Hardwicke Building

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PUBLIC LAW NEWSLETTER

Welcome to the second edition of Hardwicke Building's Public Law Newsletter. In this edition we discuss some of the key issues occupying our time such as the complaints procedure for social services and the NHS as well as some decisions which may be of interest to you. If you have any comments or suggestions for future editions contact Louise Poppelwell on louise.poppelwell@hardwicke.co.uk

Chambers News

We are delighted to announce that Hardwicke Building won third place in the Chambers of the Year category of The Lawyers Awards 2009.

Social Services and Health Services Complaints

The complaints procedure for both Social Services and the NHS has been radically altered (and simplified) by the introduction of a new regime introduced by Social Services and NHS Complaints Procedure Regulation 2009/309.

The new procedures maintain the same rule that complaints must be brought within 12 months after the date on which the complaint occurred, however, the rest of the procedures have been streamlined in order to more effectively identify the nature of the complaint: and have more joint working between the NHS and Social Services where necessary. The Regulations set out a series of standards which all service providers should abide by when dealing with complaints, including the need for efficiency and adequate investigation. There are limits as to what sort of complaints can be brought under these Regulations (outlined under Regulation 8 – which are, in the main complaints by an NHS Trust about a local authority : about Freedom of Information: or about employee/employer disputes). The New Regulations also make it a mandatory requirement that bodies co-operate with each other in the handling of any complaint.

It should be noted that all complaints about care providers (which do not relate to Social Services exercise of their statutory duties) should be made direct to the Care Quality Commission www.cqc.org.uk, which regulates and inspects all care providers.

The new procedure in respect of local authorities provides that a complaint can be made electronically, orally, or in writing. The authority has to provide a written record of the complaint if it is made orally. It must acknowledge the complaint within 3 working days. At that stage, the authority must offer to discuss with the complainant the mechanics of the complaint and the time in which a response will be received. If there is no agreement on this, then the authority can impose a period for investigation. There are no time limits in place by which a complaint has to be resolved, but it must be resolved both speedily and efficiently. Once the investigation is completed, the CEO has to sign a report which sets out the nature of the investigation and the conclusions reached. Once this stage has occurred, an individual can then go to the Local Government Ombudsman to deal with the complaints. As can be seen, this is a much simpler system than the old three tier complaints process.

The NHS Trust procedure is similar. Patients can always use PALS as a first, informal port of call to resolve on the spot issues. For formal complaints either about the NHS or about an independent provider (but the PCT can refer the complaint to the independent provider) then the process is the same as set out above for local authorities. The new complaints procedure abolishes the right to an independent stage of review to the Health Services Commission has been abolished (as the HSC itself has been) . Once the NHS Trust has dealt with the complaint, the patient can then take a claim to the Health Service Ombudsman.

In Wales, a Public Service Ombudsman deals with both health and social care complaints.

Let's hope that this system is more effective and efficient than the one that it replaces! Given the need in many judicial review claims to show that all alternatives to court action have been taken, the need for an effective complaints procedure has never been more necessary to avoid recourse to the courts.

Fiona Scolding

A move away from "Reasonable Preference" ?

The Government's recent policy document – "Building Britain's Future" – presented to Parliament in June 2009 contains the wonderfully vague "promise" that

"52...we will change the current rules for allocating council and other social housing, enabling local authorities to give more priority to local people and those who have spent a long time on a waiting list."

Putting aside the question of what is meant by "local people" it should be appreciated that local housing authorities (LHAs) can already exercise a reasoned discretion and afford a certain priority to those not obviously within the "reasonable preference" categories, provided for at section 167(2) of the Housing Act 1996 (e.g. those who are homeless, living in insanitary conditions and/or need to move on medical or welfare grounds), to whom a LHA must demonstrate reasonable preference in allocating accommodation.

In R (on the application of Ahmad)-v-Mayor & Burgesses of the London Borough of Newham [2009] UKHL 14 the House of Lords, in allowing the local authority's appeal (and in particular finding that section 167 did not require a LHA to accord priority as between the "reasonable preference" applicants by reference to the relative gravity of their needs), put the requirement to show reasonable preference to such groups in context, Baroness Hale of Richmond in particular commenting:

"19. It is accepted that the council are entitled to allocate properties to people who do not fall within the reasonable preference groups. It is accepted that they may take into account wider housing management considerations as well as the needs to which reasonable preference must be given. Thus no-one has suggested that the very favourable treatment given to under-occupation is unlawful...

