

Homelessness and threatened homelessness

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This note considers what is meant by homelessness and threatened homelessness. It particularly focuses on the definition of "accommodation" and what will not be considered to be suitable accommodation.

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This note deals with what is meant by homelessness and threatened homelessness under the Housing Act 1996 (HA 1996) with particular reference to the *Homelessness Code of Guidance for Local Authorities (2006)* (www.practicallaw.com/2-385-6876) (Homelessness Code).

For more information on the duties and powers of local authorities under Part VII of the HA 1996, see *Practice note, Homelessness: duties and powers of local authorities under Part VII of the Housing Act 1996* (www.practicallaw.com/1-520-3228).



Definition of homelessness

A person is homeless if he does not, with respect to any accommodation (in the UK or elsewhere), benefit from any of the following:

- An entitlement to occupy any accommodation by virtue of an interest in it or by virtue of a court order.
- An express or implied licence to occupy.
- Occupation of any accommodation as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.

(Section 175, HA 1996.)

Definition of accommodation

The term accommodation is not defined in the HA 1996 and means simply "a place which can fairly be described as accommodation" (*R v Brent LBC ex p Awua* [1996] AC 55). It does not matter for the purposes of section 175 whether accommodation is "settled" (*R v Hillingdon LBC, ex p Puhlhofer* [1986] AC 484 and *Awua*).

Places that do not constitute accommodation include:

- A night shelter: *R v Waveney DC, ex p Bowers* [1983] QB 238. In this case, the claimant slept in a night shelter on a day-to-day basis but was turned away if he arrived and there were no available spaces.
- A prison cell: *Stewart v Lambeth LBC* [2002] EWHC Civ 753. However, the House of Lords in *Birmingham City Council v Ali and others* [2009] UKHL 36 declined to comment on whether a prison cell or a hospital ward could be classed as accommodation (see *Legal update, House of Lords clarifies obligations owed to homeless families* (www.practicallaw.com/0-386-5457)).
- A potting shed (*Puhlhofer*).
- Diogenes barrel (*Puhlhofer*).

Until 2009, it was considered that a women's refuge did not qualify as accommodation (*R v Ealing LBC, ex p Sidhu* (1981-82) 2 HLR 45). However, the House of Lords has doubted the correctness of *Sidhu* in the light of *Puhlhofer* and *Awua*. Consequently, a women's refuge is likely to qualify as accommodation, although the person may nevertheless be homeless if it is not reasonable for her to continue to occupy it (section 175(3), HA 1996 and *Ali*) (see *Accommodation type*).

Accommodation available for occupation

Accommodation is only to be regarded as available for a person's occupation if it is available for occupation by him together with either of the following:

- Any other person who normally resides with him as a member of his family (for example, a spouse or cohabiting partner).
- Any other person who might reasonably be expected to reside with him.

(Section 176, HA 1996.)

"Together with" does not necessarily mean a single unit of accommodation is required; an offer of two self-contained flats situated on the same floor of a building used as a hostel has qualified as "available accommodation". The statutory test will be satisfied if multiple units of accommodation are located in such a way to enable a family to live together in practical terms. (*Sharif v Camden LBC* [2013] UKSC 10.)

Family members normally resident with the applicant

A person will only fall within this group if they meet the following criteria, that is, they:

- Normally reside with the applicant.
- Reside with the applicant as a member of the applicant's family.

Whether or not a person normally resides with the applicant will be a question of fact for the local housing authority (LHA) to determine, challengeable only on conventional grounds of public law. The test of normal residence is unlikely to be satisfied by mere regular visitors to the applicant's home or by a very short period of temporary living with him (see *Legal update, Claimant found to be "intentionally homeless" after moving his children into single room in a shared house* (Court of Appeal) (www.practicallaw.com/4-506-2062)). There is no requirement that the person who normally resides with the applicant is actually doing so at the date of the homelessness application. For example, a child may be normally resident with its mother even if she has left the family home in fear of domestic violence and sought sanctuary in a refuge.

"Member of his family" is not defined in the HA 1996. However, that phrase will include those established members of the household with close blood or marital relationships and cohabiting partners, including same sex partners (*paragraph 8.5, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Finally, there is no additional requirement for it to be reasonable for a member of the applicant's family to reside with him. The LHA must simply decide whether or not the two criteria set out above are met in a particular case.

Other persons who might reasonably be expected to reside with the applicant

It is for the LHA to assess whether any other person might reasonably be expected to reside with the applicant.

