**DDPO – Housing Issues for Disabled People – 13 September 2017**

**The Housing Crisis**

The UK has a chronic shortage of suitable, accessible, affordable housing. See: No Place Like an Accessible Home: LSE, CASE

<http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/No-Place-Like-an-Accessible-Home.pdf>

This is within the context of a chronic shortage of suitable affordable housing generally.

**Building affordable homes**

For the year ending March 2017 in England, outside of London, the following new ‘affordable’ dwellings were completed:

Affordable rent: 18,280

Social rent: 597

Intermediate rent: 5

Affordable home ownership: 3,976

**Total 22,858**

In Greater London the figures were:

Affordable rent: 2,574

Social rent: 505

Affordable home ownership: 1,855

**Total 4,934**

**The need for affordable homes**

In March 2004 the Barker report estimated that the supply of social and affordable homes would need to increase by 17,000 units a year for the next 10 years to meet anticipated need. This did not happen.

For the year ending March 2016 the number of households on council waiting lists in England was 1.18 million.

**THE LAW ON HOMELESSNESS**

**The basic homelessness tests:**

Local housing authorities have a duty to secure accommodation for homeless people if they are satisfied of certain things:

That the person is:

* **Homeless**
* **Eligible – an immigration test**
* **In priority need**
* **Not intentionally homeless**

If these tests are met there will be a housing duty but if the person does not have a **local connection** with the authority they applied to, they can be referred to another area.

The tests and the process are set out in Housing Act 1996 Part 7.

**Making an application**

In theory it should be easy to make an application:

The local housing authority has a duty to make inquiries if they have *reason to believe* a person *may be* homeless and eligible.

Also, if the authority has *reason to believe* the person *may have a priority need* it must provide interim accommodation while completing its inquiries.

The interim accommodation must be suitable and available for the whole household.

**1. HOMELESSNESS**

A person is homeless if s/he has no accommodation available for his/her occupation, in the United Kingdom or elsewhere, which s/he:

1. is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
2. has an express or implied licence to occupy, or
3. occupies as a residence by virtue of an enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.

(s.175(1))

A person is also homeless if s/he has accommodation, but -

1. s/he cannot secure entry to it, or
2. it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where s/he is entitled or permitted both to place it and to reside in it.

(s.175(2))

A person is threatened with homelessnessif it is likely that s/he will become homeless within 28 days (s.175(4)).

**‘Available for occupation’**

Accommodation is regarded as available for a person’s occupation only if it is available for occupation by him together with:

1. any other person who normally resides with him/her as a member of his/her family, or
2. any other person who might reasonably be expected to reside with him/her.

(s.176)

**‘Reasonable to continue to occupy’**

A person will not be treated as having accommodation unless it is accommodation which it would be reasonable for him/her to continue to occupy: s.175(3).

In deciding whether it is reasonable for a person to continue to occupy accommodation, a local authority may have regard to the “general circumstances prevailing in relation to housing” within its area: s.177(2).

***Relevant factors***

In assessing reasonableness, authorities should consider all the circumstances, particularly the following factors (Code of Guidance, para 6.26):

* affordability
* physical conditions
* overcrowding
* type of accommodation

**Risk of violence**

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 against her/him, or against a member of their household.

1. a person who normally resides with her/him as a member of her/his family, or
2. any other person who might reasonably be expected to reside with her/him. (s.177(1))

“Violence” means violence from another person or threats of violence from such a person which are likely to be carried out.

Violence is not limited to physical assault; it may take the form of emotional, psychological and/or financial abuse:  ***Yemshaw v LB Hounslow*** [2011] UKSC 3.

The authority must ask whether it is probable that continued occupation will lead to violence not consider what alternative steps could be or could have been taken (such as obtaining an injunction): *Bond v Leicester City Council* [2002] HLR 6 CA.

**2. ELIGIBILITY**

Eligibility is about immigration and the rules are complex.

**Persons subject to immigration control**

Those subject to immigration control are not eligible unless they are on a list of exceptions set out in the regulations. Those who are subject to immigration control but eligible are:

* Those with full refugee status;
* Those with exceptional leave to remain granted outside the immigration rules provided the leave is not subject to the ‘no recourse to public funds’ condition;
* Those with settled status (unconditional/indefinite leave to remain) provided they are habitually resident;
* Those with ‘humanitarian protection’ leave to remain;
* Those with limited leave on family or private life grounds under Article 8 provided the leave is not subject to the ‘no recourse to public funds’ condition.

**European Economic Area (EEA) nationals**

EEA nationals with a ‘right to reside’ in the UK are eligible for assistance, unless the right to reside is a limited right based on being a job seeker or an initial right that all EU citizens enjoy for three months.

What this means is that EU nationals who are working, self-employed or self-sufficient are generally eligible as are their family members (who may be non-EU nationals). In addition, permanent rights to reside may be established by those who have been in the UK for five years and/or are retired.