21...some preference has to be given to the reasonable preference groups over existing tenants who want to transfer. The council have sought to do this by allocating 95% of the properties which become available for choice based letting to people...in the reasonable preference groups and only 5% to voluntary transfers. Once it is accepted that reasonable preference does not mean absolute priority, and that it is reasonable for a housing authority to take wider housing management considerations into account, it is difficult to say that Newham were not entitled to strike the balance which they have struck."

Now of course it is a question of judgment as to whether the balance has been "struck right" by any LHA in drawing up its allocation policy. It is also right to say that the legislation and guidance would undoubtedly need to change in order to allow, for example, LHAs to give real "priority to local people" on that basis alone (as opposed to any concept of urgent housing need), if that is indeed what the Government intend. Indeed Baroness Hale at paragraph 16 of her judgment gives the example of a policy "that people coming from outside the borough had priority over those living within it" as one that may be seen by the courts as irrational.

Baroness Hale concludes her judgment in Ahmad by giving a Puhlhofer-style warning (very much supported by Lord Neuberger of Abbotsbury) that this whole process is essentially one for each LHA to consider, and a challenge through the courts against any particular policy would be "unlikely" to succeed:

"22...where the question is one of overall policy, as opposed to individual entitlement, it is very unlikely that judges will have the tools available to make the choices which Parliament has required a housing authority to make."

Andrew Lane

Public Law Defence for trespasser fails

In Stokes v Mayor and Burgesses of the London Borough of Brent [2009] EWHC 1426 (QB) King J dismissed an appeal brought against the decision of the County Court to make a summary possession order against a trespasser on a travellers site. The Appellant contended that the Judge should not have dealt with the matter in a summary manner but should have made directions for trial including disclosure in order that she could ascertain whether the authority were in breach of obligations to her. She relied upon Article 8 alleging that she had a public law defence to the possession claim.

All of the Appellant's arguments were rejected by the Court and it was held that on the information available to

the authority there was no prospect of the court holding that this case fell within the exceptional class in Kay v Lambeth London Borough Council; Leeds v Price [2006] UKHL 10; [2006] 2 A.C. 406. Further the Court accepted the submission of the Respondent that the Appellant's suggestion that disclosure was essential was an attempt to shift the burden of proof and that the obligation was upon the Appellant to show a prima facie case that the authority had acted unlawfully.

Kerry Bretherton

View From the School Yard.

Education law has not lost its power to surprise. Two decisions of the courts have caught my eye in recent weeks: one intellectual, the other highly practical.

The Court of Appeal gave judgment in R (ota E) v Governing Body of JFS School and Others [2009] EWCA Civ 626 on 26 June and placed the Race Relations Act 1976 back into prominence for education lawyers. The admission arrangements used to determine oversubscribed admission to JFS (formerly Jews' Free School) were unlawful; requiring the applicant's mother to be Jewish by descent or conversion is a test of ethnicity and not, as the School, the Department of Children Families and Schools and the United Synagogue argued a purely religious test. The case turned on questions of motive and causation: "A religious motive will not excuse discrimination on racial grounds". Applying the religious law of the Torah may be the motive – 'ok' said the Court, but they went further and asked what was the outcome? The Court was clear in its view the reason M was not admitted was because his mother was not Jewish (she had converted but not in a manner recognised by the Orthodox Jewish faith). The court recognised there were theological grounds why M was not to be considered Jewish, but it was equally clear this was not the ground of non-admission, that was because he was not Jewish and that went to ethnicity and not religion. Ethnicity was the reason for non-admission; religion was the motive. The admission arrangements were unlawful. "The motive for the discrimination, whether benign or malign, theological or supremacist, makes it no less and no more unlawful".

