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Housing-related Judicial Review

Housing Week 2021

Your Presenters

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Scope and application

Riccardo Calzavara

14 October 2021

A remedy of "last resort"

When to use

- Suitable alternative remedy?
- *Kay v Lambeth LBC* [2006] 2 AC 465, HL: other means.
- *R (AL) v Serious Fraud Office* [2018] 1 W.L.R. 4557, DC: not necessarily judicial.
- *Thames Wines Ltd v HMRC* [2017] EWHC 452 (Admin): interim remedies?

The scope of the dispute?

Peculiarities of Judicial Review

- *Sher v Chief Constable of Greater Manchester Police* [2010] EWHC 1859 (Admin): fact-finding.
- *R v Devon CC ex p Baker* [1995] 1 All ER 73, CA: question of law.
- *R v Chief Constable of Merseyside ex p Calveley* [1986] QB 424, CA: statutory remedy.

Statutory appeals
...and JR

- *R. v Falmouth and Truro Port HA Ex p. South West Water Ltd* [2001] QB 445, CA.
- *Oxfam v HMRC* [2009] EWHC 3078 (Ch).
- *R v Deputy Governor of Pankhurst Prison ex p Leech* [1988] AC 533, HL: ombudsman?

Homelessness?

Section 204 overlap

- *Adesotu v Lewisham LBC* [2019] 1 W.L.R. 5637, CA.

  An appeal against a housing decision based on disability discrimination and brought under the Housing Act 1996 s.204(1) was not "a claim for judicial review" within the meaning of the Equality Act 2010 s.113(3)(a) and therefore had to be brought in accordance with s.113(1) of the 2010 Act.

Procedure and practice

Catherine Rowlands

14 October 2021

Timing is everything!

Expedition and interim relief

- Expedition and Interim relief
  - Practice Direction 54B
  - Note obligation on C to ascertain position of D in relation to expedition
  - Duty to explain not just why interim relief should be granted but why it should not be
  - You should have pre-action correspondence to warn you that things are coming – this is your time to get ready to respond to an urgent claim
  - Don’t think it will go away!

First response

- Note the forms have recently changed – more suitable for online filing
- Always put in form N462 – can say “grounds for contesting to follow”
  - N462 - Judicial Review - Acknowledgment of Service (publishing.service.gov.uk)
- Always ask for costs in the AoS and give a figure

N462

Judicial Review

Acknowledgment of Service

Name of court

High Court of Justice
Administrative Court

Claim number

Name of claimant (including any reference)

Name of defendant

This Acknowledgment of Service is filed on behalf of

Name

Interested parties

who is the

- [ ] Defendant
- [ ] Interested party

Responding to interim relief

- Consider whether it is worth arguing
- May need to be an application to set aside if IR has already been granted
- It's not too late to take a decision if one has not been taken
  - Eg do a *Mohammed* letter now
- Question for court is whether applicant has shown a strong prima facie case: *De Falco v Crawley BC* [1980] Q.B. 460 recently confirmed in *R. (Nnaji) v Spelthorne BC* [2020] EWHC 2610 (Admin)

Costs of interim relief

- General rule is that Defendant does not get costs of attending an oral permission hearing but that is not an unbreakable rule
  - One reason for an award of costs is that C has misled the court: *R (Al-Ali) v Brent LBC* [2018] EWHC 3634 (Admin)
  - Another reason is a need to attend OPH to defend claim for IR
  - Or other exceptional circumstances (*Mount Cook)*

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Housing-related Judicial Review

Matthew Feldman

14 October 2021

Are Housing Associations amenable to Judicial Review?

- What are the circumstances in which a housing association is exercising functions of a public nature, and amenable to judicial review on public law principles?

Regina (Weaver) v London & Quadrant Housing Trust (Equality and Human Rights Commission intervening) [2010] 1 WLR 363

- L&Q served on its assured tenant and NSP for rent arrears under ground 8 of Part 1 of Schedule 2 to the HA 1988, that is, a mandatory ground for possession.

- The tenant sought judicial review of L&Q's decision to evict her, asserting that it had acted in breach of a legitimate expectation generated by guidance issued by the Housing Corporation and thereby infringing her article 8 rights.

R (Weaver) v London & Quadrant Housing Trust

- To prove her case, the tenant had to show that in the exercise of its eviction powers, L&Q was a public authority within the meaning of s6(3)(b) of the Human Rights Act 1998 and susceptible to judicial review, and that the act of terminating her tenancy was not a private act within the meaning of s6(5) of the 1998 Act.

- L&Q received a substantial public subsidy and its allocation and management of housing stock was subject to statutory regulation.

