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Housing Related Judicial Review
7 October 2020

Cornerstone Barristers Housing Week 2020

Housing Week 2020

Monday 5 - 11AM - Looking backwards to go forwards - Housing 2020 and 2021 Speakers: Andy Lane, Ruchi Parekh, Catherine Rowlands. Chair: Ranjit Bhose QC

Tuesday 6th - 3PM - Dealing with defendants with mental health problems/capacity issues in ASB cases Speakers: Jon Holbrook, Michael Paget, Peggy Etiebet, Tara O'Leary. Chair: Kuljit Bhogal

Wednesday 7th - 11AM - Housing-Related Judicial Review. Speakers: Kelvin Rutledge QC, Catherine Rowlands, Wayne Beglan, Alex Williams.

Thursday 8th - 3PM - Public law and discrimination challenges to possession claims - where are we now? Speakers: Andy Lane, Ryan Kohli, Riccardo Calzavara, Rowan Clapp. Chair: Dean Underwood

Friday 9th - 11AM - Collection and Use of Personal Data: A guide for Landlords. Speakers: Kuljit Bhogal, Matt Lewin, John Fitzsimons. Chair: Matt Hutchings QC

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Housing Judicial Review Tactics 2020

Kelvin Rutledge QC

Areas of potential challenge by way of JR

- **Housing allocations and certain homelessness decisions**
- **Land disposal, acquisition & management**
- **Housing related finance**
- **Interrelationship between housing & other services e.g. education, adult social care & children's services**
- **Housing related policy making, e.g. rent setting; ASB policies; additional/selective licensing schemes**
- **Contracting out**

Procedural tool kit

- **Senior Courts Act 1981, section 31**
- **CPR 54; PD54A/D**
- **The Administrative Court Judicial Review Guide 2020**
- **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf**
- **ACO Costs Guidance April 2016 (reproduced in Annex 5 to the Admin Court Judicial Review Guide)**

The three critical stages

- **Pre-action protocol stage**
- **Permission / interim relief stage**
- **Response stage**

The need for procedural rigour

"In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court.

However, both fairness and the orderly management of litigation require that <u>there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation</u> …

The Courts frequently observe … that grounds of challenge have a habit of 'evolving' during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. <u>Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them</u>. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

<u>R(Talpada) v SSHD</u> [2018] EWCA Civ 841, per Singh LJ eliding [67-69]

Time limits

- **CPR 54.5 (1) The claim form must be filed –(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose. (2) The time limits in this rule may not be extended by agreement between the parties.**

- **"First arose"**

  "... a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

  R v Secretary of State for Trade & Industry [1998] Env. L.R. 415, per Laws J

Alternative remedies

- **"Judicial review is often said to be a remedy of last resort. If there is another method of challenge available to the claimant, which provides an adequate remedy, the alternative remedy should generally be exhausted before applying for judicial review."**

  (Admin Court JR Guide, para 5.3.3.1)

- **R(Archer) v RCC [2019] 1 WLR 6355 at [87]-[95]**

- **Alternative remedies in housing cases may include statutory review/appeal; voluntary reconsideration; statutory / non statutory complaints procedure & complaint to the Ombudsman**

ADR

- ***CPR 1.*** **1.4 (1) The court must further the overriding objective by actively managing cases. (2) Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure"**

- ***"... even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress."***

  R(Cowl) v Plymouth CC [2001] EWCA Civ 1935, per Ld Woolf CJ

ADR (cont.)

Administrative Court Guide - 12.2. Duties of the parties

- **"The parties must make efforts to settle the claim without requiring the intervention of the Court. This is a continuing duty and, whilst it is preferable to settle the claim before it is started, the parties must continue to evaluate the strength of their case throughout proceedings, especially after any indication as to the strength of the case from the Court (such as after the refusal or grant of permission to apply for judicial review). The parties should consider using alternative dispute resolution (for example, mediation) to explore settlement of the case, or at least to narrow the issues in the case."**

Pre action protocol compliance

- https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

- "So far as reasonably possible, an intending claimant should try to resolve the claim without litigation. Litigation should be a last resort." (Guide, para 5.2.1)

- Pre-action protocol (judicial review)
  - No impact on time limits
  - Implications for costs/case management issues
  - Time for response/interim response

