

Allocating social housing: the new guidance



In this article, **Robert Latham** considers the impact of new statutory guidance published in December 2009 by Communities and Local Government (CLG): *Fair and flexible: statutory guidance on social housing allocations for local authorities in England* ('the guidance'). CLG has also published an *Impact assessment* and a *Summary of responses to consultation*.¹

Introduction

In his introduction to *Fair and flexible*, John Healey, the ninth housing minister under this government, sets out the aims of this new statutory guidance issued under Housing Act (HA) 1996 Part 6. He notes that the system for allocating housing is complex and poorly understood. This gives rise to the impression that the system is inflexible and unfair. It fuels the mistaken view that much public housing goes to those who have no legitimate right to it.

He urges local housing authorities (LHAs) to challenge such myths and misunderstandings. They must do more to inform their communities about who is getting housing and consult local residents on their policies.

CLG 'strongly welcome[s]' the House of Lords' decision in *R (Ahmad) v Newham LBC* [2009] UKHL 14, 4 March 2009; [2009] HLR 31 (para 15). However, the minister reaffirms the government's commitment to give priority to those in greatest housing need through the reasonable preference categories. The guidance sets out the new freedoms and flexibilities that LHAs should use when developing allocation schemes to reflect local needs.

It reminds LHAs of their duties to eliminate discrimination and promote equality. They are strongly recommended to carry out an equality impact assessment of any change to their allocation scheme. They should monitor lettings outcomes and ensure that this information is made regularly and publicly available.

Social cohesion

John Healey is correct to identify the increasing frustration faced by housing applicants in securing access to social rented housing and the resentment that this causes. Homeless families in some London authorities currently wait about 10–15 years before they are able to make a successful bid for permanent accommodation.

However, the minister fails to address the cause of this frustration. This is the object

failure of government to secure a sufficient supply of social housing for rent. Since 1979, the promotion of home ownership has dominated the political agenda. The stock of social housing has declined through the right to buy. Many council flats which were once let according to housing need have been acquired by the buy to let market and are now let to those with the greatest ability to pay.

In 1998/99, LHAs granted 378,900 new lettings.² By 2008/09, this had reduced to 151,700. While the LHA housing stock has declined from 3.2m to 1.8m dwellings between April 1999 and April 2009, their waiting lists have grown from 1.04m to 1.76m households during the same period.

The government has only recently had a death-bed conversion, releasing £2.4bn for new council and registered social landlord (RSL) homes since last June. There is now the largest council building programme for over two decades.

Promoting choice

In January 2005, the government set a target of achieving national coverage of choice-based lettings (CBL) by 2010. On 1 April 2009, 61 per cent of LHAs were participating in CBL, an increase from 47 per cent as at 1 April 2008.³ It is now unlikely that the target will be met.

The guidance restates the objective that greater choice should be promoted for prospective and existing tenants. However, there is a change of emphasis. Choice now extends to advice on the housing options available in the private sector.

Partnership working with RSLs

The guidance repeats earlier advice that LHAs should adopt common housing registers and common allocation schemes with RSLs operating within their areas.

Only 180 out of 354 LHAs retain a stock of social housing.⁴ Such LHAs can only

discharge their strategic housing functions under HA 1996 Parts 6 and 7 through nominations to RSLs. Some of these LHAs are blind to their obligation to maintain an allocation scheme. Others are ignorant of the core allocation functions which they are unable to contract out to RSLs.

RSLs are now allocating as much social housing as LHAs. While 55.6 per cent of RSL tenancies are allocated under nomination agreements with LHAs, many of these agreements are badly drafted; were executed years ago; and were made between two parties both of which may have changed their legal identity.⁵ The guidance urges LHAs to update such nomination agreements regularly to ensure that they reflect changing housing markets (para 97). Housing lawyers will need to seek disclosure of such agreements under the Freedom of Information Act 2000.

Part 6 only applies to LHAs. A RSL is under no statutory duty to adopt an allocation scheme or to allocate accommodation strictly in accordance with that scheme. While an allocation by a LHA extends to a nomination to a RSL, Part 6 is silent about what happens after the nomination is made.

Currently, 44.4 per cent of RSL stock is allocated under policies adopted by individual RSLs (including transfers), under guidance issued by the Housing Corporation.

From 1 April 2010, RSLs will allocate accommodation under standards and guidance issued by the Tenant Services Authority under Housing and Regeneration Act 2008 Part 2. These standards have not been issued. Indeed, the statutory consultation for the new regulatory framework only closed on 5 February.⁶ In its response, the Housing Law Practitioners Association is critical of the manner in which this has been introduced.⁷ This framework will be considered in an article in May 2010 *Legal Action*.

Transparency in the allocation process will only occur when there is a comprehensive statutory framework for the allocation of all social housing, whether by LHAs or RSLs.

The decision in Ahmad

In *Ahmad*, the House of Lords reversed the established line of authority which required LHAs to adopt allocation schemes which facilitate a composite assessment of housing need. Their lordships noted that both points and banding schemes had been struck down as irrational. In future, the courts would only interfere with an allocation scheme adopted by a LHA 'in clear and exceptional circumstances' (Lord Neuberger at para 62). Their lordships were attracted to the idea that waiting time should be the tiebreaker between two applicants in housing need. This decision is discussed in May 2009 *Legal Action* 41.

The guidance states at paragraph 17: '... we remain of the view that, overall, priority for social housing should go to those in greatest housing need'. However, this objective is undermined by the reference at para 65 to waiting time: 'The simplest way of determining priorities ... would be to take into account the length of time which applicants have been waiting for an allocation.' It goes on to add at para 66: 'Waiting time has the benefits of being simple, transparent, and easy to understand. It also accords with the view held by some sections of the public about how social housing should be prioritised.'

