Waltham Forest v Saleh* no longer suitable because family had increased since duty accepted.
- But where duty has been discharged reviewing officer must consider facts at date of discharge.

Bromley v Broderick

- Nor does the Council have to wait before making the offer.
- It need not delay the offer hoping that better/nearer accommodation might become available in the near future.
- Always best for applicant to accept the accommodation even if they want to challenge the suitability

When will a County Court appeal succeed?

What error of law is material?

- County court appeals hived off from Administrative Court. JR in the County Court. The HA 1996 gives the County Court wide discretion on what relief is appropriate. Pursuant to s.204(3) the court 'may make such order confirming, quashing or varying the decision as it thinks fit.' (emphasis added).
- The Court of Appeal in *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306 expressly considered the extent of the jurisdiction, when holding that the jurisdiction was not limited to legal interpretation but included public law breaches, and confirmed that:

- *'*[s.204] *gives* [the County Court] *a power akin to judicial review'* (Auld LJ 312G)

County Court appeals

- The discretion pursuant to s.204 is worded slightly differently but the Court of Appeal has previously accepted that the approach to remedies in judicial review should also apply to s.204 appeals. In *Ali and Nessa v Newham LBC* [2002] HLR 20, CA it applied an old judicial review relief test to s.204 HA 1996 by following *Barty-King v Ministry of Defence* [1979] 2 All RD 80, QBD. An appeal seeking to quash a review decision would not be granted, even though a public law breach is made out, if the County Court concludes that a properly directed local housing authority would inevitably have reached the same decision.

Section 31(2A)

- Since 13 April 2015, section 31(2A) Senior Courts Act 1981 has applied to whether or not the Administrative Court should grant relief. It provides:

- *The High Court—*
- *must refuse to grant relief on an application for judicial review,*
- *…*
- *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.*

Section 31(2A)

- The court in *Guiste v Lambeth London Borough Council* [2019] EWCA Civ 1758 but, without argument, thought that the section 31(2A) might not apply.
- Should it apply?
- Judicial review principles are updated by case law what difference is a statutory update?
- If doesn’t apply unique and stale JR principles

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