Housing: Some recent cases and legislative developments

Right to Buy

Lee v Highland Council 2015 GWD 38-601

Ms Lee made an application to the lands tribunal under section 68(4) the Housing (Scotland) Act 1987, seeking a finding that she had a right to purchase her house. The council had refused her application on the ground that the house was within an area that had, in 2010, been designated as a pressured area in terms of section 61B. As the applicant's tenancy had commenced after 30 September 2002, her right to buy had been suspended by the designation. The applicant argued that: (1) the council's letter of refusal was not a valid notice of refusal under section 63, as it did not expressly state that her application had been refused; (2) the right to buy was referred to in the tenancy agreement, and notwithstanding the designation of the area as a pressured area, the applicant had a contractual right to purchase the property; (3) the council had failed to inform her of the designation of the pressured area under section 23(5) of the 2001 Act.

Refusing the application, the tribunal held: (1) A purposive approach should be applied as to the words required to constitute a notice of refusal. Reading the letter as a whole and accepting that it dealt with an application to purchase, it was impossible to conclude that it was anything other than a notice of refusal. Ms Lee had been informed that her right to buy had been suspended, which could only lead to the conclusion that her application to purchase had been refused, the letter had a note of finality and it had stated the reasons for refusal as required under section 68(3). (2) The tenancy agreement did no more than refer to the fact that she might have a statutory right to buy, it gave no assurance that future legislation would not impact on that right, and there was no indication in the agreement that the right was other than statutory. In any event the tribunal had no jurisdiction to uphold a right to buy which was said to exist independently from the relevant statute. (3) The applicant had not received direct notification of the designation that part of her property fell within a pressured area, or the consequences thereof. Also, the council had failed to comply with the requirement under section 61B(6) of the 1987 Act (to take reasonable steps to publicise the designation). However, it was questionable whether the obligation in section 23(5) of the 2001 Act had the effect that landlords should write to all existing tenants to inform them of the designation. In any

event, the tribunal had no jurisdiction to deal with claims based upon any failure to provide information under section 23.

Repairing Obligations

McManus v City Link Development Company Ltd and Others [2015] CSOH 178

In this case the pursuers averred that, as the result of uses made of a site in Motherwell, before it was developed for housing, it was contaminated with chemicals harmful to health, which remained present on the site during and after development. The three defenders were the developers, the company said to be environmental consultants on the development, and the pursuers' landlords, Lanarkshire Housing Association. The action proceeded to a debate before Lord Jones, all three defenders arguing preliminary pleas. This is a fairly complex case, in which the Lord Ordinary issued a lengthy judgment, which can be found on the Scotcourts website. For the purposes of this update, the author proposes only to consider the case against the pursuers' landlords (the third defenders), which was dismissed by Lord Jones.

Between November 2000 and March 2009, the first pursuer had lived in a house said to be affected by contamination, under a tenancy agreement with the third defenders. The second pursuer lived with him there between 2004 and 2009. That house was initially an assured tenancy under the 1988 Act, to which the repairing obligations under schedule 10 of the 1987 Act applied. On 29 September 2002 it became a Scottish secure tenancy on that date, after which it was subject to the repairing provisions contained in schedule 4 of the 2001 Act. On or about 23 March 2009, the pursuers became joint tenants of the same landlords at a nearby house, also said to be subject to contamination. This was also a Scottish secure tenancy under the 2001 Act. The pursuers case against the third defenders, in respect of the assured tenancy, was that they were in breach of a term of the tenancy agreement, implied at common law, "that the landlord provided a house that was in a tenantable and habitable condition at the beginning of the tenancy". The also averred that it was an implied contractual term under the provisions of section 113 of and schedule 10 to the 1987 Act that the house was, at the commencement of the tenancy, in all respects reasonably fit for human habitation. As regards the 2001 Act, the pursuers averred that it was a statutory condition of a secure tenancy that the landlord must ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation. It was further averred that the first

house was not tenantable and habitable, nor was it in all respects reasonably fit for human habitation, "as a result of being built on contaminated land and the construction of the house permitted contaminated vapours to permeate the said house." The second house was not in all respects reasonably fit for human habitation, for the same reasons.

From paragraph [179] onwards, Lord Jones made the following points:

- As regards the initial assured tenancy, the pursuers' case against the third defenders was based on a misconstruction of the implied terms on which they founded. Whether it is that subjects let must be wind and watertight, tenantable and habitable, or fit for human habitation, the various authorities, statutory and common law, when properly understood, make it clear that the landlord's obligations relate to the repair of the fabric of the let property itself. The pursuers aver no defect in the fabric of the subjects.
- What the pursuers do aver is that property was not tenantable and habitable nor reasonably fit for human habitation "as a result of being built on contaminated land and the construction of the house permitted contaminated vapours to permeate the said house." However, it was not uninhabitable, in the sense intended by the implied conditions, either because of its location or its construction.
- As regards the tenancies under the 2001 Act, the same reasoning applied to any case based on breach of the statutory conditions in schedule 4.
- The third defenders submitted that the 2001 Act does not, in any event, confer any private right of action for personal injury on the pursuers. That matter was not fully argued, on either side, and the judge preferred not to make any finding on it.

In his article *Todd v Clapperton: the evolving law on repairing obligations and claims against landlords of residential property* 2010 SLT (News) 31-38, the author expressed the view that, in contrast with previous legislation, the repairing obligations in schedule 4 to 2001 Act are not terms implied in the parties' contract. [Lord Jones expresses the same view at paragraph 177 of his judgment]. However, the author suggested was suggested, in relation to tenancies under the 2001 Act, that the issue of whether the statutory duties are contractual obligations may well be academic, because local authorities and housing associations invariably use standard form tenancy agreements which restate the schedule 4 duties (or something similar) as contractual duties of the landlord. Perhaps that was not

the case in relation to the tenancy agreement in the instant case; otherwise the pursuers would not have relied solely on the statutory provisions.

