

Central Law Training

Residential Tenancies: Legal Update, April 2005

The following is an update on housing law developments including a digest of cases on housing law reported or decided between January 2004 and February 2005, and new legislation passed or being considered since September 2004. It includes English cases where those cases are significant and are relevant to Scottish law. Readers should however approach such cases with care due to the differences in the legislation and common law between the two jurisdictions. Full texts of the cases cited can often be found on the web. www.bailii.org should contain all the English Court of Appeal decisions and House of Lords decisions referred to here. It also contains some High Court decisions. www.scotcourts.gov.uk has all Court of Session decisions and some sheriff court decisions. Unreported sheriff court decisions not on this site can be obtained from the court concerned for a fee. The Scottish legislation can be found at www.scotland-legislation.hmsso.gov.uk.

CASELAW

Eviction: procedure

City of Edinburgh Council v Porter 2004 HousLR 46.

The pursuer raised an action for recovery of possession of a house let under a Scottish secure tenancy and obtained decree after the sheriff had heard from the defender. A member of the defender's family, claiming to be a qualifying occupier in terms of sections 14 and 15 of the Housing (Scotland) Act 2001, then lodged a minute for recall of the decree as well as an application to be sisted as a party to the action. SCR 24.1 provides that a "party" may lodge a minute for recall. The pursuers objected that the applicant was not a party to the action and therefore the minute for recall was incompetent. Furthermore, the decree was not a decree in absence and could not be recalled. Held. Minute for recall granted and applicant sisted as a party to the action. The "rule is a beneficial enactment which is to be largely interpreted". A party includes a qualifying occupier. The decree was in absence so far as the qualifying occupier was concerned and could be recalled. The case of *Kenmure* (see below) would not be followed as the sheriff principal in that case had not had certain important cases cited to him.

North Lanarkshire Council v Kenmure 2004 HousLR 50. The pursuer raised an action for recovery of possession of a house let under a Scottish secure tenancy, obtained decree in absence and extracted decree. The defender sought recall of the decree, which was refused. The defender's son then lodged a minute for recall of decree claiming that he was a qualifying occupier in terms of section 14 and 15 of the Housing (Scotland) Act 2001. The sheriff granted the minute for recall. The pursuers appealed. There was no appearance by the defender. **Held.** Appeal allowed. A qualifying occupier's

right to be sisted as a party to the action ceases once the proceedings have ended. The qualifying occupier is not a party entitled to move for recall of decree. [*Contrast this approach with that in Porter above*]

***Deighan v City of Edinburgh Council* 2004 HousLR 89 (Sh)**

The pursuers obtained decree for recovery of possession. They then changed the locks but did not eject the tenant. Some time later, the pursuers sought to eject the tenant. She sought recall of the decree. **Held:** the minute for recall came too late. Although the defender not been physically dispossessed, the decree, followed by changing of the locks by sheriffs officer and the passing of the keys to the pursuers, constituted eviction and thus implementation of the decree. The minute was incompetent.

***City of Edinburgh Council v Ure* 2004 HousLR 2 (Sh Pr)**

The pursuers raised an action for recovery of possession on the grounds of rent arrears. The defender appeared personally when the action first called. He admitted rent arrears, claimed that they had arisen when he was ill and said he would repay them. He also said that he did not wish to live at the house because he wanted to be nearer to his work and because of intimidation. The sheriff inferred from these statements that the defender did not wish to defend the action. The sheriff granted decree. The defender then lodged a minute for recall. That was refused by the sheriff as incompetent as the defender and appeared at the first calling. The defender appealed. **Held.** The decree ought not to have been granted in the first place. Given the serious effect of the decree, and that he was unrepresented, it was preferable that the sheriff should have had an explicit statement from the defender as to his position rather than relying on an inference. *Obiter*, the minute for recall was

incompetent as the defender had appeared at the first calling even though a formal defence had not been stated.

***Clydebank HS v McEmerson* 2004 HousLR 10 (Sh Pr)**

The pursuer landlord raised an action for recovery of possession on the grounds of rent arrears. The defender did not appear when the case first called and decree passed against him. The defender thereafter lodged a document purporting to be a minute for recall of decree. That document contained certain information about the defenders position but did not, contrary to the requirement of SCR 24.1(1) contain a statement of the proposed defence. The sheriff refused the minute as incompetent. The defender appealed. **Held.** Appeal refused. The minute was incompetent; a statement that negotiations as regards the repayment of the rent arrears did not amount to a statement of a defence.

