

Housing Team Legal Bulletin

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Homelessness; discharge of section 193 duties; allocations; determining priorities

[Birmingham CC v Aweys and others \[2008\] EWCA Civ 48 judgment](#)

The Court of Appeal has handed down judgment in this important case relating to the duties owed to the ‘homeless at home’ – persons owed the main housing duty under section 193 but who have continued to reside in accommodation which the authority has decided was not reasonable for them to continue to occupy.

The applicants complained that Birmingham City Council was acting unlawfully when, after it had accepted duties towards them all under section 193(2) (ie. agreed that they were eligible, homeless, in priority need of accommodation and not intentionally homeless) it sought to perform that duty by leaving them where they were whilst it hunted for accommodation suitable for the applicants and their families. Many of the applicants had waited significant periods of time (in some cases several years), due both to some prevarication by the council and strains on its resources.

The council had also adopted an allocation policy which gave priority to street homeless applicants over the ‘homeless at home’.

Collins J held that the council was in breach of its Part 7 duties because, as it had already found that it was not reasonable for the applicants to continue to occupy the accommodation, it could not possibly be said that the council was fulfilling its duty to secure that (suitable) accommodation was provided. He further held that the allocations policy wrongly made a distinction between the two types of homeless applicant.

The council appealed and the Court of Appeal upheld the decision of the judge. Ward LJ stated that it was not open to the council to leave the applicants at home while they hunted for alternative accommodation. He found that the section 193 duty arises as soon as the four relevant elements are satisfied. Arden LJ stated that it would not be open to an authority to assert that it was entitled to rely on having an interval of time for the performance of its duties under section 193.

The Court also upheld the judge’s decision on the allocation point. There was no justification for differentiation between the homeless who have been given different treatment when

they were in fact owed the same duty and should have been given equal treatment.

The effects of this judgment are likely to be widely felt. On the one hand it is likely to be easier for applicants owed the section 193 duty to require the swift provision of suitable accommodation. On the other, authorities may start tightening up the circumstances in which they will agree that it is not reasonable for an applicant to occupy their own existing accommodation to avoid having a duty to re-house immediately foisted upon them.

Part VI allocations; eligibility; drug use.

[R \(Dixon\) v Wandsworth LBC \[2007\] EWHC 3075 \(Admin\) judgment](#)

A person is ineligible for local authority accommodation under section 160A (1) (b) Housing Act 1996 if (i) he is guilty of behaviour that would entitle a local authority to a possession order; and, (ii) in the circumstances, the authority consider him to be unsuitable to be a tenant by reason of that behaviour.

The claimant had been a joint secure tenant of a council flat between 1983 and 2005 – his joint tenant then left and filed notice to quit, bringing the tenancy to an end. The claimant applied to the defendant authority for another property. It was initially agreed that he could stay at his flat until such time as an alternative 1 bedroom property was found. He then committed an offence of possession of a Class A drug (one gram of cocaine). In March 2006 he was found in possession of a small amount of cannabis and cautioned. Following these offences the authority took the view he was no longer eligible for accommodation (section 160A) and told him to leave the flat.

He sought a review of that decision contending that it was only if his behaviour was serious enough to warrant an outright order for possession that such a finding could be reached – which was not (so he said) the case here.

The authority upheld their decision on review, finding that the claimant’s behaviour was “unacceptable and behaviour against which the county court would be able and willing to grant an outright possession order”. The reviewing officer found that the claimant’s “problems with substance misuse are very long standing” and that, consequently, he would find his misuse difficult to overcome.

The claimant sought judicial review on the ground that the review decision was *Wednesbury* unreasonable - averring

that the authority had failed to give proper weight to a range of factors when arriving at its decision.

The claim was dismissed. The authority had reached a decision that it was entitled to make. Though there was no express reference to the length of the claimant's residence, that was a matter well known to the authority and there was no reason to believe that it had not been taken into account. Similarly there was no reason to believe that the authority had not taken into account the claimant's offer of an undertaking or his overall conduct of the tenancy and the absence of complaints before 2006. Further, the reasons provided were deemed sufficient to permit the claimant to know how the decision had been arrived at.

Possession claims; criminal convictions; court's discretion

Sandwell MBC v Hensley (2007) EWCA Civ 1425 [judgment](#)

The council sought possession against a secure tenant on grounds 1 and 2. Though he had modest rent arrears the main issue in the case was the fact that the tenant had been convicted of various criminal offences relating to the cultivation of cannabis. The most recent of those convictions (in late 2005) resulted in his being sentenced to 9 months in custody, and prompted the claim for possession.

The council prayed in aid the fact that the tenant had been convicted of possession with intent to supply cannabis in October 1999 and of cultivation of cannabis in August 2004.

Neither party called live evidence but the district judge read statements filed from both the council and the tenant and heard submissions from counsel on both sides. The council averred that the tenant had given over much of his property to his cultivation enterprise and had a range of hydroponics equipment installed. The tenant claimed he had not caused nuisance to any of his neighbours by his actions and that the cannabis grown had been for his own personal use, and that he had not committed any further breaches by the date of trial. The district judge found it reasonable to make a possession order but then decided to suspend its enforcement.

The council appealed and the Court of Appeal allowed the appeal. There was insufficient justification provided by the trial judge for her decision. In apparently accepting that the tenant was determined to turn over another leaf the judge failed to balance the fact that in his statement the tenant had described cultivating cannabis as 'his hobby'. An outright order for possession was substituted.

In reviewing the relevant caselaw (specifically *Bristol CC v Mousah (1997) 30 HLR* and *Stonebridge Housing Action Trust v Gabbidon [2002] EWHC 2091*) Gage LJ stated that he would be cautious about accepting that there was a general principle that where a tenant has been convicted of a criminal offence, there must be exceptional circumstances before the court can suspend an order for possession rather than making an outright order. He nonetheless found that the effect of *Mousah* was to:

"...stress the serious nature of a breach of a condition which involves the committing of a criminal offence. The more serious the offence, the more serious the breach. Convictions of several offences will obviously be even more serious. In such circumstances, it seems to me that the court should only suspend the order if there is cogent evidence which demonstrates, as Ward LJ put it in Manchester County Council v Higgins EWCA Civ 1423, a sound basis for the hope that the previous conduct will cease."

This case is likely to be relied upon by landlords to assist in their applications for possession following criminal convictions. However it does nothing to change the basic principle that questions of reasonableness and postponement ought to be decided on the facts of any given case. It also reaffirms the restraining hand placed on *Mousah* by the later decision in *Gabbidon*.

Practitioners should note the dangers of not calling oral evidence in a case where after a serious offence a court needs that "sound basis for the hope that the previous conduct will cease". Had the county court judge heard oral evidence and expressed a view that she believed that the defendant had turned over a new leaf that would have been much more difficult for the CA to have interfered with. Moreover, the need for careful drafting of witness statements in cases based on a criminal conviction is underlined by this case where the reference to running a cannabis factory being "a hobby" ! plainly became a hostage to fortune.

The decision of the judge was also criticised on the basis of inadequate reasoning and it should be remembered that in such cases it is open to the parties to ask the judge for more detailed reasons before an appeal is heard.

The decision is open to criticism in that the Court of Appeal substituted its own decision no less than 12 months on from the possession hearing, when one might have thought that 12 further months without any breach of the postponed order would have been highly relevant as to the exercise of that discretion and therefore the matter should have been remitted to the judge.