The following groups of people will be included in this group:

- A companion for an elderly or disabled person.
- Children who are being fostered by the applicant or a member of his family.
- Members of the family or others who were not living as part of the household at the time of the application but who nonetheless might reasonably be expected to form part of it.

(*Paragraph 8.5, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Persons who would normally live with the applicant but who are unable to do so because there is no accommodation large enough to house them all should be included in the LHA's assessment (*paragraph 8.6, Homelessness Code*).

Where a family has split up, a LHA will need to make a decision as to which members of the family normally reside, or might be expected to reside, with the applicant. As part of that assessment, useful information might include an existing residence order made by a family court indicating with whom the children are to live.

An unborn child does not qualify as a person who might reasonably be expected to reside with the applicant (*R v Newham LBC, ex p Dada* [1996] QB 507).

Right to occupy

If a LHA is satisfied that there is accommodation available for occupation by the applicant and his household, the next question is whether the applicant has any prescribed legal right to occupy that accommodation.

The applicant will only have a right to occupy the accommodation by virtue of the following:

- An interest in it (*section 175(1)(a), HA 1996*) (see *An interest in it*).
- An order of a court that he is entitled to occupy it (*section 175(1)(a)*) (see *An order of a court*).
- An express or implied licence to occupy it (*section 175(1)(b)*) (see *Express or implied licence to occupy*).
- An enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession (*section 175(1)(c)*) (see *Enactment or rule of law*).

An interest in it

"An interest in it" means a legal or equitable interest in the accommodation, including a tenancy, leasehold or freehold ownership. Importantly, the applicant must be entitled to occupy the accommodation by virtue of such an interest. Accordingly, where, for example, an applicant is the tenant of a property but has sublet it to others he is no longer entitled to occupy the accommodation by virtue of his tenancy (only the sub-lessees are entitled to occupy it) and therefore the applicant is homeless.

An order of a court

"An order of a court" will usually take the form of a declaration of a beneficial interest in the accommodation, granted under the Trusts of Land and Appointment of Trustees Act 1996, but might also be an occupation order made by the family courts under the Family Law Act 1996.

Express or implied licence to occupy

Licensees may include the following:

- Children in the home of their parents.
- Lodgers.
- Flat-sharers.
- Persons in hostels or hospitals.
- Employees occupying premises under a service occupancy that is dependent on a contract of employment.

- Friends or family members who have been asked to leave, In these cases a LHA will need to consider whether an applicant's licence has actually been revoked. LHAs should be aware of the possibility of collusion between family members or friends to enable an applicant to become eligible for housing assistance. Where it appears that collusion has taken place, a LHA may find an applicant to be intentionally homeless and as such ineligible for full housing assistance.

The key issues for a LHA to determine are whether an applicant has an express or implied licence to occupy the accommodation and, if so, what its precise terms are (*Fletcher v Brent LBC [2006] EWCA Civ 960*).

Enactment or rule of law

"Enactment" includes an Act of Parliament and regulations, orders, rules and bye-laws made under an Act of Parliament (*section 230, HA 1996*). Examples of persons included in *section 175(1)(c)* of the HA 1996 include the following:

- Former tenants and licensees under the Protection from Eviction Act 1977 (PEA 1977).
- Statutory tenants under the Rent Act 1977. A statutory tenancy is not an interest in land but the statutory tenant nevertheless has a right of occupation by virtue of the Rent Act 1977.
- Spouses, civil partners and some cohabitants who are given a right to remain in occupation of accommodation by the Family Law Act 1996.

Those likely to fall outside *section 175(1)* of the HA 1996 include the following:

- Former tenants or licensees whose tenancies and licences were excluded from the PEA 1977 (*section 3(2B), PEA 1977*).
- An applicant who occupies temporary accommodation provided to him by a LHA while it carries out its enquiries, a review or an appeal under Part VII of the HA 1996 (*Alam v Tower Hamlets LBC [2009] EWHC 44 (Admin)*).
- Those who from the outset have been trespassers and remain so. Thus squatters are statutorily homeless even though no possession order may yet have been made against them.

"Rule of law" is not defined in the HA 1996 but probably refers to the common law. For example, the judge-made rule that a licence to occupy may not normally be terminated without reasonable notice having been given (see for example *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] AC 173*).

Disregarded accommodation

A person will be treated as homeless if either of the following apply:

- They have accommodation but cannot secure entry to it (*section 175(2)(a), HA 1996*) (see *Can the applicant secure entry to the accommodation?*).
- They have accommodation but it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is nowhere he is permitted both to place it and to reside in it (*section 175(2)(b)*) (see *Moveable structures*).