***Highland Council v Roberts* 2004 HousLR 12 (Sh)**

The pursuers obtained decree for payment as well as for recovery of possession. Thereafter a charge was served. The defender lodged a minute for recall of the decree only in so far as the order for ejection was concerned. **Held.** Although the sheriff was satisfied such a decree was severable into its constituent parts and that the time limit provided for by SCR 24 for the lodging of the minute for recall probably did not apply to the part of the decree relating to the ejection, the sheriff was bound by an earlier decision of the sheriff principal to decide otherwise; minute for recall therefore refused as incompetent.

***Grampian HA v Pyper* 2004 HousLR 22 (Sh Pr)**

The pursuers raised an action seeking recovery of possession of the subjects on the grounds of rent arrears. They obtained decree, the defender not having appeared or having been represented at the relevant hearing. The defender appealed. The defender claimed *inter alia* that the proceedings were incompetent as the tenancy had converted from an assured tenancy to a Scottish secure tenancy in terms of the Housing (Scotland) Act 2001 on 30 September 2002, and that since the pursuers had followed the procedure prescribed by the Housing (Scotland) Act 1988 in seeking recovery, rather than those in the 2001 Act, the action was incompetent. She also sought to be reponed, as a fax sent to her then agents has been mis-filed by them, as a result of which they thought that they had no instructions and withdrew from acting. Had the fax been dealt with properly, agents would have appeared and decree would not have gone against her in the way that it did. **Held.** Appeal refused. The proceedings were competent. The tenancy had not converted to a Scottish secure tenancy in September 2002 as by that time, it was a statutory assured tenancy which was not within the class of tenancies which converted on that date. As regards the error of agents, given the size of the rent arrears, even if the defender were to be reponed, the sheriff would be driven inexorably to the conclusion that it would be reasonable to grant decree afresh.

Eviction: anti-social behaviour

***East Lothian Council v Ingham*, unreported, Haddington Sheriff Court, sheriff Scott, 4 February 2005**

The authority sought eviction against a tenant following his conviction and imprisonment for dealing in heroin from the house. **Held:** decree granted. The offence was a serious one. The council had a duty to protect its other

tenants. The absence of an express prohibition in the tenancy agreement was unimportant. Eviction was reasonable in the circumstances.

Eviction: rent arrears

***Angus Housing Association v Fraser* 2004 HousLR 83.**

The pursuers raised an action for recovery of possession of a house let under a Scottish secure tenancy. The defence was that it would be unreasonable to grant decree given the poor state of health of the defender and her children and that they would have nowhere to go. **Held.** Decree granted. Given the length of time that the defender had been in arrears, the amount of the arrears, the repeated failure to respond to letters from the landlord, it would be reasonable to grant decree notwithstanding the tenant's health and that of her children. However, the amount of the rent arrears sought was overstated as it included amounts in respect of housing benefit overpayments.

North British Housing Association Ltd v Matthews (and three other cases)

[2004] EWCA Civ 1736 [eviction of assured tenant under ground 8].

See under English Eviction cases below.

Eviction: asylum cases

***East Lothian Council v Skeldon* 2004 HousLR 123 (Sh)**

The tenant of a house died. The tenant's son claimed entitlement to succeed under the Housing (Scotland) Act 1987 on the grounds that the house had been his sole or main residence for the 12 months prior to death. The council claimed that he merely visited the house to provide occasional care and that his real residence was with his girlfriend in the house opposite. Following proof, **held** that the defender was not entitled to succeed and decree granted.

[Note: the legal position is now a little different under the Housing (Scotland) Act 2001].

Glasgow City Council v Shirazi 2004 SCLR 189

The defender was an Iranian who had entered the UK seeking asylum. Pending the determination of his application, accommodation was provided under arrangements made by NASS through the pursuers in terms of the Immigration and Asylum Act 1999 and the Asylum Support Regulations 2000. A condition of the accommodation arrangements was that once the asylum application was determined, the right of the defender to stay in the accommodation would cease. The defender's application for asylum status was ultimately unsuccessful. He was served with notice to quit but refused to leave. The pursuers sought summary decree. The defender argued that eviction would constitute a breach of the defender's rights under Articles 3 and 8 of the European Convention on Human Rights. **Held.** Decree granted. The pursuers had no choice under the primary legislation but to take the action that they did. The court would not consider Convention challenges to the legislation. Neither would it consider the lawfulness of the decision-making process lying behind the decision of the pursuers to raise proceedings: that was a matter for judicial review. Any breach of the Convention arose out of decisions taken by the Secretary of State, not the pursuers. There was no defence to the action.