- Judicial guidance: Ewing v ODPM [2006] 1 W.L.R. 1260 at [43]

Commencement of the claim – claimant's duty of candour

"The duty of candour is directed in the most part to ensuring that matters unfavourable to the applicant are drawn to the attention of the judge. There are many late applications for injunctive relief which are based on little more than an assertion that something may turn up if the new advisers are given time to investigate. Such applications should get nowhere. Yet there is a strong imperative for those instructed late in the day to make no representations or factual assertions which do not have a proper foundation in the materials available to them. Gaps in knowledge should not be filled by wishful thinking. In almost all such cases there will have been extensive engagement between the putative applicant and the immigration authorities and often the independent appellate authorities. So too in many cases there will have been dialogue between the authorities and previous lawyers. There will be a large reservoir of information available. Without access to that information it behoves those who come on to the scene at the last minute to take especial care in the factual assertions they make."

R (SB Afghanistan) v SSHD [2018] EWCA Civ 215, per Ld Burnett CJ

Duty of candour (cont.)

R(Citizens UK) v SSHD [2018] EWCA Civ 1812

- **Duty to assist the court with full and accurate explanations of all the facts relevant to the issues**
- **Witness statements must not deliberately or unintentionally obscure areas of central relevance**
- **No spin**
- **Breach of duty can occur by omission, e.g. non-disclosure of a material document/fact**

Duty is particularly important where without notice relief is sought: R(Gopinah Sathival) v SSHD [2018] EWHC 913 (Admin) at [20]

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Interim Relief and Procedure

Alex Williams

Interim relief

- **CPR 25 procedure applies**
- **Applicant has disclosure duties where application is made without notice – to disclose material facts that are known/should be known on a reasonable search**
- **The court will usually discharge an injunction for material non-disclosure**
- ***R (Nolson) v Stevenage BC* [2020] EWCA Civ 379 – if interim relief refused, can renew orally under CPR 3.3(5); no need to appeal to CA.**

Interim relief – is it appropriate?

- ***"There is a natural temptation for applicants to seek, and courts to grant, relief to protect vulnerable persons whether they are children or vulnerable adults. In my view this can lead (and experience as the applications judge confirms that it does lead) to practitioners making without notice applications which are not necessary or appropriate, or which are not properly supported by appropriate evidence. Also there is in my view a general practice of asking the court to grant without notice orders over a fairly extended period with express permission to apply to vary or discharge on an inappropriately long period of notice (often 48 hours). It seems to me that on occasions this practice pays insufficient regard to the interests of both the persons in respect of whom and against whom the orders are made, and that therefore on every occasion without notice relief is sought and granted the choice of the return date and the provisions as to permission to apply should be addressed with care by both the applicants and the court. Factors in that consideration will be an estimation of the effect on the person against whom the order is made of service of the order and how that is to be carried out."***

***B Borough Council v S* [2007] 1 FLR 1600, per Charles J at [41]**

Interim relief – listing the return date

"Be all that as it may, and whether or not an ex parte injunction has been made without expressed limit of time, there is, in my judgment, an absolute obligation on the court to list any application for the discharge of an ex parte injunction for hearing before a judge in court as a matter or urgency — and that, in my judgment, means within a matter of days at most, not weeks and certainly not months. Moreover, if the judge who granted the ex parte injunction has himself specified that the defendant can apply to discharge on (say) forty-eight hours notice, then, if the defendant so requires, that must define the acceptable period of delay. Forty-eight hours may perhaps sometimes have to stretch to seventy-two, unless the defendant can demonstrate real urgency, but no longer. A defendant who, as here, has been given leave by the out of hours judge to apply on forty-eight hours notice should not be required to have to file a Form N463 in order to obtain an urgent listing and certainly should not have to wait, as the defendant here did, for three weeks whilst that application for expedition is being considered and then for a further seven days until the hearing actually takes place."

***R(Casey) v Restormel BC* , per Munby J, at [41]**

Drafting the summary of grounds of opposition

- **Keep them short, relevant and focussed on the grounds of challenge**
- **Cross refer where appropriate to pre action protocol response**
- **As per *R (Ewing) v Deputy PM* [2005] EWCA Civ 1583, "draw attention to any 'knock-out points' or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition)."**
- **Include both a draft order and costs schedule where appropriate**

Consider materiality of alleged illegality

- **Senior Courts Act 1981, section 31(3C):**

  "(3C) When considering whether to grant leave to make an application for judicial review, the High Court— (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and (b) must consider that question if the defendant asks it to do so.

