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# Housing Law E-bulletin

## INTRODUCTION

Welcome to our fifth Housing Law E-bulletin which, as regular readers will notice, has undergone a radical change of format. We hope you approve and welcome any feedback you may have.

There have been a number of significant cases in housing law this quarter. We think the highlights include:

- the long awaited decision on eligibility from the European Court of Justice in the cases of *Ibrahim v Harrow LBC* & *Teixeira v Lambeth LBC*;
- the Supreme Court limiting the application of Article 6 ECHR to homelessness appeals in *Tomlinson V Birmingham CC*;
- the High Court's interpretation of important sections of the Housing Act 2004, concerning tenancy deposit schemes, in *Draycott v Hannells Lettings Limited*.

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## CASE UPDATES

### ***Harrow LBC v Ibrahim* (ECJ Case C-310/08); *Teixeira v Lambeth LBC* (ECJ Case C-480/08)**

The European Court of Justice has given its ruling following 2 references from the Court of Appeal concerning the eligibility of non-EEA nationals for assistance under Part VII HA 1996.

In *Ibrahim* the applicant (“A”) was a Somali national, married to an EU national (“Y”). Y came to the UK in 2002 and was employed in the UK until May 2003. In the meantime A and her children had joined her husband in the UK in February 2003. The children were Danish nationals. The 2 eldest children started state education in the UK. Y then ceased work in May 2003 and claimed incapacity benefit for a time, but was subsequently declared fit for work. He did not return to work, but instead left the UK in 2004 and separated from A. Y returned to the UK in 2006 but never regained the status of a “worker”. A was not self-sufficient, but dependent on means-tested benefits.

In 2007, A applied to the local authority for assistance under Part VII. The local authority found that Y had ceased to be a qualifying person for the purposes of r.6 Immigration (EEA) Regulations 2006 between the time he had ceased work in 2003 and the time he left the UK. He did not regain the status of qualified person on returning to the UK. The local authority found that A’s children did not therefore have a right to remain in the UK under the Immigration (EEA) Regulations 2006 (r.10(3) did not apply because Y had not ceased to be a qualifying person *on* ceasing to reside in the UK but *before* he left the UK). Accordingly A did not have a right to reside under r.10(4) & 14(3). As she had no other right to reside under the Regulations A was subject to immigration control, and therefore ineligible for

assistance under Part VII HA 1996 by virtue of s.185(2) HA 1996.

A argued that she had a right to reside by virtue of the decision in *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99 [2002] ECR I-7091) which pre-dated the 2004 Directive. In *Baumbast* the ECJ had held that the children of an EU worker who had joined him in the UK had a right to remain in the UK to further their education pursuant to Art 12 of EEC Regulation 1612/68 even after the EU national had lost his own right to reside (by ceasing to work in the UK), and further that the children’s primary carer (not an EU national) also had a derivative right of residence while the children remained in education.

In *Teixeira*, the applicant (“T”) was a Portuguese national who came to the UK in 1989 and worked for 2 years. Her daughter was born in 1991. Thereafter T worked intermittently, and her last period of employment in the UK was in 2005. T’s daughter entered education in the UK and came to live with T in March 2007. In April 2007 T applied to the local authority for assistance under Part VII, arguing that although she was no longer a worker, she had a derived right to reside in the UK as her daughter’s primary carer, by virtue of Art 12 EEC Regulation 1612/68 and the decision in *Baumbast*.

In both cases the Court of Appeal had considered that it was not clear whether the applicant had a right to reside in the UK under EU law, and referred a number of issues to the ECJ for determination.

**Held:** Where an EU-national has worked in the UK, his/her children can claim an independent right of residence in the UK while they are in education in the UK, on the basis of Art. 12 of EEC Regulation No 1612/68, even if they do not have a right to reside under EU directive 2004/38 (given effect in UK domestic law by

the Immigration (EEA) Regulations 2006). The parent who is the children's primary carer can also claim such a right. This right to reside is not conditional on having sufficient resources or insurance to be self-sufficient. The right of residence is also not conditional on the EU-national parent having remained a worker in the UK as at the date the child entered education. However, the derived right of residence of the parent who is the primary carer will end when the child reaches the age of 18, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

**Comment:** This decision has obvious implications for decisions as to eligibility for assistance under Parts VI and VII Housing Act 1996. In short, the Immigration (EEA) Regulations 2006 cannot be regarded as a complete code setting out all Convention rights to reside in the UK. The "*Baumbast* exception" continues to apply and is not limited to cases where the primary carer is financially self-sufficient.

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### ***Tomlinson & others v Birmingham City Council* [2010] UKSC 8**

The Appellants denied receipt of letters warning them about the consequences of refusing an offer of accommodation. The issues for the Supreme Court were (i) whether a decision by a local housing authority under the Housing Act 1996 s.193(5) that it had discharged its duty to the applicant was a determination of that person's "civil rights" within the meaning of Article 6 of the ECHR; (ii) if so, whether art.6(1) required that the court hearing an appeal under s.204 of the Act had to have a full fact-finding jurisdiction so that it could determine for itself a dispute of fact.

