instant case, like here. In addition, such readings would contradict the express words of LA 2011 s2(2) regarding pre-commencement limitation.

Healthcare

Amendments to NHS charging regs not unlawful

- **R (MP) v Secretary of State for Health and Social Care** [2020] EWCA Civ 1634, 3 December 2020

MP had blood cancer and required urgent treatment. He challenged the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017 SI No 756 (NHS Charging Regs), in particular the provisions that meant:

1. charges would need to be paid in advance of the provision of treatment that was not urgent or immediately necessary;
2. NHS trusts were required to record the fact that a person was an overseas visitor liable to be charged; and
3. liability to pay charges was extended to cover certain NHS-funded services provided in the community (whereas charging previously related to services provided by NHS bodies in or under the direction of a hospital).

The claim was refused as there was not a legal obligation to carry out a consultation on these specific changes, nor a legitimate expectation that a consultation on all the changes to the regulations be carried out ([2018] EWHC 3392 (Admin); June 2019 *Legal Action* 28). The Court of Appeal upheld the judgment of the High Court and refused MP's appeal.

Welfare rights

Exclusion from benefits of those with pre-settled status is unlawful

- **Fratila and Tanase v Secretary of State for Work and Pensions and Advice on Individual Rights in Europe (AIRE) Centre (intervener)** [2020] EWCA Civ 1741, 18 December 2020

Ms Fratila and Mr Tanase were Romanian nationals who had been granted pre-settled status under Appendix EU to the Immigration Rules and had been refused universal credit. They challenged the required residence test introduced by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 SI No 872 set out in the amended Universal Credit Regulations 2013 SI No 376 (Universal Credit Regs) reg 9(3)(c)(i) on the ground that it amounted to direct discrimination on grounds of nationality, contrary to article 18 of the Treaty on the Functioning of the European Union (TFEU).

The High Court held that the appellants were entitled to rely on TFEU article 18 but refused that claim on the grounds that the indirect discrimination was justified; there was no finding of direct discrimination ([2020] EWHC 998 (Admin); December 2020/January 2021 *Legal Action* 33).

The Court of Appeal allowed the appeal on the ground that reg 9(3)(c)(i) did directly discriminate against EU nationals on the basis of their nationality since it meant that those granted leave to enter or remain in the UK under Appendix EU could not enjoy the necessary right of residence to be eligible for universal credit. Reg 9(3)(c)(i), and other similar regs, were quashed.

1 See *Schedule 10 support*, ASAP, May 2021, available at: www.asaproject.org/uploads/Schedule_10_May_2021.pdf.
2 www.asaproject.org/uploads/HO_temporary_cessation_guidance_March_2021.pdf.
3 https://dpglaw.co.uk/wp-content/uploads/2020/12/3039784-Consent-Order-03-12-20.pdf.
4 Donnchadh Greene, barrister, Doughty Street Chambers, London.
5 *R (B) v Merton LBC* [2003] EWHC 1689 (Admin).
6 Donnchadh Greene, barrister, Doughty Street Chambers, London.
7 Polly Glynn at Deighton Pierce Glynn was the solicitor for TG.
8 Reported at [2021] 1 WLUK 253.
9 The information as to permission and content of the letter was provided by Clare Jennings at Matthew Gold & Co Ltd Solicitors, who represented some of the claimants.
10 NB, M, F and OMA are represented by Deighton Pierce Glynn; XD and YZM are represented by Matthew Gold & Co Ltd Solicitors.
11 Thanks to Farheen Ahmed at Duncan Lewis for providing information about this case. The solicitor instructed in this case was Darren Middleton at Duncan Lewis.
12 www.gov.uk/asylum-support-tribunal-decisions/mas-v-secretary-of-state-for-the-home-department-as-05-05-9315.
13 See right.

Sasha Rozansky is a solicitor at Deighton Pierce Glynn Solicitors. Deborah Gellner is a solicitor at Asylum Support Appeals Project. Lara ten Caten is a solicitor at Liberty.

Housing: case note

R (Ncube) v Brighton and Hove City Council

[2021] EWHC 578 (Admin), 11 March 2021

Jo Underwood, Robert Brown and Joshua Hitchens examine an important case regarding councils' obligations during an emergency to accommodate people who are not otherwise eligible for statutory housing support.

