

# How Should Reviewing Officers Approach the Question of Intentionality?

*The position when dealing with intentional homelessness following the decision of LB v London Borough of Tower Hamlets [2020] EWCA Civ 439.*

## **Summary**

This article focusses on the approach that reviewing officers should take when deciding whether someone has made themselves intentionally homeless following the Court of Appeal's decision in *LB v London Borough of Tower Hamlets* [2020] EWCA Civ 439.

The Court upheld a reviewing officer's decision that the Appellant had made herself intentionally homeless due to rent arrears and not domestic violence. The officer's decision must be informed by all relevant matters, including events that may occur up to the date of the authority's review decision. Evidence from events up to the time of the review should not be ignored.

The full judgement can be accessed here: <https://www.bailii.org/ew/cases/EWCA/Civ/2020/439.html>

## **Introduction**

Section 193 of the Housing Act 1996 (the Act) states that local housing authorities owe substantive duties to those eligible for assistance under Part VII of the Act where they are in priority need and have not made themselves intentionally homeless.

Section 191 of the Act provides that a person has become intentionally homeless if they:

- (1) Deliberately do or fail to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.
- (2) For the purposes of subsection (1) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate.
- (3) A person shall be treated as becoming homeless intentionally if—
  - (a) he enters into an arrangement under which he is required to cease to occupy accommodation which it would have been reasonable for him to continue to occupy, and
  - (b) the purpose of the arrangement is to enable him to become entitled to assistance under this Part,

and there is no other good reason why he is homeless.

Each applicant is entitled to have their application individually considered. Nothing in the Act prevents another member of the family or the household making a separate application. It is the applicant who must have deliberately done something or failed to have done something which resulted in homelessness. However, where applicants were not directly responsible for the act or omission, but were complicit in that behaviour, then they may be treated as having become intentionally homeless themselves.

The Homelessness Code of Guidance for Local Authorities (the Code) makes clear at paragraph 9.11 that when considering whether an applicant has been complicit in the behaviour, the authority should take into account whether the applicant could reasonably be expected to have taken that position through fear of actual or probable violence.

It will generally be up to the local housing authority to satisfy itself that the applicant is intentionally homeless. In deciding if someone is intentionally homeless, a reviewing officer will need to work through the statutory test set out at section 191 of the Act. The elements of that test have been broken down below.

### **Deliberate Act or Omission**

The Code at paragraph 9.17 sets out examples of what would *not* constitute a deliberate act or omission. The examples include:

- a. Non-payment of rent or mortgage costs arising through financial difficulties which were beyond the applicant's control.
- b. The officer has reason to believe that the applicant is incapable of managing their affairs (by reason of age, illness or disability).
- c. The act or omission was made under duress.

The applicant must always be given the opportunity to explain such behaviour. An act or omission should

not be treated as deliberate if it was forced upon the applicant through no fault of their own.

Where an applicant has lost their home due to rent arrears, the reason why the arrears occurred must be fully explored.

Examples of when an act or omission *would be* considered deliberate include where a person has:

- a. Wilfully and persistently refused to pay rent or mortgage payments.
- a. Significantly neglected their affairs having disregarded sound advice from qualified professionals.
- b. Been evicted because of their anti-social behaviour, harassment or nuisance to neighbours.
- c. Decided to sell their home in circumstances where they are under no risk of losing it.

### **Consequence of Deliberate Act or Omission**

The ending of the occupation must be the result of the applicant's deliberate act or omission. In *Haile v Waltham Forest LBC* [2015] UKSC 34 the Supreme Court held that in deciding whether a deliberate act had *caused* homelessness, "there had to be a continuing causal connection between the act and the homelessness existing at the date of the inquiry; the authority had to consider that question by reference to facts that had occurred after the deliberate act in question".

Reviewing officers will need to look back at the last period of settled accommodation, and to the reasons why the applicant left that accommodation, in order to determine if there is the necessary causal link. The Code at paragraph 9.13 gives an example where a person voluntarily gives up settled accommodation, moves to less settled accommodation but then subsequently becomes homeless when required to leave the new alternative accommodation. In that scenario, the necessary causal link would be made out.

### **Accommodation Ceases to, or Will Cease to, be Occupied as a Result of the Omission or Act**

For intentional homelessness to be established there must have been actual occupation of accommodation which has ceased. This occupation need not be continuous so long as the accommodation was available to the applicant for their occupation. The accommodation need not be in the UK.