R (Weaver) v London & Quadrant Housing Trust

- The Divisional Court dismissed the claim based on legitimate expectation
- **but** made a declaration that the management and allocation of housing stock by L&Q (including the decision to terminate the tenancy) was a function of a public nature:
  - it was to be regarded as a public authority in that respect for the purposes of s6(3)(b) of the 1998 Act
  - L&Q was amenable to judicial review on conventional public law grounds in the performance of that function

R (Weaver) v London & Quadrant Housing Trust

- In dismissing an appeal to the Court of Appeal (Elias LJ, Lord Collins, Rix LJ dissenting), it was held that
  - a number of factors cumulatively established sufficient public flavour to make provision of social housing by a landlord a public function:
    - (i) L&Q received significant capital payments from public funds to provide subsidised social housing
    - (ii) it worked in close connection with local government and helped to fulfil local government's statutory obligations
    - (iii) L&Q was itself subject to regulations designed to further the objectives of government policy [66]-[72], [101]-[102]

R (Weaver) v London & Quadrant Housing Trust

OUTCOME

- The CA held that the act of terminating the tenancy of a person in social housing was necessarily involved in the regulation of the landlord's public function and was itself a public act subject to Convention rights considerations [76]-[77], [79], [84].

R (McLeod) v Peabody Trust Governors [2016] HLR 27

- In June 2009, the Crown Estate Commissioners granted the claimant an assured tenancy of a flat. The tenancy agreement prohibited assignment, and also specified that the rent could not exceed 60% of the market rent for the flat
- In February 2011, Peabody bought approximately 1200 properties including the subject flat, from the Commissioners
- Peabody issued bonds to finance the purchase, and the transfer of the properties was subject to a Nominations Agreement which provided that Peabody could only let the transferred properties to “key workers”

R (McLeod) v Peabody Trust Governors

- Peabody had a published policy under which tenants were allowed to exchange their tenancies with other tenants of social landlords
- In May 2014, the claimant asked Peabody by telephone whether he could register his details on a website which facilitated mutual exchanges between tenants of social housing and was told that he could do so
- On 6 July 2015, he completed Peabody's application form for a mutual exchange adding a handwritten note that he was disabled

R (McLeod) v Peabody Trust Governors

- On 9 July 2015, Peabody replied that it had made a mistake by telling him that he could register with the website and that he was only allowed to exchange his tenancy with another key worker in one of the transferred properties.

- The claimant sought judicial review of the decision to refuse his application for a mutual exchange, asserting that Peabody had failed to follow its policy and that the decision was irrational. The claimant also contended that Peabody had failed to discharge its PSED towards him as a disabled person. Peabody contended that in deciding whether to allow the exchange, it had not been acting as a public body.

R (McLeod) v Peabody Trust Governors

- In dismissing the claim, William Davis J held that Peabody had purchased the claimant's flat from the Crown Estate Commissioners using funds raised on the open market, and the rent levels were above those for most social housing.

- The transferred properties were not social housing for the purposes of s69 of the Housing and Regeneration Act 2008.

- In deciding not to allow the claimant to assign his tenancy, Peabody were not exercising a public function and the decision was not susceptible to judicial review [20].

R (McLeod) v Peabody Trust Governors

- Assuming that Peabody's policy on mutual exchanges applied to the claimant, it was entitled to depart from it [23]-[24].
- The decision could not be said to be irrational [26].
- Furthermore, the claimants assertions about his disability were not supported by medical evidence [25].

Regina (Z and another) v Hackney London Borough Council and Agudas Israel Housing Association [2020] 1 WLR 4327

- Hackney LBC entered into a nominations agreement with a charitable housing association - Agudas Israel Housing Association ('AIHA')

- AIHA provided social housing primarily to members of the Orthodox Jewish community, under which applicants for social housing who had been assessed as having priority needs could be nominated by the authority to properties owned by AIHA.

R(Z) v Hackney LBC

- The claimants, a mother and her 3 year old son, had been given the highest priority rating for rehousing by the authority.
- They sought judicial review challenging the lawfulness of AIHA's arrangements for the allocation of its social housing properties, in that they effectively precluded anyone who was not a member of the Orthodox Jewish community from becoming tenants of such properties, and challenged the nomination arrangements on the ground that they unlawfully discriminated against the claimants as non-members of the Orthodox Jewish community, contrary to s13(1) of the Equality Act 2010.

R (Z) v Hackney LBC

- It was common ground that AIHA's arrangements involved direct discrimination, as defined by s13(1) of the 2010 Act but they contended that its discriminatory conduct was rendered lawful by s158 of the 2010 Act.
- In dismissing the claim, Lindblom LJ and Sir Kenneth Parker held that
  - Positive action could be taken under s158(1)(a) of the 2010 Act in relation to those with a protected characteristic who suffered a disadvantage which was "connected to" that characteristic [63]-[71].
  - Under s158(1)(b), positive action could also be taken where those with a protected characteristic had needs which differed from those without that characteristic [67].

R (Z) v Hackney LBC

- While “positive action” in favour of a preferred group might well cause disadvantage to other groups, it might be proportionate if the advantages to the preferred group outweighed the disadvantages [71].

- In circumstances in which it had been established that AIHA was legally entitled under ss158 and 193 of the 2010 Act to discriminate in the allocation of its available properties in favour of members of the Orthodox Jewish community

R (Z) v Hackney LBC

- The local authority had no legal right or power to insist that AIHA 'jettison' its lawful arrangements and make allocation decisions without regard to those arrangements; and that while AIHA had a 'duty to co-operate' with the local authority, it did not act unreasonably in applying arrangements which were lawful under the 2010 Act [113]-[114].
- The authority had not engaged in direct discrimination contrary to s13(1) of the 2010 and the claim against it was dismissed.