Can the applicant secure entry to the accommodation?

A person will be homeless if he has accommodation but cannot physically secure entry to it.

Examples include:

- Those who have been illegally evicted from the accommodation.
- Those whose accommodation is being occupied illegally by squatters.
- Those whose accommodation is temporarily inaccessible due to natural disasters such as flooding or fire.

(*Section 175(2), HA 1996.*)

In certain cases, legal remedies may be available to the applicant to regain possession of his accommodation. However, a LHA cannot decide that the applicant is not homeless because he has not exhausted all of the legal remedies available to him (*paragraph 8.16, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Section 175(2)(a) of the HA 1996 does not apply to an applicant who cannot travel to accommodation situated overseas (see *Begum v The Mayor and Burgesses of the London Borough of Tower Hamlets [2000] 1 WLR 306*). However, if the applicant cannot afford to return to the accommodation, it will not be reasonable for him to continue to occupy it (see *Accommodation that it will not be reasonable to continue to occupy*).

Moveable structures

Accommodation which comprises a moveable structure may include the following:

- A houseboat.
- A caravan.
- A mobile home.
- Converted vans, buses and boats.

Permitted to place and reside in it

"Reside" in *section 175(2)(b)* of the HA 1996 simply means "live" or "occupy"; it does not require permanence. Accordingly in *R v Chiltern DC, ex p Roberts (1991) 23 HLR 387*, the court held that travelling showmen were neither homeless nor threatened with homelessness while moving between fairgrounds.

If the applicant has permission or an entitlement, usually in the form of a licence, to bring his mobile home onto a designated piece of land and to reside in it, then the applicant is not homeless. However, if the applicant does not have permission or an entitlement both to place and reside in his mobile home on a piece of land, then he is homeless.

A more difficult situation arises where an applicant had permission or an entitlement to place and reside in his mobile home, but such permission has expired and yet no possession proceedings have been brought. If the applicant continues to occupy the land the LHA will have to decide whether or not he is homeless. This will depend on whether it can be inferred from the lack of action by the landowner that the permission is in fact continuing.

Accommodation that is reasonable to continue to occupy

A person shall not be treated as having accommodation unless it is accommodation that it would be reasonable for him (and his household) to continue to occupy (*section 175(3), HA 1996*).

"Continue to occupy" means that the LHA must look at accommodation that an applicant has and is entitled to occupy. It is not restricted to actual occupation (*Waltham Forest LBC v Maloba [2007] EWCA Civ 1281*).

In most cases the crucial test is whether it would be reasonable for the applicant to continue to occupy the accommodation for as long as they will have to do so if the LHA does not intervene (*Birmingham City Council v Ali and others [2009] UKHL 36, at paragraph 46*) (see *Legal update, House of Lords clarifies obligations owed to homeless families (www.practicallaw.com/0-386-5457)*).

A LHA should consider any factor that appears to be relevant to the issue of whether certain accommodation is reasonable to continue to occupy. There are a number of common factors which a LHA should consider, but a LHA **must** consider the affordability of the accommodation in all cases. It may also have regard to the prevailing general housing conditions in its district (*section 177(2), HA1996*).

Accommodation will not be reasonable for the applicant to continue to occupy where:

- The factual circumstances of the applicant and his household are such that the accommodation is not reasonable to continue to occupy.
- The circumstances are such that section 177 of the HA 1996 deems the accommodation to be unreasonable to continue to occupy.

Factual circumstances

Whether, as a matter of fact, accommodation is not reasonable for the applicant to continue to occupy is a broad question for the LHA to determine. There is no simple test of reasonableness. It is for the LHA to make a judgment on the facts of each case, taking into account the circumstances of the applicant and his household. (*Paragraph 8.18, Homelessness Code (www.practicallaw.com/2-385-6876)*.)

Affordability

The LHA must consider in each case whether the accommodation is affordable, that is, it must take into account the following:

- The costs of the accommodation.
- The applicant's financial resources.
- Any child support or maintenance to a spouse or former spouse that the applicant is liable to pay.
- The applicant's reasonable living expenses.

(*Article 2, Homelessness (Suitability of Accommodation) Order 1996 (SI 1996/3204)*.)

