

The policy of the provisions

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Introduction

1.1 This chapter outlines the history of the law on homelessness and allocations, from before the Housing (Homeless Persons) Act (H(HP)A) 1977 through the Housing Act (HA) 1996 Parts 6 and 7 – the present, principal Acts – to the Homelessness Act 2002.

1.2 Although Parts 6 and 7 are free-standing legislation – in the sense that they are neither consolidation nor amendment – and it may be unnecessary always to approach them by reference to their evolution, nonetheless both Parts are best understood historically. Their application needs to be informed not only by the case-law but also by the statutory provisions which preceded them, in respect of both that which was retained and that which was changed.

1.3 Thus, the Minister for Local Government, Housing and Urban Regeneration (Mr Curry) said of the changes to homelessness law made by the 1996 Act:

We shall not go back to pre-1977 days. We shall keep the 1977 Act concepts of entitlement, homelessness, priority need, intentionality and local connection. Essentially, what we are changing is the way in which the duty is to be discharged.¹

1.4 That discharge was closely interwoven with the allocation of local authority housing – Part 6 was the first big change in allocations law since 1935, when the concept of ‘reasonable preference’ for certain categories of housing need was introduced: in practice, however, allocations policy had been dominated by the homeless since H(HP)A 1977.

1.5 Since HA 1996, the Homelessness Act 2002 has again changed the shape of the law, introducing a new ‘strategic’ duty to formulate a response to homelessness and reshaping Part 6 to seek to include ‘choice-based letting’ within allocations law. Further changes have been made by regulations.

1.6 In this chapter, homelessness and allocations policy as embodied in law will be approached as follows:

- a) National Assistance Act (NAA) 1948 Part 3;
- b) H(HP)A 1977; Housing Act (HA) 1985 Part 3;
- c) *Re Puhlhofer*;²
- d) Housing and Planning Act (HPA) 1986;
- e) Asylum and Immigration Appeals Act (AIAA) 1993;

1 *Hansard*, Standing Committee G, 12 March 1996, col 587.

2 *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; 18 HLR 158, HL.

- f) *Ex p Awua*;³
- g) HA 1996 Parts 6 and 7;
- h) between Acts;
- i) Homelessness Act 2002;
- j) changes since the 2002 Act.

National Assistance Act 1948

- 1.7 The provisions of NAA 1948 s21(1) put local authorities under a duty to provide:

... residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them, [and] temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine.

- 1.8 Homelessness law – starting with H(HP)A 1977 – replaces only the second limb of that duty, the duty to provide temporary accommodation in urgent need.⁴

- 1.9 The NAA 1948 duty extended to people ordinarily resident in the local authority's area.⁵ The National Assistance Board (NAB) (later the Supplementary Benefits Commission (SBC)) had power to require an authority to provide accommodation where satisfied that such a person was in urgent need of it. The local authority was under a further duty to protect the property of a person to whom it provided assistance under these provisions.⁶

- 1.10 Local authority duties under NAA 1948 were exercised under the general guidance of the Minister, who was, for these purposes, the Minister of Health.⁷

- 1.11 This legal structure fell far short of imposing a full and permanent duty on local authorities to protect all homeless people. Rather, it provided for emergencies, especially unforeseeable emergencies.⁸ The

3 *R v Brent LBC ex p Awua* [1996] 1 AC 55; 27 HLR 453, HL.

4 H(HP)A 1977 s20 and Schedule, repealing this part of NAA 1948 s21.

5 NAA 1948 s24.

6 NAA 1948 s24.

7 NAA 1948 s33, subsequently Local Authorities Social Services Act 1970 s7.

8 *Southwark LBC v Williams* [1971] 1 Ch 734, CA; see also Ministry of Health Circular 87/48 illustrating 'urgent and unforeseen need' as homelessness arising as a result of 'fire, flood or eviction'.

duration of accommodation, save where the NAB/SBC was involved, was a matter for the authority. It probably meant no more than for so long as the authority considered appropriate or necessary;⁹ urgent need for temporary accommodation was not to be equated with a vital but continuing need for permanent accommodation.¹⁰

1.12 The discretionary and temporary nature of this provision was the principal problem. Another problem was that of deciding on 'ordinary residence' in an area. Notoriously, and reminiscent of the Poor Laws which NAA 1948 repealed and replaced, authorities 'shuttled' homeless people between areas, claiming that they were ordinarily resident in another authority's area.

1.13 Even more problematic was the division of responsibilities between different authorities within a single geographical area: homelessness provision was to be found in NAA 1948 and was regarded as a social services problem; the duty to provide housing in any area lay, however, with the authority having responsibility under the Housing Acts.¹¹ This problem was exacerbated by the re-organisation effected by the Local Government Act 1972 with effect from 1 April 1974. From that date, social services outside London, and in non-metropolitan areas, became the responsibility of county councils, while housing was the responsibility of the district council.¹² Even in London and the metropolitan areas, where social services and housing remained the responsibility of the same authority, different departments would usually handle the different responsibilities. In either event, this brought with it a different kind of shuttling, not in this case between different geographical areas, but between different authorities or different departments carrying out different functions in the same locality.

1.14 This was an unsatisfactory division. Popular perception was changing – homelessness was no longer readily regarded as a symptom of personal or social inadequacy; it had come to be recognised as part of the continuing severe housing problem (whether this is described as a crude shortage of housing or as a shortage of adequate housing in the location where it is needed).¹³

9 *Bristol Corporation v Stockford* (1973), reported in Carnwath, *A guide to the Housing (Homeless Persons) Act 1977* (Knight's Annotated Acts, 1978).

10 *Roberts v Dorset CC* (1976) 75 LGR 462.

11 Formerly HA 1957 Part 5, now HA 1985 Part 2.

12 Formerly HA 1957 s1, as amended by Local Government Act 1972 s193 and Sch 22, now HA 1985 s1.

13 Significant contributions to this rise in awareness included those of J Sandford and K Loach, *Cathy come home* ('The Wednesday Play', 1966 television film);

- 1.15 The fact that children were commonly taken into care for no reason other than their parents' want of accommodation was itself a significant factor in the changing attitudes which produced the climate for H(HP)A 1977.
- 1.16 There are two other points to make concerning the pre-1977 Act position, both of them occurring in 1974. The first is largely technical. The Local Government Act 1972 contained an amendment to NAA 1948, additional to the redistribution of responsibilities in non-metropolitan areas. The amendment reduced to a mere power what had previously been a duty.¹⁴ The secretary of state, however, was empowered to reimpose the duty by directive, and, following an outcry by voluntary and welfare workers, lawyers and others concerned with the homeless,¹⁵ did so in February 1974.
- 1.17 Of more significance was the circular issued in February 1974, which came to be known as the 'Joint Circular',¹⁶ directed both to social services departments and authorities, and to housing departments and authorities.
- 1.18 The Joint Circular had two main aims: first, it urged the transfer of such stock as was held by social services authorities and social services departments for the purpose of discharging their responsibilities towards the homeless, to housing authorities or departments; second, it identified what it described as 'priority groups' who were intended to enjoy a claim on local authority stock.
- 1.19 The definition of priority groups in the Joint Circular closely resembled the definition of priority need that was adopted in H(HP)A 1977 s2, subsequently in Housing Act 1985 s59 and, now, in HA 1996 s189:

The Priority Groups comprise families with dependent children living with them or in care; and adult families or people living alone who either become homeless in an emergency such as fire or flooding or are vulnerable because of old age, disability, pregnancy or other special reasons. For these priority groups, the issue is not whether, but by what means, local authorities should provide accommodation

J Greve et al, *Homelessness in London* (Scottish Academic Press, 1971); Bryan Glastonbury, *Homeless near a thousand homes* (Allen & Unwin, 1971); F Berry, *Housing – the great British failure* (Charles Knight, 1974). Of less populist, but greater official, influence was the Cullingworth Report, *Council housing – purposes, procedures and priorities* (9th report of Housing Management Subcommittee of the Central Housing Advisory Committee, 1969).