Eviction: right to succession

Nutting v Southern Housing Group Ltd [2004] EWHC 2982, [succession by virtue of homosexual relationship].

See under English Eviction cases below.

***City of Edinburgh Council v Baillie* 2004 HousLR 15**

The tenant under a secure tenancy died. A relative claimed that she had succeeded to the tenancy under section 52 of the Housing (Scotland) Act 1987 as she was a member of the deceased's family who had lived in the house as her only or principal home for the 12 months prior to death. The pursuers disagreed and raised an action for recovery of possession. **Held.** Following proof, the defender, upon whom the burden of proof lay, had satisfied the court that she met the statutory criteria and the defender was assoilzied.

***Ghaidan v Godin-Mendoza* [2004] UKHL 30**

The House of Lords, (Lord Millet dissenting) **upheld** the decision of the Court of Appeal that the same-sex partner of a deceased statutory tenant was entitled to succeed to a statutory tenancy under the Rent Act 1977, rather than an assured tenancy under the Housing Act 1988, and so be treated the same as a heterosexual partner.

Eviction: damages for unlawful eviction

***Anderson v Cluny Investment Service Ltd* 2004 SLT (Sh Ct) 37 and 2004 HousLR 102 (Sh Pr).**

The tenant had to leave the subjects of let to allow essential repair work to be carried out. Once the work was complete, the landlord sought to impose certain conditions on the tenant before she would be allowed to return. Those conditions were unacceptable to the tenant. She was eventually allowed to return without conditions 14 months after the subjects became ready for occupation. She raised an action seeking damages for unlawful eviction for that period in terms of section 36 of the Housing (Scotland) Act 1988. She was unsuccessful at first instance, the sheriff holding that the terms of the statute

precluded recovery in these circumstances. Held. Appeal allowed. Damages of £7,500 granted. The actions of the landlord amounted to unlawful eviction of the defender for that period as it was not entitled to impose the conditions.

Eviction: mortgage arrears

***Lloyds TSB Plc v Lauter*, Glasgow Sheriff Court (Sh) 2 July 2004 (see case commentary at 2004 HousLR 76)**

Proceedings were originally raised against the defender prior to the Mortgage Rights (Scotland) Act 2001 coming into force. Decree was obtained and extracted but not implemented. The parties entered into an arrangement for the repayment of the arrears at that point. Then arrears were paid off. The arrangement continued for over 3 years. The bank then sought to implement the decree on the arrangement breaking down. The sheriff allowed the defender to be reponed, the defence being one of personal bar.

***Northern Rock Plc v Goodwin* 2004 HousLR 88 (Sh)**

Held, the defender was not entitled to be reponed on a defence that the defender would be entitled to seek an order under the Mortgage Rights (Scotland) Act 2001: that was not a defence.

[Note: contrast with the view taken by Sheriff Principal Bowen in *GMAC-RAF Ltd v Murray and Murray* 2003 HousLR 50]

***Clydesdale Bank plc v Hyland* 2004 HousLR 116 (Sh)**

The pursuers sought declarator, various powers under the 1970 Act and summary ejection of the defenders in respect of the default. The pursuers claimed that the warrant to cite should be in form O1 (which contains no mention of the rights of the defender under the Mortgage Rights (Scotland) Act 2001, rather than form O2A (which does)). The sheriff clerk refused to

grant warrant and the matter was put before the sheriff. **Held**, the correct warrant was in form O2A. Furthermore, since the action was one to which OCR 3.2(3) applied, the writ would require to have averments to satisfy that Rule before warrant to cite could be granted. [leave to appeal was granted].

English eviction cases

London Quadrant Housing Trust v Root and Anr, CA, 12 January 2005

Severe and persistent anti-social behaviour by members of the tenant's family. Decree granted. On appeal, held that the court had not erred in granting an order for recovery of possession, despite the effects on the tenant and her children. The behaviour was very bad, the effect on the neighbours was great and the court was entitled to conclude that an outright order for possession rather than a suspended order was the appropriate remedy.

Nutting v Southern Housing Group Ltd [2004] EWHC 2982

The defendant claimed that he had succeeded to the assured tenancy of the deceased by virtue of his homosexual relationship with the deceased. **Held**, the principles set out in *Ghaidan v Mendoza* (which concerned succession to a protected tenancy) applied equally to assured tenancies. A homosexual relationship is equivalent to that of marriage if it is an emotional one of mutual lifetime commitment which has been presented to the outside world openly and unequivocally. The judge at first instance had been right to conclude that, on the facts, the relationship between the defendant and the deceased did not display a sufficient commitment to permanence to meet that test.

