

# Allocating social housing: the new CBL guidance



In August 2008, Communities and Local Government (CLG) published *Allocation of accommodation: choice based lettings: code of guidance for local housing authorities* ('the CBL code').<sup>1</sup> This article considers the impact of this new statutory guidance.<sup>2</sup>

## Introduction

On 23 July 2002, the Court of Appeal gave judgment in *R (A) v Lambeth LBC; R (Lindsay) v Lambeth LBC* [2002] EWCA Civ 1084; [2002] HLR 57. Lambeth's allocation scheme was found to be unlawful because it did not have a rational mechanism for identifying those in greatest need and ensuring that they were given priority. In November 2002, the secretary of state issued *Allocation of accommodation: code of guidance for local housing authorities* ('the allocations code').<sup>3</sup>

In a letter to directors of housing of all local authorities in England and Wales and other interested bodies, which accompanied the allocations code, Frances Walker, housing policy adviser at the then Office of the Deputy Prime Minister, explained how the code sought to address the issue of how to offer applicants a choice of accommodation while continuing to give reasonable preference to those with the most urgent housing need.<sup>4</sup> In addition, she wrote that more detailed guidance would be issued before the end of 2003. The letter also noted that the allocations code did not contain detailed guidance on either decision-making or reviews. Local housing authorities (LHAs) were advised to ensure that their procedures were fair and complied with the European Convention on Human Rights ('the convention'). The case of *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, 13 February 2003; [2003] 2 AC 430 was pending before the House of Lords and would establish whether or not the Housing Act (HA) 1996 Part 7 homelessness procedures were compatible with article 6 of the convention.

The issue of further guidance would be considered in the light of this judgment. Finally, the letter noted that the eligibility rules discussed in the allocations code were to be replaced on 31 January 2003. However, despite various promises from the government, no further guidance materialised.

In the interim, LHAs have been criticised in a number of decisions by the courts and the

Local Government Ombudsman for their failure to allocate accommodation in line with their statutory duties. In January 2007, CLG finally published a consultation paper, *Allocation of accommodation: choice based lettings: code of guidance for local housing authorities*.<sup>5</sup> The consultation period ended in April 2007. Thereafter, there was a further period of silence until both the CBL code and *Summary of responses to the consultation on the choice based lettings code of guidance* were published unexpectedly in August 2008.<sup>6</sup>

## Responses to the consultation

Three legal professionals were among the 83 respondents to the consultation. These were the Housing Law Practitioners' Association (HLLPA), the Social Housing Law Association and Garden Court Chambers. The lawyers were equally critical of the draft code and explained why it was insufficient to enable LHAs to comply with their statutory duties.

The secretary of state was urged to publish a single, comprehensive code, rather than one that sought merely to supplement the allocations code. It was suggested that the revised code should reflect the recent case-law and Ombudsman reports. Both HLLPA and Garden Court Chambers urged the secretary of state against issuing the code in its then form, and suggested that, rather, major revisions were required. The delays in publishing the CBL code gave practitioners hope that these criticisms had been heeded. However, it is apparent that only modest amendments have been made.

## Two codes of guidance

LHAs in England now have to work to two codes of guidance, namely the allocations code and the CBL code. There are differences of emphasis between the two codes (for example, the use of priority cards: see CBL code para 4.29 and allocations code para 5.12); in addition, there are areas of duplication (for example, see CBL code para 4.9 and allocations code para 5.9).

However, the real problem is that, taken together, the two codes do not provide a comprehensive framework to enable LHAs to discharge their statutory duties. For example:

- No guidance is given on the requirements for a reasoned decision letter and a robust review procedure to comply with the convention.

- Eligibility is a nightmare for LHAs: the current rules are set out in the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294. However, neither code addresses these rules.

