

PUBLIC AND PRIVATE REALMS OF THE ADMINISTRATIVE JUSTICE SYSTEM: HOMELESSNESS CASES IN ENGLAND

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Abstract

Applicants who need urgent housing assistance from local government in England hope to gain the benefit for which they have applied. Should they fail to secure assistance or actual temporary accommodation, effective dispute processes would need to be in place within the administrative justice system. Yet, what would effective dispute management mechanisms look like to homeless applicants who might be experiencing ‘applicant fatigue’? This article examines the situation of the homeless applicant, aspects of whose private life is being processed by a public administrative and legal system, and considers the measures that need to be in place for homeless applicants to be able to access the full benefits of the non-legal and legal mechanisms.

Keywords: homelessness; complaints; reviews; applicant fatigue; applicant-administrator relationship

[A] INTRODUCTION

Homeless applicants in England who need urgent housing assistance from local government hope to receive the benefit they have applied for. If immediately homeless, the hope could be an immediate offer of accommodation, which would be adequate, in good condition and suitable for the applicant along with his or her household members, if there are

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any.² The Housing (Homeless Persons) Act 1977 and subsequent revisions applied to both England and Wales until 27 April 2015, when the homelessness provisions of the Housing (Wales) Act 2014 came into force, following constitutional reforms in the UK. The legislation currently in place in England is the Homelessness Reduction Act 2017, which amends part VII of the Housing Act 1996. The 2017 Act contains the more ‘pro-active’ duties, while the ‘reactive’ duty can be found in the 1996 Act. Homeless applicants attempt to engage in an apparently simple administrative application process for assistance for a very basic human need—housing—while at the same time they may be navigating the welfare benefits system for monetary assistance from the government. Simultaneously, applicants might be trying to deal with the very conditions that may have caused their homelessness in the first place, as well as other practical or legal problems that might be interconnected. The lack of stable accommodation or being homeless means that homeless people would automatically be considered by society to be vulnerable. Seeking assistance to address this basic need becomes a priority because homeless applicants hope that accommodation will help them, their family and their belongings to be safer. However, social vulnerability does not automatically mean that a homeless applicant would be considered to be vulnerable under the homelessness law, particularly if she or he is a single person. This article addresses the question: what does ‘applicant fatigue’ inform us about the existing administrative justice system and about the place of complaint and review processes in relation to homeless applicants?

This article argues that the pressure of daily fatigue, due to homelessness, in a homeless applicant’s life means that any administrative actions that are unfair, unjust or wrong and any decision-making process that is unfair or unjust causes additional burdens and fatigue. By extension, the availability of complaints procedures and review processes could then in reality function as mere symbols for a homeless applicant, rather than providing substantive methods for an applicant to participate in a process to acquire the benefit for which she or he has applied. In this case, a homeless applicant hopes to gain access to assistance or actually attain a basic human need of shelter. An administrative action or a negative decision, along with applicant fatigue,

² However, see the case of Ben and Carrie, and their two young children, who spent a total of 26 weeks in a bed and breakfast hotel (B&B). The family lived in one room and shared cooking and washing facilities with other residents. No other family lived in the hotel (LGSCO 2017: 4). Unfortunately, as the LGSCO report indicates, there are other families who are routinely placed into inadequate accommodation for long periods. Authorities cannot place households which include a pregnant woman or dependent children for longer than six weeks in a B&B when no other accommodation is available (Homelessness (Suitability of Accommodation) (England) Order 2003): see also MHCLG (2018: paras 17.31-17.44).

potentially creates an impasse in the homeless application process, to the detriment of the applicant. In this situation, it would be helpful to examine the applicant–administrator relationship. However, good administration and meaningful access to justice could assist homeless applicants to break this ‘stuckness’. The social vulnerability of homeless applicants suggests that a consideration is required individually of related issues, as well as how different issues interconnect to each other; issues such as administrative justice, which is also connected to social or housing justice and access to justice (Ng 2009).³

Within the administrative justice system, it is possible to make complaints when there is maladministration⁴ and service failure which has had an adverse effect on the complainant, thereby causing injustice. Review processes have a two-fold impact. First, as part of a two-component statutory appeal process, following a negative homelessness decision, a request for an internal review would have to be made first; secondly, in relation to any problems where it is arguable the local authority has made a wrong decision or has exceeded its authority. For example, in the non-provision of interim accommodation during the enquiry process, potentially it would be possible for an applicant to make a claim for judicial review. The complaint and review processes are the more common non-legal and legal remedies available to address problems in relation to homeless applicants. However, since the implementation of the Access to Justice Act 1999, litigation can only be considered as a last resort. Bearing in mind that an applicant would already be experiencing the cumulative effects of his or her homelessness, when an applicant feels that he or she has been treated unfairly or has been issued with a wrong or unjust decision by a local government officer, which could mean that emergency housing assistance has been denied, it would be natural for an applicant to want the problem to be resolved as quickly as possible. However, any negative administrative action or decision in relation to any welfare assistance claim would more likely cause additional fatigue.

