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Key developments in 2017 … and a look forward to 2018

Kelvin Rutledge QC & Dean Underwood

Homelessness and allocations

In Parliament

Homelessness Reduction Act 2017

- Adopted Private Member's Bill "to make provision about measures for reducing homelessness and for connected purposes."
- Received Royal Assent on 27 April 2017 but not yet in force.
- Amends Housing Act 1996, Part 7
- Based in part on Housing (Wales) Act 2014
- Main focus on "prevention" & "relief"
- Introduces important new duties

Homelessness Reduction Act 2017
Policy drivers

- Last 20 yrs: LA stock ↓ 2m, RP stock ↑ 1.5m
- Welfare benefit cuts
- Housing crisis: private rents ↑
- TA provided by London LAs 75% of all England figure

Homelessness Reduction Act 2017
Main duties

1st s.184 | 2nd s.184 | 3rd s.184

Prevention → Relief → Main duties

56 days | 56 days

Homelessness and allocations

In the courts

PSED – a victory for common sense
Hackney v Haque [2017] H.L.R. 14

Essential facts

- A reviewing officer decided that the room secured for the appellant, a person with disability, was suitable.
- In particular, the officer stated that the room was of ample size but was cluttered with the appellant's belongings, some of which could be put into storage.
- He concluded by stating that he had had regard to "the Equalities Act 2010".
- A circuit judge allowed his appeal holding that the decision letter failed to demonstrate sufficient evidence of compliance with the public sector equality duty.

Held

- Allowing Hackney's appeal, a reviewing officer is not always required to spell out his reasoning as to whether the public sector equality duty is engaged and if so with what precise effect, although such an approach may put the issue of compliance with the duty beyond reasonable doubt.
- In cases where an applicant's criticisms of the suitability of his accommodation derive from precisely identified aspects of his disabilities and their alleged consequences, an officer considering those objections in a focused manner would be likely to comply with the public sector equality duty even if unaware of its existence as a separate duty.

The door shuts on Article 6 ECHR … again!
Poshteh v Kensington & Chelsea RLBC [2016] UKSC 36

Essential facts

- P made Part 7 application
- PTSD due to imprisonment in Iran
- Refused final offer under s193 HA96
- Windows reminded her of prison cell
- P appealed decision that duty ended
- Rejected by County Court and Court of Appeal
- Permission to appeal to Supreme Court:
  - should it depart from decision that Article 6 ECHR does not apply to Part VII decisions
  - had RO applied the right test?

Held

- *Ali v Birmingham CC* [2010] UKSC 8 was intended to settle A6 issue
- No Grand Chamber decision on point
- No clear and constant line of ECHR decisions to the contrary
- *Ali* remained good law
- Viewing decision as a whole, the RO had applied the right test
- Benevolent approach to decision letters affirmed: *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7

The door shuts on Article 6 ECHR … again!
Poshteh v Kensington & Chelsea RLBC [2016] UKSC 36

"The scope and limits of the concept of a "civil right", as applied to entitlements in the field of public welfare, raise important issues as to the interpretation of article 6 , on which the views of the Chamber are unlikely to be the last word. In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the court in *Ali v Birmingham City Council [2010] 2 AC 39* . It is appropriate that we should await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position."

"In my view, the appeal on this issue well illustrates the relevance of Lord Neuberger's warning in *Holmes-Moorhouse [2009] 1 WLR 413* (see para 7 above) against over-zealous linguistic analysis."

per Carnwath SCJ

Out-of-borough placements … a real education!
R (E) v Islington LBC [2017] EWHC 1440 (Admin)

Essential facts

- M, disabled DV victim, homeless
- Daughter, E, in Islington school
- ILBC accepted s193 duty
- Accommodated M out-of-borough
- But did not ‘ensure’ E’s education
- No education for E for whole term
- Then, short-notice return to Islington
- Again, no adequate arrangements made for E’s education
- E claimed breach of ECHR P1,A2
- ILBC denied primary responsibility for out-of-borough education

Held:

- E was denied right to education
- ILBC had duty to ensure E’s welfare on delegation of powers: s11 CA04
- ILBC primarily responsible for guaranteeing in-borough and ensuring out-of-borough education
- ILBC had corresponding duty to make contemporaneous records explaining:
  - likely impact of transfer on child
  - decision that receiving borough would secure the child’s education

Out-of-borough placements … a real education!
R (E) v Islington LBC [2017] EWHC 1440 (Admin)