Homelessness

LW v Stirling Council [2015] CSOH 162; 2016 SLT 35

LW petitioned for judicial review of a decision of the local housing authority that she was intentionally homeless. She had previously been the tenant of a short assured tenancy. She fell into arrears of rent, having failed to pay a shortfall between rent and housing benefit. The landlord terminated the tenancy and raised proceedings. Decree was granted against her in September 2014. She applied to the council as a homeless person. Following its initial decision (that she was intentionally homeless), LW sought a review, arguing that her significant mental health problems had not been taken into account. The decision was affirmed on review. The council decided that whilst LW had recently suffered periods of significant mental health difficulties, that had not been throughout the duration of the short assured tenancy. She had initially been assessed as being competent and having the capacity to manage her financial affairs and had had sole responsibility for doing so. She had had sufficient income to meet her rent payments, had understood her responsibilities to pay rent and keep her benefits up to date. She had demonstrated the ability to do so, and had been provided with a significant amount of housing support in order to assist her to maintain the tenancy. Her tenancy had ultimately failed because of her own actions. The petitioner submitted that (1) there was no proper basis in fact to support the determination; (2) the decision had failed to properly and reasonably take into account her significant psychiatric history and ongoing treatment; and (3) the decision was *Wednesbury* unreasonable.

Refusing the petition, Lady Wolffe held: (1) the petitioner's case was not one of total or complete incapacity, and there was no medical assessment that would evidence her suffering from mental illness at the time when she initially fell into arrears. It was not suggested that she had been incapable at the time she had assumed the private tenancy. The council had addressed the relevant question in its review decision, it could neither be said that the council had had no basis of fact from which the requisite intentionality could be found nor that the decision was one that no reasonable decision taker, properly directing itself as to its task and on the basis of the material before it, could have reached. (2) The petitioner's second ground amounted to no more than a complaint that the

council had not given certain factors the weight that she would have wished, which was not a permissible ground of judicial review. Once there was relevant material before a decision taker, the weight to attach to it was a matter for it to assess, and it could not be said that the council had misapprehended a potentially decisive element of the evidence on material before it. (3) As there had been material before the council on the basis of which a finding of fact of intentionality could be made, it could not be said that its decision had been *Wednesbury* unreasonable or perverse.

English Cases

Tenant consultation

Bokrosova v Lambeth LBC [2015] EWHC 3386 (Admin)

Ms Bokrosova was one of a number of tenants of Lambeth LBC living in the Cressingham Garden Estate. In March 2015, Lambeth decided that the properties on the estate no longer met the local authority's housing standard. It announced that it would hold a public consultation on five options: (1) refurbishing all the homes; (2) refurbishing some of the homes, demolishing others and building new ones; (3) refurbishing a minority of the homes, demolishing the majority, and building new ones; (4) medium-intervention development; and (5) comprehensive redevelopment. During the consultation, the local authority decided that the cost of refurbishing the homes to the required standard was unaffordable. It therefore stopped consulting on the three refurbishment options and concentrated instead on the two redevelopment options. Ms Bokrosova sought a judicial review of that decision, arguing that the local authority had breached the section 105 of the Housing Act 1985 ("Consultation on matters of housing management") when it decided not to proceed with the first three options. [Section 105 is broadly similar, though not identical, to section 54 of the Housing (Scotland) Act 2001.]

Granting the application, the court held that section 105 obliged the local authority to make arrangements enabling tenants to be informed about its proposals on matters of housing management and to make known their views on any such proposals [as does section 54(1) of the 2001 Act]. Specifically, the local authority was obliged to consider any representations made to it in accordance with those arrangements before making a decision. [Under section 54(1) of the 2001 Act the landlord "must have regard to any representations made to it"]. Although s.105 did not refer to consultation, it was, in

substance, an obligation to consult. [It is submitted that section 54 of the 2001 Act is also, in substance, an obligation to consult].

In *R. v North and East Devon HA Ex p. Coughlan* [2001] QB 213, the Court said: "…whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

In the instant case, the local authority had advertised a detailed and sophisticated programme of consultation. However, its decision to redevelop the estate reneged on that programme and meant that it was unable to consider the representations that would have been generated had the programme been followed. The local authority had not made it clear that it could halt the consultation if it decided that an option was unaffordable. Even if it were assumed that a local authority could not be required to continue with an advertised consultation if it transpired that an option was unaffordable, not enough had changed to entitle the local authority to stop consulting on the first three options. By deciding to remove those options from the consultation, the local authority had acted unlawfully.

Homelessness and Allocations

Samuels v Birmingham City Council [2015] EWCA Civ 1051; [2015] HLR 47

Ms Samuels lived with four children (a son, a daughter, a niece and a nephew) in a private tenancy. She was in receipt of housing benefit, but here was a monthly shortfall of £151.49 between housing benefit the rent. She fell into rent arrears and her landlord gave her notice. In July 2011, she left the property and her nephew and niece went to live with her mother. In June 2012, Ms Samuels made an application for assistance to the council. She provided details of her income and expenditure for the time when she had been living in the rented accommodation. The council decided that she was intentionally homeless because she could have afforded to remain in the property. She requested a review of that decision, which was upheld on review. She did not appeal to the county court. In July 2013,

Ms Samuels made a second application to the council. It again decided that she had become intentionally homeless from the rented property because she could have afforded to remain there. Ms Samuels requested a review of the decision. On this occasion she provided new and further details of her monthly expenses, which totalled £1,234.99, including £750 on food and household items. On 11 December 2013, the reviewing officer decided that the property had been affordable for the appellant. The decision letter recorded that he considered that £750 per month on food and household items was excessive and that the appellant could have budgeted so as to afford the rent shortfall. The decision letter did not expressly refer the relevant paragraph in the English Code of Guidance, as regards affordability of subjects. [Paragraph 17.40 of the *Homelessness Code of Guidance for Local Authorities* (July 2006) recommends that authorities should: " … regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit. … Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials. …"].

