Fair and Flexible? The New Allocations Guidance

The publication of the new statutory guidance on social housing allocations for local authorities on 4th December 2009 concluded one of the most significant years to date for the law relating to allocation of social housing under Part VI of the Housing Act 1996. 2009 started with the first House of Lords decision on allocations in the case of ***R (on the application of Ahmad) v Newham LBC*** [2009] UKHL 14, which reversed a number of previous court decisions that had interpreted Part VI as requiring allocations policies to give cumulative preference to those falling within a number of reasonable preference categories (s167 HA 96). Then part way through the year the House of Lords re-emphasised that the courts should be slow to interfere with a local authority's allocations policy but nonetheless went on to uphold the striking down of Birmingham City Council's policy as being unlawful (***Birmingham CC v Ali*** [2009] UKHL 36). Then finally, continuing on the same theme of freedom and flexibility for local authorities in the framing of their own allocations policies came the new code of guidance that local authorities must have regard to when creating their own schemes (s169 HA 96).

The new statutory guidance has three objectives that every local authority must achieve, being: support for those in greatest need (recognising the reasonable preference categories), providing settled homes for those who have experienced homelessness, and promoting greater equality and clearly meeting equalities duties. In addition, the guidance sets out objectives that every local authority should seek to achieve in framing their policies, being: greater choice and wider options for prospective and existing tenants, creating more mixed and sustainable communities, greater mobility, making better use of housing stock, policies which are fair and considered to be fair, and support for people in work or seeking work. As the title of the guidance suggests there is a strong emphasis on flexibility for individual local authorities in how they frame their policies but at times the reader might be excused for thinking that this is at the expense of doing what it says on the tin, namely, providing guidance. For example, it stresses the importance of informing an applicant of decisions made in relation to their application and their right to a review, as well as the procedure on review, but it misses the opportunity to provide a universal recommended review procedure. Notwithstanding this, the following principles or recommendations can be extrapolated from the guidance:

(1) The removal of the requirement for cumulative preference is confirmed.

(2) Simple banding has a number of advantages over points based or more complicated systems.

(3) There needs to be a means for prioritising between those with a similar level of need. The simplest way is by reference to waiting time but others include behavior and local connection.

(4) It is strongly recommended that allocation schemes are put in place that reflect the Government's objectives and which take into account the needs and priorities of the local area.

(5) Common housing registers, common allocation policies and the interrelationship between RSL's and local authorities are particularly relevant in choice based lettings.

(6) Providing information to applicants about the scheme, the review procedure, the decisions made, how long they are likely to have to wait, and what is available are all important.

As to whether the new guidance achieves flexibility and fairness, flexibility—it certainly does. Fairness—it depends on whether one views the need to prioritise according to how many reasonable preference categories an individual falls into (cumulative preference) to be of fundamental importance to fair allocations.

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The Practical Implications of the New Statutory Guidance

(1) Cumulative preference has gone, however, many allocations policies e.g. Devon Home Choice Policy and Bristol CC's policy continue to recognise it and they are bound to apply their policies and therefore it will continue in some areas, at least in the short term.

(2) Local authorities have considerable flexibility in their policies allowing them to cater for local needs and priorities. The reasonable preference categories must nonetheless still be recognised and therefore other priorities should not be elevated to an extent that they effectively remove the reasonable preference given to the s167 HA 96 categories.

(3) There are likely to be less challenges to allocations policies, but challenges to the lawfulness of review procedures and individual decisions are likely to continue, and policies can still be challenged if they are irrational, unlawful, or on conventional JR grounds.

(4) There remains (in this author's view) an unfortunate lack of regulation or guidance providing a universally applicable review procedure. This potentially raises the question of the compatibility of Part VI with Article 6 of the ECHR.

First Hearings in Possession Cases

The recent decision of ***Forcelux Limited v Binnie*** [2009] EWCA Civ 854 makes the important point that a first hearing in a possession claim is not, save in exceptional cases, a trial, but a hearing at which the court may summarily decide the claim or give case management directions. The significance of this conclusion by the Court of Appeal is that if a first hearing were a trial and the Defendant failed to attend the court, on a subsequent application to set aside the possession order the court would only be entitled to do so if the strict requirements of CPR r39.3(5) were established. These requirements include the need for the applicant to "act promptly" in making his or her application. The decision that the first hearing is not a trial means that in any application to set aside the possession order made at such a hearing the court has a much wider discretion under CPR r3.1, taking into account factors such as those set out in CPR r3.9. This will be a welcome relief for those tenants who fail or forget to attend the first hearing and then for whatever reason delay making their application to set aside the possession order made, but do so before any warrant is executed. In those not unfamiliar cases a tenant can take advantage of the courts more general discretion if the tenant has an answer to the claim by his or her landlord for possession.