North British Housing Association Ltd v Matthews (and three other cases) [2004] EWCA Civ 1736

Held: in exceptional circumstances, the court has the power to adjourn proceedings for possession brought against an assured tenant under ground 8 (3 months rent arrears: a mandatory ground) even where the landlord can demonstrate at the hearing that the requisite amount of arrears exist. However, failure by the local authority to process an application for housing benefit timeously is not, in itself, an exceptional circumstance.

Eviction: disability discrimination.

***Manchester City Council v Romano, Samari* [2004] EWCA (Civ) 834**

The local authority raised proceedings for recovery of possession against two tenants based on repeated and severe instances of anti-social behaviour. The tenants claimed that they were mentally disabled in terms of the Disability Discrimination Act 1995, that the anti-social behaviour was a consequence of that disability and that eviction amounted to unlawful discrimination against them on the grounds of their disability. **Held.** Appeals dismissed. However, the Court of Appeal, approving the decision of the High Court in *North Devon Homes v Brazier* [2003] HLR 905 (see last Housing Law Update November 2003), affirmed that where a landlord is considering eviction in circumstances where the anti-social behaviour results from a disability, it must be able to satisfy the court that such action is justified within the meaning of the 1995 Act: simply satisfying the court on a housing law basis that the ground for eviction is made out and that it would be reasonable to grant a decree is insufficient. Nonetheless, the threshold for justification is low. The Court also called for fresh legislation to prevent a "deluge" of such cases.

Eviction: other

***Wolanski & Co. Trs Ltd v First Quench Retailing Ltd* 2004 HousLR 110 (Sh)**

In an action for declarator of irritancy and removal, the pursuers claimed that the defenders were in breach of the lease entitling them to decree. The defenders claimed that the notices served under the lease were invalid and that in any event, the pursuers had waived their rights. Following debate, the sheriff allowed a proof before answer on all averments.

South Lanarkshire Council v Taylor 2005 CSIH 6

The pursuers sought declarator that the defender had no right or title to occupy parts of the Lanark Racecourse, and removal. They obtained decree below on the basis that the defender had no lease and could have no lease as the pursuers had certain rights to require the defender to share possession of the areas of the racecourse. **Held**, appeal allowed. Without further enquiry, it was not possible to say whether those rights were in themselves sufficient to preclude the existence of a lease. Case remitted to the sheriff and proof before answer allowed.

Marcus Dean, trading as Abbey Mill Business Centre [2005] CSOH 3

In an action of damages by the owner of a number of properties against the cautioner for tenants where the leases had been brought to an end as a result of the commencement of insolvency proceedings, the question arose as to when, in these circumstances, the leases terminated and the liability of the tenants to the landlord ceases. **Held** the question could not be determined without enquiry and case put out By Order.

Right to buy

McAuslane v Highland Council 2004 HousLR 30 (Lands Tribunal for Scotland)

The manager of a ferry service operated by the Council at Corran, Loch Linnhe, sought to buy his house under the right to buy legislation. The Council refused saying that the house was occupied for the better execution of his duties. The pursuer then made an application to the Tribunal challenging that decision. **Held.** Application refused. Although residence in the house was not absolutely necessary for the performance of his duties, , it was for the better performance of his duties and so the house was not let under a secure tenancy.

***Erskine v West Lothian Council* 2004 HousLR 35 (Lands Tribunal for Scotland)**

The applicants sought to exercise the right to buy. The offer to sell contained the condition that there would be a right of access over the subjects by way of servitude in favour of the neighbouring proprietors. Although the applicants as tenants had allowed access over their land to the neighbours during the course of the tenancy, it was not a permanent arrangement. The applicants applied to the tribunal to have this condition removed. **Held.** Application successful. Council ordered to serve amended offer. The applicants had no legal obligation to allow the access that they did: it was a personal arrangement. The date which was relevant for the examination of the terms of the offer was the commencement of the tenancy, not the date of the application to buy.

***Donohoe v Queens Cross HA* 2004 HousLR 42 (Lands Tribunal for Scotland)**

The applicant applied to buy his house. The landlord delayed making an offer pending the outcome of litigation in a related case (*McAllister v Queens Cross HA* 2003 SC 514, summarised in the last Housing Law Update) which they lost. The landlord then agreed that it would process the application. The

applicant nonetheless sought a formal finding from the Tribunal that he had the right to buy; and his expenses. **Held.** He was entitled to both the order and the expenses as the application had been initially refused, even though the landlord had since changed its mind.

