Homeless Applicants with Dissatisfactory Decisions, Appropriate Dispute Processing and Access to Justice

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Abstract

This short article examines the situation of the homeless applicant in relation to unsatisfactory decisions when attempting to secure temporary accommodation from local government in England. The issues of appropriate dispute processing, or methods of redress, and whether in practice legal and other remedies are available to applicants, should be analysed in the context of power imbalance in the applicant and local government officer relationship. Additionally, the applicant's vulnerability, which led to the request for assistance in the first place, would need to be considered. Given that applicants are more likely not to challenge unsatisfactory decisions, socio-legal tools could assist in acquiring an insight into why this might be the applicant's default position.

Key words: homelessness, appropriate dispute processing, access to justice, power imbalance, socio-legal tools

[A] INTRODUCTION

This article explores the notion of appropriate dispute processing of homeless applicants' dissatisfactory decisions when they have failed in their attempts to secure their substantive benefit within part VII of the Housing Act 1996 (hereafter the 1996 Act), as amended by the Homelessness Reduction Act 2017 (hereafter the 2017 Act), which applies to England. There is a clear two-part appeal route for homeless applicants who have been issued with a decision that they find unsatisfactory. The appeal process is triggered by the applicant requesting an internal review (1996 Act, section 202) of the negative homelessness decision. External

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review by a county court then follows, provided there is a point of law at issue (1996 Act, section 204). In addition to the statutory appeal process for scrutinizing the homelessness decision, judicial review is also available in specific circumstances for matters that fall outside of the appeal procedure—for example, in the event that interim accommodation has not been provided while enquires are still being carried out, or the applicant seeks to challenge the suitability of interim accommodation (section 188(1) of the 1996 Act; MHCLG 2018: chapter 15, paragraph 15.4). In addition, it would be possible for applicants to make formal complaints at any stage of the application process or after. Should the applicant be dissatisfied with the final outcome of the complaint, ultimately, the applicant would be able to request that the Local Government and Social Care Ombudsman investigate the complaint.

A homeless applicant hopes to be granted the benefit of temporary accommodation assistance. However, should an applicant be issued with a negative decision, a question that needs to be addressed is whether the appeal route is appropriate and in practical terms available to failed applicants. In relation to applicants who experience problems during the enquiry stage, the issue is whether or not the judicial review and complaints system are appropriate methods of redress. And are they in practice available to unsuccessful applicants? The reasons that homeless people would need emergency housing assistance in the first place are connected to their circumstances, which involve issues of vulnerability.[2] For example, more than likely, the applicant will have physical as well as mental health issues at the same time as experiencing multiple legal and non-legal problems (Genn & Ors 1999; Pleasance & Ors 2006). The 'clusters' of legal problems experienced could interconnect with each other, such as, problems with a current or former landlord, homelessness, welfare benefits and debt. The applicant's situation could well include causal factors to the homelessness or to the applicant becoming homeless.

So, when applicants fail in their attempts to secure their potential right to temporary housing assistance at any stage of the application process, what factors should be considered, when exploring appropriate dispute

[2] Vulnerability is a criterion itself within the 'priority need' consideration (MHCLG 2018: chapter 8, paragraph 8.3).

processing[3] in the context of access to justice issues? There are at least three that should be taken into account. First, bearing in mind the situation of the relationship between the applicant and local authority, which is represented by various officers, power imbalance would be one factor. The second is the vulnerability of applicants when they experience difficulty—during the application process or after the issue of a decision—whether they seek legal advice, and, if they do, whether they are successful in seeking advice and what happens in the applicant–advisor relationship. Third, there is the nature of dispute processes available to an aggrieved or failed applicant to pursue, as well as their availability in practice.