14 Local Government Act 1972 s195 and Sch 23.

15 Partington, *Housing (Homeless Persons) Act 1977* (Sweet & Maxwell, 1978), introductory notes.

16 DoE Circular 18/74, DHSS Circular 4/74.

themselves or help those concerned to obtain accommodation in the private sector . . .

Where a family has children there is no acceptable alternative to accommodation in which the family can be together as a family. The social cost, personal hardship, the long-term damage to children, as well as the expense involved in receiving a child into care rules this out as an acceptable course, other than in the exceptional case when professional social work advice is that there are compelling reasons apart from homelessness for separating children from their family. The provision of shelter from which the husband is excluded is also not acceptable unless there are sound social reasons, as, for example, where a wife is seeking temporary refuge following matrimonial dispute and it is undesirable that she should be under pressure to return home.¹⁷

- 1.20 Notwithstanding this advice, many authorities failed to transfer responsibility from social services to housing, or to give the priority groups preference over their own, local priorities.¹⁸ Accordingly, when a Liberal MP, Stephen Ross, was successful in the ballot for private members' bills, the government of the day supported him in introducing a Homeless Persons Bill and the opposition announced that it, too, would broadly support the measure. The bill was introduced and became law as the Housing (Homeless Persons) Act 1977.

Housing (Homeless Persons) Act 1977; Housing Act 1985 Part 3

- 1.21 These two Acts are taken together, as the Housing Act 1985 was an exercise of consolidation of housing law: as such, save so far as there were recommendations of the Law Commission (Cmnd 9515) to effect explicit changes (of which there were none relevant to the policy or the framework of the legislation), no substantive change in homelessness law was intended or achieved.

- 1.22 One clear aim of H(HP)A 1977 was to place responsibility for the homeless on district councils and the London borough councils.¹⁹ Provision was made to transfer staff and stock from social services to housing: the Secretary of State for the Environment enjoyed power to compel the transfer of property and staff from one authority to

17 DoE Circular 18/74 paras 10–12.

18 *Hansard* HC Debs, 15 December 1975, Vol 902 cols 473–475.

19 H(HP)A 1977 s19.

another, not merely between London borough councils and district councils, but as between all 'relevant authorities', defined to include social service authorities.²⁰

1.23 Another aim of H(HP)A 1977 was to provide a uniform and national definition of, or criterion for, the circumstances in which one authority could shift on to another responsibility for a homeless person, so as to end shuttling. These 'local connection' provisions included a positive link between employment and housing.²¹

1.24 The local connection provisions operated not so much to permit an authority to shift the burden of housing a homeless person on to another authority as to prevent it from doing so once the applicant was shown to have a local connection with the area of the authority to which s/he had applied. Thus, the authority for the area in which an applicant had only an employment connection had to house the applicant, even though s/he might have had no other connections with that area, for example, family or residence.

1.25 The most important provision of H(HP)A 1977, however, was the establishment of a national criterion which required local authorities to accommodate, or to secure accommodation for, those who:

- a) were homeless;
- b) were in priority need of accommodation; and
- c) did not become homeless intentionally.

1.26 Leaving aside the resolution of responsibility embodied in the local connection provisions, the three key questions, therefore, became:

- a) what was homelessness?
- b) who was in priority need? and
- c) when was homelessness intentional?

Homelessness

1.27 Defining homelessness is not easy, either as a matter of law or as a matter of policy.²² The most literal approach is to deal with those without a roof over their heads. This is not only difficult to estimate, but is likely to exclude those with children as, commonly, some form of accommodation, however inadequate, is found for them.

20 H(HP)A 1977 s14; Housing (Consequential Provisions) Act 1985 s5 and Sch 4 para 8.

21 H(HP)A 1977 s18; HA 1985 s61.

22 This and the next paragraph are based largely on Partington, *Housing (Homeless Persons) Act 1977* (Sweet & Maxwell, 1978), introductory notes, subheading 'Definitions of homelessness and extent of homelessness'.

- 1.28 The most radical approach, advocated by Shelter, the National Campaign for the Homeless, was that a person was homeless if s/he lived 'in conditions so bad that a civilised family life is impossible': this was homelessness 'in the true sense of the word'.²³
- 1.29 Another approach is to consider those families who have no home where they can reside together. This excludes both single people and childless couples, but it was at the core of the definition which was adopted.
- 1.30 Under H(HP)A 1977, Parliament started with legal rights of occupation: a person was homeless if there was no accommodation which s/he could occupy by virtue of an interest or estate, or contract, together with anyone else who usually resided with him/her either as a member of the family, or in circumstances in which it was reasonable for that person to reside with him/her.²⁴
- 1.31 A person was also not to be regarded as homeless if s/he was in occupation in circumstances in which a court order was required for eviction, for example, tenants whose tenancies had been determined. A person was homeless, however, if s/he had been locked out of accommodation, had to leave the accommodation because of domestic violence, or, in the case of mobile homes and houseboats, if there was nowhere to park/moor accommodation and to live in it.²⁵

Priority need

- 1.32 The definition of homelessness did not create any substantive housing rights on its own. It had to be read together with the definition of priority need.
- 1.33 Only homeless people with a priority need for accommodation received housing assistance under H(HP)A 1977 and Housing Act 1985:
- those with children who were residing, or who might reasonably be expected to reside, with either the applicant or with anyone with whom the applicant might be expected to reside;
 - those who were residing, or who might reasonably be expected to reside, with someone who had become homeless as a result of an emergency;
 - those who were residing, or who might reasonably be expected to reside, with someone who was vulnerable on account of age, handicap or other special reason; and

23 *The grief report* (Shelter, 1972).

24 H(HP)A 1977 s1; HA 1985 s58.

25 H(HP)A 1977 s1; HA 1985 s58.

– a person who was residing, or who might reasonably be expected to reside, with someone who was a pregnant woman.²⁶

1.34 The important point to note was this: in determining whether or not there was a priority need, not only the applicant but anyone who might reasonably be expected to reside with him/her, regardless of whether they had hitherto lived together, had to be considered.

Intentional homelessness

1.35 Homeless people in priority need had acquired a prima facie right to accommodation. To have become homeless, however, did not necessarily mean that someone had been evicted: the person might have quit of his/her own accord.