³ Housing justice focuses on the procedural aspects of administrative justice and the dispute management process itself, with the aim of leading to a fair and just decision, even though a homeless applicant may not have been able to achieve a successful substantive outcome.

⁴ Although not defined in legislation, the definition of maladministration, in terms of service failure, include: delay; poor record-keeping; failure to take action; failure to follow procedures or law; poor communication; and giving out misleading information. See LGSCO, ‘How to Complain: What We Can and Cannot Look at’.

Yet, the literature has indicated potential problems with the complaints mechanism (Gulland 2011)⁵ and the low take-up rate in challenging negative decisions by review (the first part of a two-part appeal process) (Halliday 2001; Cowan, Halliday & Ors 2003; Cowan & Ors 2017).⁶ A reason for the low number of applicants seeking review of an unsatisfactory decision could be connected to ‘grievance apathy’ and ‘appeal fatigue’, or an encompassing term that Cowan and colleagues call ‘applicant fatigue’ (Cowan, Halliday & Ors 2003: 138-141; see also Cowan & Ors 2017). ‘Grievance apathy’, like political apathy where most people do not vote in most elections, is the situation when most grievants do not name, blame or claim and enter into a dispute (Felstiner & Ors 1980-1981: 636). Whereas ‘appeal fatigue’ is the circumstances when complainants ‘rarely persevere beyond the first point of complaint’ (Cowan, Halliday & Ors 2003: 138), ‘applicant fatigue’ consists of two elements of fatigue: first, there is exhaustion from the cumulative effects of previous or synchronous events in homeless people’s lives, which is often connected to the circumstances of their homelessness. Secondly, this cumulative exhaustion drains energy from an applicant having to deal with any appeal process following a negative decision in relation to any welfare claim (Cowan, Halliday & Ors 2003). To this definition, I would add that, in addition to cumulative daily living fatigue that depletes energy from an applicant having to deal with maladministration and service failure, an applicant might just ‘let go’ of a negative decision as an event that took place in this period of the applicant’s life. This essay adopts the term ‘applicant fatigue’. Given that only a low number of people will complain following an erroneous decision, ‘thoroughness and procedural fairness are more important in primary adjudication than they are in appellate processes’ (Ison 1999: 23). Hence, it is essential to bear in mind the significance of how ‘fairness’ is played out in the pre-decision applicant and administrator relationship.

In addressing the central question of this essay on ‘applicant fatigue’ and the place of complaint and review processes within the administrative justice system, three analytical tools could assist us in understanding

⁵ Gulland considers the informal complaints system in relation to users of social care services. See note 31 below. The effectiveness of formal complaints procedure and socially appropriate responses to complaints has been discussed by Lloyd-Bostock & Mulcahy (1994). The co-authors argue that not all claimants seek compensation. In pursuing a claim, some claimants are only interested in being provided with an explanation, apology or preventing the situation happening to others in future (Lloyd-Bostock & Mulcahy 1994:145).

⁶ However, Cowan & Ors found an increasing upward trend in the volume of internal review applications, although this could possibly be connected to an increase in the volume of decisions being made under the homelessness legislation (2006: 388).

potential problems that could prevent applicants from accessing or experiencing the full effectiveness of the complaint and review mechanisms. Socio-legal analytical tools, legal consciousness (Cowan 2004; Cowan & Ors 2006) and the dispute transformation process (Felstiner & Ors 1980-1981) could enhance our understanding of the applicant and decision-maker relationship, as well as an impasse that a homeless applicant could experience in pursuing any challenge when faced with negative administrative action or decision. Legal consciousness research, which seeks to understand people's routine experiences and perceptions of law in everyday life, began life in the United States (Cowan 2004; see also Merry & Silbey 1984; Ewick & Silbey 1998). The dispute transformation paradigm strives to make sense of events that a person with a 'justiciable' (Genn 1999 & Ors) problem might experience in the pre-dispute stages of naming, blaming and claiming. The starting point being whether a person is likely to experience a 'perceived injurious experience' which then leads to this person naming the experience as such. The examination of the transformation and emergence of a dispute takes place within the specific environments from which injuries might or might not be perceived, as well as people's responses to 'experience of injustice and conflict' (Felstiner & Ors 1980-1981: 631-632).⁷ Finally, intersectionality provides us with an understanding, perspective and acknowledgment of the individual experience of the specific environments from which disputes might or might not emerge. For,

Intersectionality investigates how intersecting power relations influence social relations across diverse societies as well as individual experiences in everyday life. As an analytic tool, intersectionality views categories of race, class, gender, sexuality, nation, ability, ethnicity, and age—among others—as interrelated and mutually shaping one another. Intersectionality is a way of understanding and explaining complexity in the world, in people, and in human experiences (Hill Collins & Bilge 2020).