Hanoman v Southwark LBC, unreported, Peter Smith J., ChD, 22 June 2004

Held. A local authority cannot treat a right to buy application as withdrawn where the applicant failed to provide information (in this case, proof of identity) within a time period which was unilaterally imposed by the authority and for which there was no legislative basis. The authority must either refuse or allow the application to buy within the statutory period.

Human rights

R. (Morris) v Westminster City Council [2004] EWHC 2191 (Admin)

The High Court held that section 185(4) of the Housing Act 1996 was incompatible with Art 14 of ECHR because it required the local authority to disregard the dependent child of the homeless applicant for rehousing (because she was subject to immigration control) when assessing whether the applicant had a priority need for accommodation. The effect of the provision was to treat the applicant differently on the grounds of her nationality and that difference in treatment was neither reasonable nor proportionate. [Section 185(4) reads: (4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether another person- [...] (b) has a priority need for accommodation.]

R (on the application of Haggerty) v St Helens BC [2003] HLR 1052 (QBD)

The local authority, in pursuance of its community care duties, entered into a contract with a private company for the provision of places in a nursing home. A number of elderly person, some suffering from senile dementia and other similar ailments, were placed in the home. One year, the company put up its prices to a level beyond which the local authority was prepared to pay. The Council then gave notice to terminate the agreement which would have the effect of requiring that the residents in the home funded by the local authority would have to leave. The company proposed an alternative agreement which the Council refused. A number of the residents sought judicial review of the decision of the local authority not to enter into that agreement claiming that that refusal was a breach of Articles 2, 3, 8 of the ECHR as well as being unlawful through failure to consult adequately and irrationality. **Held.** Application refused. It was unnecessary to decide whether the decision was amenable to judicial review. On the facts, there was no breach of the Convention. The consultation was adequate in the circumstances. The decision was not, on the facts, irrational.

***Sharp v Brent LBC* [2003] HousLR 993 (CA)**

The appellant applied for housing as a homeless person. Certain decisions were made by the local authority. The tenant then appealed to the County Court where she was successful. The local authority appealed to the Court of Appeal. **Held.** Article 8 of the ECHR was relevant to consideration of the appellant's circumstances as the local authority, having required the appellant to leave her home was interfering with her Article 8 rights. In considering whether that interference was justified the court had to consider: whether the home in issue was lawfully established; that Article 8 does not provide a right to a home; that in carrying out the balance of interests in the context of local authorities' housing responsibilities, the balance has been struck by the

legislation itself; and only in individual cases does the court have to consider the individual facts itself. The present case was not exceptional.

R (on the application of Gangera) v Hounslow LBC [2003] HLR 1028

The claimant, subject to immigration control, lived with his parents in their council flat in London. The father died and the mother succeeded to the tenancy. She then died. The council refused the claimant's application to succeed to the tenancy on the grounds that the legislation provided for one round of succession only to a tenancy. Soon after, an order was made for his deportation due to his having overstayed in the UK. The local authority meantime commenced proceedings for recovery of possession of the house. The claimant then applied to the social services department for an assessment under the community care legislation claiming to be suffering from a number of ailments. The authority determined that the claimant was not entitled to accommodation under the community care legislation as he was not yet homeless. Judicial review proceedings were then commenced and joined with the possession proceedings. The claimant argued that the legislation relating to succession to the tenancy was unlawful in terms of Article 14 of the ECHR. Further, he claimed that the community care decision was irrational. **Held.** Claim refused. The claimant was not in an analogous position with either of the two comparators advanced; and even if the circumstances were analogous, the difference in treatment was justifiable, the courts deferring to decisions taken by Parliament regarding allocation of resources of this type. Furthermore the local authority was entitled to decide that the claimant was not yet homeless and therefore not in need of accommodation.

Anufrijeva v Southwark LBC [2004] 1 AC 604; [2004] 2 WLR 603 (CA)

Each appeal involved a claimant who came to the UK to seek asylum. Each

claimant complained of a failure by the defendants to comply with a public law duty imposed by statute under which they contended they were entitled to receive benefits or advantages including housing. Each complained that that failure was attributable to maladministration and that the maladministration and its consequences constituted a breach of their rights under art 8 of ECHR. Each claimed to be entitled to damages under the 1998 Act in respect of that breach. **Held** as follows

When did a duty arise under art 8 to take positive action?