***EU/EEA member states***

EU countries other than the U.K. are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain and Sweden; together with - from 1 May 2004 – Malta, Cyprus, Slovenia, Slovakia, Poland, Lithuania, Latvia, Hungary, Estonia, and the Czech Republic; and – from 1 January 2007 – Bulgaria and Romania; and – from 1 July 2013 – Croatia.

The EEA comprises all EU countries plus Iceland, Liechtenstein and Norway.

**3. PRIORITY NEED**

The following have a priority need for accommodation:

1. a pregnant woman or a person with whom she resides or might reasonably be expected to reside;
2. a person with whom dependent children reside or might reasonably be expected to reside;
3. a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;
4. a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

(s.189(1))

**Vulnerability**

The Supreme Court considered vulnerability in ***Hotak v Southwark LBC, Johnson v Solihull MBC and Kanu v Southwark LBC*** [2015] UKSC 30, 13 May 2015

Mr Hotakwas a refugee with learning difficulties who suffered depression and PTSD. He relied on his brother for day-to-day support. His brother was ineligible for homelessness assistance and they had been living together in a flat belonging to a friend but had to leave because of overcrowding. The council decided that, if it were not for the support of his brother, Mr Hotak would be accepted as vulnerable. However, taking into account the fact that the brother’s support would continue if Mr Hotak was homeless, they concluded that he was not vulnerable.

Mr Johnson had a history of drug abuse, criminal offending and imprisonment. The

local authority decided that such personal circumstances were not uncommon in the homeless population and that in comparison with “the ordinary homeless person”. Mr Johnson was not less able to fend for himself so as to make him vulnerable.

Mr Kanu received support from his wife and adult son but did not live with them. He suffered from physical and mental health problems and was also found to be not vulnerable, on the basis of the support he would continue to receive from his family when homeless. In addition, he argued that the local authority had failed to comply with the public sector equality duty (PSED)in relation to Mr Kanu’s disability.

The Supreme Court held that:

* The vulnerability test requires a ‘comparator’ and the proper comparator is the ordinary person who becomes homeless. The Court rejected the argument that the applicant must be more vulnerable than most homeless people, who may share such characteristics as depression, alcoholism and drug abuse. Lord Nueberger said that “vulnerable … connotes ‘significantly more vulnerable than ordinarily vulnerable’ as a result of being rendered homeless.”
* A local authority can take account of the personal support offered by family and friends when deciding if a person is vulnerable. However, the authority must be satisfied that such support will be available on a “consistent and predictable basis” and, a person may still be vulnerable when homeless even if such support was available.
* In relation to the Public Sector Equality Duty (PSED) the authority must comply with the duty but in a case where the authority are directly deciding whether a person is vulnerable the Equality duty is complementary to the authority’s duty under the Housing Act. A decision-maker may comply with the duty even if they fail to make reference to the duty in the decision letter and a formulaic recital is to be avoided “ … the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable".

**Other classes of priority need**

The Homelessness (Priority Need for Accommodation) Order 2002 added the following further categories of priority need:

1. A person aged 16 or 17 who is *not* either

* a “relevant child” or
* a child in need to whom a local authority owes a duty to provide accommodation under s. 20 of the Children Act 1989.

“Relevant children” are 16/17-year-olds who have left care, but were “looked after” by social services for a minimum period of 13 weeks beginning after the age of 14.

1. A person under 21 who was (but is no longer) looked after, accommodated or fostered. This can have been at any time between the ages of 16 and 18.
2. A person aged 21 or more who is vulnerable as a result of having been looked after, accommodated or fostered (except a person who is a “relevant student”);

A “relevant student” is a care leaver to whom section 24B(3) of the Children Act 1989 applies, who is in full-time further or higher education and whose term-time accommodation is not available during a vacation. In such a case, social services are responsible for providing out-of-term accommodation.

1. A person who is vulnerable as a result of having been a member of Her Majesty’s regular naval, military or air forces;
2. A person who is vulnerable as a result of:

* having served a custodial sentence,
* having been committed for contempt of court or any other kindred offence, or
* having been remanded in custody;

1. A person who is vulnerable as a result of ceasing to occupy accommodation because of violence from another person or threats of violence from another person which are likely to be carried out.

**Capacity to accept a tenancy**

The House of Lord has held that a person without capacity cannot make an application for housing under Part 7: ***R v Tower Hamlets ex parte Begum*** [1993] AC 509.

In ***R (MT) (by his litigation friend GT) v Oxford City Council*** [2015] EWCH 795 (Admin) the court held that to decide that a person did not have the capacity to make a Part 7 application or to be a tenant was not discrimination under Article 14 ECHR.

A person who cares for a person without capacity can make an application if homeless and will be in priority need by virtue of the incapacitated person who lives with him/her.