[B] HOMELESSNESS APPLICATIONS

In terms of local authority assistance, it is possible for homeless applicants or those threatened with homelessness to seek assistance, within the 2017 Act, in relation to three areas: homelessness prevention, relief or the main homelessness duty. The sole focus of this paper, for reasons of space, is the homelessness duty, as contained in part VII of the 1996 Act, and as amended by the 2017 Act.[4] The legislation is meant to provide a safety net for the more vulnerable among the homeless. An officer carries out an enquiry into the homelessness circumstances of an applicant. In order to make a successful application, a homeless person must be able to provide evidence, and otherwise demonstrate in relation to homelessness, eligibility for assistance[5] and priority need.[6]

[3] The 'primary' dispute resolution processes, such as negotiation and mediation, that can be used as an alternative to court adjudication—another primary dispute resolution process—are still referred to as 'alternative dispute resolution' processes. 'Appropriate' dispute resolution of legal disputes usually refers to the 'best fit' to the matter in dispute considered by the parties involved. See, for example, Wolfe (2001); Menkel-Meadow (2014). See also Merry and Silbey (1984). For discussion of primary forms of dispute process, see Menkel-Meadow (2000: 29); Palmer & Roberts (2020).

I prefer to use the term 'dispute processing' to reflect that not all legal disputes can be resolved, although it is possible to process legal disputes by using one or a range of methods. See also Menkel-Meadow (2000: 3 and 36) and her use of the term 'dispute handling'.

[4] The 2017 Act only affects applicants who applied as homeless after April 2018.

[5] In relation to homeless applications made on or after 3 April 2018, provided the applicant meets the first two conditions, the authority might offer emergency housing. Known as the relief duty, the authority has an overlapping duty to assess the applicant's needs and produce a personalized housing plan at the same time (section 189B (1) of the 1996 Act as inserted by section 5(2) of the Homelessness Reduction Act 2017, see also MHCLG 2018: chapter 13), as well as potentially a main housing duty. The relief duty does not guarantee the provision of accommodation by the authority.

[6] At this stage, provided the applicant has supplied the authority with the lower threshold of evidence, and the authority has reason to believe that the applicant may be homeless, eligible for assistance and in priority need, an interim duty to provide accommodation would have been triggered. See section 188 of the Housing Act 1996; MHCLG (2018: chapter 15).

Furthermore, the applicant should not have caused him or herself to become homeless intentionally, and, in general, must have a local connection with the authority area where the application has been made.[7] Commonly known as 'obstacles', an applicant needs to 'jump' successfully over each of the obstacles, which represents the circumstances which led to the applicant's homelessness or impending homelessness, in order to achieve a positive outcome of a homeless application. Provided homeless applicants meet certain conditions,[8] interim accommodation should be offered towards the beginning of the enquiry process. After enquiries have been completed, a decision has been made, and a written decision issued, applicants with positive decisions should be offered temporary accommodation until the main housing duty comes to an end.[9]

Applying for homelessness assistance from the local government appears to be a straightforward administrative process. However, this process involves a local authority officer who will be exercising discretion when making decisions in the course of carrying out an enquiry into the applicant's homelessness circumstances. Many applicants will experience the enquiry as an investigation, largely because of the nature of questions asked and the supporting evidence sought. A socio-legal perspective offers insights into whether homeless applicants take any action to challenge negative decisions (Cowan & Ors 2003; Law Commission 2006a, 2006b).

[C] THE NATURE OF THE DISPUTE AND AVAILABLE DISPUTE PROCESSES

Thus, a significant question connected to the applicant's circumstances from a socio-legal viewpoint is: when an applicant experiences problems

[7] Within Part VII of the Housing Act 1996, see sections 189B and 193(2); see also MHCLG (2018: chapter 13). Before the main housing duty is triggered, the authority must be satisfied—a higher threshold—that the applicant is homeless, eligible for assistance, in priority need, not have made him or herself intentionally homeless, and in general to have a local connection (see MHCLG 2018: chapter 10 for exceptions). The main housing duty is a duty on the authority to provide temporary accommodation until the duty ends—see section 193 of the 1996 Act for the six conditions that would bring the main housing duty to an end.

[8] Note 6 above.

[9] See MHCLG (2018: chapters 15-17 (accommodation duties); 18 (applications, decisions and notifications), see also above note 7 for an explanation of the main housing duty and when it comes to an end.