1.36 This provoked a hostile local authority reaction to H(HP)A 1977 as a bill and, in turn, led to the inclusion of the ‘intentional homelessness’ provisions.

1.37 Infamously, the bill was to be described as a charter for ‘scroungers and scrimshankers’.²⁷

1.38 Mr G Cunningham acquired a notoriety that in earlier editions of this book was described as ‘unenviable’, but that has – it must be said – been given a degree of judicial sanction by the House of Lords decision in *R v Brent LBC ex p Awua*,²⁸ in which Lord Hoffmann, delivering the only substantive speech, suggested that local authorities could decide to provide only temporary accommodation to a pregnant woman and ‘wait and see’ whether or not the child is placed for adoption.

1.39 Foreshadowing this, Mr Cunningham had suggested that women would become pregnant to acquire a priority need and then terminate their pregnancies once housing had been secured.²⁹ ‘Families who have hesitated in the past to make themselves homeless [as opposed to finding themselves homeless] need have no such reluctance now . . .’. ‘It will mean chaos.’ ‘Fifty per cent of alleged claims of homelessness are “try-ons”’.³⁰

1.40 Parliament did not wholly give in to these fears. Under H(HP)A 1977, and then the Housing Act 1985, not everyone who voluntarily

26 H(HP)A 1977 s2; HA 1985 s59; cf, above, para 1.19.

27 Per Mr W R Rees-Davies, *Hansard* HC Debs, 18 February 1977, Vol 926 col 905.

28 [1996] 1 AC 55; 27 HLR 453, HL.

29 *Hansard* HC Debs, 8 July 1977, Vol 934 col 1689.

30 Quotes to be found in Widdowson, *Intentional homelessness* (Shelter, 1981), p6.

quit accommodation was considered to be homeless intentionally, from which it followed that some could quit and yet be entitled to assistance from a local authority. It is when this class – those who could quit of their own accord, and yet not be deemed homeless intentionally – is considered that there is to be found the last element that serves to define the remit of the 1977 and 1985 Acts.

1.41 For an authority to be permitted to find that someone had become homeless intentionally – and, thus, had forfeited his/her right to assistance – required four preconditions:

- a) the applicant had to have ceased to occupy accommodation – so that those who had never had accommodation or last had it so long ago that it could not properly be taken into account, could not be homeless intentionally; *and*
- b) the applicant had to have ceased to occupy accommodation in consequence of a deliberate act or omission – an act or omission in good faith, in ignorance of a material fact (for example, security of tenure or financial assistance towards housing costs), was not to be considered deliberate; *and*
- c) the accommodation had to have been such that it was reasonable to continue to occupy it – although those who optimistically left bad physical conditions were faced with the qualification that, in determining whether or not it was reasonable to remain in occupation, a housing authority could take into account housing conditions in its area generally; *and*
- d) the accommodation which had been quit had to have been ‘available for the occupation’ of the applicant.³¹ Accommodation was only ‘available for occupation’ if it was available both for the homeless person and for anyone who might reasonably be expected to reside with him/her.³² In determining who might reasonably be expected to live together, no account was to be taken of want of accommodation.³³

1.42 It followed that people who had never been able to live together and who had to be deemed reasonably to be expected to do so – for example, the young couple who had to live apart for want of accommodation – and who acquired a priority need (for example, through pregnancy), could not be found to be intentionally homeless should one or other or both of them leave the separate accommodations in

31 H(HP)A 1977 s17; HA 1985 s60.

32 H(HP)A 1977 s16; HA 1985 s75.

33 *Re Islam* [1983] 1 AC 688; (1981) 1 HLR 107, HL.

which they had hitherto been living. Only those who had quit accommodation which was available both for themselves and for those with whom they might reasonably be expected to live could be deemed homeless intentionally.

Discharge

- 1.43 Homeless people, then, for whom it was the policy of H(HP)A 1977 to ensure that any authority with which there was a local connection provided substantive assistance, were those who had no accommodation (whether they gave it up of their own accord or not); who were in priority need of accommodation, which most commonly meant that they had children; and who did not quit accommodation which was available for themselves and for the whole of their family unit.
- 1.44 The right which such applicants acquired was not, however, the legal right to council housing itself. Rather, the authority's duty was to ensure that accommodation was made available for the applicant (and those who might reasonably be expected to reside with him/her). The authority might discharge this duty in any of the following ways:
- a) by making available accommodation held by it under what is now Housing Act 1985 Part 2 (ie, the principal part of that Act under which council housing is held)³⁴ or under any other enactment (for example, housing acquired in the exercise of other functions, such as education, highways, etc); or
 - b) by securing that the applicant obtained accommodation from some other person; or
 - c) by giving such advice and assistance as would secure that accommodation was obtained from some other person.³⁵
- 1.45 Of course, the principal burden was bound to be placed on the local authority's own stock. Since 1935,³⁶ local authorities had been under an obligation to 'secure that in the selection of their tenants a reasonable preference is given to persons who are occupying insanitary or overcrowded houses, have large families or are living under unsatisfactory housing conditions';³⁷ subject to this somewhat loose obligation, they were free to determine their own priorities. To this there

34 Formerly, HA 1957 Part 5.

35 H(HP)A 1977 s6(1); HA 1985 s69(1).

36 HA 1935 s51.

37 As consolidated in HA 1936 s85(2).

was now added a new group: those to whom authorities owed a duty under the homeless legislation.³⁸

- 1.46 In principle, this did no more than require authorities to treat the homeless on the same footing as others, which in law was largely a matter of local choice. In practice, however, provision for the homeless was bound to make a significant impact – especially as no added money was made available to authorities under H(HP)A 1977.³⁹ Exacerbating the problem, public spending powers were severely restricted from 1980 onwards.⁴⁰ In addition, the introduction of security of tenure and the right to buy under the Housing Act 1980 Part 1,⁴¹ meant that the stock of new housing available to local authorities was in decline. Inevitably, therefore, an increasing proportion of allocations went to homeless people.

Re Puhlhofer

- 1.47 With so much at stake for individuals, and authorities unable – and sometime unwilling – to fulfil the hope that the Act appeared to hold out, it was inevitable that the courts would be needed to broker the two main parties. Because of the structure of the rights and duties created by the legislation – and following a period during which it had been considered that challenges to authorities' decisions might be mounted by ordinary civil claim (in the county court or the High Court)⁴² – it was held that this was a role that could only be fulfilled by way of judicial review in the High Court.⁴³
- 1.48 What this led to was a very substantial number of cases in what has subsequently become the Administrative Court,⁴⁴ which hears judicial review applications at first instance.⁴⁵ Any analysis runs the

38 H(HP)A 1977 s6(2), amending HA 1957 s113(2), subsequently HA 1985 s22.

39 A point made by Lord Brightman in *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; 18 HLR 158, HL.

40 Local Government, Planning and Land Act 1980; subsequently Local Government and Housing Act 1989. See now, the somewhat more liberal regime of Local Government Act 2003 Part 1.