Accommodation is not reasonable for the applicant to continue to occupy if the costs of paying to live in it deprive him of the means to provide for the "ordinary necessities of life" (*R v Brent London Borough Council, ex p Baruwa (1997) 29 HLR 915*). What comprises such ordinary necessities may vary according to the applicant's needs and will be a question of fact for the LHA to determine (*R v Hillingdon London Borough Council, ex p Tinn (1988) 20 HLR 305*).

Threatened or actual possession proceedings

Where an applicant has been occupying accommodation as a tenant and has received a valid notice to quit or other notice indicating that the landlord intends to recover possession, a LHA will need to consider whether it would be reasonable for the applicant to continue to occupy the accommodation once the notice has expired (*paragraph 8.30, Homelessness Code (www.practicallaw.com/2-385-6876)*).

In making its decision, the LHA will need to consider all of the factors relevant to the particular case, which may include the following:

- The respective positions of the tenant and the landlord.
- The likelihood of the landlord actually pursuing possession proceedings.
- The burden on courts of unnecessary possession proceedings where there is no defence to the claim.
- The general cost to the LHA.

It is unlikely to be reasonable for an applicant who is an assured shorthold tenant to continue to occupy accommodation beyond the date given in a notice under *section 21* of the HA 1988 where all of the following apply:

- The section 21 notice is valid.
- The LHA are satisfied that the landlord intends to seek possession.
- There would be no defence to the claim for possession.

(*Paragraph 8.32, Homelessness Code.*)

Overcrowding

When a LHA is considering the question of overcrowding it should take into account both statutory overcrowding (as defined by Part X of the Housing Act 1985) and overcrowding that does not amount to statutory overcrowding.

The reason for any overcrowding is not relevant to the question of whether it is reasonable for the applicant to continue to occupy the accommodation. Accordingly, a decision that it was reasonable to continue to occupy accommodation because the overcrowding was due to the expanding size of the applicant's family was quashed in *R v Eastleigh Borough Council, ex p Beattie (No 1) (1983) 10 HLR 134*. However, a LHA can have regard to the degree of overcrowding in the prevailing housing circumstances in its district.

The fact that accommodation is statutorily overcrowded does not necessarily mean that it is unreasonable to continue to occupy (*Harouki v Royal Borough of Kensington and Chelsea [2007] EWCA Civ 1000*).

Physical characteristics of accommodation

It would not be reasonable for the applicant to continue to occupy accommodation if the physical characteristics of it were unsuitable for the applicant's needs (for example, where an applicant is a wheelchair user but the accommodation only has limited means of access).

Accommodation type

Some types of accommodation are only intended to provide very short-term, temporary accommodation in a crisis and LHAs should not regard such accommodation as being reasonable to continue to occupy in the medium and longer-term (*paragraph 8.34, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Examples of such accommodation include the following:

- Direct access hostels.
- Night shelters.
- Women's refuges.

(*Birmingham City Council v Ali and others* [2009] UKHL 36.)

In *Sharif v Camden London Borough Council* [2013] UKSC 10, several of the judges commented on the fact that the accommodation offered in that case (separate units of accommodation on the same floor) was temporary in nature. While on the facts of the case this was acceptable, the judges made it clear that it is possible that such accommodation may not have been considered acceptable if it was being offered as permanent accommodation in discharge of the local authority's housing duty under the HA 1996 (see *Legal update, Separate units of accommodation satisfy housing duty under Housing Act 1996* (Supreme Court) (www.practicallaw.com/4-524-4270)).

People fleeing harassment

In some cases severe harassment may fall short of actual violence or threats of violence likely to be carried out (see *Violence*). In such cases, LHAs should carefully consider whether it would be, or would have been, reasonable for the applicant to continue to occupy accommodation in circumstances where they have fled their home due to the harassment. (*Paragraph 8.34, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Former members of the Armed Forces

Discharged members of the Armed Forces are likely to lose any service accommodation provided to them. The Ministry of Defence will issue a Certificate of Cessation of Entitlement to Occupy Service Living Accommodation six months before discharge, which indicates the date on which entitlement to occupy service accommodation ends. A LHA will then be able to ascertain if an ex-Armed Forces applicant is actually homeless. In such cases, LHAs should not insist on a court order for possession but use the six-month notice period to "ensure that service personnel receive timely and comprehensive advice on the housing options available to them when they leave the armed forces." (*Paragraph 8.33, Homelessness Code* (www.practicallaw.com/2-385-6876)).

Violence

It will not be reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against any of the following:

- The applicant.
- A person who normally resides with the applicant as a member of his family.
- A person who might reasonably be expected to reside with the applicant.

(*Section 177(1), HA 1996*.)