R (Z) v Hackney LBC

- The Court of Appeal dismissed the appeal, and a further appeal to the Supreme Court was also dismissed on the basis that the conventional approach to the question of proportionality was applicable; that the range of permissible legitimate aims within the meaning of s158 and 193(2) of the 2010 Act included enabling persons who shared a protected characteristic, or to meet needs particular to persons with the protected characteristic [65]-[72].

R (Z) v Hackney LBC

- The SC held that it was proportionate for AIHA to operate a blanket policy to allocate its properties to members of the Orthodox Jewish community as a means of promoting that legitimate aim, and the blanket effect of that policy did not make it a measure which was disproportionate to that aim.

- The Divisional Court had correctly directed itself in respect of the proportionality test and made appropriate findings of fact [76]-[88].

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Public sector equality duty

Andy Lane

14 October 2021

Public Sector Equality Duty (PSED)

Look at the purpose/role of the PSED

1. The PSED "*informs the decision-making process; it does not override it*". Lewison LJ in *McMahon v Watford Borough Council; Kiefer v Hertsmere Borough Council* [2020] P.T.S.R. 1217 at §67.

2. The duty at issue is one of **consideration** – 'due regard' - not one "to achieve a result": Turner J in *London & Quadrant Housing Trust v Patrick* at §42(ii); Elias LJ in *R (Hurley) v SS BIS* [2012] EWHC 201 (Admin) at §76.

3. *"47. Similarly, I do not accept that it is necessary for the Council to have adduced evidence of a particular moment when it "sat down" and made a decision to pursue the proceedings with due regard to the PSED. The judge's task was to consider on the basis of all the evidence whether the Council's decision (which it clearly made, as it pursued the possession proceedings) to continue with the proceedings once it appreciated Ms Taylor's disability was taken with due regard (as a matter of substance, rigour and with an open mind) to the PSED"*: *Taylor v Slough* [2021] H.L.R. 28 at §47.

4. *"Consistently with this, s.149 does not amend the statutory powers and functions of a public authority prescribed by other legislation. So in this case it does not limit or qualify the power of a housing authority to seek possession of premises let to persons with a protected characteristic. But in deciding whether to take or continue such proceedings the authority must perform the duty of consideration which s.149 imposes on it."*: *Luton CH v Durdana* [2020] H.L.R. 27 at §19.

The Equality Act 2010

Section 149

(1) A public authority must, in the exercise of its functions, have due regard to the need to—(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

Regard not result

R (Fisher) v Durham CC [2020] Env. L.R. 28

99. The Council officers also had due regard to the protected characteristics of others and their needs in relation to PSED. The Council gave close considered involvement to the issues arising in this case. It had in mind the suffering that had been and was being endured by the claimant's neighbours. They were in an intolerable situation. Mr Holland pointed out that the PSED does not amend the statutory powers and functions of a public authority prescribed by other legislation: *Luton Community Housing Ltd v Durdana [2020] EWCA Civ 455* at [19] and hence did not limit the Council's powers to issue an abatement notice provided it took into account its PSED.

Julian Knowles J

- See *R (McDonagh) v Newport CC* [2019] EWHC 3886 (Admin) at §64

Judicial review issues

Reach and Impact

- Rarely a ground on its own: e.g. *R (Ibrahim) v Westminster CC* [2021] EWHC 2616 (Admin).
- E.g. Discharge of s193(2) duty and suitability: *R (Elkundi) v Birmingham CC* [2021] 1 W.L.R. 4031.
- Territorial reach limited to UK: *Turani v SSHD* [2021] EWCA Civ 348.
- Impact not always conclusive: see Soole J in *Ibrahim*:

> "127…As I have held under grounds 2 and 3, breach of PSED is a point to raise on appeal and provides no independent reason for the Court to grant relief in respect of the refusal to undertake an extra-statutory further review."

Macro Decisions

- *R (Ncube) v Brighton & Hove City Councvil* [2021] 1 W.L.R. 4762

  Local authorities could lawfully provide accommodation to street homeless persons with no recourse to public funds during the COVID-19 pandemic by virtue of their powers and duties under the Local Government Act 1972 s.138 and the National Health Service Act 2006 s.2B. No reference to PSED.

- *R (DMA) v SSHD* [2021] 1 W.L.R. 2374

  Re Secretary of State's approach to her duty to provide or arrange for the provision of accommodation for destitute failed asylum seekers under the Immigration and Asylum Act 1999 Pt I s.4(2). Breach of PSED.

- *R (McDonagh) v Newport CC* [2019] EWHC 3886 (Admin)

  A local authority's Gypsy and Traveller Site Allocations Policy, which had been revised to only apply to applicants with a demonstrable aversion to bricks and mortar accommodation, was lawful notwithstanding the fact that it did not contain a definition of "aversion", which was to be given its ordinary meaning.

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Question and Answer session

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