41 See now HA 1985 Parts 4 and 5.

42 But see, now, chapter 12, for appeal to the county court on a point of law under HA 1996 s204.

43 Under RSC Order 53; *Cocks v Thanet DC* [1983] AC 286; 6 HLR 15, HL.

44 Formerly, the Crown Office List of the High Court.

45 By 1991, almost 20% of all cases in the Crown Office list were homelessness cases, second only to immigration: Bridges, Meszaros and Sunkin, *Judicial review in perspective* (Public Law Project, 1995).

risk of being subjective, but there was a popular perception that the High Court – and, on appeal, the Court of Appeal – so far from maintaining a consistent bias against the homeless, were not uncommonly helpful in their interpretation of the legislation, a perception which derives much support from many of the earlier decisions referred to in the body of this book.

1.49 One body of this judge-made law developed the obviously sensible notion that if a person was occupying accommodation so poor that it could be quit without a finding of intentionality, s/he ought to be treated as if already homeless. This in effect wrote into the definition of homelessness itself – with its reliance on rights of occupation⁴⁶ – a minimum standard below which any accommodation should be entirely disregarded, even if there was a right to occupy it.⁴⁷

1.50 Another – related – body of judge-made law introduced the concept of ‘settled accommodation’.⁴⁸ Only departure from settled accommodation could constitute intentionality, whether because of its condition, terms of occupation or temporary quality. Conversely, only acquisition of settled accommodation would, in normal circumstances, break a period of intentional homelessness and entitle an applicant to re-apply.

1.51 Sympathy – while on occasion expressed – was rarely to be seen in action, however, at the highest level, the House of Lords. Of the nine cases under the 1977/1985 legislation which reached the House of Lords,⁴⁹ the homeless were successful in only two of them.⁵⁰

46 Above, para 1.30.

47 See *R v South Herefordshire DC ex p Miles* (1983) 17 HLR 82, QBD; *City of Gloucester v Miles* (1985) 17 HLR 292, CA; *R v Dinefwr BC ex p Marshall* (1984) 17 HLR 310, QBD; see also the judgment of Ackner LJ in *Re Puhlhofer* at the Court of Appeal (1985) 17 HLR 558.

48 The phrase was coined by Ackner LJ in *Din v Wandsworth LBC* at the Court of Appeal: [1983] 1 AC 657; 1 HLR 73, HL; see also *Dyson v Kerrier DC* [1980] 1 WLR 1205, CA. See below, chapter 6.

49 *Re Islam* [1983] 1 AC 688; (1981) 1 HLR 107, HL; *Din v Wandsworth LBC* [1983] 1 AC 657; 1 HLR 73; *Re Betts* [1983] 2 AC 613; 10 HLR 97; *Cocks v Thanet DC* [1983] AC 286; 6 HLR 15, HL; *Eastleigh BC v Walsh* [1985] 1 WLR 525; 17 HLR 392; *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; 18 HLR 158, HL; *R v Oldham BC ex p G*, *R v Bexley LBC ex p Bentum*, *R v Tower Hamlets LBC ex p Begum* [1993] AC 509; 25 HLR 319; *R v Northavon DC ex p Smith* [1994] 2 AC 402; 26 HLR 659; *R v Brent LBC ex p Awua* [1996] 1 AC 55; 27 HLR 453, HL.

50 *Re Islam* [1983] 1 AC 688; (1981) 1 HLR 107, HL and *Eastleigh BC v Walsh* [1985] 1 WLR 525; 17 HLR 392. Of these, *Walsh* was part of a wider issue – the distinction between tenancy and licence – which was contemporaneously being reviewed (and recast) by the House of Lords: see *Street v Mountford* [1985] AC 809; 17 HLR 402.

1.52 One of those nine cases was *Re Puhlhofer*,⁵¹ in which the equiparation of homelessness and want of intentionality⁵² was firmly rejected. No words such as ‘appropriate’ or ‘reasonable’ were to be imported into the term ‘accommodation’ in H(HP)A 1977 s1/Housing Act 1985 s58 (definition of homelessness). The absence of any such qualification was described as something ‘plainly and wisely’ determined by Parliament.

1.53 The House of Lords also took the opportunity forcefully to express its concern about the ‘prolific’ use of judicial review in this area: the courts should exercise great restraint when giving leave to proceed by way of judicial review; the courts should be used to monitor the actions of local authorities under the legislation only in exceptional cases. The speech of Lord Brightman, in particular, expressed the hope that there would be a lessening in the number of challenges under the legislation.⁵³

My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977. Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power – eg bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the *Wednesbury* sense – unreasonableness verging on an absurdity: see the speech of Lord Scarman in *Reg v Secretary of State for the Environment, Ex parte Nottinghamshire CC*.⁵⁴ Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision

51 *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; 18 HLR 158, HL.

52 Above, para 1.49.

53 At 518.

54 [1986] AC 240, 247–248 – see below, paras 12.13–12.16.

of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.

. . . I express the hope that there will be a lessening in the number of challenges which are mounted against local authorities who are endeavouring, in extremely difficult circumstances, to perform their duties under the Homeless Persons Act with due regard for all their other housing problems.

- 1.54 Save for a relatively brief period, however, there was no appearance of any such reduction or indeed of a lower rate of success on the part of the homeless.

Housing and Planning Act 1986

- 1.55 In 1986, in direct response to *Puhlhofer*,⁵⁵ Parliament reacted to the judgment that it had been ‘wise’⁵⁶ not to qualify the sort of accommodation the absence of which rendered a person homeless by amending the principal definition of homelessness to do just that, in effect to harmonise the criteria of homelessness and intentionality: the homeless were now those who, even if enjoying one of the qualifying rights of occupation, occupied accommodation so bad that it would not be reasonable to remain in occupation of it (having regard to the general housing circumstances of their area).⁵⁷
- 1.56 This in substance preferred the High Court approach⁵⁸ to that of the House of Lords. In practical or applied terms, it meant that a person would now be homeless if s/he enjoyed no settled accommodation.⁵⁹
- 1.57 The Housing and Planning Act 1986 also amended the Housing Act 1985 to ensure that accommodation provided under Part 3 met broadly the same minimum criteria, and likewise rejected critical observations by Lord Brightman in *Re Puhlhofer* in what had not otherwise proved to be an active area of controversy.⁶⁰ In substance

55 *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; 18 HLR 158, HL.

56 Above, para 1.52.

57 HPA 1986 s14(2), amending HA 1985 s58. In Scotland, the equivalent amendment treated as already homeless those who were overcrowded under Scots law and in such circumstances that their health was endangered: Housing (Scotland) Act 1986 s21(2), amending H(HP)A 1977 s1(2).

58 Above, para 1.49.

59 Above, para 1.50.

60 In two cases, without drawing the same link that had been drawn between homelessness and non-intentionality, it had been held that accommodation

and in practice, therefore, it could now also be said that accommodation to be provided had to be settled.

- 1.58 It may be at this point that homelessness law reached its greatest coherence or cohesiveness – the lower courts had taken the parliamentary framework and, reinforced by the 1986 Act, fleshed it out to identify a level of accommodation to which all those in priority need were entitled, below which they could quit without being intentionally homeless or they continued to be homeless and entitled to the benefit of rehousing assistance under the Act, including priority in the allocation of local authority stock.