**Overlap between housing under Part 7 and housing under Care Act 2014**

The accommodation duties in the National Assistance Act 1948 (NAA) are now found in the Care Act 2014. The accommodation duties in the NAA 1948 were often relied on by those unable to apply for accommodation under Part 7, mostly because of immigration status.

A body of case law developed which established that someone excluded from housing under Part 7 who had had a need for “care and attention” (not caused solely by destitution) could obtain ordinary housing under the NAA 1948.

It is not clear whether this is still the case under the Care Act 2014. The language and structure are different from the NAA and in two decided cases the courts have held that the Care Act did not create a duty or power to provide accommodation. See:

***R (GS) (by his litigation friend LF) v LB Camden*** [2016] EWHC 1762

A disabled woman with mental health problems lacked capacity and for that reason could not be returned to Switzerland. The local authority could not provide accommodation under Part 7 because she was not eligible. Further her immigration status precluded her from receiving services under the Care Act 2014. The council argued that there would be no breach of her human rights by their refusal to provide accommodation since she could pay rent from the PIP benefit she had been awarded. The Court rejected that and held that the authority must exercise its power to provide accommodation under s.1 Localism Act 2010 to avoid a breach of her Article 3 rights which would be inevitable if she became homeless.

***R (SG) v LB Haringey*** [2015] EWHC 2579 (Admin)

The court was considering whether an authority had a duty to accommodate a person subject to immigration control. The case was decided on another point but the judge suggested that under the Care Act 2014 the provision of accommodation was discretionary.

**4. INTENTIONAL HOMELESSNESS**

A person becomes homeless intentionally if s/he deliberately does or fails to do anything in consequence of which s/he ceases to occupy accommodation which is available for his/her occupation and which it would have been reasonable for him/her to continue to occupy: s.191(1).

An act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate: s.191(2)).

**`Contrived’ homelessness**

A person is also intentionally homeless if:

1. s/he enters into an arrangement under which s/he is required to cease to occupy accommodation which it would have been reasonable for him/her to continue to occupy, and
2. the purpose of the arrangement is to enable him/her to become entitled to housing assistance,
3. and there is no other good reason why s/he is homeless. (s.191(3))

***R (Pieretti) v London Borough of Enfield*** [2010] EWCA Civ 1104, was about a finding of intentional homelessness. The Court of Appeal held that section 49A of the Disability Discrimination Act (now the PSED under the Equality Act 2010) applied when a local authority was making inquiries and determinations on individual homeless applications. The decision of a reviewing officer who failed to make further inquiry into whether the applicant suffered from a disability relevant to a finding of intentional homelessness was quashed. This was despite the fact that this had not been put forward as a ground of review prior to the County Court appeal.

The Court said that while [the PSED] may not create new individual rights it is designed “to secure the brighter illumination of a person’s disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal.”

Parliament had intended there be “a culture of greater awareness of the existence and legal consequences of disability, including the fact that a disabled person may not be adept at proclaiming his disability.”

**THE HOUSING DUTIES**

The “main housing” duty is owed to a person who is found to be homeless, eligible, in priority need and not intentionally homeless. No housing duties are owed to a person who is found to be not homeless or not eligible.

**Duties to non-priority need applicants**

Where a person is found to be homeless, eligible and not intentionally homeless but not in priority need the authority must provide advice and assistance in any attempt s/he makes to secure their own accommodation: s.192(2). The authority must first assess the person’s housing needs and the advice and assistance must be tailored to the applicant’s needs. The advice and assistance may be provided by other agencies by arrangement with the local authority.

Further, the authority *may* secure accommodation for such people: s.192(3).

**Duties to the intentionally homeless: s190**

Where a person is found to be homeless, eligible for assistance and in priority need, but intentionally homeless the authority must secure accommodation for such period as they consider will give him/her a reasonable opportunity of securing accommodation and provide advice and assistance in their attempts to do so. As for non-priority need applicants the advice and assistance must be tailored to the applicant’s needs following an assessment of those needs.

What is a reasonable period will depend on the context. Local authorities must take account of local circumstances and the particular needs and circumstances of the applicant. Local authorities cannot take account of their own resources when deciding on what period will give the applicant a reasonable opportunity to secure their own accommodation: *Conville v L.B. Richmond upon Thames* [2006] EWCA Civ 718.

**The main housing (“full”) duty**

When an authority is satisfied that an applicant is homeless, eligible for assistance, in priority need and not intentionally homeless, and is not subject to a `local connection’ referral to another authority, it must “secure that accommodation is available for occupation by the applicant”: s.193(2).

The accommodation must be suitable (in particular, it must be affordable) and it must be available for occupation by the applicant together with any other person who normally resides with him/her as a family member or who might reasonably be expected to reside with him/her: ss 176, 206 and 210.

**Discharge of the housing duty**

The duty continues until it ceases for one of specified reasons set out in the Act: 193(5)- 193(7AA).