Ms Samuels appealed to the Court of Appeal, arguing: (1) As social security benefits are not intended to cover housing costs, the starting-point in considering whether an applicant can afford to remain in a property should be a presumption that an applicant who is dependent on benefits does not have sufficient flexibility in his income to allow for payment of housing costs. (2) The reviewing officer had failed to take into account paragraph 17.40 of the Code. (3) The reviewing officer had failed to give sufficient reasons for his decision; in particular, he should have explained why he considered £750 per month on food and household items was excessive and specified what items of expenditure the appellant should have reduced.

Dismissing the appeal, the Court held: (1) In deciding whether accommodation is affordable for an applicant the authority can take into account all forms of income (including social security benefits of all kinds) and all relevant expenses (including rent and other reasonable living expenses). There was no basis for treating state benefits differently from other income. (2) Although the respondent authority's decision letter did not expressly refer to paragraph 17.40 of the Code, it was clear from the decision letter that the reviewing officer had had that guidance in mind. (3) The reviewing officer had been entitled to decide that £750 per month on food and household items was excessive

and that the appellant could have afforded to pay the rent shortfall. He did not have to give details about why he considered £750 on food and household items to be excessive nor did he have to specify what reductions in expenditure the appellant should have made to meet the rent shortfall.

One of the interesting aspects of this case is the Court's discussion (at paragraphs 33 to 39) of the approach to be taken by the local authority to the Code of Guidance. The Court observed that the importance of the guidance, and the need for it to be clear from the decision that proper consideration has been given to the relevant matters required by the statute and the guidance, are emphasised in the decision of the Supreme Court in *Nzolameso v Westminster City Council* [2015] UKSC 22; [2015] H.L.R. 22, in particular in the passage at [31]–[35] setting out the concerns of the Secretary of State. The local authority's decision *must* make clear that the relevant matters have been considered. But for that purpose it is not generally necessary to refer expressly to individual passages in the guidance concerning the matters considered. It is sufficient if the substantive consideration given to the issue showed that due regard had been had to the paragraph.
R. (on the application of HA) v Ealing LBC [2015] EWHC 2375 (Admin); [2016] PTSR 16

The claimant sought judicial review of the council's allocations policy. The claimant and her five children had fled their home to escape domestic violence. They went to the Ealing area and made a successful application to the council under the homelessness legislation. Under section 166A(3) of the Housing Act 1996, it had to ensure that reasonable preference was given to, *inter alia*, those who were homeless, those owed a duty by any local housing authority, and people who had to move on welfare grounds. However, Ealing's allocations policy provided that households who had not been resident in its area for the previous five years were not eligible for social housing. It had, in exceptional circumstances, discretion when making housing decisions ("the exceptionality provision"). The claimant's application under the allocations scheme was rejected on the basis that she had not been resident in the area for five years. In its decision, the local authority gave no indication as to whether consideration had been given to her particular circumstances, or whether the exceptionality provision might have applied to her. The claimant provided evidence that the imposition of a residence criteria restricted access to housing for people who had fled domestic violence and that those experiencing domestic violence were overwhelmingly likely to be women. She submitted that: (1) the policy was contrary to the 1996 Act in that it established an absolute exclusion from the housing register for those who did not meet the residency requirement, including those who

fulfilled the "reasonable preference" criteria under section 166A(3); (2) it unlawfully discriminated against women who were victims of domestic violence contrary to ECHR article 14 and section 29 of the Equality Act 2010 (which concerns discrimination in the exercise of public functions) because, on the evidence, women were far more likely to be victims of domestic violence and so were significantly less likely to establish the residency criteria; (3) the local authority had failed to apply the exceptionality provision in its policy.

The application for judicial review was granted by Mr Justice Goss: (1) No consideration had been given to the section 166A(3) criteria under the exceptionality provision, nor could it have been under the local authority's policy. Although a residency requirement was an entirely appropriate provision in relation to admission on to a social housing list, it should not preclude the class of people who fulfilled the reasonable preference criteria. The local authority's policy did not provide for the giving of reasonable preference to prescribed categories of persons as required under section 166A(3) of the Act; consequently, the policy was unlawful. (2) Article 14 could only be considered as a parasitic right: it required another article to be engaged. The issues were whether the difference in treatment fell within the ambit of ECHR article 8, thereby engaging article 14, and whether the difference in treatment was justified. There was no enshrined right to a physical home; the right was to enjoyment of a family life. However, in reality that could only be enjoyed in settled accommodation and so there was a sufficient link. No rational justification had been advanced for treating women fleeing from domestic violence to the local authority's area differently from other applicants for social housing. The residency criterion was contrary to article 14. Section 29 of the 2010 Act did not depend upon the discrimination being parasitic on another article. The policy amounted to a breach of section 29 by being indirectly discriminatory. (3) Even if the court had erred in relation to the lawfulness of the policy, there had still been a failure to apply it to the claimant's case. There was no evidence that consideration had been given to whether her case was exceptional, the discretionary provision relied upon by the local authority. Accordingly, there was a failure to apply its own policy and the decision was unlawful.