[10] Meaning an increase in the formal written law, for example, in relation to the rights in social welfare law such as entitlements in housing and welfare benefits. In the context of this essay, I mean the reframing of problems that applicants experience in relation to their homeless applications, within the legal framework regulating homelessness law: the 1996 Act as amended by the Homelessness Reduction Act 2017. See also Pleasance & Ors (2017), and more generally, Habermas (1987: 357); Bourdieu (1987); Flood and Caiger (1993).

in any part of the homelessness application, do the applicant's problems arise as a result of the process of 'juridification'? The idea that problems become juridified (Cowan & Ors 2003)[10] enables us to understand whether and when problems are transformed into a dispute. Socio-legal analytical tools assist in understanding, for example, whether an applicant has 'legal consciousness' (Cowan 2004) that could be a vital factor in determining whether an applicant seeks legal advice and assistance, as well as representation (see also Silbey 2005). Also, what happens in the advisor–applicant relationship when the applicant seeks legal advice. An internal review could remain a simple administrative process if the applicant does not seek legal advice and does not have representation (Cowan & Ors 2003). However, if the applicant seeks legal advice following a negative decision (1996 Act: section 184), the request of a section 202 review may become a legal dispute through a transformation process—that is, the new understanding that the applicant acquires through adopting a more legal perspective.

The 'transformation' process itself is a useful tool in assisting us to understand the part that different parties play in transforming problems into disputes (Cicourel 1976; Felstiner & Ors 1980-1981). The Law Commission (2006b: 10-15) in its *Further Analysis* paper, dealing with issues of proportionate dispute resolution in relation to housing disputes, discusses the transformation of problems into disputes within the context of an 'accountability space'.[11]

As to whether the statutory appeal procedure might be the most appropriate method to process disputes about negative homelessness decisions, it would appear to be so. Although useful comments by Seneviratne were made before the appeal route formally became available to homeless applicants, they remain useful: the statutory appeal route involves institutions that are too adversarial, and therefore a more conciliatory process might well be more appropriate (Seneviratne 1990: 127). In terms of which procedural forum would be the most appropriate for the appeal to be considered, over time various suggestions have been made. In relation to the section 202 review, a suggestion was made of the possibility of the then Local Government Ombudsman carrying out the internal review, with its more investigative or inquisitorial approach (Ng

[11] In its 2006b *Further Analysis* paper, the Law Commission discusses the 'accountability space' as a 'polyvocal grievance-handling system', citing the example of local authorities having a range of mechanisms to deal with grievances, such as audit, internal review, quality control mechanisms, which includes the complaints system.

2009).[12] While JUSTICE (2020) suggests that a new Housing Disputes Service (HDS) should carry out the internal review. With the intention of establishing a new culture of collaborative non-adversarial working, the HDS aims to investigate and 'to find solutions and remedies which most closely match the justice of the issue and the parties' aspirations for the resolution of the dispute' (JUSTICE 2020: 17). In a sense, the HDS's functions would be similar to a 'multi-door courthouse'[13] except the HDS's focus would be on informal dispute resolution processes only, using negotiation and other forms of alternative dispute resolution (JUSTICE 2020: 18-19). The HDS 'would not have hearings'. JUSTICE envisages that there would be a right to appeal decisions to the appellate courts and tribunals. The Law Commission (2006b) had considered that the section 204 external review could be carried out by the Upper Tribunal.

In terms of potential problems experienced by applicants where an officer's decisions create a grievance or series of grievances, it would be useful to consider which problems would be more suited to the complaints process and which problems would be better processed by way of judicial review. Certainly, problems that are clearly administrative in nature could be processed by a management response, which connects to quality control, with the aim of improving organizational practices (Law Commission 2006b: part 8). Where officers' decisions exceed the legal limits of their power and questions are raised in terms of the legality of a decision, then judicial review would be the solution.[14] Yet, what do administrative problems encompass?[15] At what point does an administrative problem that an applicant experiences during the homeless application stage become a legal problem and therefore a dispute to be processed by judicial review rather than through an administrative management response? Within the legal system of England and Wales,

[12] It is possible for local authorities to contract out its homelessness functions and statutory obligations (MHCLG 2018: chapter 5).

