

ASB, Disabilities and Public Law Defences in Housing.

The recent decision of the Court of Appeal in *Barber v Croydon LBC* [2010] EWCA Civ 51 offers a glimmer of hope to those with disabilities facing eviction for anti social behaviour in the post *Lewisham LBC v Malcolm* [2008] UKHL 43 world. Whilst the enactment of the Equality Bill is awaited (currently expected in Autumn 2010) which promises to remedy some of the problems or gaps left after the decision in *Malcolm*, the decision in *Barber* potentially provides some assistance to vulnerable or disabled tenants in social housing, albeit by the public law defence route rather than pursuant to the Disability Discrimination Act 1995 (the DDA defence in *Barber* was rejected).

The brief facts of *Barber* were that Mr Barber suffered with learning difficulties and a personality disorder of a permanent nature. He was being housed by Croydon LBC under a non-secure tenancy pursuant to their homelessness duty. On 22nd May 2007 there was an incident involving Mr Barber where he threatened, spat at and kicked the caretaker in the property. Croydon then served a notice to quit and took possession proceedings against Mr Barber and he sought to challenge this through a public law (Gateway B) defence. This defence was unsuccessful at first instance, but the appeal succeeded and the possession claim was dismissed.

The main issue in the case concerned whether or not Croydon LBC had properly applied its own Anti Social Behaviour Policy and/or acted in a manner that no reasonable person would consider justifiable. The relevant parts of the Anti Social Behaviour Policy of Croydon LBC required it to refer ASB cases to the Integrated Mental Health Service to ensure that vulnerability was considered when action was to be taken and to allow alternatives to be considered. On this issue the Court of Appeal concluded that the local authority had carried out an analysis of whether some alternative course of action would have prevented further instances of ASB in the future without assistance from the specialist agencies and without attaching any weight to the medical report of Dr Owen, which the tenant relied upon. It followed, in the conclusions of the Court, that the local authority dealt with the case as if its policies on vulnerable persons had no application and this approach was both wrong in principle and led to a decision that no housing authority could have reasonably made on the facts.

The implications of this case for practitioners are as follows:

- (1) The decision by a local authority or a housing association to take possession proceedings is something that must be kept under review with the effect that all relevant facts that come to its attention at any stage in the proceedings must be taken into account (Para 18). This is important to any public law defence case.
- (2) Consideration of the ASB policy of a local authority or housing association will be important in all cases where there is a vulnerability or disability. If a local authority or housing association has had proper regard to the relevant guidance in formulating their policy (as required by s218A(7) of the Housing Act 1996) they will address vulnerable groups including those where drug use, alcohol use, mental health or disability are an issue. Thereafter if they have not properly applied their policy there may be a public law defence available to the tenant.
- (3) If a public law defence succeeds the possession claim will be dismissed. This will not prevent the local authority or housing association taking fresh possession proceedings if they conclude that such action is justified having considered the matter afresh (Para 47), but it will require them to carry out the decision making process again in a lawful manner.

Eligibility for Housing Assistance: Relying on the Kids

The European Court of Justice has recently given judgment in the two English homelessness cases of *Harrow LBC v Ibrahim & Teixeira v Lambeth LBC* (2010) Times, Feb 26, deciding that the parent and primary carer of a child of a national of a Member State who is in education in the UK has a right to reside in the UK pursuant to Article 12 of Regulation (EEC) No 1612/68 that is not dependent on the parent and primary carer being financially self sufficient. This means that such a parent or primary carer will be eligible for housing assistance under Part VII of the Housing Act 1996 providing they can bring themselves within the remit of Regulation 6 of the Allocation of Housing and Homelessness (Eligibility) England Regulations 2006 (i.e. habitually resident, a worker, a self-employed person, an accession state worker requiring registration, a family member of one of the aforementioned, or a person with a right to permanently reside pursuant to Reg 15(c) (d) or (e) of the Immigration (EEA) Regulations).

The brief facts of these cases were:

The Ibrahim Case - Ms Ibrahim was a Somali national who was married to a Dutch citizen who arrived in the UK in 2002, worked until May 2003, claimed benefits between June 2003 and March 2004, left the UK in 2004, and returned in 2006. Ms Ibrahim joined her husband in the UK in February 2003 with her three children and the two eldest started school in the UK straight away. They had a fourth child before Ms Somali separated from her husband (when he left the UK in 2004). In 2007 Ms Somali made a homelessness application and was refused on the ground that she was ineligible. This was overturned on appeal to the County Court (s204 HA 96), and on appeal to the Court of Appeal the matter was referred to the ECJ.

The Teixeira Case - Ms Teixeira was a Portuguese national who arrived in the UK with her husband in 1989. Ms Teixeira worked in the UK between 1989 and 1991 and in 1991 had a daughter. Ms Teixeira and her husband subsequently divorced. From 1991 onwards Ms Teixeira had intermittent periods of work, including during her daughters education. In March 2007 Ms Teixeira's daughter came to live with her and in April 2007 Ms Teixeira made a homelessness application. This was refused on grounds of eligibility and Ms Teixeira's appealed to the County Court. This appeal was dismissed and on appeal to the Court of Appeal the matter was referred to the ECJ.

The rulings of the ECJ in these cases uphold the Baumbast principle and make it clear that this decision was not dependent on the individuals being financially self-sufficient.

Decision Making & Article 6

The Supreme Court has concluded in the appeal of *Tomlinson v Birmingham CC* [2010] UKSC 8 that decisions under Part VII of the Housing Act 1996 (homelessness) do not involve the determination of an individual's civil rights so Article 6 of the ECHR is not engaged. On a slightly similar theme, it is anticipated that the Supreme Court will consider whether the procedure for enforcement of demotion orders contravenes Article 6 as part of the appeal in *Pinnock v Manchester CC*, to be heard this summer.

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