At this stage two points would need to be raised, first, a legal system which only allows litigation as a last resort presents potential problems. Second, as suggested above and now necessary to emphasize, just as important an issue is the interconnected discussion of dispute management and access to justice in the situation of the homeless applicant. It is important to bear in mind that administrative law, being a constituent of public law—regulating the relationship between the individual and the government—attempts to equalize the imbalance of power between the individual and the government. Moreover, there is a

⁷ Carrie Menkel-Meadow (1985) has criticized the dispute transformation model as providing only partial answers and focusing on processes and not outcomes.

need to further address the imbalance of power through access to justice, if the government is serious about enabling the more vulnerable people within society to challenge administrative decisions. Unfortunately, litigation has already been restricted through the civil procedural principle of litigation being the last resort.⁸ For homeless applicants, because of their social vulnerability, dispute management is inextricably connected with access to justice issues. Moreover, since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPOA 2012), eligibility for legal aid has been restricted (Hynes 2012). The ongoing problems connected to legal advice deserts (Law Society 2019), limitation of legal aid (Hynes 2012) and the closure of county courts (Caird and Priddy 2018) further contribute to the restriction of access to justice for homeless applicants.

The discussion within this article has been located within the literature on administrative justice, alternative dispute resolution and socio-legal studies and, to a lesser degree, social justice. Administrative justice arguably resides within the broader framework of social justice in terms of equal effective legal rights. While the literature on the relationship between the decision-maker and the potential recipient of welfare benefits is more developed, there has been less attention on the homeless applicant and administrator or bureaucrat relationship. First, a discussion of ‘applicant fatigue’ will take place within the context of homelessness applications and the dispute processes available within the administrative justice system. The homeless applicant and administrator relationship will then be explored before the article concludes. The main focus of this article will be on homeless applicants, in England, seeking assistance in relation to the main housing duty.⁹ The term, ‘homeless applicant’ will be used because authorities would still need to take a homeless application if there is reason to believe that an applicant may be homeless or threatened with homelessness, regardless of the subsequent duty owed.

[B] HOMELESSNESS APPLICATIONS AND DISPUTE PROCESSES WITHIN THE ADMINISTRATIVE JUSTICE SYSTEM

In England, it is possible for people who are homeless or who are threatened with homelessness to seek assistance at their local authority.¹⁰

⁸ See Civil Procedural Rules and Pre-Action Protocol for Judicial Review.

⁹ See note 11 below.

¹⁰ See Davies (2017) and Davies & Ors (2019) for further information.

New legislation, the Homelessness Reduction Act 2017 (hereafter the 2017 Act), which was implemented in 2018, created new pro-active homelessness duties on authorities in England. The 2017 Act also amended part VII of the Housing Act 1996 (hereafter the 1996 Act), which contains the more reactive homelessness duty.¹¹ The new duties apply to homelessness applications made on or after 3 April 2018. The existing reactive homelessness duty contained in part VII of the 1996 Act now intersects with the more recent homelessness prevention¹² and relief¹³ duties. As soon as an authority is satisfied that an applicant is homeless or threatened with homelessness and is eligible for assistance, it must carry out an assessment (1996 Act, section 189A). A personalized housing plan (PHP) should then be drawn up following the assessment. The PHP should contain an action plan of the steps to be taken by all the parties involved to prevent or relieve the applicant's homelessness.¹⁴ Local authorities are expected to make every effort to reach an agreement with the applicant in relation to the PHP. The parties are likely to be the local council, the applicant and possibly the landlord or an agency assisting the applicant. In carrying out both the preventive and relief duties, authorities must take into account the PHP.¹⁵

The 2017 Act extended the types of decisions that could be statutorily appealed. Types of decisions include the steps an applicant has been expected to take in the PHP in relation to the prevention duty; notice given by the authority to end a prevention duty; the steps an applicant has been expected to take in the PHP in relation to a relief duty; and notice given by the authority to end a relief duty (1996 Act: section 202). In addition, the ending of the prevention and relief duties can be reviewed. Both duties

¹¹ To be eligible for the main housing duty (section 193 of the 1996 Act)—a duty on the authority to provide accommodation until the duty ends—an applicant must be able to meet five criteria—homelessness, eligibility for assistance, priority need, unintentional homelessness and local connection (Ministry of Housing, Communities and Local Government (MHCLG) 2018: chapters 6-10 and 15)—which authorities need to take into account in carrying out enquiries and the decision-making process. Interim accommodation ought to be provided when an applicant meets 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 (section 188 of the 1996 Act).