[13] The idea of a multi-door courthouse, as envisaged by Frank Sander, would screen any incoming cases, triage disputes and match them to a range of dispute resolution processes. Each 'door' represents a dispute process, which includes litigation. See Sander (1976).

[14] Elliot and Varuhas (2017). However, see note 16 below and the Pre-Action Protocol for Judicial Review.

[15] Although not defined in legislation, in terms of 'service failure' maladministration includes: delay; poor record-keeping; failure to take action; failure to follow procedures or law; poor communication; giving out misleading information; and failure to investigate. See Local Government and Social Care Ombudsman, 'What Can I Complain About?'.

the choice of judicial review for an unsatisfied homeless applicant is rather restricted, since 'litigation should be a last resort'.[16]

Furthermore, appropriate dispute processing is inextricably linked to access to justice issues for homeless applicants, with funding for legal services being a significant matter. Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPOA 2012), fewer people have been eligible for legal aid (Hynes 2012). Since 2012, there have been a decreasing number of county courts (Caird and Priddy 2018), and decreased government funding has caused a drying-up of the availability of legal advice, creating 'advice deserts' (Law Society 2019). Strategies have been suggested to address the need for legal advice and the paucity of services (Low Commission 2014, 2015). Moreover, following the recent review of LASPOA 2012, the government has developed a Legal Action Plan (Ministry of Justice 2019).

[D] CONCLUSION

To conclude, the homeless application process involves a local government officer exercising power while performing a duty to carry out enquiries in relation to the homelessness situation of a person, along with his or her household. The applicant—more than likely vulnerable—is attempting to seek assistance for a basic human need. The officer could be perceived as either the barrier or gate through which an applicant would or would not be assisted. When an applicant experiences problems in relation to any aspect of the homeless application process, an indicator of appropriate dispute processing would include a mechanism or series of mechanisms that would effectively address any power imbalance present in the applicant–bureaucrat relationship. Any indicator would need to take into account a landscape of 'legal advice deserts' and the paucity of legal advice, assistance and representation. In any event, a consideration of access to justice issues may not necessarily equalize the power imbalance between an applicant and local government officer—for example, an applicant might have managed to secure legal representation, yet the applicant's representative might not have fully grasped the applicant's circumstances.[17] To ensure that steps are taken to address any power

[16] Pre-Action Protocol for Judicial Review, paragraph 9. Parties are expected to consider other ADR processes, including the complaints system, and provide evidence that ADR has been considered. In the event that the Pre-Action Protocol has not been followed in relation to ADR, then, in considering and awarding costs, the court must factor in the decision not to pursue ADR.

[17] In this situation, potential issues, which would need to be explored, include: the lawyer's workload; and the lawyer working with clients within the limitations of the legal aid framework – there could be any number of reasons why a representative might not have fully grasped the client's circumstances.

imbalance in a disputing relationship, the dispute processes would also need to be examined as part of the enquiry to assess whether the processes might be available in practice and would be appropriate. In England and Wales, given that litigation should only be used as a last resort, it would be useful to ask, 'when, how, and under what circumstances should cases be settled?' (Menkel-Meadow 1995: 2665, italics in original). As Menkel-Meadow puts it: 'We must learn to analyse and understand what conflicts and disputes are about, in their full contextual complexity, before we can choose the appropriate behavioural response.' (2004: 18)

The situation of the homeless applicant highlights that in any area of law a thorough examination is required in terms of the dispute itself, before assessing which dispute process or series of dispute processes would be the most appropriate. Moreover, any dispute processes applied should enhance access to justice, and not suppress the problems, particularly in relation to public law cases. This may mean that a mixture of different processes or methods might be involved in 'handling' disputes.[18] Adjudicators, for example, could need to adopt a more inquisitorial style where litigants in person are conducting their own case in court. Although it has been pointed out that judges potentially lose impartiality, and the shifting of a judge's responsibility impacts on their independence when in the role of an inquisitor (Genn 2017).

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[18] See note 3 above.

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