Jo Underwood

Robert Brown

Joshua Hitchens

How do you obey government orders to stay at home during this pandemic, if you don't have a home? These unprecedented times have been incredibly tough for rough sleepers. The 'Everyone In' initiative, launched in March 2020 to provide everyone with emergency accommodation, has undoubtedly been a success and local authorities made huge efforts to ensure that no one was left without a roof over their head during lockdown. This effort saved lives[1] and created a foundation on which we can build to end rough sleeping.

However, despite these efforts and some central government funding to assist local authorities, many rough sleepers were still turned away for homelessness support and emergency accommodation, on the basis that they were not eligible for assistance due to their immigration status (Housing Act (HA) 1996 s185). This particularly affected people with no recourse to public funds (NRPF), like Mr Ncube. The Ministry of Housing, Communities and Local Government has never issued any clear guidance on this issue.

Facts

In September 2020, Mr Ncube approached Brighton and Hove Council for homelessness support. He had previously fled Zimbabwe to seek asylum in the UK but his asylum claim had been refused. He had diabetes, was visually impaired and had poor mental health. He had previously been staying with his sister but had to leave due to overcrowding. Without being able to work and having NRPF, he was homeless and destitute. The council rejected his application on the basis that he was ineligible for homelessness support under HA 1996 Part 7 (Homelessness: England). It could not be disputed that he was ineligible. The issue was whether the council should have considered powers outside Part 7 to accommodate him.

In October 2020, Mr Ncube's solicitors sent a letter before action to the council, formally requesting that Mr Ncube be provided with accommodation on the basis that he was destitute, vulnerable and homeless during a pandemic, and that accommodation should have been

provided pursuant to the 'Everyone In' scheme. The council replied to this letter, confirming that it would not be providing accommodation and that it believed s4 Home Office accommodation for asylum-seekers was the correct type of accommodation provision for Mr Ncube to seek (Immigration and Asylum Act 1999 s4(2)). Mr Ncube subsequently applied for s4 support, but his application was refused. He was accommodated by the time of the hearing under s4 pursuant to a subsequent decision of the First-tier Tribunal.

Mr Ncube's solicitors issued judicial review proceedings (before he had been granted s4 accommodation). Shelter was granted permission to intervene. Shelter and Mr Ncube argued that the council had not considered other powers available to it to provide accommodation outside HA 1996 Part 7, namely:

- Local Government Act (LGA) 1972 s138 – powers councils can use during an emergency or disaster, or to prevent an emergency or disaster. In the context of an emergency involving danger to life, councils can incur expenditure to secure assistance which could include securing accommodation;
- National Health Service Act (NHSA) 2006 s2B – a general power permitting councils to take steps to improve the public health of people who live in their areas; or
- Localism Act (LA) 2011 s1 (where there has been a breach of human rights or where the accommodation is not being provided in a housing capacity but in another capacity, for example, as a social services authority) – a general power permitting councils to do anything that an individual generally may do.

The council defended the claim on the basis that:

- the claim was academic because Mr Ncube had been accommodated in s4 accommodation by the time of the hearing;
- HA 1996 s185 prohibited it from providing Mr Ncube with accommodation, as he was not eligible for assistance under HA 1996 Part 7, and that accommodation via other means would be simply a way of circumventing this prohibition;
- the definition of an 'emergency' for the purposes of LGA 1972 s138 would not be applicable in the circumstances of this case as the Brighton area was only subject to tier 1 restrictions at the time of Mr Ncube's homelessness application and infection rates were low;
- the list of services available under NHSA 2006 s2B, while non-exhaustive, did not relate to the provision of accommodation; and
- specifically, in relation to the LA 2011, s2 precludes the council from doing anything that it is unable to do by virtue of a pre-commencement limitation, namely the limitation in HA 1996 s185 that accommodation should not be provided to those who are ineligible for homelessness assistance.

The housing, communities and local government secretary was added as an interested party but did not take part in the proceedings other than providing written submissions that broadly accorded with the council's position.

Judgment

The court found that although the case was academic because Mr Ncube had been accommodated by the Home Office, the conditions for hearing an academic claim were met given the questions of law posed and the importance for many other rough sleepers.

The court confirmed that councils *do* have powers to accommodate people under LGA 1972 s138 and NHSA 2006 s2B, where the conditions in those sections are met, and that those powers fall outside the restrictions of HA 1996 s185, so that accommodation can be provided to people who are ineligible for homelessness assistance under Part 7 (provided that the use of those powers is not being used to deliberately circumvent s185).