Neither did the secretary of state address the changes in the statutory framework that had occurred since the draft code was published. In July 2008, one month before the CBL code was published, the Housing and Regeneration Act (H&RA) 2008 received royal assent. The H&RA makes major changes in the regulation of registered social landlords (RSL) (see 'Allocating social housing: the registered social landlord context', October 2008 *Legal Action* 42). There is no reference to this in the CBL code. Nor is there any reference to the amendments made by the H&RA in respect of:

- eligibility rules which deny a reasonable preference to those whom a homelessness duty may now be owed as a result of curing the incompatibility identified in *R (Morris) v Westminster City Council*; *R (Badu) v Lambeth LBC* [2005] EWCA Civ 1184, 14 October 2005; [2006] 1 WLR 505 (H&RA s167(2ZA));

- local connection provisions in respect of armed forces personnel (H&RA s315); and
- the need to make provision for those leaving the new family intervention tenancies (H&RA ss297–298).

### The government's policy

The CBL code does not provide a legal framework for choice-based lettings (CBL): there is no such framework. LHAs are required merely to have a policy on offering people who are to be allocated accommodation a choice of housing accommodation: HA 1996 s167(1A). The move towards CBL has been driven by the January 2005 ministerial dictate which sets a target of achieving national coverage of CBL by 2010.<sup>7</sup> Some 50 per cent of LHAs have now adopted CBL, and only five per cent of LHAs have no plans to implement CBL by 2010.

CBL code paras 2.8–2.9 set out the government's current policy. This extends beyond the manner in which social landlords allocate individual properties and is intended to facilitate mobility between landlord (whether LHA, RSL or private), area and tenure, including low-cost ownership or the private sector.

CBL code Chapter 6 recommends that LHAs work together with RSLs to adopt

common allocation schemes and common housing registers, and CBL code Chapter 7 suggests this is done on a regional or sub-regional basis. An immediate problem is the tension between the government's aspirations and the existing legislation (see October 2008 *Legal Action* 42).

### The challenge for LHAs

LHAs 'shall have regard' to the CBL code 'in the exercise of their functions': HA 1996 Part 6 s169. The CBL code came into effect on 27 August 2008, the date of its publication. LHAs were given no lead-in time to plan for the code's introduction.

LHAs 'shall not allocate housing accommodation except in accordance with their allocation scheme': HA 1996 s167(8). The first task is for LHAs to carry out a thorough audit of their current allocation procedures. In so far as any procedure is inconsistent with the CBL code, LHAs will need to consider whether or not amendments are required. The second task is for LHAs to consider whether or not amendments are required to the allocation scheme. Until a LHA's allocation scheme has been lawfully amended, its existing scheme must override the statutory guidance. There may be aspects of the allocation procedures which can be amended without the need to alter the allocation scheme. However, there is a statutory requirement that the allocation scheme should include all aspects of the allocation process: HA 1996 s167(1).

CBL code paras 1.6–1.13 emphasise the importance of LHAs ensuring that their allocation procedures are compatible with their equality duties. Arguably, LHAs are obliged to carry out an equality impact assessment. Therefore, regard should be had to *R (Kaur and Shah) v Ealing LBC and Equality and Human Rights Commission (intervener)* [2008] EWHC 2062 (Admin), 29 July 2008, in which the court quashed Ealing's plans for funding borough-wide domestic violence support because an assessment had not been completed.

The CBL code does not suggest the scope of any such audit. It is suggested that the code should encompass the following:

- **The assessment of applications** Self-assessment is now out: LHAs need to ensure that they carry out such inquiries as are necessary to establish the priority that should be afforded to an applicant.

- **Bidding** CBL must not favour computer-savvy applicants at the expense of those who are more vulnerable. Positive steps are required to ensure that all applicants participate on a level playing field.

- **The impact of particular procedures** Take one example: before the introduction of CBL,

LHAs used to assess applicants for particular accommodation and prioritise them for such housing through direct offers (ie, the applicant with an autistic child assessed as needing ground-floor accommodation with a garden). No such assessment is made under CBL on the ground that the applicant could now choose what accommodation to bid for. However, given the popularity of ground-floor accommodation with a garden, CBL may have a detrimental impact on the applicant with an autistic child if s/he is no longer given a head start for accommodation as against applicants with no such need.

### Reconciling choice and need

There is a continuing debate between LHAs about whether to adopt a points or banding system to assess the respective priority of applicants. The allocations code urged LHAs to consider a simplified banding system in place of a 'complex' points-based approach. It also suggested that there was a need to 'reconcile' choice and need. This was a false dichotomy. Identifying those in greatest housing need is part of the assessment process; rather, CBL relates to the allocation of accommodation.