Asylum and Immigration Appeals Act 1993

- 1.59 For a period, homelessness and allocations law enjoyed a period of statutory stability.
- 1.60 Complaints of unfairness towards others awaiting public sector accommodation, or of an unduly liberal approach to intentionality, were met with revisions to the Code of Guidance issued by the Secretary of State for the Environment⁶¹ but neither achieved – nor sought to achieve – any substantive differences in effect.
- 1.61 During the 1990s, however, there was growing antagonism towards asylum-seekers, many of whom remained in the United Kingdom for years before a final decision on a claim was reached. As persons lawfully in the country, they had at all times fallen within the protection of the legislation.⁶² Under AIAA 1993, however, they were now placed on a different footing from other homeless people. Until the final determination of a claim for asylum, when authorities were bound to reach a new decision,⁶³ there would be no duty towards any asylum-seeker who had the benefit of some accommodation, however temporary. Likewise, accommodation to be provided did not have to be more than temporary.⁶⁴ In effect, therefore, asylum-seekers now enjoyed lesser rights, for the duration of their period as such.

to be provided had to be appropriate or suitable or habitable (having regard to the applicant and those to reside with him/her): *Parr v Wyre BC* (1982) 2 HLR 71, CA (disapproved in *Re Puhlhofer*), and *R v Ryedale DC ex p Smith* (1983) 16 HLR 66.

61 Under HA 1985 s71; see now HA 1996 s182.

62 *R v Hillingdon LBC ex p Streeting* [1980] 1 WLR 1425, CA; *R v Westminster CC ex p Castelli, Tristram-Garcia* (1996) 28 HLR 616, CA.

63 AIAA 1993 s4(4).

64 AIAA 1993 s4(4).

Ex p Awua

- 1.62 Leaving aside the policy of AIAA 1993, as a matter of law – or legal structure – that Act recognised what the courts, and the Housing and Planning Act 1986, had achieved in terms of quality of accommodation,⁶⁵ which is to say that it was that very achievement of which asylum-seekers were to be deprived.
- 1.63 This did not stop the House of Lords taking another crack at such minimum standards. The decision in *R v Brent LBC ex p Awua*⁶⁶ ‘caught most people in the housing world somewhat by surprise. It said that a housing authority’s duty could be discharged in as little as 28 days. The legal landscape . . . has, therefore, changed’. This was how the Minister for Local Government, Housing and Urban Regeneration, described the decision, noting that HA 1996 was neither introduced because of the *Awua* case nor was a response to it.⁶⁷
- 1.64 In *Awua*, it was held that ‘accommodation’ in both Housing Act 1985 s58(1) (definition of homelessness) and s60(1) (definition of intentionality) meant no more than a place which could fairly be described as accommodation and which it would be reasonable, having regard to general housing conditions in the local housing authority’s district, for the person in question to continue to occupy. Notwithstanding the 1986 Act amendments, there was no additional requirement that it should be permanent or settled.⁶⁸ The same was true of the accommodation which a local housing authority had to make available to an unintentionally homeless person under section 65(2); the accommodation had to be ‘suitable’, but there was no requirement of permanence.
- 1.65 Temporary accommodation was accordingly not per se unsuitable. If the tenure was so precarious that the person was likely to have to leave within 28 days without any alternative accommodation being available, then s/he remained threatened with homelessness⁶⁹ and the authority would not have discharged its duty. Otherwise, the period for which the accommodation was provided was a matter for the authority to decide.
- 1.66 This decision, at a stroke, swept away the concept of settled accommodation, save for the purpose of defining that class of accommodation which an intentionally homeless applicant would need to secure

65 Above, paras 1.48–1.50.

66 [1996] 1 AC 55; 27 HLR 453, HL.

67 *Hansard*, Standing Committee G, 19 March 1996, col 691.

68 Cf, above, paras 1.57–1.58.

69 HA 1985 s58(4); see now HA 1996 s175(4).

for him/herself before being entitled to re-apply.⁷⁰ It could no longer be used to identify accommodation which a person could quit without being found intentionally homeless or as the class of accommodation to which a qualifying applicant was entitled. The committee was not referred to – and did not refer to – AIAA 1993.⁷¹

Housing Act 1996 Parts 6 and 7

Policy

1.67 Not only was the Housing Act 1996 not a response to *Awua*, the Minister for Local Government, Housing and Urban Regeneration suggested that it went further than the government intended, by removing the safety net of immediate help that it was its new policy to provide,⁷² in order to reduce the (increasing) proportion of (decreasing) local authority accommodation that was then being allocated to the homeless.

1.68 HA 1996 was foreshadowed by a Consultation Paper – *Access to Local Authority and Housing Association Tenancies* – in January 1994, which described:

... two main methods of acquiring a local authority or housing association tenancy – by making a direct application to the landlord concerned (and usually going on the relevant waiting list until a suitable property becomes available), or by being accepted as statutorily ‘homeless’ by a local authority . . .⁷³

1.69 Government research⁷⁴ published contemporaneously:

... shows that people rehoused from the waiting list are in many important respects (such as income, employment status and previous tenure) similar to households through the homelessness route . . . But statutorily homeless households receive automatic priority over others . . . As a result, in some areas – particularly in parts of London – it is almost impossible for any applicant ever to be rehoused from the waiting list . . . Of those who did manage to get rehoused, people

70 Above, para 1.50.

71 See above, para 1.61.

72 *Hansard*, Standing Committee G, 21 March 1996, col 776. The Minister was aware of the implications of *Pepper v Hart* [1993] AC 625, HL, even if none too accurately, when he remarked, at *ibid* col 769: ‘The Hon Gentleman should also know that what Ministers say during the passage of a Bill is taken into consideration in legal proceedings’.

73 January 1994 Consultation Paper, para 2.5.

74 *Routes into local authority housing*, DoE Housing Research Summary No 16, 1994.

using the waiting list route had to wait nearly twice as long . . . as people housed under the homelessness legislation . . .⁷⁵

By giving the local authority a greater responsibility towards those who can demonstrate 'homelessness' than towards anyone else in housing need, the current legislation creates a perverse incentive for people to have themselves accepted by a local authority as homeless . . . In the great majority of cases, someone accepted as homeless is in fact occupying accommodation of some sort at the time he or she approached the authority. Indeed, the largest single category of households accepted as statutorily homeless are people living as licensees of parents, relatives or friends who are no longer willing or able to accommodate them . . . There is a growing belief that the homelessness provisions are frequently used as a quick route into a separate home . . .⁷⁶

Against this background, the government is proposing measures to ensure fairer access to all parts of the rented housing sector. These include measures to prevent homelessness, to remove the distorting effect that the present provisions have on the allocation of housing, and to ensure that subsidised housing is equally available to all who genuinely need it, particularly couples seeking to establish a good home in which to start and raise a family.⁷⁷

1.70 The proposals were threefold:

- a) to limit the extent of an authority's duties to the homeless;
- b) to limit local authority housing allocation to the homeless; and
- c) to encourage more advisory activity to help people find other accommodation.⁷⁸

1.71 The idea was to provide an immediate safety net, while longer-term allocation to homeless people would be considered alongside others seeking council housing.⁷⁹ This would be achieved by new constraints on allocation, subject to 'broad principles' to be laid down by central government.⁸⁰