## **Available to be Occupied by the Applicant**

A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he is entitled to occupy by virtue of an interest, court order, express or implied licence or by virtue of an enactment / rule of law giving him permission to remain in occupation or restricting the rights of another person to recover possession (section 175 of the Act).

Section 176 of the Act states that accommodation is only available where it is available for the applicant, their household and any other person reasonably expected to live with them.

## **Reasonable to Continue to Occupy the Accommodation.**

An applicant cannot be treated as intentionally homeless unless it would have been reasonable for them to have continued to occupy the accommodation. It is for the housing authority to make a judgement on the facts of each case, taking into account the circumstances of the applicant (paragraph 6.23 of the Code). This will include the applicant's financial resources, whether there is a probable risk of domestic violence and the general housing conditions (for example if the occupant required wheelchair access to the property).

In *Denton v Southwark LBC* [2007] EWCA Civ 623 the Court of Appeal found that the reasonableness of continued occupation was to be determined at a point of time before the deliberate act which led to the loss of accommodation took place.

The High Court in *Mohammed v Hammersmith and Fulham LBC* [2001] UKHL 57 suggested that the reviewing officer should not limit the review by reference to circumstances existing at the date of the deliberate action or inaction alone, but by reference to *all the circumstances* before that date and matters thereafter up to the date of the review.

## **Financial resources**

As regards to financial resources, the following factors may be considered by the reviewing officer:

- a. The financial resources available to the applicant (including salary, maintenance payments, savings and social security benefits).
- b. The cost of the accommodation including but not limited to rent.

- c. The applicants reasonable living expenses. The reviewing officer should consider whether the applicant can afford the housing costs without being deprived of essential food, clothing, heating and transport. Housing costs should not impact the applicant's ability to afford these things (paragraph 17.45 of the Code).

## Domestic violence

As regards to domestic violence and harassment, section 177(1) and (1A) of the Act states:

“(1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him, or against:

- (a) a person who normally resides with him as a member of his family, or
- (b) any other person who might reasonably be expected to reside with him.

(1A) For this purpose “violence” means:

- (a) violence from another person; or
- (b) threats of violence from another person which are likely to be carried out;

and violence is “domestic violence” if it is from a person who is associated with the victim.”

Reviewing officers should note that an assessment of the likelihood of a threat of violence or abuse being carried out should not be based on whether there has been actual violence or abuse in the past. Assessments must be based on the facts of the case and should not make any value judgements about what an applicant should or should not do to mitigate the risk of any violence and abuse.

It is essential that inquiries do not provoke further violence and abuse. Housing authorities should not approach the alleged perpetrator, since this could generate further violence and abuse. Housing authorities may, however, wish to seek information from friends and relatives of the applicant, social services, health professionals or the police, as appropriate. This is not an exhaustive list and other sources of evidence may be available. It is important for housing authorities to not have a blanket approach when dealing with domestic abuse cases (paragraph 21.21 of the Code).

## **Acts or Omissions Made in Good Faith**

Acts or omissions made by the applicant in good faith must not be considered deliberate (section 191(2) of the Act).

The Code at paragraph 9.24 provides examples of what may constitute good faith in this context. These include:

- a. A person giving up possession of accommodation after receiving a valid notice that their assured shorthold tenancy has come to an end and the landlord requires possession of the property. If the former tenant was genuinely unaware that they had a right to remain until the court granted an order for possession and a warrant or writ for possession to enforce it, then they would be deemed to have acted in good faith and not to have acted deliberately.
- b. A person getting into rent arrears, being unaware that they may be entitled to Housing Benefit, Universal Credit or other social security benefits.
- c. A tenant, faced with possession proceedings to which there would be no defence, and where the granting of a possession order would be mandatory, surrenders the property to the landlord.

It is important to note that evidence of dishonesty removes the question of an act or omission having been made in good faith (paragraph 9.24 of the Code).

## **Applicants Entering into an Agreement**

Reviewing officers must be alive to the possibility that applicants may have colluded with members of their family, friends or their landlord. Applicants may purport to have been obliged to leave available accommodation in order to take advantage of assistance available under the Act. Where there is evidence of collusion, and there is no genuine other reason for them leaving the accommodation, the local housing authority should treat the applicant as being intentionally homeless pursuant to section 191(3) of the Act.