There was a stage at which the dictates of humanity required the state to intervene to prevent any person within its territory suffering dire consequences as a result of deprivation of sustenance. If support was necessary to prevent a person in this country reaching the point of art 3 degradation, then that support should be provided. It was hard to conceive of a situation in which the predicament of an individual would be such that art 8 required him to be provided with welfare support, where his predicament was not sufficiently severe to engage art 3. Art 8 might more readily be engaged where a family unit was involved. Where the welfare of children was at stake art 8 might require the provision of welfare support in a manner which enabled family life to continue.

When did maladministration constitute breach of art 8?

Before inaction could amount to a lack of respect for private and family life there must be some ground for criticising the failure to act. At the very least there must be knowledge that the claimant's private and family life were at risk. Where domestic law imposed positive obligations in relation to the provision of welfare support, breach of those positive obligations might suffice to provide the element of culpability necessary to establish a breach of art 8, provided that the impact on private or family life was sufficiently serious and was foreseeable. It was necessary to have regard both to the extent

of the culpability of the failure to act and to the severity of the consequence. Isolated acts of even significant carelessness were unlikely to suffice.

When should damages be awarded?

The approach to awarding damages in this jurisdiction should be no less liberal than that applied by the Court of Human Rights. Especially at first instance, courts dealing with claims for damages for maladministration should adopt a broad-brush approach. Where there was no pecuniary loss involved, the question whether the other remedies that had been granted to a successful complainant were sufficient to vindicate the right that had been infringed, taking into account the complainant's own responsibility for what had occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. The approach was an equitable one. The scale of damages should be modest.

Orejudos v Kensington and Chelsea RLBC [2004] HLR 379

The claimant had been assessed as homeless by the local authority who provided him with bed and breakfast accommodation. It attached a condition to that accommodation which was that if he did not stay the night at the accommodation, he would have to agree the proposed absence with the local authority's housing officer in advance. The claimant was absent from the accommodation on a number of occasions without agreement. The local authority eventually cancelled the accommodation had determined that it had fulfilled its duties under the legislation. The claimant sought judicial review of that decision claiming that the requirement that he be present at the hotel every night was an infringement of his art 8 rights. The court dismissed the application. On appeal **held** not every Act which adversely affects a person's ability to live his life as a chooses is a violation of art 8; where accommodation is provided under the homelessness legislation, art 8 rights are not violated if

the conditions are a necessary and ordinary part of the provision of the accommodation. The condition requiring the appellant to provide a satisfactory reason for not sleeping in the room allocated to him every night was an ordinary and necessary condition which the local authority could impose. In any event, such a condition was justifiable under art 8(2).

***Newham LBC v Kibata* [2004] HLR 462 (CA)**

The wife of the defendant, who was a secure tenant of the local authority, left the accommodation claiming that she was subject to domestic violence. The defendant stayed behind. The local authority offered her alternative accommodation on condition that she give up her former tenancy; all in terms of their usual policy. She gave up the former tenancy. The local authority then raised proceedings against the defendant seeking recovery of possession. He defended the possession proceedings claiming that an order for possession would breach his rights under arts 6, 8 and 14 of ECHR. In particular he claimed that the council's policy discriminated against him in comparison with cases where there was no allegation of domestic violence. The judge found that the authority had acted unfairly in failing to put the allegations to him, by procuring the giving up of the tenancy and through failure to properly consider his art 8 rights. On appeal, held, Applying *Qazi v Harrow LBC* [2004] 1 AC 983, the ECHR could not provide a defence to a properly based application to the court by the local authority for repossession; that as a matter of public law, the local authority had acted lawfully and fairly in relation to the formulation and application of their policy; that requiring the wife to terminate the tenancy was not a determination of his civil rights and so did not fall within art 6 and that since he had no right under art 8, art 14 did not arise.

Homelessness

Osmani v Camden LBC [2004] EWCA Civ 1706

A refugee from Kosovo sought housing as homeless person. The authority refused deciding that he was not in priority need as he was not “vulnerable”. He appealed on the grounds that the authority had not properly applied the *Pereira* test. **Held.** An authority should apply the words of the statute within the statutory context: *Pereira* is merely a judicial guide. The *Pereira* test is that a claimant is vulnerable if he has such a lesser ability than that of a hypothetical “ordinary homeless person” to fend for himself so that he would suffer greater harm from homelessness; this is an imprecise exercise; authorities are best placed to make such judgements. The *Pereira* test does not require that an applicant should also be less able than an ordinary homeless person to find accommodation; it involves a composite assessment of the applicant’s circumstances. The council must assess an applicant’s vulnerability on the assumption that he is or will become street homeless, not on his ability to fend for himself while still housed. Decision letters should not be treated as statutes or judgements; they must be read as a whole.