1.72 The white paper on which the Act was based, *Our future homes*,⁸¹ pursued the theme that homelessness was:

. . . usually a short term crisis . . . We are committed to maintaining an immediate safety net, but this should be separate from a fair system

75 January 1994 Consultation Paper, para 2.6.

76 January 1994 Consultation Paper, para 2.8.

77 January 1994 Consultation Paper, para 3.1.

78 January 1994 Consultation Paper, para 3.2.

79 January 1994 Consultation Paper, para 3.4.

80 January 1994 Consultation Paper, paras 20.2 and 22.1.

81 Cm 2901 (HMSO, June 1995).

of allocating long-term accommodation in a house or flat owned by a local authority or housing association . . .⁸²

Local authorities will continue to have an immediate duty to secure accommodation for families and vulnerable individuals who have nowhere to go. Where such people are found to have no alternative available accommodation, the local housing authority will have to secure suitable accommodation for not less than twelve months.⁸³ The authority may continue to secure accommodation for longer than that, although after two years it must check that the household's housing circumstances have not changed . . . These arrangements are intended to tide people over the immediate crisis of homelessness, and to give them time to find longer-term accommodation . . .⁸⁴

1.73 The white paper was followed in January 1996 by a linked consultation paper, *Allocation of housing accommodation by local authorities*. This introduced the ideas that were to become Part 6 of HA 1996, governing the waiting list. It identified changes proposed to Housing Act 1985 s22,⁸⁵ designed to 'create a single route into social housing',⁸⁶ in accordance with the policy⁸⁷ of putting 'all those with long-term housing needs on the same footing, while providing a safety net for emergency and pressing needs' [emphasis in original]. It will be 'the only route into social housing allocated by local authorities; it will be dynamic, and will focus on basic underlying need rather than immediate emergency'.⁸⁸

1.74 The consultation paper proposed to retain the long-established categories of those occupying insanitary or overcrowded housing, or living in unsatisfactory housing conditions,⁸⁹ to which it would add:

- those living in conditions of temporary or insecure tenure (including those at risk of losing accommodation, for example, tied accommodation);

82 *Our future homes* (see footnote 81, above), p36, claiming that over 40 per cent of local authority new tenancies – over 80 per cent in some London authorities – and over 25 per cent of allocations of housing association tenancies were going to those accepted under the homelessness legislation.

83 Later changed to two years: see HA 1996 s193(2). See also *Hansard*, Standing Committee G, 21 March 1996, col 776 – reflecting a concern that, even if renewable, one year would not provide sufficient security.

84 White paper, *Our future homes*, p37.

85 Above, paras 1.45 and 1.46.

86 *Hansard* (HC), Standing Committee G, 16th Sitting, 12 March 1996, Minister for Local Government, Housing and Urban Regeneration (Mr Curry), col 614.

87 White paper, *Our future homes*, chapter 6.

88 *Hansard* (HC), Standing Committee G, 15th Sitting, 12 March 1996, Minister for Local Government, Housing and Urban Regeneration (Mr Curry), col 588.

89 See above, para 1.45.

- families with dependent children or who are expecting a child ('recognising the importance of a stable home environment to children's development');
- households containing a person with an identified need for settled accommodation (for example, those who give or need to receive care or other personal circumstances); and
- those households with limited opportunities to secure settled accommodation (for example, low income), bearing in mind longer-term prospects.⁹⁰

1.75 The principal policy change – to minimise the priority call of homeless people on local authority stock – may be addressed under its two heads: principal homelessness changes; and allocation changes. In addition, there were a number of other discrete changes.

Principal homelessness changes

1.76 The principal homelessness changes⁹¹ were:

- persons subject to immigration control under the Asylum and Immigration Act 1996, unless of a class prescribed by the secretary of state, were no longer eligible under Part 7;⁹² nor were others within any class prescribed by the secretary of state; nor were such persons to be taken into consideration when determining whether someone else was homeless, threatened with homelessness, or had a priority need for accommodation;⁹³
- where the authority was satisfied that there was other suitable accommodation available in its area, the duty was limited to giving 'such advice and assistance as the authority consider is reasonably required to enable' the applicant to secure such accommodation;⁹⁴
- in cases where such suitable accommodation was not available, the duty to secure that accommodation was made available to the applicant was limited to two years (although it could be continued in defined circumstances following a review, and – in default – a new application could otherwise be made);⁹⁵

90 January 1996 Consultation Paper (see para 1.73, above), paras 26, 27, 28–31 and 33.

91 The exclusion of those subject to immigration control, introduced in 1993 (above, paras 1.59–1.61).

92 HA 1996 s185.

93 HA 1996 s185(4).

94 HA 1996 s197.

95 HA 1996 ss193 and 194.

- unless and until the authority could make an offer from its waiting list, the authority was prohibited from providing its own accommodation in discharge of functions under Part 7 for more than two years out of any three (whether continuously or in aggregate), unless it was hostel accommodation or accommodation privately leased by the authority from a private landlord.⁹⁶

Allocations

1.77 Meanwhile, HA 1996 Part 6 provided that:

- local authorities were bound to comply with Part 6 when making any allocation decision, including the selection of their own tenants and making nominations to a registered social landlord;⁹⁷
- allocation could also⁹⁸ only be to persons qualified on their housing register, which did not include a person subject to immigration control under the Asylum and Immigration Act 1996, unless of a class prescribed by the secretary of state, nor did it include others within any class prescribed by the secretary of state; qualification was otherwise within the discretion of the authority;⁹⁹
- authorities had to adopt an allocation scheme for determining priority between applicants, including by whom decisions could be taken.

Subject to this, the scheme had to be framed to secure a reasonable preference not for the homeless to whom duties were owed per se but for:

- a) those occupying insanitary or overcrowded housing, or otherwise living in insanitary conditions;
- b) those living in temporary accommodation or on insecure terms;
- c) families with dependent children;
- d) households consisting of or including someone who was expecting a child;
- e) households consisting of or including someone with a particular need for settled accommodation on medical or welfare grounds, with added preference under this heading to those who could not reasonably be expected to find their own settled accommodation in the near future; and

96 HA 1996 s207; this included housing associations or, as they were coming to be known by Part 1 of the same Act, registered social landlords.

97 HA 1996 s159.

98 See above, para 1.76.

99 HA 1996 s161.

- f) households whose social or economic circumstances were such that they had difficulty in securing settled accommodation.¹⁰⁰

Other changes

- 1.78 HA 1996 Part 6 included a number of ancillary provisions, including notification of entry on and removal from the register, review of entries and review of decisions.
- 1.79 Part 7 also effected a number of changes to homelessness law, of which the most significant were the introduction of a right to internal review and subsequent appeal to the county court.¹⁰¹

Between Acts

Restoration of priority to homeless people

- 1.80 HA 1996 Parts 6 and 7 had been in force for only a relatively short period of time when the general election of 1997 brought a new government into power.
- 1.81 One of its first acts was to restore priority to homeless people under HA 1996 Part 6. Using a power¹⁰² to specify further descriptions of people to whom a preference should be given, the Allocation of Housing (Reasonable and Additional Preference) Regulations 1997¹⁰³ re-afforded¹⁰⁴ a reasonable preference to the unintentionally homeless towards whom a duty was owed under Part 7 or its predecessor provisions in the Housing Act 1985.