¹² Applies to all those threatened with homelessness within 56 days and who are eligible for assistance. Priority need is not an issue, although the prevention duty does not extend to an authority having to secure accommodation. An authority should intervene and prevent homelessness, so that households can remain in their accommodation (MHCLG 2018: chapter 12).

¹³ The relief duty places onus on authorities to take reasonable steps to secure accommodation for any eligible homeless applicant. Again, priority need is not an issue, and the authority does not actually have to provide accommodation, unless an applicant would be considered to be in priority need for accommodation (MHCLG 2018: Chapter 13).

¹⁴ See MHCLG 2018: chapter 11.

¹⁵ See [Shelter Legal](#) for information about the prevention and relief duties.

could be brought to an end if an applicant deliberately and unreasonably refuses to take any of the steps he or she had agreed to take in relation to the PHP, or the authority had included in the PHP the steps the applicant should take where agreement could not be reached. However, an applicant can also request a review, should he or she disagree with the authority's proposed steps in the PHP.¹⁶

For homeless applicants who wish to challenge an unsatisfactory written decision, an internal review forms the first part of a two-part statutory appeal process. This means that a homeless applicant should be issued with a written decision first and, at the same time, should be informed of a right to request a review because there is a 21-day deadline within which the request has to be made. However, a request for a review of the homelessness decision would need to be made first and a review decision made before an application could be made to the county court to appeal an unsatisfactory review decision on a point of law. A judicial review-type enquiry by a judge will then be carried out (section 204 of the 1996 Act). In addition, where applicants believe that an officer is not dealing with their application properly, they will be able to make a complaint.¹⁷

In terms of the public authority's complaints procedures, usually the grievant would need to pass through all the stages of the internal complaints process first before making a complaint to the Local Government and Social Care Ombudsman (LGSCO). In a sense the LGSCO would be the last resort for complaints unless an authority has not resolved the complaint or a complainant has not received a response within a reasonable amount of time, which is usually 12 weeks.¹⁸ In addition, the LGSCO cannot investigate if the complainant has or had a right of appeal or could take legal action and the LGSCO considers it to be reasonable for the complainant to do so.¹⁹ This means that an applicant could raise a complaint during the enquiry process. Any service failure would then be rectified as soon as possible following an investigation. However, it is not always possible for service failure to be corrected before

¹⁶ See LGSCO (2020) where the LGSCO report on the implementation of the 2017 Act two years later. Unfortunately, common problems that occur include: delay in authorities assisting people; communication problems, including the non-issue of clearly written decisions or not informing applicants of their appeal rights, and not updating PHPs.

¹⁷ LGSCO, [Homelessness Applications Fact Sheet](#).

¹⁸ See the [LGSCO website](#). In certain circumstances, it is possible for complainants who are dissatisfied with the outcome of the LGSCO decision to seek a review of the decision or to seek a judicial review: see '[Challenging our decisions](#)' on the website. .

¹⁹ See LGSCO note 4 above.

the issue of a homelessness decision, given the need for a complainant to exhaust the internal complaint process first and the time period that the LGSCO considers to be reasonable for a response from an authority.²⁰ In the case of Ms B, the LGSCO investigator reported that if the LGSCO had not started investigating in June 2019, even though Ms B had not complained to the local authority before contacting the LGSCO, then the authority possibly would not have offered her any accommodation until the day of eviction on 11 February 2020 (paragraphs 37, 40 and 43).²¹ The LGSCO follows its own six principles of good administrative practice which set the standards expected of local government, when it investigates the actions complained about (LGSCO 2018).²²

Problems that arise during the enquiry of a homeless application which would not be covered by the appeal process are potentially judicially reviewable. Judicial review has been the main route available for rectifying decisions made by local government officials which are either wrong, or made outside of their remit of power, or where there has been an abuse of power in an act or omission.²³ However, judicial review can only be considered as a last resort. In urgent cases, a claim could be made immediately.²⁴ Where a judicial review claim is not urgent, claimants would be expected to follow the Judicial Review Pre-Action Protocol. Where there is no right of appeal, disputing parties are instructed to consider ‘some form’ of alternative dispute resolution (ADR) first. This might be discussion and negotiation, ‘public authority complaints or reviews procedures’, ombudsman or mediation.²⁵ Timing and efficiency—in terms of costs and preventing delays, transparency, and claimants’ disputing behaviour—appear to be the key factors that courts take into account.²⁶ Although the dispute processes are separate processes and

²⁰ It takes about 13 to 26 weeks for cases to be investigated and completed by an LGSCO investigator. (LGSCO 2019).