These reasons are:

* refusal of an offer of accommodation - the applicant must have been informed of the possible consequence of refusal, and of the right to request a review of the suitability of the accommodation:s.193(5).
* the applicant ceases to be eligible for assistance: s.193(6)(a).
* the applicant becomes intentionally homeless from the accommodation provided: s.193(6)(b)
* the applicant accepts an offer of accommodation made under Part 6, HA 1996 (allocations): s.193(6)(c)
* the applicant accepts an offer of an assured tenancy (not an assured shorthold tenancy) from a private landlord: s.193(6)(cc)
* the applicant ceases to occupy the accommodation provided: s.193(6)(d)
* the applicant refuses a “final offer”of accommodation under Part 6: s.193(7). Again, the applicant must have been informed of the possible consequence of refusal and of the right to request a review of the suitability of the accommodation,

A “final offer”must be in writing, state that it is a final offer, and the authority must be satisfied that the accommodation is suitable for the applicant: s.193(7A),(7F)).

***Discharging the duty by means of a private rented sector offer***

Under the Localism Act 2011, a local authority can discharge its duty by making an offer of a 12-month assured shorthold tenancy of suitable accommodation in the private rented sector: s.193 (7AA). However, a local authority may still, if they so decide, discharge the duty by providing temporary accommodation until a final offer of a secure or assured tenancy is made. Prior to the Localism Act this was the usual way the duty was discharged, though many applicants remained in ‘temporary accommodation’ for many years.

Section 193 (7AA) provides that the duty will end if the applicant accepts or refuses a private rented sector offer, provided s/he was informed in writing of the following matters:

(a) the possible consequence of refusal or acceptanceof the offer

(b) that the applicant has the right to request a review of the suitability of the accommodation and

(c) ... the effect under section 195A of a further application to a local housing authority within two years of acceptance of the offer.

A private rented sectoroffer is defined as -

* an offer of an assured shorthold tenancy made by a private landlord to the applicant
* which is made, with the approval of the authority, in pursuance of arrangements made by the authority with the landlord with a view to bringing the authority's duty under this section to an end, and
* the tenancy being offered is a fixed term assured shorthold tenancy for a period of at least 12 months.

For the offer to be suitable, minimum standards of suitability must be met: Homelessness (Suitability of Accommodation) (England) Order 2012.

Accommodation is ***not*** to be regarded as suitable for this purpose where:

* it is not in a reasonable physical condition;
* it does not meet statutory conditions relating to fire safety, electrical equipment, gas safety, energy performance and carbon monoxide precautions;
* the landlord is not a “fit and proper person”;
* it is subject to licensing, but is not licensed; and/or
* the landlord has not provided a satisfactory written tenancy agreement.

If the private rented sector offer is accepted and the applicant becomes homeless from that accommodation within two years, theduty will ‘recur’, provided the applicant is still eligible and has not become homeless intentionally. Priority need will not need to be established.

***Duties in cases of threatened homelessness***

Where an authority is satisfied that an applicant is threatened with homelessness, eligible for assistance, in priority need, and not intentionally threatened with homelessness, they must take reasonable steps to secure that accommodation does not cease to be available for his/her occupation: s.195(2).

**Suitability of accommodation**

When deciding whether accommodation is ‘suitable, the authority must have regard to legislation on slum clearance; overcrowding; housing standards and licensing requirements: s.210(1).

**Affordability**

The Homelessness (Suitability of Accommodation) Order 1996provides that, in determining whether accommodation is suitable for a person, authorities must take into account whether or not the accommodation is affordable, and in particular -

* the financial resources available to that person;
* the costs of the accommodation;
* that person’s other reasonable living expenses.

**Location**

Section 208(1), HA 1996, provides: that “So far as reasonably practicable, an authority shall, in discharging their housing functions, secure that accommodation is available for the occupation of an applicant in their district.”

However, the shortage of affordable private rented accommodation means that many authorities, particularly in London, offer accommodation outside their area and often in different part of the country.

**Out of borough/out of London placements**

Authorities must consider the individual needs of the applicant and particularly of their children when deciding what is suitable.

In ***Nzolameso v City of Westminster*** [2015] UKSC 22, the applicant had five children under the age of five. The Council accepted a full housing duty and offered her temporary accommodation in a house in Bletchley, some 50 miles north of London outside its own district. She refused the offer, whereupon the Council considered that it had discharged its duty towards her. The Supreme Court upheld her appeal: the test of "reasonable practicability" under s.208 HA 1996 suggested a stronger duty than did "reasonableness". The authority had to evidence and explain any decision about where to accommodate a homeless applicant. If, however, it was not possible to accommodate a homeless applicant in its own area, the authority must attempt to offer accommodation that was as close as possible to where the applicant had previously been living.

Furthermore, under s.11 of the Children Act 2004, public authorities had a duty to have regard to the need to safeguard and promote the welfare of children. That requirement was clearly relevant in determining whether out-of-borough accommodation was suitable.