Definition: violence and domestic violence

"Violence" means either violence from another person or threats of violence from another person which are likely to be carried out. The Secretary of State has made it clear that "violence" should not be given a restrictive meaning (*paragraph 8.21, Homelessness Code*).

"Domestic violence" means violence from a person associated with the victim (see *Associated persons*) and includes:

- Physical violence.
- Threatening or intimidating behaviour.
- Any other form of abuse (other than physical violence or threatening or intimidating behaviour) which, directly or indirectly, may give rise to the risk of harm.

(*Section 177(1A), HA 1996 and Yemshaw v London Borough of Hounslow [2011] UKSC 3, at paragraph 28 (see Legal update, Supreme Court extends meaning of domestic violence).*)

Probable that continued occupation will lead to violence: definition

"Probable" means "more likely than not". "Likely", in relation to threats of violence, means "a real or serious possibility".

An assessment by the LHA of the likelihood of a threat of violence being carried out should not be based on whether there has been actual violence in the past. Such an assessment must be based on the facts of the particular case and devoid of any value judgment about what the applicant should or should not do, or have done, to mitigate the risk of any violence (for example, apply for an injunction against the perpetrator). (*Paragraph 8.22, Homelessness Code (www.practicallaw.com/2-385-6876)*). Accordingly, a LHA's decision that an applicant could have invoked legal remedies to prevent further domestic violence was set aside in *Bond v Leicester CC [2001] EWCA Civ 1544*.

However, LHAs may wish to inform applicants of the option to seek an injunction but they are not obliged to do so and should encourage applicants to seek independent advice.

Associated persons

A person is associated with another if they satisfy any of the following:

- They are, or have been, married to each other.
- They are, or have been, civil partners of each other.
- They are, or have been, cohabitants (including same sex partners).
- They live, or have lived, in the same household.
- They are relatives (that is, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson, granddaughter, brother, sister, uncle, aunt, niece, nephew (whether of full blood, half blood or by affinity) of that person or of that person's spouse, civil partner or former spouse or civil partner.
- They have agreed to marry each other, whether or not that agreement has been terminated.
- They have entered into a civil partnership agreement between them, whether or not that agreement has been terminated.
- In relation to a child, each of them is a parent of that child or has, or has had, parental responsibility for the child (within the meaning of the Children Act 1989). A child is a person under 18 years of age.

- Where a child has been adopted or freed for adoption, two persons are associated if one is the natural parent or grandparent of the child and the other is the child or a person who has become a parent of the child by virtue of an adoption order, or who has applied for an adoption order, or someone with whom the child has been placed for adoption.

(Section 178, HA 1998.)

Threatened homelessness

A person is threatened with homelessness if it is likely that they will become homeless within 28 days (section 175(4), HA 1996).

LHAs are advised not to wait until homelessness is a likelihood or is imminent before providing an applicant with advice and assistance (paragraph 8.3, *Homelessness Code* (www.practicallaw.com/2-385-6876)).

In reality, many homeless applicants are likely to be threatened with homelessness rather than being actually homeless when they initially make their application for accommodation or assistance, for example, they may be the subject of an eviction order and have less than 28 days before the warrant for eviction is executed.

Making enquiries

Where a LHA is presented with an applicant who is threatened with homelessness, it must start to make its enquiries under section 184 of the HA 1996; its duty to do so cannot be delayed until the applicant is actually homeless (*R v Newham London Borough Council ex p Khan and Hussain* (2001) 33 HLR 29).

If a LHA decides that an applicant is threatened with homelessness and a duty is owed then the duty may be:

- To take reasonable steps to secure accommodation does not cease to become available for occupation.
- To provide advice and assistance to help an applicant secure that accommodation does not cease to be available for their occupation. The provision of advice and assistance can be offered before a LHA has reason to believe that an applicant may be homeless or threatened with homelessness as part of its homelessness prevention policy or during the 28 days preceding the date of homelessness as part of its homelessness duties under the HA 1996. Where the advice and/or assistance offered does not succeed in retaining the accommodation and the applicant subsequently becomes homeless then they will be covered by the LHA's statutory duties owed under the HA 1996.

(Section 195(2) and (9), HA 1996.)

Previous homelessness applications: private rented sector offer

Where an applicant has made a previous application for assistance and accepted a private rented sector offer and then makes another application within two years as a result of having been served with a eviction notice under section 21 of the *Housing Act 1988*, then they will be treated as threatened with homelessness at the date of the section 21 notice (section 195A(4), HA 1996).