R. (Griffin) v Southwark LBC [2004] EWHC 2463 (Admin)

Where the local authority has accepted and met a duty to provide accommodation under the homelessness legislation, it is not obliged to consider a second application for accommodation in the absence of a change in circumstances.

R (on the application of B) v Southwark LBC [2004] HLR 18 (QBD)

A prisoner, approaching the end of his sentence, applied for rehousing (to be available on his release) as a homeless person. The local authority refused the application on the grounds that the prisoner was not homeless. It also refused

to provide interim accommodation. The prisoner sought judicial review. **Held.** Claim allowed. Detention in prison is not “accommodation” within the meaning of the legislation as the prisoner does not have the right to occupy the cell and accordingly the prisoner was homeless.

R (on the application of C) v Lewisham LBC [2004] HLR 27 (CA)

The claimant applied to the local authority for housing as a homeless person. That application was refused. She sought a statutory review out of time. The local authority refused to exercise its discretion to extend the time limit. The claimant sought judicial review of that refusal which was refused. The claimant appealed once more. **Held.** Appeal refused. The discretion conferred on an authority to allow a review out of time is wide and must be exercised in furtherance of the statutory purpose, viz. to manage the housing in an orderly way and to grant an indulgence to an applicant where the merits of the claim for review are deserving enough to override the failure to request the review in time. The merits were not wrongly exercised here. *Obiter*, while the legislation envisages one review only, the local authority does have a discretion to allow more than one review but the exercise of that discretion is close to being absolute and likely to be beyond challenge by way of judicial review.

Knight v Vale Royal BC [2004] HLR 106 (CA)

The claimant became homeless, applied for housing as a homeless person to the local authority and was refused on the grounds that she was intentionally homeless. She then obtained accommodation herself on a six-month assured shorthold tenancy. She did this in the knowledge that the landlord did not intend to renew the lease on expiry. In fact, he did not. She then made a further application to the local authority as a homeless person. It decided that

the proximate cause of the homelessness was the original cause and the assured shorthold tenancy was not 'settled accommodation' and so did not break the chain of causation. **Held.** Although accommodation let on a six-monthly assured shorthold tenancy is capable of being settled accommodation, it is not as a matter of law always settled; that is a matter of fact and degree. In this case, since the claimant knew at the outset that the landlord did not intend to renew, the accommodation was not settled. *Obiter.* Accommodation let on an assured shorthold tenancy is normally a significant pointer to its being settled.

Al-Ameri v Kensington and Chelsea RLBC [2004] 2 AC 159; [2004] 2 WLR 354
(HL)

The asylum legislation provided for dispersal of asylum seekers throughout the country. If a seeker's claim was successful, the question arose in a number of cases as to whether a dispersed person, seeking accommodation under the homeless person's legislation, had established a "local connection" with the area to which they had been dispersed, thus, in effect, preventing them from being successful in an application for rehousing in a different area. **Held.** A destitute asylum seeker accommodated in a particular area pursuant to the asylum legislation cannot have a local connection with the district of the authority in which he is accommodated on the ground that he is or was normally resident there through choice; since although the asylum seeker has the choice as to whether to accept an offer of accommodation from the Secretary of State under the asylum legislation, he has no choice as to where he will then be accommodated.

R (on the application of Khatun) v Newham LBC (CA)

The claimant challenged a number of aspects of the Council's policy in relation to the way in which the Council made offers of permanent accommodation to those for whom it had accepted a duty to permanently rehouse and who were temporarily placed in bed and breakfast accommodation. The appellant also challenged contractual arrangements under the Unfair Terms in Consumer Contract Regulations 1999. The Court of Appeal **held**: 1) an applicant for housing under the homelessness legislation does not have the right to view and comment on the permanent accommodation offered by the Council before being required to decide whether to accept it. 2) The Council is not obliged to have regard to the applicant's subjective view of the accommodation offered; 3) a policy denying an applicant the opportunity to view and comment on accommodation being offered would only be unlawful on the usual *Wednesbury* grounds; in this case, the policy was reasonable; 4) even though the time given to decide or reject the accommodation was very short (and departed from the statutory Code of Guidance), it was nonetheless lawful in the circumstances; 5) the Regulations did apply to contracts concerning land and to the Council in its dealings with the applicant.