The Court accepted that authorities were entitled to take account of the resources available to them and the difficulties of procuring sufficient temporary accommodation at affordable prices. Where there was a shortfall of "in-borough" accommodation, the policy should explain the factors that would be taken into account in allocating available properties.

**Process of making offers**

***Newham v Khatun, Zeb, Iqbal & OFT [***2004] EWCA Civl 55, Court of Appeal said it was up to the local authority to decide what is suitable and that it was lawful to require applicants to sign and agreement before viewing the premises being offered.

Local authorities often send applicants to collect keys from landlord/agent and they are required to sign a tenancy or licence agreement on the spot, sometimes prior to the viewing.

**Suitability challenges**

The decision that accommodation is suitable can be challenged by way of a review. An offer can be accepted and challenged and that is generally the safer course of action: if the offer is refused and the review unsuccessful the authority will owe no housing duty to the applicant.

In ***Hackney v Haque*** [2017] EWCA Civ 4 a disabled man challenged the suitability of the accommodation provided, which was a room in a hostel. It was argued that the authority had failed to comply with the Public Sector Equality Duty. The Court of Appeal rejected that and held that compliance required the following:

i) A recognition that Mr Haque 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 Mr Haque'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 Mr Haque which paid due regard to those matters.

The Court also said that “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.”

**5. LOCAL CONNECTION**

After determining that the main housing duty is owed, a local authority may consider whether the applicant can be referred to another authority. Only if the conditions set out in s.198(2) are met can the case be referred:

1. neither the applicant nor any person who might reasonably be expected to reside with him/her has a local connection with the district of the authority to whom the application was made,
2. the applicant or a person who might reasonably be expected to reside with him/her has a local connection with the district of that other authority and
3. neither the applicant nor any person who might reasonably be expected to reside with her/him will run the risk of violence in that other district.

(s.198(2))

### What is a local connection?

A person has a local connection with the district of a local housing authority in any of the following circumstances:

* because s/he is, or in the past was, normally resident there, and that residence is or was of his/her own choice;
* because s/he is employed there;
* because of family associations; or
* because of special circumstances.

(s.199(1))

The Local Authority Association Joint Local Connection Agreement offers the following guidance:

* A working definition of ‘normal residence’ is that the household has been resident in the area for at least six out of the previous twelve months, or three out of the previous five years. Time spent in hospital or in emergency accommodation (such as refuges or some hostels) may be disregarded. Time spent in the service of the armed forces, or in prison, is also to be disregarded.
* Employment in the area ‘of a casual nature’ will not normally count.
* Family associations normally arise where an applicant, or member of his/her household has parents, adult children or brothers or sisters currently residing in the area and these relatives have been resident for a period of at least five years and the applicant indicates a wish to be near them.
* Special circumstances: the fact that an applicant seeks to return to an area where s/he was brought up or had lived for a considerable period of time in the past may be a ground for finding a local connection because of special circumstances.

**CHALLENGING DECISIONS:**

**Statutory Review**

An applicant can request a review of any decision made by a local housing authority about: eligibility, homelessness, priority need, intentional homelessness, local connection referral and the suitability of accommodation.

A request for review must be made within 21 days of the date when the applicant is notified of the authority’s decision (unless the authority allow a longer period): s.202(3). The review should be completed within eight weeks of the request.

If the decision on review is unfavourable to the applicant, the authority must notify him\her of the reasons for the decision: s.203(4). It must also inform him/her of the right to appeal to the county court on a point of law, and of the time limit for appealing: s.203(5).

### *Scope of the review*

The role of the reviewing officer is to consider the facts and law and to exercise discretion afresh. He or she is not simply considering whether the initial decision was right as at the date it was made: ***Mohammed v L.B. Hammersmith and Fulham*** [2001] UKHL 57.

Applicants can request a review of the suitability of an offer whether they accept the offer or reject it. It is generally better to accept the offer while seeking a review. If the offer is rejected and the decision that it is suitable upheld the applicant will be owed no housing duty.

### Temporary accommodation pending review of decision

The duty to provide interim accommodation ceases when the authority’s decision is notified to the applicant, even if s/he requests a review of the decision. The authority may continue to secure that accommodation is available for the applicant’s occupation pending the outcome of a review: s.188(3)).

*R -v- Camden LBC ex parte Mohammed*(1997) 30 HLR 189, CA gives guidance on the exercise of a local authority’s discretion concerning the provision of temporary accommodation pending a review. The authority’s discretion is to be exercised having regard to:

* the merits of the case itself;
* any new material, information or argument raised in the application for review;
* the personal circumstances of the applicant and the consequences for him/her of refusing to provide interim housing; and
* any other relevant considerations.