  (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave."

Revisiting the decision

- **By ratification: e.g. in *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB), per Jay J**

- **Post hoc justification**

  "*if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide*."

  ***Re Brewster* [2017] 1 W.L.R. 519, per Lord Kerr JSC**

Evidence and detailed grounds

- **Within 35 days of permission being granted, the Defendant must file and serve:**
  - **(a) detailed grounds for contesting the claim; and**
  - **(b) written evidence - CPR r.54.14(1)**

- **Set out the relevant facts and the reasoning behind the decision-making process: *Tweed v Parades Commission* [2007] 1 AC 650**

- **A "very high duty" to make full and fair disclosure; adverse inferences: *R (Quark Fishing) v FCO* [2002] EWCA Civ 1409**

- **Evidence may clarify or supplement reasons for original decision – but cannot contradict those reasons**

Preparation for the final hearing

- **Skeleton arguments –** a summary of that party's arguments in the case – CPR PD 54A, para 15 (Claimant: not less than 21 days before hearing; Defendant: not less than 14 days)
- **Bundles –** Claimant's responsibility but parties must co-operate and agree a joint bundle containing all documents to which all parties intend to refer
  - index, page numbers, 2-sided
  - documents in chronological order
- **Authorities –** limited to "those which are really necessary for fair disposal of the claim, and which establish the particular principle of law contended"
  - in most cases, no more than 10 – some cases will require "fewer, if any"

Interested parties and Interveners

- An **Interested Party** is any person, other than the Claimant/Defendant, who is directly affected by the claim: CPR r. 54.1(2)(f)
- Any person may apply to be an **"Intervener"** – permission to file evidence or make representations at a hearing: CPR r.54.17

  R (British American Tobacco Ltd) v Secretary of State for Health [2014] EWHC 3515 (Admin)
  - will the intervention assist the court?
  - balance the benefits of the intervention against any delay, inconvenience and expense which the intervention would cause to the existing parties
- Interveners must (generally) bear their own costs – and may be ordered to pay costs incurred by main parties: s. 87 Criminal Justice and Courts Act 2015

Settlement

- **Discontinuance** – Claimant may discontinue the claim at any time: CPR r.38.2(1)
  - court's permission required if interim injunction in place
  - notice of discontinuance in Form N279
  - Claimant deemed liable to pay Defendant's costs: CPR r.38.6(1)
- **Consent orders** – parties may agree to withdraw the claim or quash the decision
  - if withdrawn – decision remains in place (unless voluntarily withdrawn by Defendant)
  - if quashed – consent order must include a schedule giving reasons (including legal provisions) which explains why decision should be quashed – see Admin Court JR Guide 2020, para 22.4.2.3
  - costs – consent order must make provision for costs

Costs following settlement

- **Admin Court JR Guide 2020, para 23.5 and Annex 5**
  - **parties must first try to agree costs**
  - **if no agreement, must follow ACO Costs Guidance (2016) in Annex 5**

- ***Croydon* costs guidance**

"in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims"

***R(M) v LB Croydon* [2012] EWCA Civ 595**

Having the last word

- **ACO Costs Guidance (April 2016) (at Annex 5, Admin Court JR Guide)**

  Paras 10-11. Within 28 days of the order, the defendant may file with the Court and serve on all other parties, submissions as to what the appropriate costs order should be. If the defendant does not file submissions, the (usual) order will be that the defendant will pay the claimant's costs of the claim on the standard basis, to be the subject of detailed assessment if not agreed.

  Paras 12-13. Where the defendant does file submissions within 28 days, the claimant or any other party may file and serve submissions within 14 days of service of those submissions. If neither the claimant nor any other party files such submissions in response, the costs order will (usually) be in the terms sought by the defendant.

  Para 14. Where submissions are filed by the claimant or any other party, the defendant shall have 7 days in which to file and serve a reply. The matter shall then be put before the judge for a decision on costs or further order.