A requirement to ensure that reasonable preference was given to homeless persons also exists as regards housing allocation policies of landlords in the social rented sector, in terms of section 20(1)(b) of the Housing (Scotland) Act 1987. In the author’s experience, it is also quite common for the allocations policies of Scottish social landlords to have exceptionality provisions, and provisions which require some local connection with the

area. This case is of interest, in identifying the ways in which operation of such provisions can prove problematic. It is also another example of the Equality Act 2010 having an impact in housing cases.

Mirga v Secretary of State for Work and Pensions; Samin v Westminster City Council [2016] UKSC 1; [2016] 1 WLR 481

The Supreme Court considered two separate cases in relation to domestic laws which limited access by EU nationals to income support (Mirga) and assistance under the housing legislation (Samin). Ms Mirga was ineligible for income support because she was a "person from abroad"; that was on the basis that she could not claim to be a "worker" as she was a Polish national who had not completed 12 months' registered employment under the Accession (Immigration and Worker Registration) Regulations 2004 and thus could not be a "qualifying person" for the purpose of the Immigration (European Economic Area) Regulations 2006; there was no question of her having been a "jobseeker", a "self-employed person" or a "student" under the 2006 Regulations, nor could she claim to be a "self-sufficient person". Mr Samin was an Austrian citizen who had come to the UK in 2005. He was in poor health and had not worked since 2006. He applied for housing under the homelessness provisions of the Housing Act 1996, but his application was refused. The local authority's position was that: Mr Samin was not a "worker" within the 2006 Regulations, as he was now permanently incapable of work; in any event, he could not claim to be a "worker", as he had not worked for 12 months in the UK; accordingly, he was not a "qualified person" under the regulations, from which it followed that he was "ineligible" for housing assistance; further, he could not claim to be "a self-sufficient person" within the regulations, as he had no assets and no health insurance. The issues were (1) whether the domestic regulations which had led to the impugned decisions infringed the right under Treaty on the Functioning of the European Union article 21(1) to "reside freely" within the EU and/or the right under article 18 not to be discriminated against on nationality grounds; (2) whether there should have been an investigation as to whether it was proportionate to refuse income support and housing assistance.

Dismissing the appeals, the Court held: (1) The appellants' TFEU rights had not been infringed. The right accorded by article 21(1), on which Ms Mirga relied, was qualified by the words "subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect". The "measures" included Directive 2004/38, which was concerned with "the right of citizens of the Union and their family members to

move and reside freely within the territory of the member states". It was a significant aim of the Directive that EU nationals from one Member State should not be able to exercise their rights of residence in another Member State so as to become "an unreasonable burden on the social assistance system". Article 7(1) limited the right of residence after three months to those who were workers, self-employed, students or persons with sufficient resources and health insurance "not to become a burden on the social assistance system of the host member state". Under article 24, EU nationals' right of equal treatment in host Member States was "subject to ... secondary law" and they could be refused social assistance "where appropriate". Having regard to the 2003 Treaty and the Directive, because Ms Mirga had not done 12 months' work in this country, she could not claim to be a "worker", and, because she was not a "jobseeker", "self-employed", a "student" or "self-sufficient", she could validly be denied a right of residence in the UK and therefore could be excluded from social assistance. In those circumstances, it had to follow that article 21(1) could not assist her. The position was similar in relation to article 18, on which Mr Samin relied. That did not constitute a broad or general right not to be discriminated against. First, its ambit was limited to "the scope of the Treaties", which meant that it only came into play where there was discrimination in connection with a right in the TFEU or another EU Treaty. Second, the art.18 right was "without prejudice to any special provisions contained [in the Treaties]". (2) Where a national of another Member State was not a worker, self-employed or a student, and had no, or very limited, means of support and no medical insurance, it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another Member State, save perhaps in extreme circumstances. It would also place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.

Housing Benefit

Rutherford v Secretary of State for Work and Pensions [2016] EWCA Civ 29

This is the latest important decision concerning a challenge to the so-called “bedroom tax” regulations, on the ground that they are unlawfully discriminatory. The Court of Appeal considered appeals involving families with disabled children who required an additional bedroom for overnight carers, and female victims of domestic violence living in accommodation adapted under the sanctuary scheme. One of the applicants (T), was a

child with a severe disability who lived with his grandparents. He required 24-hour care. They were in poor health and received respite care twice a week from carers who stayed with them overnight. They lived in a three-bedroom housing association property which had been adapted for T's needs. Another applicant (X) was a victim of domestic violence who lived with her son in a three-bedroom local authority house. The house had been adapted to make it secure under the sanctuary scheme. Until the Housing Benefit (Amendment) Regulations 2012 came into force, introducing regulation B13 of the 2006 Regulations, the appellants had all received housing benefit which covered their full rent. However, their benefit was reduced because they were therefore deemed to be under-occupying their houses. They all received discretionary housing payments which made up the shortfall in their housing benefit. However, they contended that they ought to come within the defined classes of persons set out in regulation B13 and that the failure to make provision for them breached their rights under ECHR article 14. In particular, X argued that the failure to make provision for female victims of domestic violence amounted to sex discrimination because it had a disproportionate effect on a group which was overwhelmingly female. She also maintained that the secretary of state had breached his public sector equality duty under the Equality Act 2010 section 149. In both cases, at first instance the judge concluded that, looking at the overall scheme, the policy of dealing with those affected by discretionary housing benefit payments was not manifestly without reasonable foundation. In X's case he also found that the secretary of state had not breached his public sector equality duty because it was unnecessary to look at every eventuality for the discharge of that duty.