Asylum-seekers

- 1.82 The Immigration and Asylum Act 1999 set up an entirely separate national service (the National Asylum Support Service (NASS)) to deal with destitute asylum-seekers.¹⁰⁵ As a result, all asylum-seekers

100 HA 1996 s167(2).

101 HA 1996 ss202 and 204.

102 HA 1996 s167(3).

103 SI No 1902.

104 Cf above, para 1.45.

105 Now, for those who made their first asylum claim on or after 5 March 2007 dealt with under the New Asylum Model – see below, chapter 3; earlier applicants are known as ‘legacy’ cases and should have their asylum and support claims dealt with by the Casework Resolution Directorate (CRD).

whose claims were made on or after 3 April 2000 were taken out of HA 1996 Part 7.

The green paper

1.83 These changes were followed, in April 2000, by ‘the first comprehensive review of housing policy for 23 years’ – the green paper, *Quality and choice: a decent home for all* (DETR, 2000).

1.84 The green paper set out aims for reform in relation to both homelessness and allocations. The changes to the allocations provisions were given more prominence and made subject to an overall aim of encouraging ‘social landlords to see themselves more as providers of a lettings service which is responsive to the needs and wishes of individuals rather than purely as housing “allocators”’.¹⁰⁶

1.85 The aims were to ensure that lettings and transfer services:

- a) meet the long-term housing requirements of those who need social housing most, in a way which is sustainable both for individuals and the community;
- b) adopt a simple and customer-centred approach, empowering first-time applicants and existing tenants to make decisions in choosing housing which meets their requirements;
- c) make better use of the national housing stock, by widening the scope for lettings and transfers across local authority boundaries, and between local authorities and registered social landlords; and
- d) give local authorities more flexibility to build sustainable communities within the national context of extreme variations in local housing markets.¹⁰⁷

1.86 The green paper’s proposals for the reform of homelessness policy were intended to:

- ensure that unintentionally homeless people in priority need are provided with temporary accommodation until they obtain settled accommodation (in either the public or private sector);
- broaden the definition of priority need to ensure our most vulnerable citizens are protected by the homelessness safety net;
- enable local authorities to use their own housing stock to provide temporary accommodation, without the current restriction that it may only be provided for two years in any three;

¹⁰⁶ *Quality and choice: a decent home for all* (DETR, 2000), para 9.3.

¹⁰⁷ *Quality and choice: a decent home for all*, para 9.4.

- give those housed in temporary accommodation a reasonable period in which they can exercise the same degree of customer choice of settled accommodation as is available to other people with urgent housing needs waiting on the housing register;
- allow local authorities greater flexibility to assist non-priority homeless households, particularly in areas of low demand; and
- encourage a more strategic approach to the prevention of homelessness and the rehousing of homeless households.¹⁰⁸

1.87 Following consultation, the government published a response (*Quality and choice: a decent home for all – The way forward*, DETR, December 2000), explaining how it was ‘taking the agenda forward’.¹⁰⁹ ‘The principle of choice in lettings was broadly welcomed.’¹¹⁰ Indeed, the move towards choice-based lettings was already being facilitated within the existing legal framework of HA 1996 Part 6, through a series of government-funded pilot schemes.¹¹¹ In relation to the homelessness proposals, ‘there was almost unanimous support, from those who responded’.¹¹² Legislation was promised to implement both the allocation and the homelessness proposals.

1.88 This legislation originally formed part of the Homes Bill 2001, which also included provisions to improve the process of buying and selling homes through a requirement for a ‘home-buyers pack’. The bill fell at committee stage in the House of Lords, as a result of the general election in May 2001. Following re-election, the government decided not to proceed immediately with the provisions relating to home-buying, but re-introduced those relating to homelessness and allocation, in the Homelessness Bill.

Priority need categories

1.89 Not all the elements of the green paper proposals required primary legislation, however. In particular, the green paper proposed extending the categories of priority need¹¹³ to those leaving an institutional or care background, those fleeing domestic violence, and 16- and 17-year-olds. This could be achieved by statutory instrument, under HA 1996 s189(2).

108 *Quality and choice: a decent home for all*, para 9.42.

109 *The way forward*, p4.

110 *The way forward*, para 6.2.

111 *The way forward*, para 6.5.

112 *The way forward*, para 7.3.

113 *Quality and choice: a decent home for all*, paras 9.55 and 9.56.

- 1.90 An amendment was first made by the National Assembly for Wales on 1 March 2001.¹¹⁴ In England, there was consultation on a draft statutory instrument during 2001, and it was not until 2002 that the changes were made, to coincide with the coming into force of the majority of the homelessness provisions in the Homelessness Act 2002.¹¹⁵
- 1.91 The Welsh and English provisions are not worded identically, illustrating an increasing divergence in housing policy following devolution.

Homelessness Act 2002

- 1.92 The Homelessness Act 2002 received Royal Assent on 26 February 2002.

Strategies

- 1.93 The green paper had emphasised the need for authorities to develop a more strategic approach to the prevention and redress of homelessness. This was embodied in Homelessness Act 2002 ss1–4, by a duty requiring each local housing authority to undertake a review of homelessness and to formulate an effective strategy to deal with it, in consultation with both social services (whether of the same authority or another) and other organisations.

Duties

- 1.94 One of the main changes of HA 1996 had been to limit the initial duty to house homeless people to a period of two years.¹¹⁶ This limit was repealed by the Homelessness Act 2002, along with the limitation of use of an authority's stock to house the homeless.¹¹⁷ Also repealed were the provisions of HA 1996 s197 which allowed the main duties to be avoided¹¹⁸ if other suitable accommodation was available.¹¹⁹

114 Homeless Persons (Priority Need) (Wales) Order 2001 SI No 607.

115 See the Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051.

116 See para 1.76, above.

117 Homelessness Act 2002 s6.

118 See para 1.76, above.

119 Homelessness Act 2002 s9.

- 1.95 Nonetheless, the duty was not intended to last for an infinite time, and the circumstances which bring an authority's duty to an end under HA 1996 s193 were accordingly widened to allow more reliance on assured tenancies, and – in certain circumstances – even assured shorthold tenancies.¹²⁰

Non-priority need applicants

- 1.96 Homelessness Act 2002 s5 also gave local authorities power to house the unintentionally homeless under HA 1996 Part 7, even where not in priority need.

Other changes

- 1.97 Further changes were made to the definitions of homelessness and intentionality, to ensure that any kind of violence – not only domestic violence – would mean that it is not reasonable to continue to occupy accommodation.¹²¹ This helps, for example, those fleeing racial harassment or intimidation.

- 1.98 In addition, there was an extension in the jurisdiction of the county court to allow an applicant who is appealing against an authority's decision also to appeal to that court against a refusal by the authority to provide him/her with interim accommodation pending final outcome of the appeal process.¹²²

- 1.99 The Homelessness Act 2002 made two other amendments to the review process: applicants are allowed both to accept an offer of accommodation and to challenge its suitability by way of review;¹²³ and the county court may itself extend the 21-day time limit for appealing.¹²⁴

Allocations

- 1.100 The amendments to HA 1996 Part 6 almost all reflected the government's aim of bringing greater choice to the allocation process by local authorities.