The CBL code adopts a more neutral position, but it is apparent from the emphasis given that banding is the favoured option: points systems merit just one paragraph, ie, para 4.11, in the code. However, the code demonstrates a signal failure to understand the basic legal requirements for a composite assessment of housing need. CBL code para 4.15 recommends a basic structure of four bands as follows:

- no reasonable preference;
- reasonable preference on a single, non-urgent basis;
- multiple need (ie, more than one reasonable preference category); and
- additional preference for those with an urgent housing need.

The fallacy of this approach is easy to demonstrate:

- It suggests that all people who fall within a HA 1996 s167(2) reasonable preference category have the same level of need; however, in practice, the extent of medical need will vary.
- Few authorities have a housing supply that enables them to afford the same degree of priority to homeless applicants regardless of whether or not a full or limited housing duty is owed: HA 1996 s167(2)(b), or indeed where no duty is owed since any homeless applicant falls within HA 1996 s167(2)(a).

- This model has no mechanism for reducing priority on grounds of:

- financial resources;
- conduct; or

– absence of local connection: HA 1996 s167(2A).

While CBL code para 4.19 recognises that some authorities may need to adopt more than four bands, it does not address the challenge posed for LHAs by the decision of the Court of Appeal in *R (Ahmad) v Newham LBC* [2008] EWCA Civ 140, 29 February 2008, in which Richards LJ analysed the jurisprudence in respect of ‘composite assessment’. The House of Lords is due to hear Newham’s appeal on 19 and 20 January 2009. It may be that the secretary of state hopes that the House of Lords will rewrite the established law in this area, and sanction waiting time, rather than housing need, as the determinative factor as to whom social housing accommodation is allocated.

### Assessing applications

CBL code para 4.5 comes up with a somewhat bizarre proposal for the assessment of applications, namely a two-stage process:

- a simplified process at the initial application stage; and
- a more detailed assessment of the relative priorities of applicants at the bidding stage when a number of applicants should be shortlisted.

It is difficult to see how such an assessment process could work in practice:

- Applicants need to know their currency before they bid. The less their currency, the lower applicants will set their sights. Applicants will only know how much currency they have if there has been a lawful assessment of the extent of their assessed housing need as against other applicants against whom they are competing for accommodation.
- If a number of applicants are shortlisted at the bidding stage, any of the unsuccessful bidders has the right to request a review of any fresh assessment, namely the facts of his/her case which have been taken into account in considering whether or not to allocate the accommodation to him/her: HA 1996 s167(4A)(d).

The allocation scheme must specify any criteria that have been applied at the shortlisting stage as these are an important aspect of the allocation process. There may be a dispute about whether or not the selection has been made in strict accordance with the published scheme. The unsuccessful bidders may also demand that they are considered for other properties for which, had they bid, they might have been successful. The problems will be the greater where the shortlisted applicants have made multiple bids. There is a danger that the allocation process will grind to a halt.

### Positive aspects of the CBL code

Despite the above criticisms, there are many positive recommendations to be found in the CBL code which deserve careful study. The code recommends that LHAs do the following:

- Consult with voluntary organisations, statutory agencies and those working with vulnerable tenants before amending their allocation scheme (para 5.3).
- Offer the same choice to the statutory homeless, wherever possible, as to other applicants (paras 4.50–4.59).
- Provide choice to disabled applicants with access needs (paras 4.60–67).
- Ensure that any exclusion policies operated by partner RSLs are specified in the allocation scheme and in any advertisement (para 6.7).
- Publish feedback information about accommodation that has been allocated (para 5.14).
- Provide such feedback information in respect of direct offers (para 5.16).
- Monitor the scheme to ensure that it complies with LHAs’ aims and objectives and their various equality duties (paras 5.30–5.34).

In addition, the code recommends that LHAs should not do the following:

- Impose penalties on applicants who refuse an offer (para 3.13).
- Restrict the number of bids that applicants are able to make (para 3.14). It is noted that such policies are likely to favour computer-savvy applicants (paras 5.4 and 5.7).
- Reduce the priority of applicants who have no local connection to the extent that this negates any reasonable preference (para 4.45).