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Parts VI and VII Housing Act 1996 – a selection of key cases

Wayne Beglan

R (oao Flores) v Southwark LBC [2020] EWHC 1279

- JR – allocation scheme – Band 3 placement
- Appeal outstanding
- C entered into tenancy of one-bedroom flat knowing he would be occupying with this partner and their two children

- Q: Whether authority could lawfully decide that family were not Band 1, because moving into overcrowded accommodation at outset was a “deliberate act”

R (oao Flores) v Southwark LBC [2020] EWHC 1279

- Two points in case: Investigation and causation

- Three main findings:
  - “Deliberate act” did not mean deliberate act intended to advance position in housing scheme, but simply something done voluntarily
  - T.f. whether C knew about the terms of the statute or scheme made no difference
  - On causation: Here authority entitled to find “inevitable” that problem would occur as existing children grew older, c.f. case of additional children

R. (oao M) v. Newham LBC [2020] PTSR 1077

- Mandatory order – unusual
- Suitable alternative accommodation mandatory order – very unusual
- Rare case, where LHA admitted it was in breach of duty under s.193(2)
- And had been for 2 years

R. (oao M) v. Newham LBC [2020] PTSR 1077

- Key recent restatement of established principles:
  - It is open, subject to irrationality etc, to LHA to conclude that accommodation will be suitable by reference to, or for, a period of time (i.e. in the short term). Letter should be explicit in this respect, with reasons.
  - BUT, in cases where LHA concludes accommodation is not, or is no longer, suitable, there is no “reasonable time” provision in statute to find an alternative

R. (oao M) v. Newham LBC [2020] PTSR 1077

- Also useful as extensive discussion of historical caselaw / development of law over 40 paras including:
  - Ex p. Anderson (1999)
  - Ex p. Sembi (1999)
  - Ex p. Begum (2000)
  - Codona (2005), CA
  - The Birmingham Cases (Ali & Ors) (2009)

R. (oao M) v. Newham LBC [2020] PTSR 1077

- On test of relief – 5 factors in Khan v Newham LBC [2001] EWHC 589 applied
  - Nature of temporary accommodation
  - Length of breach
  - Efforts made
  - Prospect of accommodation in near future
  - Any other relevant factors

Ward v Hillingdon [2019] PTSR 1738

- Significant recent case of CA – wide ranging discussion of issues
- JR to allocation scheme – application of 10 year local residence rule – scheme had residence provisions for (a) joining; and (b) uplift in priority
- **Q1:** Whether discriminatory against Irish Travellers or refugees **Q2:** If so, whether justified; **Q3:** Whether PSED breach

Ward v Hillingdon [2019] PTSR 1738

- **Holdings:**
- Was indirect discrimination
- Right to look at schemes as a whole, but even read a whole discrimination arose **[96-97], [113-114]**
- LHA had focused case on point above, so had not sought in any detail to justify discrimination
- Onus to justify clearly on policy maker
- CRITICAL: Justification can be ex post facto - is not necessary for situation / example to have been considered at time of policy creation **[75-76], [86-89], [113-114]**

Adesotu v Lewisham LBC [2019] 1 WLR 5637

- Significant case dealing with courts' jurisdiction under Part VII – s.204

- Three key points:
  - A statutory appeal is not a *"claim for judicial review"* for EA 2010 s.113 purposes
  - On s.204 appeal, no jurisdiction to decide disputed facts
  - Decision under appeal is s.202 Review Decision letter

Adesotu v Lewisham LBC [2019] 1 WLR 5637

- Point 1: Not *"claim for judicial review"*
  - This is a "term of art" within EA 2010 s.113
  - So point applies across the board, not just to housing statutory appeals: Hamnett v. Essex CC [2017] 1 WLR 1155, experimental TRO challenge
  - So s.113 does not apply to s.204 appeals, and court has no jurisdiction to determine claims of breach based on ss.5, 9 of EA 2010

Adesotu v Lewisham LBC [2019] 1 WLR 5637

- Point 2:
  - S.204 confers no jurisdiction to decide facts
  - Bubb v. Wandsworth LBC [2012] PTSR 1011
  - N v. Lewisham LBC [2015] AC 1259 did not overrule Bubb, which remains good law

Alibkhiet v Brent LBC [2019] HLR 15

- JR challenges to allocation schemes
- Decision letters show good example of how out of area placements can lawfully be made, in this case Birmingham placement
- In second appeal example of fact that sufficiency of reasons in RDL can properly be tested by reference to representations made