#### **Held (dismissing the appeal):**

(1) cases where the award of services or benefits in kind is not an individual right of which an applicant can consider himself a holder (characterised by Lord Collins as an "individual economic right") but where it is dependant upon a series of evaluative judgments by the provider as to whether the statutory criteria are

satisfied and how the need for it ought to be met, do not give rise to "civil rights" and therefore to not engage Article 6(1);

(2) applicants' rights to accommodation under s. 193 HA 1996 fall into that category and are not "civil rights";

(3) *Obiter*: The issue of whether the letters were received was incidental to a more searching and judgmental inquiry into the accommodation's suitability. It was a staging post on the way to a broader judgement that had to be made. The absence of a full fact-finding jurisdiction in the court on a s.204 appeal does not deprive it of what it needs to satisfy the requirements of article 6(1).

GSP

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### ***Draycott v Hannells Lettings Limited* [2010] EWHC 217**

On 28<sup>th</sup> February 2008 D entered into a 12 month assured shorthold tenancy agreement with Derby Build Limited and paid a deposit of £2,700 to H. H acted as letting agents for the landlord. It was common ground that the deposit was required to be protected under the provisions of Chapter 4 of the Housing Act 2004. The deposit was registered and lodged with the Deposit Protection Service (a custodial deposit scheme) only on 19<sup>th</sup> May and D was informed of this on 21<sup>st</sup> May 2008. D brought a claim alleging that H was in breach of s. 213(3) HA 2004 because it did not transfer the deposit into the scheme within a period of 14 days beginning with the date on which it was received. The county court judge found in favour of D. H appealed to the High Court.

#### **Held (allowing the appeal):**

(1) S. 213(3) imposes a 14 day requirement for compliance with the initial requirements of an authorised scheme – but the section does not identify the 'initial requirements' because the Act envisages that more than one type of scheme might be authorised, and that their requirements may be different;

(2) on the facts of this case, the initial requirements of the DPS was that the deposit should be paid into the scheme;

(3) therefore, during the period of 12<sup>th</sup> March to 18<sup>th</sup> May,

H was in breach of s. 213(3) – the deposit had not been paid into the DPS within the 14 day time limit;

(4) however, D was not entitled to an order under s.214(4) (ie an award of money equal to 3 times the deposit) in circumstances where H had protected the deposit outside the 14 day period from receipt, but before a claim was issued by D. So long as a deposit is not paid, the statutory protection given to tenants is that the landlord cannot recover possession: s.215 HA 2004.

AD

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### **Barber v Croydon LBC [2010] EWCA Civ 51**

B, a non-secure tenant, suffered from a permanent personality disorder and learning difficulties. In May 2007 he verbally abused and physically assaulted the Council's caretaker. B was only interviewed by the Council after it had served him with a notice to quit. In the possession proceedings, a jointly instructed psychiatrist reported that B's behaviour was related to his medical conditions and that he would not be able to cope like an ordinary homeless person if he lost his accommodation. The parties agreed that B's medical conditions qualified him as a 'disabled person' within the meaning of the DDA 1995. There was no subsequent repetition of B's anti-social behaviour. Prior to the trial in December 2008, the Council decided to continue the possession proceedings, given the seriousness of the incident in May 2007. The trial judge made an immediate order for possession. B appealed, arguing that it was unreasonable for the Council to seek and obtain an order for possession.

#### **Held (allowing the appeal):**

(1) in cases where *Kay v Lambeth LBC* gateway (b) arguments are raised, there are potentially a number of 'decisions' which are amenable for challenge, including the decision to serve a notice to quit, the decision to commence possession proceedings, and the decision to press ahead with proceedings: *Taylor v Central Bedfordshire Council* [2009] EWCA Civ 613 applied;

(2) although it did consider the contents of B's interview and the psychiatrist's report, the Council acted unreasonably in deciding to pursue the possession proceedings because it failed to apply its own policy on

vulnerable persons (ie to explore alternative solutions to prevent future anti-social behaviour) and it had rejected, without explanation, the psychiatrist's view that that incident was linked to B's disabilities;

(3) If *Wednesbury*-type public law defences are permitted to be run in private law proceedings for possession, then an exception to the private law rules against re-litigating previously decided issues has to be recognised. The court will not treat any second action as an abuse of process when it has been necessitated by a local authority having to take further administrative steps in order to satisfy its public law obligations.

AD

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### **R (McIntyre) v Gentoo Group Limited [2010] EWHC 5 (Admin)**

The Ms were assured tenants at 6 Hollywood Avenue ("6HA"). The landlord decided to give them consent to exchange 6HA with another of its assured tenants on the condition that Mr. M first satisfied a court order which related to outstanding rent on his previous property, 78 Rockingham Road ("78RR"). The Ms sought judicial review of the landlord's decision.