### The future

The sad conclusion is that the CBL code offers too little, too late. While LHAs will need to audit their allocation procedures against the new code, they would be well advised to keep their eye on the future. Although the Tenant Services Authority (TSA) initially will only issue statutory guidance to RSLs, it is anticipated that the TSA will also regulate LHAs from April 2010 (see October 2008 *Legal Action* 42).

The TSA is to be launched formally in December 2008. It is already talking of securing a level playing field between LHAs and RSLs. There is a real danger that the regulatory tail is now wagging the dog of social housing. It is difficult to see how a level playing field can be achieved while different statutory codes govern both their tenants (ie, secure and assured tenancies) and the criteria by which their accommodation is allocated.<sup>8</sup>

A housing reform green paper was due to be published before the end of December 2008. CLG has indicated that this will look at

the allocation process and address the following issues:

- The high levels of worklessness in social housing.
- The length of waiting lists.
- Low social mobility.
- Geographic concentrations of deprivation.

The Chartered Institute of Housing (CIH), in partnership with CLG, have launched an e-forum to debate the issues feeding into the green paper over the coming months.<sup>9</sup> The CIH has published a discussion paper, *Rethinking housing*, which supports the controversial proposal of abolishing social tenancies for life.<sup>10</sup>

Margaret Beckett, the new housing minister, has recently distanced herself from suggestions that CLG was drawing up proposals to end social tenancies for life and subject them to regular reviews of tenants’ financial circumstances. Labour colleagues were furious at remarks attributed to her in an article in the *Times* on 10 November 2008.<sup>11</sup> The next day, she stated that she had made no decision on either the content or the timing of the green paper.<sup>12</sup> It is probable that this will now slip well into 2009.

- 1 Available at: [www.communities.gov.uk/documents/housing/pdf/choicecodeguidance](http://www.communities.gov.uk/documents/housing/pdf/choicecodeguidance).
- 2 See the author’s series of articles on allocating social housing in the context of the statutory framework of HA 1996 Parts 6 and 7. The articles, which focus on the policy context and allocations by LHAs and RSLs, were published in June, August and October 2008 *Legal Action* 25, 29 and 42 respectively.
- 3 Available at: [www.communities.gov.uk/documents/housing/pdf/157737.pdf](http://www.communities.gov.uk/documents/housing/pdf/157737.pdf).
- 4 Available at: [www.communities.gov.uk/documents/housing/pdf/138670.pdf](http://www.communities.gov.uk/documents/housing/pdf/138670.pdf).
- 5 Available at: [www.communities.gov.uk/documents/housing/pdf/153041.pdf](http://www.communities.gov.uk/documents/housing/pdf/153041.pdf).
- 6 See note 1. The summary of responses is available at: [www.communities.gov.uk/documents/housing/pdf/cblresponsecode.pdf](http://www.communities.gov.uk/documents/housing/pdf/cblresponsecode.pdf).
- 7 *Sustainable communities: homes for all: a five year plan from the Office of the Deputy Prime Minister* is available at: [www.communities.gov.uk/documents/corporate/pdf/homes-for-all.pdf](http://www.communities.gov.uk/documents/corporate/pdf/homes-for-all.pdf).
- 8 See note 2.
- 9 Visit: <http://housingreform.cih.co.uk>.
- 10 Available at: [www.cih.org/policy/Rethinking%20Housing%20-%20CIH's%20Housing%20Reform%20Response%202008.pdf](http://www.cih.org/policy/Rethinking%20Housing%20-%20CIH's%20Housing%20Reform%20Response%202008.pdf).
- 11 *Council homes for life 'to be scrapped'*, available at: [www.timesonline.co.uk/tol/news/politics/article5120047.ece](http://www.timesonline.co.uk/tol/news/politics/article5120047.ece).
- 12 See: [www.insidehousing.co.uk/story.aspx?storycode=6501832](http://www.insidehousing.co.uk/story.aspx?storycode=6501832).

**Robert Latham is a barrister at Doughty Street Chambers, London and is a finalist for Legal Aid Barrister of the Year 2008 (see page 8 of this issue). The author would like to thank Jan Luba QC for his assistance with this article.**