"… any local authority contemplating the transfer of a school-age homeless child into temporary accommodation out of borough is under a *Nzolameso* duty to make contemporary records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the child, in accordance with its primary obligation under section 11(2)(a) . In addition, however, by virtue of section 11(2)(b) , it must be able to demonstrate, by reference to written contemporaneous records, the specific process of reasoning by which it reached the decision (if it did) that the authority to which it was delegating its housing obligations would secure the child's educational welfare, either through making appropriate arrangements for school admission, or by making available alternative educational provision under section 19 of the Education Act 1996."

per DHCJ Ben Emmerson QC

Southwark stars shine on
R (XC) v Southwark LBC [2017] EWHC 736 (Admin)

Essential facts:

- Allocation scheme
- Priority Star system
- Additional preference given for community contribution
- X, disabled, carer for disabled son
- Assessed as non-priority Band 4
- Claimed indirect discrimination, in breach of s19 Equality Act 2010
  - disabled persons and women with caring responsibilities less likely to be able to work or volunteer in the community

Held:

- Priority Star system discriminated indirectly against women and disabled:
  - disabled and women less likely to obtain one or both stars
- But scheme had a legitimate aim:
  - creation of sustainable and balanced communities
  - encouraging community contribution
- and Priority Star system was a proportionate means of achieving it

Southwark stars shine on
R (XC) v Southwark LBC [2017] EWHC 736 (Admin)

"Meeting the test which I have found is applicable, however, requires that the measure adopted must be the least intrusive which could be used without unacceptably compromising the objective. It must also be shown … that in adopting the measure they struck a fair balance between securing the objective and its effects on the claimant's rights.

I can see no measure less intrusive, less likely to be detrimental to the claimant, which would not undermine the legitimate objective identified by the council and to which I have referred above. … The wider the class the less valuable the benefit of being within it.

Even though this allocation scheme does, in my judgement, discriminate against those with the sort of disabilities of which the claimant complains and against women, … in my judgement the defendant has shown that it has adopted a scheme which was the least intrusive possible and which struck the right balance."

per Graham J

Victory for local democracy in Ealing
R (H) v Ealing LBC [2017] EWCA Civ 1127

Essential facts:

- Ealing LBC allocation policy
- Working Household Priority
- 15% kept for working households
- Judicially reviewed
- Alleged indirect discrimination against women, disabled, elderly
- s19 Equality Act 2010
- Articles 8 and 14 ECHR
- Also alleged breach of PSED and s11 Children Act 2004
- WHP Scheme quashed at trial

On appeal:

- Appeal allowed
- Unacceptable incursion into practical running of allocation scheme
- Failed adequately to address the scheme's 'safety valves'
- Decision on PSED upheld
- But Ealing LBC left to address PSED breach in scheme review
- Whether allocation schemes fall outside Article 8 left doubted

Housing management

R (Turley) v Wandsworth LBC [2017] EWCA Civ 189
A succession of legitimate policies

Essential facts:

- T and D unmarried couple
- D the sole tenant
- T and D broke up; D moved out
- D moved back in Jan 2012
- D died March 2012
- T wanted to succeed D as tenant
- Section 87, Housing Act 1985
- T neither spouse nor civil partner
- T had not resided with D for 12 months before death
- Alleged discrimination: Arts.8 & 14

Held, on appeal from dismissal of JR:

- Pre-2012 policy requiring relationship permanence was legitimate
- So too treating marriage and civil partnership, but not others, as sufficiently permanent
- 12-month residence condition was best, if blunt, marker of permanence
- Change in law did not render previous policy unjustifiable
- Prospective-only amendment of law not manifestly without reasonable foundation

R (Turley) v Wandsworth LBC [2017] EWCA Civ 189
A succession of legitimate policies

"I find it impossible to say that the imposition of the twelve-month condition was manifestly without reasonable foundation as a criterion for demonstrating the necessary degree of permanence and constancy. The fact that a couple have been living together for a minimum period of time is plainly the best available objective demonstration that their relationship has the necessary quality of permanence and constancy. The choice of 12 months as the period cannot be said to be without reasonable foundation: indeed if it were much shorter, its value as a marker of a permanent relationship would be slight. … It is true that it is, as Knowles J observed, something of a blunt instrument, but that is very often the case with a bright-line rule. And it is important to appreciate that local authorities *347 are not precluded from granting a tenancy to a person left in occupation by the death of a secure tenant, including a common law spouse who cannot satisfy the twelve-month condition, if for particular reasons they consider it right to do so. "

per Underhill LJ

SPOs, UPOs and … Potemkin villages
Poplar HARCA v Begum [2017] EWHC 2040 (QB)

Essential facts:

- Assured tenants, 2 children
- Receiving full Housing Benefit
- Sublet 2 bedroom flat: £400pm
- Retained 1 locked bedroom
- Served with NTQ and NSP
- Subtenants unlawfully evicted
- Tenants moved back in with children
- Police raid 6 months later
- Drugs and dealing paraphernalia

- At trial, Recorder makes SPO
- Refuses the claim for UPO

On appeal:

- SPO overturned
- Flawed exercise of discretion
- Possession and UPO granted

SPOs, UPOs and … Potemkin villages
Poplar HARCA v Begum [2017] EWHC 2040 (QB)

"The appellant … works with the local housing authority to provide affordable housing to those unable to obtain accommodation in the open market. I pause to note that there is a very long waiting list indeed for such accommodation and that those who secure it should be expected to be slow to abuse the benefits and advantages which it brings."