#### **Held (dismissing the claim):**

(1) the landlord's decision to permit exchange on the condition that Mr. M first paid outstanding rent arrears in relation to 78RR was amenable to judicial review: *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587 applied;

(2) on the facts, the condition imposed by the landlord was not lawful. It had nothing to do with 6HA, as the amounts related to another dwelling 78RR. It was a condition which could not be lawfully imposed as a matter of private law on any consent to an assignment by them which was not to be unreasonably withheld. The landlord erred in law by proceeding on the assumption that it could impose such a condition;

(3) however, an alternative remedy was and remained available to the Ms by way of an ordinary claim (under the Landlord & Tenant Act 1988). As judicial review exists as a remedy of last resort, the judicial review relief sought was refused.

AD

**Savage v Hillingdon London Borough Council [2010]  
EWHC 88 Admin**

S had been denied assistance under a deposit provision scheme because she was intentionally homeless. In a claim for judicial review, S contended the authority failed to: (i) carry out any proper assessment of her housing needs in accordance with s. 190(4), (ii) provide proper advice and assistance pursuant to s.190(2)(b) since the effect of s.206(1) was that, to qualify as advice and assistance, the provision of suitable accommodation was required and (iii) fettered its discretion with regard to the applicant's eligibility for the rent deposit scheme.

**Held (dismissing the claim):**

S's case that no assessment of her housing needs had been done lacked reality. The authority had been familiar with her history and had assessed her needs in accordance with its s.190 duty. The effect of s.206(1)(c) was not such that to qualify as advice and assistance, help given by an authority had to be to ensure suitable accommodation was available. Such a construction of s.206 would oblige an authority to ensure accommodation was provided to all homeless persons. However, Hillingdon had acted unlawfully in excluding S from the scheme on the basis she was homeless intentionally and had not considered whether to offer help because of S's own particular circumstances. Under its own code of guidance, assistance with deposits was specifically mentioned as a possible way of helping the intentionally homeless.

GSP

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**Yemshaw v Hounslow LBC [2009] EWCA Civ 1543**

The Appellant had applied to the local authority for assistance under Part VII HA 1996, claiming to have fled the matrimonial home because of emotional, psychological and financial abuse by her husband. The local authority decided that she was not homeless, because it was reasonable for her to continue to occupy the matrimonial home, and it was not probable that this would lead to physical violence or threats of physical

violence.

**Held (dismissing the appeal):**

The local authority's decision was upheld. The term "violence" in s.177(1) HA 1996 requires some form of physical contact, and should not be given the wider meaning contended for at paragraph 8.21 of the 2006 Code of Guidance. *Danesh v RB Kensington & Chelsea* [2006] EWCA Civ 1404 followed.

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**Secretary of State for Environment Food & Rural Affairs v Meier & others [2009] UKSC 11**

Where trespassers occupy a plot of land (Plot A) and threaten, if evicted, to occupy another entirely separate plot of land owned by the Claimant (Plot B), the court cannot make a possession order in relation to Plot B, as the Defendants cannot be ordered to deliver up possession of property that they do not occupy. *Drury v Secretary of State for Environment Food & Rural Affairs* [2004] EWCA Civ 200 disapproved, *University of Essex v Djemal* [1980] 1 WLR 1301 distinguished. However an injunction order may be made.

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**UK Housing Alliance (North West) Ltd v Francis [2010] EWCA Civ 117**

In a lease-back sale agreement, the terms of sale provided 70% of the purchase price was payable on completion and 30% ("the Final Payment") payable on the expiry of 10 years. If the Housing Alliance terminated pursuant to a contractual right, there was no right to the Final Payment.

**Held (dismissing the appeal):**

(1) The Final Payment was not a deposit within the meaning of Part 6 of the Housing Act 2006 (Tenancy Deposit Scheme). The references in Part 6 to "paid", "received" and "payable" were inapt to describe a

situation in which the tenant paid nothing, but was a person to whom money would be paid.

(2) F's contingent right to payment of a debt was not a right the loss of which could rise to relief against forfeiture

(3) The terms of the sale agreement were not contrary to the Unfair Terms in Consumer Contracts Regulations (1999). The retention of the Final Payment on the grant of a court order for possession did not create a significant imbalance. The tenancy could not be brought to an end by a trivial breach because termination only occurs on a court order. There might be a significant imbalance if the original contract price was below market price and the rental and the rental (or sales) market was buoyant at the time of possession, but the matter has to be judged at the time the contract is made. The term of the agreement that the landlord retain the final payment was not contrary to the requirements of good faith. The term was fully, clearly and legibly expressed and given appropriate prominence.

*GSP*

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