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Recent case law

Catherine Rowlands

Section 31(2A): an unresolved dispute

- *McMahon v Watford BC, Kiefer v Hertsmere BC* [2020] EWCA Civ 497
- Does section 31(2A) of the Senior Courts Act 1981 apply in appeals under section 204 HA96
  - *(2A) The High Court—(a) must refuse to grant relief on an application for judicial review, and*
  - *(b) may not make an award under subsection (4) on such an application,*
  - *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): an unresolved dispute

- *McMahon v Watford BC, Kiefer v Hertsmere BC* [2020] EWCA Civ 497
- S.204 appeals are “akin to judicial review” but does the “highly likely” test carry over into s.204?
- Did not arise in this case as no breach of PSED so we await clarification.
- My view is: it does apply – or common law to same effect

R. (on the application of Escott) v Chichester DC

- [2020] EWHC 1687 (Admin), Martin Spencer J
- Challenge to suitability of temporary accommodation – C demanded self-contained accommodation and then demanded fridge, cooker and bed (then demanded that someone clean the fridge for him)
- Local authority was not required to provide furnished accommodation
- When refusing interim relief, judge took into consideration the strains on local authorities due to the pandemic

R (Idolo) v LB Bromley

- [2020] EWHC 860 (Admin); Rowena Collins Rice as DHCJ
- Challenge to performance of Care Act 2014 + Housing Act 1996 duties, with art 8 ECHR
- C lived in 8th floor flat; suddenly paralysed so needed to move. Care Act assessment done, acknowledged he needed ground floor accommodation. Was provided with appropriate care, but long delay in processing his application for a move

R (Idolo) v LB Bromley

- He argued that Bromley should not have left his housing to the housing department
- However, s23 CA says the council has no duty or power to do under the CA anything it must do under the HA
- *On the one hand, local authorities face the irresistible force of demand to meet properly assessed needs for adult social care, including needs for decent adapted or adaptable housing. On the other hand, they face the immovable object of limited housing resources, and the housing duties they owe to others in the community. The solution the law appears to provide is that (re)housing needs, even if identified through the Care Act route, cannot shortcut the detailed system of balanced priorities within Housing Act schemes, but must find their proper place within those schemes.*

R (Idolo) v LB Bromley

- Duties under CA include identifying housing needs, but meeting housing needs is the job of the housing department. Both sides should work together
- He was given reasonable preference so HO duties fulfilled
- Article 8 was not breached despite the delay: there was no culpable breach
- By the time it got to court, only claim for damages was left. Judge was critical.

R (Idolo) v LB Bromley

- Guidance in *Anufrijeva* – C should explain why pursuing claim for damages rather than internal complaints
- Final comment:
  - *Local authorities have hard choices to make. Sometimes they are simply choices about the least unfair distribution of relative disadvantage. Sometimes there are few practical or satisfactory choices at all.*

R (Aburas) v Southwark LBC

- **[2019] EWHC 2754 (Admin), Michael Fordham QC as DHCJ**
- Challenge to Care Act and housing duties by man with NRPF
- C previously had immigration accommodation; has bi-polar disorder and depression; needs medication on an ongoing basis.
- Southwark assessed him as not having eligible care needs – he challenged the factual assessment but was refused permission for that.

R (Aburas) v Southwark LBC

- He also challenged the approach having regard to article 8 – said he needed accommodation, this engaged article 8, therefore Southwark had to assess whether he needed accommodation to avoid a breach
- Challenge failed. The starting point is the CA assessment. The need for accommodation is not a *"need for care and support"* for the purposes of CA14.
- A local authority can only provide accommodation if it is necessary to do so for the applicant's eligible care needs to be met. As he did not have eligible care needs, they could not provide accommodation