**Appeals to the County Court**

Where an applicant has requested a review of an authority’s decision and s/he is dissatisfied with the decision on the review, or is not notified of the review decision within the prescribed time, s/he may appeal to the county court on any point of law arising from the decision: s.204(1). The county court may make such order confirming, quashing or varying the decision as it thinks fit: s.204(3).

## Time limit for appealing

An appeal must be brought within 21 daysof notification of the decision. The court may give permission for an appeal to be brought after that deadline, but only if satisfied that the applicant had a good reasonfor being unable to bring the appeal in time and for any delay in applying for permission.

***`Point of law’***

This has been interpreted as including grounds of challenge that would be available on a judicial review: ***Begum v Tower Hamlets L.B.C.*** (1999) 32 HLR 445.

**Temporary accommodation pending appeal**

Where the authority had a duty under s.188 to accommodate pending the original decision, they *may* secure that accommodation is available to the applicant during the period for appealing; and if an appeal is brought, until the appeal is finally determined: s.204(4).

***Appeal against refusal to accommodate pending appeal***

An applicant can lodge a separate appeal where an authority has refused to continue accommodating him/her pending the outcome of the main county court appeal.

The court can confirm or quash the decision under appeal, and “shall apply the principles applied by the High Court on an application for judicial review”: s.204A(4)(b)).

The factors set out in ***R v Camden L.B.C. ex parte Mohammed*** (above) are relevant to the council’s exercise of its discretion as to whether to provide or continue to provide temporary accommodation pending appeal. But in the reported cases the courts have tended to hold that it will only be in exceptional cases that such appeals will be granted: the court must be satisfied that a failure to accommodate “would substantially prejudice the applicant’s ability to pursue the main appeal”: s.204A(6).

**ALLOCATIONS**

The term ‘allocation’ refers to an offer of a ‘long-term’ home to someone registered under a local authority’s allocation scheme. The offer will usually be an introductory or secure tenancy of a property from the authority’s own stock or an assured tenancy from a housing association or other ‘private registered provider of social housing’. Since the Localism Act 2011 the offer may be of a fixed-term tenancy (a flexible or assured shorthold tenancy).

Allocations are governed by the Housing Act 1996 Part 6, as amended by the Localism Act 2011. Local authorities must also have regard to the Code of Guidance published in June 2012).

### Definition of an allocation

An `allocation' of housing accommodation occurs where an authority:

1. selects a person to be a secure or introductory tenant of council property; or
2. nominates a person to be a secure or introductory tenant of accommodation owned by another authority; or
3. nominates a person to be an assured tenant of housing accommodation owned by a registered social landlord; or
4. notifies an existing tenant or licensee that his/her tenancy or licence is to be a secure tenancy. (s.159(2) and (3))

***Transfers***

Transfers at the instigation of the authority are not “allocations”. This provision means that housing authorities have freedom to grant transfers to existing secure, introductory or assured tenants outside their allocation schemes: s. 159(4A). But transfers at the instigation of the tenant, where they would qualify for ‘reasonable preference’, should be treated as allocations.

An authority’s Allocation Scheme should set out who qualifies as eligible for an allocation and how priority is accorded to those on the scheme. Authorities have discretion as to how they frame their allocations schemes but Part 6 sets out certain mandatory provisions and principles.

### Eligibility for allocation

Part 6 provides that:

Local authorities cannot allocate accommodation to persons from abroad who are ineligible for an allocation. Those classes of persons who are ineligible are set out in regulations and mirror the eligibility rules for homelessness assistance.

A person may only be allocated accommodation if the person is a “qualifying person” and, subject to the regulations and Equality Act duties, local authorities can decide what classes of persons are or are not qualifying persons.

Following the amendments made by the Localism Act 2011 local authorities have more discretion to set their own criteria as to who can be a qualifying person and can base these on factors such as: local connection, economic and financial criteria, past conduct such as rent arrears or anti-social behavior and how they contribute to the community.

###### Applying for an allocation

###### A housing authority must ensure that advice and assistance is available free of charge about the right to make application for an allocation; and that any necessary assistance in making an application is available to anyone who is likely to have difficulty in doing so: s.166.

Authorities must consider every application for an allocation which complies with the procedural requirements of its allocation scheme: s.166(3).

**The applicant’s duty**

An applicant must give correct information to the authority in support of the application and may commit an offence if false information is given or if information is withheld.

In addition, where an assured or secure tenancy is granted because of a false statement made by the tenant or someone acting on his or her behalf, the landlord has a ground for possession and may seek to evict the tenant if this comes to light after the tenancy has been granted.

Assessing priority

***`Reasonable preference’***

Local housing authorities must have a scheme for determining priorities and procedures in the allocation of housing accommodation.

Allocation schemes must be framed so as to secure that reasonable preference is given to -

1. people who are homeless;
2. people who are owed homelessness duties (under section 190(2), 193(2) or 195(2) of the 1996 Act, or who are occupying accommodation under s.192(3) (power to provide accommodation to persons not in priority need);
3. people occupying insanitary or overcrowded housing, or otherwise living in unsatisfactory housing conditions;
4. people who need to move on medical or welfare grounds; and
5. people who need to move to a particular locality, where failure to meet that need would cause hardship (to the applicant or to others).