"I would stress that it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families. In particular, in this case, there was a complete dearth of material which could amount to cogent evidence that the respondents would mend their ways in future."

"I am satisfied that the total amount referred to under step 1 does not exclude the element of Housing Benefit. … The inclusion of the word "total" indicates that the gross receipts secured and consequent upon the dishonest relinquishment of possession should be considered under step 1. To hold otherwise would be to render all but nugatory the clear purpose of the section."

Per Turner J

A duty-dependent dwelling?
Dacorum BC v Bucknall [2017] EWHC 2094 (QB)

Essential facts:

- B applied as homeless
- Accommodated under s188
- Dacorum accepted s193 duty
- B remained in same flat
- She later rejected PRS offer
- Dacorum served NTQ
- NTQ omitted prescribed info.
- Possession granted nonetheless
- B did not occupy “dwelling”
- Not entitled to 1977 Act protection
- *R(N) v Lewisham LBC* [2014] UKSC 62 applied

On appeal:

- s193 accommodation not necessarily let as “dwelling”
- Depends on circumstances
- Each case fact specific
- Letting for indeterminate period likely to be of a “dwelling”
- B, left in occupation for indeterminate period, occupied flat as “dwelling”
- Entitled to 1977 Act protection
- Appeal allowed

A duty-dependent dwelling?
Dacorum BC v Bucknall [2017] EWHC 2094 (QB)

"I do not accept … that if accommodation is being provided pursuant to the full housing duty it is automatically to be treated as occupied as a dwelling. … : the change in the duty does not necessarily change the dwelling/non-dwelling status of occupation, which depends on the purpose of occupation, not the duty itself. … Each case will be fact specific. … the critical factor will be the purpose for which the applicant is permitted to continue to occupy the property. This will depend primarily on the terms which will accompany the notification of the s.184 decision, not the length of occupation which in fact continues thereafter. If the occupant is permitted to stay in the accommodation for an indefinite further period, that is likely to lead to the conclusion that the continued occupation is as a dwelling, notwithstanding any avowed intention by the local authority to offer him or her another property at some uncertain point in the future. If the occupier is told that he or she can stay in the property for the time being pursuant to the local authority's acceptance that it must house them, they are justified in treating it as their home if they stay for more than a short period. It is the indefinite nature of the period of continued occupation offered which matters."

Per Popplewell J

Housing & Planning Act 2016 – into the long grass

- Starter homes (Pt 1)
- Rogue landlords & property agents in England (Pt 2)
- VRTB (Pt 4)

Licensing under the Housing Act 2004

Cohesive living lives on
Nottingham City Council v Parr [2017] EWCA Civ 188

Essential facts:

- 2 houses let to students
- Limited floor space in loft rooms
- Licence prohibited use of rooms for sleeping
- FTT allowed appeal
- Houses had enough shared space to counter bedrooms' size and, living "cohesively" students would use that space
- Condition in one licence varied: use as bedroom only by full-time student living there for 10m maximum
- UT upheld that condition on appeal and applied it to second house

On appeal:

- Condition not outside ambit of s67: nothing inimical to HMO regime in investigating occupiers' characteristics
- Condition did not allow students to live in substandard accommodation. UT entitled to find that, with shared space, rooms were not substandard.
- Condition was not irrational. UT had not attempted to define "cohesive living" as a concept; and the regime was merely intended to ensure the *availability* of adequate facilities, not to compel occupiers to use them.

The relevance of planning
Waltham Forest LBC v Khan [2017] UKUT153 (LC)

Essential facts:

- Borough-wide selective licensing scheme
- K, professional landlord
- Converted 2 properties into flats
- No planning permission
- Applied for a Part 3 licence
- Licences granted for 1 year
- K expected to regularise planning position within the year
- On appeal, FTT held: planning compliance irrelevant to licensing
- Licences extended to 5 years

Held on appeal:

- FTT wrong to hold K's compliance with planning requirements irrelevant to licensing
- In light of selective licensing aims, not possible to hold otherwise
- Concerns of licensing and planning control overlapped
- Legitimate for LHA to consider planning status when considering licence application and terms
- Permissible to refuse to determine application until position regularised

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