Allowing the appeals, the Court held: (1) Those who were within the sanctuary scheme and in need of an adapted "safe" room were few in number and capable of easy recognition. There would be little prospect of abuse and little need for monitoring if they were included within the defined categories in regulation B13. Regulation B13 discriminated against women within the sanctuary scheme. The question was whether that discrimination was justified. In *R. (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584 the Court had made a clear distinction between a broad class for which discretionary housing payments were appropriate and a narrow class for which they were not. X's case was within the narrow class. In those circumstances, the secretary of state had failed to show that his reasons amounted to an objective and reasonable justification for the admitted discrimination in regulation B13. (2) Those within the sanctuary scheme who would be adversely affected by regulation B13 were few in number. The secretary of state had addressed the issue of

gender-based discrimination. In the circumstances, it was not a breach of the public sector equality duty to fail to identify that tiny and specific group in the equality impact assessment. When the group had been identified, the problem had been addressed by the provision of discretionary housing payments. (3) The best interests of children in T's position should have been a primary consideration for the secretary of state in devising the Regulations. That was underlined by the way in which the Master of the Rolls, in *MA*, had acknowledged that the secretary of state had been entitled to provide for a greater degree of protection for children than for adults who were in the materially similar situation of having a disability-related need for an additional bedroom. There was a difference in treatment in regulation B13 concerning accommodation needed for carers of disabled adults and accommodation needed for carers of disabled children. The secretary of state had not addressed how that difference could be justified by reference to the best interests of the child. Discretionary housing payments were intended to provide the same sum of money, but that did not justify the different treatment of children and adults in respect of the same essential need within the same Regulation. Neither the Regulation nor the policy behind it addressed the best interests of the child as a primary consideration. T's appeal therefore succeeded for those reasons as well as those which applied to X.

European Court of Human Rights

Ali v United Kingdom Application No.40378/10 [2015] HLR 46

In 2006, Ms Ali made a successful homeless application to Birmingham City Council. On 14 March 2007, an officer of the authority telephoned to offer her accommodation. On the same day, the authority sent her a letter, which Ms Ali said she did not receive, in which it was said that the authority's duty to her would come to an end if she refused the offer of accommodation without good cause. She viewed the property and refused the offer. On 21 March 2007, the authority wrote to her stating that its duty had been discharged. Ms Ali sought a review that decision, claiming that the council had not discharged its duty to her because it had failed to notify her in writing of the consequences of refusing the offer. The reviewing officer found that the applicant had received the letter and upheld the original decision. Ms Ali appealed to the county court, contending that the court should determine as an issue of fact whether the offer letter had been received. Dismissing the appeal, the judge held that the decision as to whether the letter had been received was for the reviewing officer and not the court. Ms Ali then appealed to the Court of Appeal,

arguing: (i) a review decision was a determination of her civil rights for the purposes of article 6(1) of the European Convention on Human Rights; (ii) the reviewing officer was not an independent and impartial tribunal; and (iii) where the questions on review are disputes of fact, the county court should hear evidence and determine them itself in order for the procedure to comply with article 6.

The Court of Appeal dismissed her appeal. The applicant further appealed to the Supreme Court. Her appeal was dismissed: [2010] UKSC 8; [2010] 2 AC 39; [2010] HLR 22. It was held that article 6 does not apply to an award of services or benefits in kind which is not an individual right of which the claimant can consider himself the holder but which depends on a series of evaluative judgments by the provider of the services or benefits as to whether statutory criteria are satisfied. A majority of the Supreme Court also held that, even article 6 applied, the procedure for reviews was compatible with it.

The applicant applied to the European Court of Human Rights. The Court held that there had been no violation of article 6. Firstly, it disagreed with the decision of the Supreme Court as to the applicability of article 6. By virtue of the relevant statutory provisions, the applicant had a legally enforceable right to accommodation, even though she could not identify any specific property over which she had that right. That is more akin to a claim for social security benefits than it is to a claim for social or other services, where the authorities have a greater degree of discretion and resource considerations may also be relevant. It is now well-established that disputes over entitlement to social security or welfare benefits generally fall within the scope of article 6(1) [See, for example, *Tsfayo v United Kingdom* (2004) 39 EHRR SE22.]

Secondly however, the Court accepted that there were sufficient procedural safeguards such that there was no violation of article 6. The reviewing officer was required to be senior in rank to the original decision-maker; the officer could not have been involved in the original decision; the applicant was entitled to make representations, which the officer was obliged to consider; the applicant was entitled to be represented; the officer was required to give reasons for any decision adverse to the applicant; and the applicant had to be informed of her right of appeal to the county court. Although the county court did not have jurisdiction to conduct a full rehearing of the facts, the appeal available to the applicant did permit it to carry out a review of both the facts and the procedure by which the factual findings of the officer were arrived at. In particular, the applicant could—and initially did—argue that in reaching the decision the officer had taken into

account irrelevant considerations and/or acted under a fundamental mistake of fact; that the Council had failed to make adequate inquiries to enable it to reach a lawful decision; that the decision was one which no rational Council could have made; that it fettered its discretion; and that it acted in breach of natural justice [i.e. the well recognized grounds for judicial review]. The scheme at issue in the present case was designed to provide housing to homeless persons. It was therefore a legislative welfare scheme covering a multitude of small cases and intended to bring as great a benefit as possible to needy persons in an economical and fair manner. With regard to the "determination" of rights and obligations deriving from such a social welfare scheme, when due enquiry into the facts has already been conducted at the administrative adjudicatory stage, article 6(1) of the Convention cannot be read as requiring that the judicial review before a court should encompass a reopening with a rehearing of witnesses.