## **LB v London Borough of Tower Hamlets**

On 24 March 2020, the Court of Appeal handed down its judgment in the case of *LB v London Borough of Tower Hamlets* [2020] EWCA Civ 439. The Appellant, Ms LB, applied to the London Borough of Tower Hamlets for assistance under Part VII of the Act. The Respondent's housing officer refused the application

on the ground that she had rendered herself intentionally homeless. The decision was upheld by the Respondent's reviewing officer. Ms LB appealed the decision. The County Court at Central London dismissed her appeal. Ms LB then appealed to the Court of Appeal.

Ms LB lived in a privately rented property with her husband and their three children. There was evidence that she had been subjected to domestic abuse and harassment from her husband. As a result of the abuse, the husband moved out of the property and a Non-Molestation Order was made against him. Ms LB subsequently fell into rent arrears and was evicted for that reason.

As set out above, improper non-payment of rent, leading to eviction, can be treated as intentional homelessness. Therefore, the question in this case was whether, given the rent arrears leading to eviction, it would not have been reasonable for Ms LB to continue to occupy the property because it was probable that occupation would lead to domestic abuse or violence against her and/or her children.

The reviewing officer found that it would have been reasonable for her to continue to occupy the property in all the circumstances. The County Court affirmed that decision.

The Appeal focused on the lawfulness of the Respondent's review. The Court also dealt with the question of the date at which probability of violence is to be assessed for the purpose of sections 191 and 177 of the Act.

The Court held that section 191 is directed to the time when the relevant person does or fails to do something with the result that he or she ceases to occupy accommodation and then, to whether it would have been reasonable for her to continue in occupation. In applying section 177, the Applicant will be held to have been reasonable in ceasing to occupy if, when she does or fails to do the act, continued occupation would probably lead to domestic or other violence.

The Court held that while the question of whether it was reasonable for a person to continue to occupy premises which she had ceased to occupy deliberately is to be assessed at or about the time of the act in question, **the assessment needs to be informed by all relevant matters, including events that may occur up to the date of the authority's review decision.**

# How Should Reviewing Officers Approach the Question of Intentionality? Continued...

In deciding whether or not it was reasonable for Ms LB to have continued to occupy the property, instead of ceasing to do so deliberately by not paying the rent, **the authority had to consider whether it was probable that this would have led to violence. It could not ignore evidence from events up to the time of review.**

The authority must also consider whether what it had learned about subsequent events should lead to a decision that her continued occupation of the property would have made it probable that further violence would follow.

The Court found that the reviewing officer was entitled to reach the decision that she did. The officer expressed her assessment of the risk to Ms LB as a result of continuing to live at the property. She did not confine herself solely to the events that might occur physically at the property. The officer had investigated the background to the eviction, having proper regard to the nature of the events which were said to have occurred and the absence of evidence of significant breaches of the Non-Molestation Order.

The officer did not make a value judgement as to what Ms LB should or should not have done to avoid further violence. The question of how much weight is to be attached to particular elements of the evidence was for the Respondent to decide. Absent any error of principle or logic, the decision of the reviewing officer cannot be said to be unlawful. As such, the appeal was dismissed.

## **Practical Considerations and Conclusion**

While each case is fact specific, the Code and the case law gives clear guidance as to the way in which reviewing officers should approach the question of intentionality. Officers must engage individually and meaningfully with each applicant. They must consider the reasons behind the applicant's current situation, not limiting themselves to a surface level analysis. The analysis must be holistic, not blinded by a single factor like rent arrears.

Officers must give special consideration to the issue of domestic abuse and violence. People working with potential victims of domestic abuse must be flexible and discreet in their approach. Decisions must be made on evidence and not based on value judgements. In cases where an officer suspects that there has

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been collusion, they should seek to gather evidence to prove the collusion. It would not be enough for the officer to act on hearsay or unfounded suspicions.

The case of *LB v London Borough of Tower Hamlets* builds on the existing principles of reasonableness to continue to occupy accommodation. As a point of practice, it also provides a helpful reminder that, where issues of domestic violence and intentional homelessness arise, it is essential that proper consideration is given to matters which occur up to the date of the review decision. A reviewing officer cannot rely solely on matters which pre-date the end of the occupation at the property.

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