Local Government Act 1972 s138

The court found that LGA 1972 s138 contains a power for a local authority to provide accommodation, including to a person who is not eligible for homelessness assistance under HA 1996 Part 7, where:

(a) there has been an emergency or disaster, or it is imminent, or there is reasonable ground for apprehending such an emergency or disaster;
(b) the type of disaster is one involving danger to life or property;
(c) if so, the council is of the opinion that it is likely to affect its area or some of its inhabitants; and
(d) if so, the council may incur such expenditure as it considers necessary to avert, alleviate or eradicate its effects or potential effects.

The court found that the current pandemic did constitute an emergency, and there had been a danger to the lives of the inhabitants of Brighton even at the time when Brighton was in tier 1 (when social distancing, wearing masks and the prohibition of more than six people in a group were all in force). The risks became more significant in November 2020 and then on 4 January 2021, when the latest lockdown was put in place. It also found that Brighton had rightly identified that rough sleepers were a particularly vulnerable group, and that accommodation should be provided both for their own safety and to manage infection control. Accordingly, accommodation provision could be used as part of a response to that emergency. Further, the use of powers under s138 is not a circumvention of HA 1996 s185.

National Health Service Act 2006 s2B

The court also decided that a council has the power to provide accommodation under NHSA 2006 s2B, as part of its duty to take such steps as it considers appropriate for improving the health of the people in its area. That power can be used to accommodate people who are not eligible for homelessness assistance, where the accommodation is provided in order to minimise any risk to health, and it is not intended to circumvent the prohibition at HA 1996 s185.

Localism Act 2011 s1

Following the reasoning of the High Court in *R (AR) v Hammersmith and Fulham LBC* [2018] EWHC 3453 (Admin); (2019) 22 CCLR 56[2] and *R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin); (2019) 22 CCLR 537,[3] the judge did not accept the general proposition that the power under LA 2011 s1 was available to provide accommodation in a case where an applicant was excluded from homelessness assistance under HA 1996 s185. As to the more specific proposition that the power should nevertheless be available where necessary to avoid a breach of the European Convention on Human Rights, and that LA 2011 s2 should be read down to permit that result, the judge declined to make a determination on this issue as it did not arise on the facts of the case as Mr Ncube had been accommodated in s4 accommodation by the Home Office by the time of the hearing. The court confirmed:

There remains a question as to whether the 2011 Act could be invoked to perform a human rights compliance function. As was said in Aburas, *that question remains to be resolved in other cases, but for the moment it suffices to say that if it is a case simply about the need for accommodation without a substantive statutory context other than the 2011 Act, the 2011 Act does not have a role to play in the provision of accommodation* (para 132).

Comment

It is now clear that councils cannot say they are unable to accommodate people who are not eligible for statutory housing support. The court explicitly confirmed that the pandemic is an emergency and a public health issue for the purposes of LGA 1972 s138 and NHSA 2006 s2B respectively. It is difficult to see how a council could refuse to accommodate somebody during the pandemic purely on the basis that they are not eligible for homelessness assistance. Arguably, those provisions also extend to others who are homeless but may not currently meet other statutory tests such as priority need. Shelter has disseminated a briefing for councils to this effect: *Offering accommodation to street homeless people during the pandemic* (April 2021).

The obvious question then left to be addressed is for how long this judgment will be applicable, as we gradually move out of lockdown restrictions. It is Shelter's view that this judgment is applicable for the duration of the pandemic, as determined by the World Health Organization, and certainly while England has a coronavirus epidemic set out in the government's alert levels,[4] regardless of the easing of lockdown measures. The public health powers under NHSA 2006 s2B may also be of relevance to vulnerable individuals beyond the currency of the pandemic.

1 Dan Lewer et al, 'COVID-19 among people experiencing homelessness in England: a modelling study', *The Lancet Respiratory Medicine*, vol 8, issue 12, 1 December 2020, page 1181.
2 See also February 2019 *Legal Action* 44 and July/August 2019 *Legal Action* 28.
3 See also February 2020 *Legal Action* 28.
4 *COVID-19 winter plan – summary*, Cabinet Office, last updated 2 December 2020.

Jo Underwood is managing solicitor of the strategic litigation team at Shelter. Robert Brown is a solicitor in Shelter's legal team. Joshua Hitchens is a barrister at Outer Temple Chambers. Mr Ncube was represented by Lawstop solicitors, Martin Westgate QC of Doughty Street Chambers and Joshua Hitchens. Shelter was represented on a pro bono basis by Freshfields Bruckhaus Deringer LLP and Liz Davies, Connor Johnston and Adrian Berry of Garden Court Chambers. We are grateful for their contribution to this article.