LEGISLATION

Primary Legislation

Immigration Act 2014, part 3; Immigration Bill 2015

Part 3 of the Immigration Act 2014 has the purpose of restricting the ability of illegal immigrants to access the private rented sector. It disqualifies certain classes of persons from renting, and provides that a landlord must not "authorise" an adult to occupy premises under a "residential tenancy agreement" if the adult is disqualified. Authorisation of an unlawful occupation is a criminal offence, liable to fine not exceeding £3,000. There are defences, such as the assertion that the landlord carried out prescribed identity checks before the tenancy was granted.

Part 3 of the 2014 Act was initially only brought into force on a trial basis, from 1 December 2014, in Birmingham, Wolverhampton, Dudley, Walsall and Sandwell. The government has proved reluctant to publish any analysis of the scheme, but the Joint Council for the Welfare of Immigrants his published its analysis (which it co-ordinated with the government). It shows that 42 per cent of landlords were less likely to rent to anyone who could not produce a British passport, with 27 per cent expressing a reluctance to rent to those with foreign accents or names. Landlords expected the relevant documents to be provided prospective tenants immediately and were less likely

to rent to those who could not do so. Only 35 per cent of landlords had read and understood the Code of Practice on preventing discrimination in letting.

Following the general election, the Prime Minister announced that the Act would be extended nationwide and it came into force in England on 1 February 2016. The legislation extends to Scotland, but as yet, there is no date set for it for it to come into force there. In September 2015, the Scottish Government's Minister for Housing and Welfare, Margaret Burgess, wrote to the UK Government Immigration Minister James Brokenshire to express concerns about the roll out of the Immigration Act 2014 to Scotland and the linked Immigration Bill 2015, which was introduced to Westminster earlier this month.

The Immigration Bill 2015 (clause 12) introduces a new criminal offence, which is committed by a landlord if: (1) his property is "occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement"; and (2) the landlord knows or had reasonable cause to believe that this is so. The penalty is up to five years' imprisonment (on indictment, 12 months on summary conviction) and/or a fine. The Bill also introduces a new section 33D of the 2014 Act. If the Secretary of State becomes aware that a person without a right to rent occupies the property, he can serve a notice on the landlord. The landlord can then give the tenant 28 days' notice. That notice will bring the tenancy to an end and is enforceable "as if it were an order of the High Court". There is no appeal mechanism for either the landlord or the tenant against the service of either notice. The landlord's notice to his tenant seems intended to have the effect of terminating the underlying tenancy and removing all security of tenure. That would appear to suggest that the landlord can evict the tenant without a court order. There is no provision for rent repayment, whether as a condition of execution or at all. So, where a tenant has paid rent in advance, the landlord is under no obligation to refund the rent for the "lost" period.

These points are discussed in more detail in an excellent article by Justin Bates in the Journal of Housing Law (J.H.L. 2016, 19(1), 4-10). "No passport = no tenancy: the Immigration Act 2014 and the Immigration Bill 2015", to which the present author acknowledges his debt.

Secondary Legislation

The Courts Reform (Scotland) Act 2014 (Commencement No. 5, Transitional and Saving Provisions) Order 2015.

On 1 January 2016, the new statutory regime for appeals to the Sheriff Appeal Court came into force. This applies to summary causes, in terms of article 4 of the order. The rules for appeals are now much more detailed: see the Act of Sederunt (Sheriff Appeal Court Rules) 2015. It is no longer possible, in ordinary actions, for appeal to be made directly to the Inner House. The time limit for lodging appeals is now 28 days, rather than 14 days, as was previously the case.

The Housing (Scotland) Act 2014 (Commencement No. 4 and Amendment) Order 2015
The Private Rented Housing Panel (Tenant and Third Party Applications) (Scotland) Regulations 2015– this seems to bring in procedural requirements for all applications, not just TPAs.
The Private Rented Housing Panel (Landlord Applications) (Scotland) Regulations 2015 SSI 403

These statutory instruments extend the jurisdiction of the Private Rented Housing Panel, and introduce new procedural requirements for applications. Local authorities will be able to make "third party" applications for *inter alia*, enforcement of the repairing standard under section 13 of the Housing (Scotland) Act 2006. Landlords will be able to make applications for the inspection and repair of properties, under section 181(4) of the 2006 Act.

The Housing (Scotland) Act 2014 (Commencement No. 5 and Consequential Provision) Order 2015

This SI allows the Scottish Government to make regulations concerning the registration and training of letting agents. It also amends the Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013 in consequence of sections 22 (carbon monoxide alarms), 23 (electrical safety inspections) and 25 (third party application in respect of the repairing standard) of the Act.

The Private Housing (Tenancies) (Scotland) Bill

The Private Housing (Tenancies) (Scotland) Bill was introduced in the Scottish Parliament on 7 October 2015. According to the Explanatory Notes (para 4): "The purpose of the Bill is to introduce a new type of tenancy for the private rented sector in Scotland to replace the short assured tenancy and assured tenancy for all future lets." It is envisaged that from the date on which the new statutory regime comes into force, any tenancy created in the private sector will be a "Private Residential Tenancy" ("PRT"). The Housing (Scotland) Act 1988 will continue to apply existing assured tenancies, but it will no longer be possible to create new assured tenancies.

The Bill has 8 parts, 63 sections, and 5 schedules.