***‘Additional preference’***

The scheme may be framed so as to give additional preference to particular descriptions of people with urgent housing needs.

**Common issues**

* decisions about eligibility (immigration status)
* decisions about ‘qualification’ under a particular scheme;
* decisions to defer or suspend an application;
* decisions about the level of priority given under the authority’s policy;
* the lawfulness of a particular allocations policy, ie whether it com­plies with HA 1996 Part VI or other statutory duties such as under the Equality Act 2010.

## Challenging decisions

There is a right of review of

* decisions about eligibility and quali­fication for the ‘waiting list’.
* decisions about the facts taken into consideration in making an allocation deci­sion.

There is no county court appeal but decisions may be chal­lenged by judicial review.

Legal aid is no longer available for advice and assistance about allocations but is available for judicial review claims.

**Right to information and reviews**

***General information***

Authorities must publish a summary of their allocation scheme and provide a copy free of charge to any member of the public on request. The scheme itself must be available for inspection at the principal office of the authority and a copy provided on request to any member of the public, on payment of a reasonable fee. Most authorities publish the full allocation policy online.

When making any alterations to the scheme reflecting major changes of policy the authority must take reasonable steps to bring the effect of the changes to the attention of those likely to be affected, within a reasonable period of time.

***Particular information***

An authority’s allocation scheme must also ensure that an applicant has the right to the following information, on request:

* general information so as to be able to assess how his or her appli­cation is likely to be treated;
* whether he or she is likely to be given preference under the scheme;
* whether it is likely that appropriate accommodation will be made available; and, if so, the timescale; and
* the facts that have been taken into account (or are likely to be taken into account) in considering whether to allocate accommo­dation to him or her.

**Reviews**

There is a right to request a review of any of the following:

* a decision that a person is ineligible;
* a decision that a person is not a qualifying person;
* a decision about the facts of the person’s case which have been taken into account in considering whether to allocate accommodation.

These are the only decisions which carry the right of review. If an applicant believes that he or she has been given insufficient priority, unless this is effectively a decision about the facts of the case, there is no right of review. Furthermore, there is no right of review where the applicant is seeking to challenge the lawfulness of the policy itself.

In summary, the ways to challenge allocation decisions are as follows:

* Eligibility status (immigration status): right of review, then judicial review.
* Qualifying status (authority’s own rules): right of review, then judicial review.
* Decision based on incorrect facts (e.g., number of children in the household, size of the home, a failure to record disability or a medical condition): right of review, then judicial review.
* Decision based on correct facts that household entitled to a low level of priority: no review, only judicial review.
* Allocation Scheme is unlawful (e.g., because it is discriminatory or fails to comply with Part VI): judicial review.

In practice, the most common complaint is that an applicant has been waiting for a long time but no offers have been made or bids been successful. If the person’s circumstances have been correctly recorded and the policy correctly applied there will be no action that can be taken.

In addition to the right to information under the Data Protection Act 1998 an applicant has a right to specific information pursuant to sec­tion 167(4A).

Where medical issues are relevant, it may help to obtain a fresh medical report/letter from the GP and/or to request a re-assessment of any medical priority.

**Challenging the lawfulness of the policy itself**

In ***R (Ahmad) v Newham LBC*** [2009 UKHL 14 the challenge was to an allocations policy that operated a choice-based lettings scheme under which applicants were placed in one of three categories: ‘Priority Homeseekers’ (households containing at least one person who satisfied one or more of the reasonable preference criteria); ‘Tenants Seeking a Transfer (council tenants not within the Priority Homeseekers category who wanted to move); and ‘Homeseekers’ (who fell into neither of the other two categories). The Court of Appeal held that the scheme was unlawful for failing to give preference to those with cumulative need over others in the same band. It also held that the authority’s policy of allocating five per cent of choice-based lettings to ordinary transfer applicants in the same band was unlawful for failing to give reasonable preference to those in housing need.

The House of Lords upheld the council’s appeal, holding that:

… it is for the local authority to provide an allocation scheme accord­ing to its Part VI duty, and the merits as to who, how and when pri­ority should be afforded is a matter for the local authority subject to its special duties. Judges must be particularly slow in entering the politically sensitive area of allocations policy by over-broad use of the doctrine of irrationality. A particular scheme cannot be castigated as irrational simply because it is not a familiar one to the court or is not considered to be the perfect solution to a difficult, if not impossible, question to resolve.

**Administrative law principles applicable to allocations**

**Allocations must be in accordance with the policy**

Section 166A(14) provides that an authority cannot allocate accom­modation except in accordance with its allocation scheme, which must be publicly available. This means:

* an authority cannot make decisions in accordance with policies or practices that are not clearly indicated in the allocation scheme; and
* an authority cannot ‘earmark’ a vacant property for a particular applicant prior to allocation through the scheme.