120 Homelessness Act 2002 s7.

121 Homelessness Act 2002 s10.

122 Homelessness Act 2002 s11.

123 Homelessness Act 2002 s8(2).

124 Homelessness Act 2002 Sch 1 para 17.

1.101 One change was to bring transfer applications (whether within the stock of a single landlord or between the stocks of more than one landlord) into the ambit of HA 1996 Part 6.¹²⁵ This ensured both that existing tenants are dealt with on the same basis as new applicants and that their qualification for rehousing is not limited.¹²⁶

1.102 The HA 1996 requirement to keep a housing register was abolished.¹²⁷

Removing the requirement to have a register is an important step in facilitating the development by local authorities of choice-based letting schemes that put the applicant at the centre of the decision-making process. We want to encourage authorities to move away from the rigid formulas of an often artificial points-based system, which typically becomes associated with allocation schemes based on the housing register.¹²⁸

1.103 The government retained the ineligibility of persons from abroad for an allocation of housing.¹²⁹ In addition, the Homelessness Act 2002 and the green paper continued to reflect a widespread concern about anti-social behaviour, and the Act therefore contained provisions allowing those guilty of ‘unacceptable behaviour serious enough to make him/her unsuitable to be a tenant’ also to be excluded from social housing.¹³⁰

1.104 The requirement that allocation schemes reflect housing need in some way was likewise not abandoned, and the Act retained the concept of the ‘reasonable preference’ to be given to certain groups, albeit subject to some changes.¹³¹ Authorities’ schemes are explicitly allowed to take into account financial resources, behaviour and local connection when determining preference and, even where those guilty of seriously unacceptable behaviour are not excluded from the allocation scheme altogether, they may be accorded no preference.

1.105 Changes were made to the ancillary provisions on notification and internal review, to allow an applicant to seek an internal review in relation to any decision about the facts of his/her case, including

125 Homelessness Act 2002 s13.

126 See *Quality and choice: a decent home for all* (DETR, 2000), para 9.8.

127 See para 1.77, above.

128 Standing Committee A, 12 July 2001, col 81, per Dr Alan Whitehead, Parliamentary Under-Secretary for Transport, Local Government and the Regions.

129 See para 1.77, above.

130 See para 1.77, above.

131 Including giving preference to all homeless people, whether in priority need or not, and whether or not they are intentionally homeless.

a decision that s/he is to be excluded or given no preference because of unacceptable behaviour.¹³²

- 1.106 The Homelessness Act 2002 provisions still do not comprise a tightly-prescriptive framework and there remains considerable room for local variation:

We believe the right way forward is for local authorities and registered social landlords to decide in the light of local circumstances, and drawing on the experiences of the pilot studies, the ways in which they should amend or develop their existing arrangements.¹³³

Changes since the 2002 Act

- 1.107 Since the Homelessness Act 2002, the focus of government policy has been primarily on its implementation. One particular focus has been on the reduction in the use of bed and breakfast accommodation. In 2003, secondary legislation made it unlawful in England for local authorities to place families in bed and breakfast accommodation for more than six weeks.¹³⁴
- 1.108 Other key changes have focused on issues of immigration and asylum. While it has already been noted that asylum-seekers were taken outside the existing statutory provisions in April 2000 by the establishment of NASS,¹³⁵ the question arose whether accommodation provided by NASS gave rise to a local connection under HA 1996 Part 7 if and when asylum-seekers achieved refugee status and were thus able to apply under Part 7. The House of Lords initially answered this question in the negative.¹³⁶ The government, concerned that refugees would overwhelmingly apply to areas of greatest housing stress in London and the south-east, reversed this decision by amendments to HA 1996 s199 contained in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 s11.
- 1.109 Another immigration-related statutory change followed from the exclusion of ineligible persons when considering whether an applicant for Part 7 assistance was homeless, threatened with

132 Homelessness Act 2002 s14.

133 *The way forward* para 6.4.

134 Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326. Similar (although not identical) limitations were introduced in Wales in 2006.

135 See para 1.82.

136 *Al-ameri v Kensington and Chelsea RLBC; Osmani v Harrow LBC* [2004] UKHL 4; [2004] HLR 20.

homelessness or in priority need.¹³⁷ This had been held to be incompatible with the family life provisions of article 8 of the European Convention on Human Rights.¹³⁸ In consequence, the Housing and Regeneration Act 2008 amended HA 1996 s185(4) so as to take such persons into account, except in those cases where, although eligible, the applicant¹³⁹ is subject to immigration control,¹⁴⁰ albeit that such an application would be known as a ‘restricted case’ to whom the authority owes a – somewhat lesser – duty by way of making a ‘private accommodation offer’,¹⁴¹ and which is excluded from the reasonable preference afforded to the homeless under Part 6.¹⁴²

1.110 The 2008 Act also made changes to the local connection provisions, so as to include employment in the armed forces and residence during such service as grounds for a local connection, where they had formerly been excluded.¹⁴³ No case-law¹⁴⁴ has, however, had the seminal effect of a *Puhlhofer*¹⁴⁵ or *Awua*,¹⁴⁶ with the possible exception of the Part 6 decision in *R (Ahmad) v Newham LBC*,¹⁴⁷ in which there are shades of Lord Brightman’s speech in *Puhlhofer*¹⁴⁸ to be found in the speech of Lord Neuberger:¹⁴⁹

... [A]s a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that Judges should embark on the exercise of telling authorities how to decide on priorities as

137 See above, para 1.76.

138 *R (Morris) v Westminster CC* [2005] EWCA Civ 1184; [2006] HLR 8.

139 Not being an EEA or Swiss national, who are fully eligible: see below, paras 3.11–3.12.

140 Ie, asylum-seekers, those with indefinite leave to remain: see below, paras 3.91–3.93.

141 Housing and Regeneration Act 2008 s314 and Sch 15 Part 1. The details of what this duty entails may be seen below, paras 5.7–5.8.

142 HA 1996 s167(2ZA), inserted by 2008 Act s314 and Sch 15 Part 1.

143 See below, para 7.16.

144 Other important decisions include *Birmingham CC v Ali*, *Moran v Manchester CC* [2009] UKHL 36 (see below, paras 4.13 and 4.70), and *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7; [2009] HLR 34 (see below, para 5.26).

145 Above, paras 1.47–1.54.

146 Above, paras 1.62–1.66.

147 [2009] UKHL 14; [2009] HLR 31.

148 Above, para 1.53.

149 At [46–47].

between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge.

In relation to the provision of accommodation under the National Assistance Act 1948, my noble and learned friend, Baroness Hale of Richmond, then Hale LJ, said in *R (Wahid) v Tower Hamlets LBC*,¹⁵⁰ para 33, '[n]eed is a relative concept, which trained and experienced social workers are much better equipped to assess than are lawyers and courts, provided that they act rationally'. Precisely the same is true of relative housing needs under Part 6 of the 1996 Act, and trained and experienced local authority housing officers.