Part 1 sets the conditions that must be met for the creation of a PRT. Sections 1 and 2 are similar, but not identical, to sections 12-14 of the 1988 Act. In particular, section 1(1)(c) and schedule 1 provide for a list of tenancies which are excepted from the Act, similar to the list in schedule 4 of the 1988 Act. Section 4 of the Bill contains an interesting new provision to the effect that "if an agreement would give rise to a tenancy but for the fact that it does not specify an ish, it is to be regarded as giving rise to a tenancy".

Part 2 concerns "statutory terms", which are to be terms of every PRT. Section 5 confers on the Scottish Ministers a power to issue regulations prescribing the statutory terms. These must (as a minimum) prescribe the five terms set out in schedule 2: (a) requiring the landlord to give receipts for payments of rent in cash; (b) rent may only be increased in accordance with part 4 of the Act; (c) the tenant is obliged to notify the landlord of the name of any person over 16 residing at the tenancy, and his/her relationship to the tenant; (d) prohibition against assignation and subletting without consent; (e) reasonable access to be given to the landlord for repairs etc. The regulations will be made following consultation. They may prescribe statutory terms additional to the schedule 2 terms.

Part 3 places a duty on the landlord to provide a written tenancy agreement, and specified information to the tenant. Where a tenancy agreement is not provided, the tenant may apply to the First-tier Tribunal ("FTT"), asking it to draw up terms. The FTT may also sanction failure to provide a tenancy agreement, or the specified information, by ordering the landlord to pay an amount not exceeding three months' rent. This provision is similar to the sanction for failure to comply with the Tenancy Deposit regulations (sanction of up to three times the deposit).

Parts 4 and 5 of the Bill are the longest, and most complex. Part 4 sets out a new statutory system regulating increases of rent in private sector tenancies. Rent increases may only take place once a year. Advance notice of a proposed rent increase (in the prescribed form) must be given in all circumstances. The notice may then be referred by the tenant to a rent officer (provided the property is not in a "rent pressure zone"). The rent officer then sets the new rent. Either party may then appeal to the FTT, which then sets the rent. The rent to be set (both by the rent officer and the FTT) is an "open market rent" which takes into account certain factors, and disregards certain other factors, listed in section 27. By section 29, rent officers and the FTT must make publicly available the information about rents they have taken into account in determining the open market rents for let properties under section 27.

Under chapter 3 of part 4, a local authority may make an application to the Scottish Ministers asking that all or part of the authority's area be designated as a "rent pressure zone" ("RPZ"). The Scottish Ministers may then (following consultation) issue regulations which, in effect, place a cap on rent increases in that area. By section 31, any rent-increase notice issued for a property within an RPZ cannot increase the rent by a percentage greater than the consumer price index plus one percentage point plus a figure specified in the regulations.

Part 5 sets out the circumstances under which a PRT may be brought to an end. When the 2016 Act comes into force, it will effect a major break with the statutory system that has operated in respect of private sector tenancies in Scotland since the first Rent Acts. Under the Rent Acts (and the 1988 Act), the statutory tenancy, with its attendant rent control and security of tenure, comes into effect once the tenancy contract has been terminated. Thus, under the 1988 Act, the termination of the tenancy triggers the *statutory* assured tenancy under section 16. Under the new system, statutory regulation (including, as we have seen, control of rent increases) will be imposed from the beginning of the tenancy. In this respect, PRTs will be more like Scottish secure tenancies under the 2001 Act. Among other things, this means that it will no longer be necessary for either party to terminate the tenancy contract by a notice to quit. Instead, the party wishing to terminate a PRT will simply serve the appropriate statutory notice. Also, whilst the PRT must have an "initial period" (see below), once that expires, the tenancy will have an indeterminate duration, to terminate on the date on which a termination notice by either the landlord or the tenant takes effect, or when an eviction order is granted by the FTT. This will limit the adverse consequences of serving a defective notice: if that happens, another notice may be served immediately.

Part 5 begins with section 35, a short and somewhat sweeping provision, to the effect that a PRT "may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part". This seems to rule out

various ways in which a tenancy may terminate at common law, say by renunciation, the parties entering into a new agreement, the operation of a break clause, total or partial destruction of the subjects, and so on. In practice, it may be possible to achieve the same effect as say, a renunciation or a break, by the tenant terminating the PRT, with the latter's consent if that is necessary (a notice by the landlord would have to rely on one of the statutory grounds).

Termination by the tenant takes place under chapter 2 of Part 5. Notice must be given in writing (though there is no prescribed form), stating the date on which it is to take effect, being any day after the end of both: (a) the initial period, and (b) the minimum notice period. Period (b) depends on the length of time that has expired since "the tenant became entitled to occupy the let property": 28 days where the landlord receives the notice six months or less after that date; 56 days if longer. Under section 39(2), the landlord can agree to a termination notice which is given within the initial period, or which does not give adequate notice under the Act.

At the beginning of chapter 3 of part 5 (termination at the landlord's instigation) section 40 provides that the PRT will end if the landlord has served the statutory "notice to leave" on the tenant, and the tenant is no longer in occupation. There is, therefore, a relationship between section 40 and ground 9 in schedule 3 (that the tenant is not in occupation of the tenancy - see below). Presumably it is intended that the abandonment ground will be used where there is some dispute which requires resolution by the tribunal, or where the position is uncertain. By contrast the landlord can simply proceed to repossess under section 40, without an order from the FTT, where the tenant has agreed to leave (section 40 has the heading "consensual termination"). There is perhaps a lack of clarity in the relationship between section 40, ground 9, and section 23 of the Rent (Scotland) Act 1984, which prohibits eviction without proceedings in court. Is it intended that an application to the FTT will be equivalent to court proceedings, for the purposes of section 23 of the 1984 Act? There is nothing in the Bill to that effect.