These criteria of 'housing need' and 'waiting time' are irreconcilable in any inner city area. This is illustrated by the statistics for Newham where a statutory homeless family seeking a three-bedroom property has to wait between 10 and 15 years before it can make a successful bid.⁸ This scheme has a blunt mechanism for assessing the respective needs of applicants. Such a policy is now lawful. However, is the intention of government that homeless families should be condemned to the uncertainties of temporary accommodation for the majority of the period that their children will be passing through the education system? In the absence of any guidance from the government, this is a matter of political judgment for the individual LHA.

Framing a lawful allocation scheme

In *Ahmad*, Baroness Hale noted the duty on a LHA to frame its allocation scheme in accordance with the statutory duty provided by Part 6 (para 14). The guidance confirms the preference of government for banding schemes over points-based schemes. However, it fails to give LHAs any guidance on how to construct a banding scheme given the extent of the discretion now open to them.

The first issue to address is the threshold to be set before allocating an applicant to the 'reasonable preference' band.

Second, a LHA needs to consider whether it is appropriate to give the same level of priority to all applicants meeting one of the reasonable preference grounds.

Third, are there other applicants whom a LHA would wish to afford some preference to reflect local needs and political priorities (ie, under-occupiers; decants; management transfers; social services nominations; sons and daughters schemes, etc)?

Fourth, the guidance notes that the House of Lords has given a green light to LHAs to allocate properties to transfer applicants who do not meet any of the reasonable preference categories (paras 79 and 80).

Fifth, while a LHA is no longer obliged to make a composite assessment of need, would it wish to do so?

Sixth, a LHA may also decide to award 'additional preference' to people falling within the reasonable preference categories who have urgent housing needs.

Finally, a scheme may also make provision for reducing priority having regard to the financial resources of the applicant; the behaviour of a member of the family (rent arrears or nuisance); and/or lack of local connection. It is probable that most LHAs would wish to take all these factors into account. A LHA may decide to take other factors into account (para 64 of the guidance). These may also have a cumulative effect.

Involving local people

LHAs are urged to engage with their local communities in the development of their allocation schemes. This may make housing applicants more aware of the limited stock of social housing that is now available to rent.

CBL creates greater transparency in the allocation process. This makes it the more apparent when LHAs are not allocating accommodation in accordance with their schemes. Unfortunately, the reported cases confirm the extent to which LHAs still fail to do so. The most recent example is the rogue housing officer in *Birmingham City Council v Qasim and Others* [2009] EWCA Civ 1080, 20 October 2009. Further examples were considered in August 2008 *Legal Action* 29.

The guidance fails to recognise the consequences of giving local people a greater say in determining priorities. Experience suggests that local people will urge greater priority for sons and daughters of existing social tenants. However, the guidance continues to urge LHAs to afford priority to the statutory homeless. Also, the government seeks to encourage greater mobility nationally, particularly for those seeking employment. However, local people will rather urge greater priority for those with a local connection with their area.

Neither does the guidance recognise the equality implications of affording a higher priority to local people with a long-standing link to an area.

Comprehensive statutory guidance

CLG has been deaf to the pleas of LHAs for a single statutory code. LHAs must also have regard to the following: *Allocation of accommodation. Code of guidance for local housing authorities* (November 2002); *Allocation of accommodation: choice based lettings. Code of guidance for local housing authorities* (August 2008); and Circular 04/2009, *Housing allocations – members of the Armed Forces* (April 2009).

The new guidance specifies those paragraphs of the earlier codes which have now

been replaced. This adds to the complexity of housing law, the effect of which is to make it largely incomprehensible to the housing applicant whom it is intended to empower.

There remains a lack of clarity about what allocation functions a LHA is lawfully able to contract out. This is particularly important to the 174 LHAs which have divested themselves of their entire housing stock. The only assistance on this is to be found in chapter 7 of the 2002 guidance. This is in urgent need of revision.

Uncertainty remains about the extent to which domestic housing law currently complies with article 8 of the European Convention on Human Rights and this is leading to costly and unnecessary litigation. The European Court of Human Rights' judgment in *Kay v UK* App No 37341/06 is expected later this year. Social landlords could reduce the risk of such challenges were they to have proper policies to deal with issues such as the joint tenant who unilaterally determines a joint tenancy, or the tenant who dies leaving in occupation a family member or carer with no statutory right of succession. No such guidance is provided.

In the 2002 guidance, the secretary of state promised more detailed guidance on determining applications for accommodation and in respect of review procedures regarding adverse decisions. Part 6 does not prescribe a structured decision-making process such as to be found in Part 7 (homelessness). Such guidance is still awaited. LHAs do not have robust procedures for assessing Part 6 applications. Until they do so, flawed assessments will continue to be challenged in the Administrative Court. Such challenges may increasingly focus on any failure of a LHA to comply with its equality duties.

- 1 Available at: www.communities.gov.uk/publications/housing/allocationsstatutoryguidance.
- 2 Statistics are taken from *Local authority housing statistics, England, 2008–09*, available at: www.communities.gov.uk/documents/statistics/pdf/1186234.pdf.
- 3 See note 2.
- 4 See: www.communities.gov.uk/documents/housing/pdf/1307370.pdf.
- 5 Statistics for 2008/09 taken from *HAT update September 2009*, available at: www.tenant-servicesauthority.org/server/show/ConWebDoc.19400.
- 6 See: www.tenantservicesauthority.org/server/show/ConWebDoc.19730.
- 7 See: www.hlpa.org.uk.
- 8 See statistics from the East London Lettings Company for October 2009 to January 2010 at: www.ellchoicehomes.org.uk/Data/ASPPages/1/55.aspx.