Porteous v West Dorset DC [2004] EWCA (Civ) 244

Held. Where a local authority makes a decision on an application for rehousing by a homeless person, and does so on the basis of mistake as to a material fact (here, that the applicant did not have the tenancy of a house), it is entitled to revoke that decision and substitute a different one, notwithstanding the absence of a clear statutory power in the legislation.

R. (Morris) v Westminster City Council [2004] EWHC 2191 (Admin)

See human rights cases above.

Assured tenancies

Wishaw and District Housing Association Limited v Michael Neary 2004 SC 463.

Held. The inclusion in a tenancy agreement of a break clause in favour of the tenant entitling him to terminate the tenancy at any time on one month's notice (thus allowing termination within the initial minimum six-month period) does not prevent the tenancy from being a short assured tenancy.

Fair rents

Western Heritable Investment Co. v Hunter 2004 SC 635; 2004 SLT 355

A Rent Assessment Committee fixed a fair rent for 246 houses. The landlord appealed to the Inner House claiming that the RAC was in error in not following the approach to the interpretation of the fair rent legislation adopted by the Court of Appeal in England (see *Curtis* 1999 QB 92) which held that a fair rent is the market rent less scarcity and disregards. Furthermore, the reasoning adopted by the RAC in his statement of reasons was flawed in that no good reason was given for its failure to quantify the 'scarcity element'. **Held.** Appeal allowed on the second ground only and decision remitted to the RAC for reconsideration. The RAC had not erred in failing to apply the *Curtis* approach. Even though the English legislation was practically identical to the Scottish legislation, the court did not agree with the interpretation of that legislation made by the Court of Appeal.

R (on the application of Lester) v London Rent Assessment Committee [2003]
HLR 787 (CA)

The landlord of a periodic assured tenancy proposed an increase in rent to take effect from 20 March. The tenant “referred” the proposal to the Rent Assessment Committee for determination. That reference was sent by first class post and was received at the RAC office on 20 March. The statute provides that the tenant has to refer the increase to the RAC before the increase is due to take place. The RAC determined that it had no jurisdiction as the reference was out of time, the reference not having been received before the increase in rent took effect. The tenant appealed arguing that the word “refer” should be interpreted as only requiring the tenant *to send* the reference before the due date. **Held.** Appeal refused. The proper construction of the statute is that the application must be received at the RAC office before the increase takes effect. It was not a breach of the appellant’s human rights to apply this interpretation.

LEGISLATION

Housing (Scotland) Bill

This Bill was introduced to the Parliament on 7 February 2005. It is a major piece of legislation comprising 169 sections and 5 schedules. Among other measures it proposes:

- housing renewal areas (to replace housing action areas);
- a new repairing standard for tenancies in the private sector;
- a private rented housing panel (subsuming the current rent assessment panel) to deal with appeals involving the new repairing standard;

- measures to encourage owners in the private sector to maintain their property (such as work notices and maintenance orders);
- provision of assistance (including grants and loans) for housing purposes;
- introduction of the (controversial) compulsory house seller's survey;
- licensing of HMOs;
- improvement of rights to mobile home residents.

The Communities Committee is the lead committee and invites written evidence by 2 May 2005.

Homelessness

The Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2004, SSI 2004/489

With effect from 6 December, certain types of accommodation is designated as unsuitable accommodation and may not be provided to certain classes of homeless person in fulfilment of a local authorities duties under the homelessness legislation.

Housing support services

The Housing (Scotland) Act 2001 (Payments out of Grants for Housing Support Services) Amendment (No. 2) Order 2004

Makes a minor amendment to the principal Order.

Housing finance

The Housing Grants (Assessment of Contributions) (Scotland) Amendment Regulations 2004, SSI 2004/456

Makes a series of amendments to the principal Regulations.

The Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2005, SSI 2005/62

This Order provides that local authorities may not include in their estimates for the year 2005 2006 any contribution from their general fund to their housing revenue account.

English legislation

The Housing Act 2004 received the Royal Assent on 18 November 2005. It applies to England and Wales only. It is a major piece of legislation covering: housing conditions; houses in multiple occupation; licensing of privately rented accommodation; home information packs for sellers; changes to the right to buy; improvement of rights for mobile home dwellers; tenancy deposit scheme: for much of which, see above...

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NOTE:

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