Section 41 provides that on an application by the landlord, the FTT will issue an eviction order, if it finds that any one of the grounds in schedule 3 is established. The application must be accompanied by copy of the "notice to leave", which has been served on the tenant, in the prescribed form. It is not possible to apply during the initial period of tenancy, except where certain of the grounds apply. For most of the grounds, the notice period is 84 days. However, for certain of the grounds (which involve fault on the part of the tenant, or non-occupation), the period is 28 days. The shorter period also applies where the notice is served on a day not more than six months after the tenant become entitled to take up occupancy under the tenancy.

In the pre-Bill consultation documents, it was envisaged that, in comparison with schedule 5 of the 1988 Act, the grounds for possession would be fewer, and simpler. There is indeed one fewer (16, as opposed to 17 under the 1988 Act), but the grounds are certainly no less complex than under the existing legislation. The new grounds are follows; where there is equivalent or similar ground under the 1988 Act, that is noted.

1. The landlord intends to sell the property
2. The property to be sold by lender (ground 2 1988)
3. Landlord intends to refurbish (ground 6 1988)
4. Landlord or family member intends to live in property (ground 1(b) 1988)
5. Landlord intends to use for non-residential purpose
6. Property required for religious purpose (ground 5 1988)
7. No longer an employee (ground 17 1988)
8. No longer a student
9. Not occupying let property
10. Breach of tenancy agreement (ground 13 1988)
11. Rent arrears (grounds 8, 11 and 12 of 1988)
12. Criminal behaviour (ground 15(a) 1988)
13. Anti-social behaviour (ground 15(b) HSAS88)
14. Landlord has ceased to be registered
15. HMO licence has been revoked
16. Overcrowding statutory notice.

Readers with an interest in this area are invited to reflect not only on the grounds that are new to the Bill, but also the 1988 grounds which have been discarded (e.g.: 1(a) - landlord previously resided at property; 7 – inherited property; 9 – landlord wishes to make alternative property available; 14 and 16 - deterioration of condition of house or common parts or furniture etc.).

All of the grounds are effectively mandatory, except 10 (which is only mandatory if the tenant has "materially failed" to comply with one of the prescribed statutory terms of the tenancy). The rent arrears ground (11) applies if the tenant has been for three or more consecutive months continuously in arrears of rent, and that at any point during that period, for an amount equal to or greater than one month's rent, provided that the arrears of rent are not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit. That sets an extremely low bar. It means that eviction could be mandatory where the tenant was never in arrears for more than one month's rent, and has paid the arrears in full by the time the FTT hearing takes place. Moreover ground 11 also has a discretionary sub-ground where there have simply been arrears for at least three consecutive months, irrespective of the amount.

As regards grounds 1, 3 and 5: there have been other "landlord intends" grounds in the past (such as ground 6 under the 1988 Act). The courts have tended to impose the proviso that the landlord must have both a genuine desire to carry out the action in question, and a reasonable prospect of actually bringing about the result, such that there is an intention rather than a mere aspiration. Standing the drafting of grounds 1, 3 and 5, one might question whether the issue of the practicability of the proposed intention is capable of being considered by the FTT.

Sections 47 to 49 provide for a former tenant to make an application to the FTT for a "Wrongful Termination Order" ("WTO"). This is may be made where the FTT is satisfied that "it was misled into issuing an eviction order" or, in the case of consensual termination under section 40, if the tenant "was misled into ceasing to occupy the let property". On a WTO being made, the FTT may impose a penalty not exceeding three month's rent. The author has some difficulty making sense of these provisions. The Explanatory Notes and Policy Memorandum accompanying the Bill do not assist. It is thought that the remedy may be directed at cases in which the landlord was able to secure an eviction order (or the tenant's consent to termination) on the basis of a stated intention to do one of the things described in grounds 1, 3 or 5, when, in truth, he had no such intention. In that case, the tenant may then make an application for a WTO if the landlord does not follow through on his stated intention. However, a person may have a genuine intention to do something, which is then not carried out, due to some supervening event. How is the tenant to know if that is the case? Furthermore, sections 47 to 49 arguably offend against the principle that legal proceedings ought to achieve finality in determining a dispute. They appear to encourage the tenant to check up on the situation at the property, once she has left. Moreover, if the landlord *has* secured the eviction of a tenant from his home by deceiving the FTT, one might wonder whether three months' rent is a sufficiently severe sanction.

It was anticipated (given the terms of the pre-Bill consultation documents) that the "initial period" of the PRT would be 6 months. However, section 51 provides that the "initial period" simply "ends on whatever date the landlord and tenant have agreed is its end date." Failing such agreement, a period of six months is imposed. It is then provided that "the Scottish Ministers may by regulations make provision governing how an agreement between a landlord and tenant as to the end date of an initial period may be validly made." Presumably the regulations will impose some degree of control over the circumstances in which parties might agree a period of less than six months. Part 6 allows for succession to a PRT by a spouse, civil partner, or cohabitee.

Part 7 provides for consequential and transitional provisions, which were summarised in the first paragraph of this article. The author understands that it is unlikely that the new form of tenancy will become operational until the end of 2017, at the earliest. It

will be necessary for the Scottish Ministers to consult on certain issues (for example, the statutory terms of the PRT). Also, the implementation of the new system relies on the FTT having the capacity to deal with its new jurisdiction under the 2016 Act (as well as the transfer of 1988 Act cases from the sheriff court, under section 16 of the Housing (Scotland) Act 2014). That may not be straightforward.

Part 8 covers regulation making powers, interpretation, and so on.

Adrian Stalker
21 October 2015