R (Aburas) v Southwark LBC

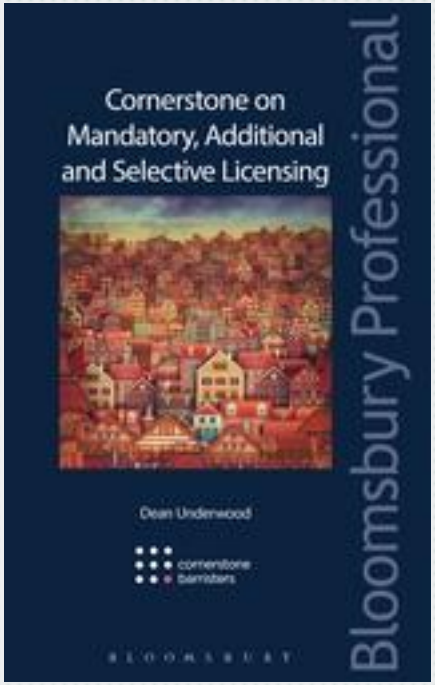
- They could only meet eligible care needs *if and to the extent necessary to do so* to avoid breach of his human rights*:*
  - *It can be asked, of the relevant 'looked-after need' whether " it appears on a fair and objective assessment of all relevant facts and circumstances that [he] faces an imminent prospect of* ***serious suffering caused or materially aggravated by [the] denial****" ; whether that denial is* ***of " the most basic necessities of life****" ; and remembering always that "[m]any factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."*

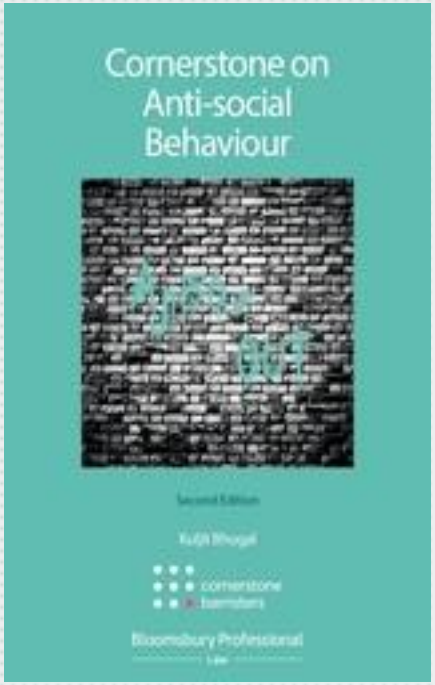
R (Aburas) v Southwark LBC

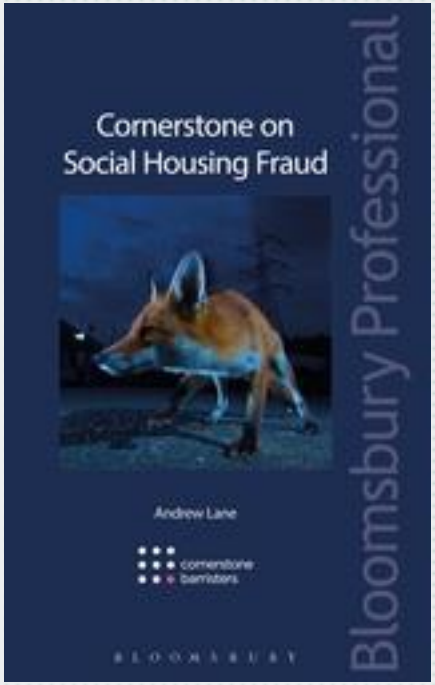
- S. 1 of the Localism Act 2011 was not a route to circumvent the statutory frameworks of housing and care
- However, section 19 of the Care Act 2014 may give a local authority power to accommodate someone even if they do not have eligible care needs if that is the only way to avoid “serious suffering”.

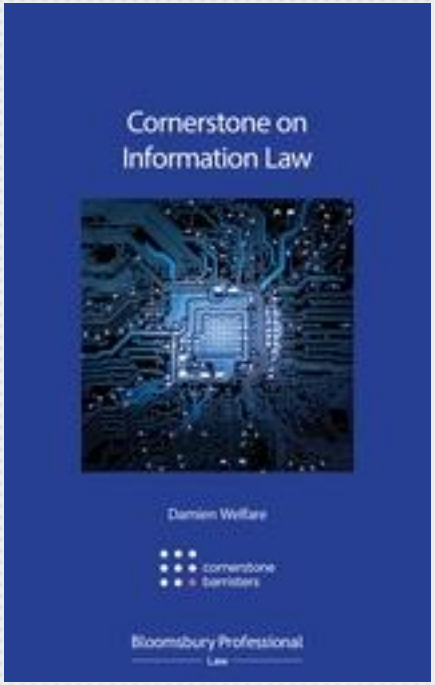
Questions

Cornerstone Books









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