In *Gallacher v Stirling Council,* May 2001, LAG 22,the authority had a policy of only considering homeless applicants for low-demand, high-turnover housing, but this policy did not appear in the published housing allocations scheme. The court held the policy was invalid as it rendered inapplicable to homeless applicants the provisions of its allocations policy and applied special rules to such applicants. Further, any decision made in accordance with an unpublished policy would be invalid.

Often applicants become aware of a vacant property that would be suitable and request it is allocated to them. Authorities will rarely be able to do this and, under Part 6, such an allocation may be unlawful.

Similarly, people in unlawful occupation of council accommodation (such as those who are not able to succeed on the death of the tenant) may argue that the authority will owe a homeless duty and that they should therefore be allowed to remain in occu­pation and be granted a tenancy. Unless the authority has a policy to grant ‘non-statutory succession’ an authority would be acting unlawfully if it granted a secure tenancy to such a person outside of its allocation scheme.

**The scheme must explain how accommodation is allocated**

This is closely related to the above principle. Allocations must be in accordance with the published policy and the published policy must describe, in sufficient detail, how the policy operates. This includes the criteria on which priority is assessed: ***R(Mei Ling Lin) v Barnet LBC*** [2007] EWCA Civ 132.

**Deferrals and suspensions**

Many authorities suspend active consideration of applications because of things like rent arrears or a previous refusal of an offer of accommodation. The general rule is that such policies are not unlawful, provided they are not so rigidly applied as to fetter the discretion of the authority.

**Exercising discretion**

Where a local authority has a discretion to make certain decisions, a policy that is rigidly applied may be unlawful on the basis that it fet­ters the discretion of the authority.

**General duty of fairness**

As in all administrative decision-making, the process of decision-making must be ‘fair’ and comply with the rules of ‘natural justice’. It is a fundamental principle of fair decision-making that a per­son should be given notice of adverse information and the opportunity to comment on any such information.

In many allocation cases, an applicant will submit medical reports and the authority may take its own medical advice on reports sent by the applicant or obtain information and opinions directly from those treating the applicant. In such cases, where significant information is obtained by the authority, there will be a duty to disclose this to the applicant and invite him or her to comment on the information. However, there is no duty to give the applicant the last word in every case.

In***Amirun Begum and Nashima Begum v Tower Hamlets LBC***[2002] EWHC 633, information sent to the authority by the applicant’s GP was inconsistent with that provided by the applicant. The information from the GP had been taken into account by the authority without offering the applicant the opportunity to comment.

It was held that: ‘The information provided by the claimants’ general practitioner is significant, and has materially affected [the defendant’s] conclusions. It follows that the defendant may not lawfully finally decide whether any particular accommodation is suitable for the claimants without taking into account their responses, now in evidence, to their general practitioner’s letters’.

**Challenges following the Localism Act 2011 and *Ahmad***

In ***R (Jakimaviciute) v Hammersmith and Fulham LBC*** [2014] EWCA Civ 1438, the scheme provided that homeless applicants in long-term suitable temporary accommodation under the homelessness duty could not normally qualify to register under the scheme. The Court of Appeal held this was unlawful since it effectively excluded a class of persons who were to be given reasonable preference: ‘on the natural interpretation of the statutory provisions the setting of the qualification criteria is subject to the reasonable preference duty’. The scheme operated so that a sub-group within a reasonable preference category were given no priority at all but were simply excluded from qualification under the scheme: ‘This amounts to an attempted redefinition of the statutory class or, putting the point another way, to an attempt to thwart the statutory scheme.’

However, this does not mean that local authorities cannot use their power to decide who qualifies for their scheme in a way that does in fact exclude individuals with reasonable preference. As the Court of Appeal went on to say in **Jakimaviciute:** ‘It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class in the way that [the scheme] attempts to do’.

**R (HA) v Ealing LBC** [2015] EWHC 2375 was a challenge to a policy that provided that only those who had lived in the local area for five years could be considered for an allocation. The applicant and her five children had fled domestic violence from a neighbouring borough and been accepted by Ealing as owed the homelessness duty. The court quashed the policy holding that it breached the Housing Act 1996 in failing to give reasonable preference to someone owed a homelessness duty. Further, it was discriminatory and also failed to comply with s.11(2) of the Children Act 2004 which required the authority to have regard to the need to safeguard and promote the welfare of children.

I**n *R (on the application of H and others) v Ealing London Borough Council [*2017] EWCA Civ 1127, the Court of Appeal upheld the local authority’s appeal against a finding that its policy was unlawful for allocating a proportion (20%) of stock to working households and model tenants. The Court of Appeal held that considered in the round the policy did not discriminate against women and disabled persons who were accorded high priority for the other 80% of the stock.**

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