Back at the coal face I was asked to advise in relation to another school admission decision; an IAP's errant approach to the need to follow the new admissions code. Over the weekend the client decided he wanted to proceed, so pleadings were drafted on Monday, a bundle put together and the claim was issued in Manchester on Tuesday. I drafted the urgent consideration form and asked for expedition of the acknowledgement of service and an expedited rolled-up permission/substantive. The Court responded on the Wednesday: granting expedition and setting the matter down 10 days later. From issue to hearing in a matter of 2 weeks: reasons to cheer the regionalisation of administrative law. The Court has been happy to ensure the hearing takes place in Liverpool for the convenience of the parties. It appears to me there is a well of goodwill plumbed deep between Cardiff, Birmingham, Leeds and Manchester. The new Practice Direction 54D expects parties to issue in the locality closest to the Claimant, subject to a number of other factors. The legal romantics amongst you might miss the lofty grandeur of those favoured administrative courts 1 to 9 in the RCJ, but with such judicial responsiveness, it's an offer not to be missed.

John McKendrick

Weaver: Housing Associations are Public Bodies

In London & Quadrant Housing Trust v R (on the application of Weaver) & Equality and Human Rights Commission (Intervenor) [2009] EWCA Civ 587 a majority of the Court of Appeal (Rix L.J. dissenting) held that the housing association's act of terminating a tenancy was not a private act, because of the context in which the act occurred. It was conceded that the housing association was a hybrid public body and so the only remaining issue was whether the act of terminating the tenancy was a private act. In reaching the decision account was taken of the source and nature of the activities were public when considering the landlords reliance on public finance and the fact that it operated in close harmony with local government. The landlord provided a public service and had charitable objectives. Notwithstanding the fact that that the act of termination was a contractual act, it was so much part of the public function in providing social housing that it was a public act rather than private and so amenable to challenge on a human rights basis.

While the Court emphasised that the determination of the public status of a body was fact specific, the reality is that the criteria adopted by the Court are such that the overwhelming majority, of housing associations are likely to meet the public function criteria identified in Weaver. The implications for housing associations are substantial; quite apart from public law defences in possession claims it is likely that their allocation and other policies will be amenable to challenge by way of judicial review. It is anticipated that London and Quadrant will seek to appeal this decision and so this decision is unlikely to represent the final word on this issue.

Kerry Bretherton

Upcoming Seminars

Deprivation of Liberty: avoiding unlawful conduct in residential care
23rd September 2009 5.30pm – 7pm; 5pm Registration
Topics to include:

- What is deprivation of liberty
- How to defend a deprivation of liberty case
- What steps need to be taken to avoid having such a case

The seminar will be given by Alison Meacher and Fiona Scolding and chaired by Barbara Hewson of Hardwicke Building.

The seminar will be followed by drinks and nibbles and is free of charge.

Challenging Public Law and Human Rights Act Submissions in Possession Proceedings
30th September 6pm - 7pm; 5.30pm Registration

This seminar will look at the nature and availability of Human Rights Act and public law defences to otherwise mandatory possession claims in the light of the decisions in Kay & others-v-Lambeth LBC: Price & others-v-Leeds City Council (2006) 4 All ER 128 and Doherty & others-v-Birmingham City Council (2009) 1 All ER 653, and see how they have developed since then. It will also consider appropriate "good practice" that may be employed by local authorities and registered providers to discourage such defences and litigation tactics to minimise their impact.

The seminar will be given by Andrew Lane and Laura Tweedy of Hardwicke Building's Social Housing Team.

The seminar will be followed by drinks and nibbles and is free of charge.

If you or your colleague(s) would like to attend or if you have any questions please contact Marketing Manager Louise Poppelwell on 0207 242 2523 or email louise.poppelwell@hardwicke.co.uk

The members of Hardwicke Building's Public Law division have specialist skills and experience in a range of public law matters including social housing, education and human rights.

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George Pulman QC	1971 (1989)	Maggie Bloom	1994	John McKendrick	1999
John Friel	1974	Clive Rawlings	1994	David Lawson	2000
Stephen Lennard	1976	Brendan Mullee	1996	Denis Edwards	2002
Barbara Hewson	1985	Fiona Scolding	1996	Dean Underwood	2002
Karl King	1985	Alison Meacher	1998	Sarah Venn	2002
Deborah Hay	1991	Nicola Muir	1998	Morayo Fagborun-Bennett	2004
Kerry Bretherton	1992	Alastair Redpath-Stevens	1998	Ajmal Azam	2006
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