²¹ Report by the LGSCO: Investigation into a Complaint against London Borough of Haringey (Ref No 19 014 008), 25 June 2020.

²² (1) Getting it right; (2) being service-user focused; (3) being open and accountable; (4) acting fairly and proportionately; (5) putting things right; (6) seeking continuous improvement.

²³ See [Shelter’s website](#) for the types of decisions that can be judicially reviewed: for example, local authority refusal to accept a homelessness application or a fresh homelessness application; the non-provision of accommodation pending the internal review; local authority refusal to provide interim accommodation pending a decision on the homelessness application; suitability of interim accommodation.

²⁴ Para 6 of the Pre-Action Protocol for Judicial Review.

²⁵ Paras 8-9 of the Pre-Action Protocol for Judicial Review.

²⁶ See Pre-Action Protocol for Judicial Review.

have been described as such, the circumstances of a homeless applicant mean that more than one process might be resorted to at any one time.

Some homeless applicants do not always understand the situation they are attempting to address, nor are some able to articulate the difficulties they experience or the nature of assistance they need. What is clear though is that the applicant struggles with a welfare system that is meant to assist them, with bureaucrats that expect co-operation from the applicant, non-confrontational engagement and an acceptance of the intrusion into their privacy with endless patience. It is a system where every detail about decisions applicants had made about their accommodation, their relationship status, their financial situation, medical conditions, dependency issues, or child care arrangements is questioned (Cowan, Halliday & Ors 2003; Ng 2009; Bretherton & Ors 2013). Furthermore, within the dispute-processing framework, although some do make formal complaints, the applicant is more likely to have quarrels with the bureaucrats, engaging in verbal exchanges at an informal level when dissatisfied rather than confrontation that involves taking formal action.²⁷

As explained above, ‘applicant fatigue’ (Cowan, Halliday & Ors 2003) could play a considerable part in the applicant’s inaction to challenging negative homelessness decisions. Just as delays and uncertainty based on non-communication or insufficient information provided by an officer could cause more fatigue, any problems become part of an accumulative effect in causing an extra burden in having to deal with any appeal process in relation to any welfare assistance claim. The applicant might already be fatigued from ‘the product of previous or concurrent events in their lives, often related to the circumstances which surround their homelessness. These events have depleted their energy to pursue a challenge to the welfare bureaucracy’ (Cowan, Halliday & Ors 2003: 139). When an applicant has reached an impasse and becomes stuck in trying to move forward with an application, the ‘stuckness’, when there is no movement for applicants, raises questions about this inertia: does the applicant feel that he or she has no choice other than to accept a negative decision? For those who had decided to lump it, why? For those that decide to avoid having to confront the situation, why? Yet, just as difficult

²⁷ However, see Gulland (2011) at note 31, who examined the informal complaints stage in relation to users of social care services.

would be complainants who are angry (Susskind & Field 1996).²⁸ This anger could be connected to being treated unfairly or with a lack of respect.

Alternatively, rather than experiencing ‘applicant fatigue’, an applicant might just have ‘let go’ of a negative decision during part of a particular period in life that has been dominated by difficulties. This is passive, rather than active, decision-making. Therefore, just as an applicant would experience the weight of daily living fatigue through being homeless, as a series of events taking place, a negative decision might be viewed as just yet another event occurring in that period of the applicant’s life when the applicant might have felt powerless to take any action to resolve problems in any area of his or her life. This inaction is different from ‘avoidance’, although the ‘acceptance’ does fall within the inaction range in the typology of dispute responses (Palmer & Roberts 2020). ‘Avoidance’ does require action in the sense that a decision has to be made to disengage and avoid the person with whom there has been a disagreement. The action is then avoidance, creating a disturbance in the social relationship, leading to economic, psychological or social losses (Felstiner 1975: 695-696), whereas to ‘lump it’ requires a decision to let go, to do nothing about the problem, rather than to respond for various reasons (Felstiner & Ors 1980-1981).

At this point, the dispute transformation process could help us to understand why there is inaction. Furthermore, it could be that an applicant might benefit from legal advice and assistance, particularly

²⁸ Susskind and Field’s book focuses on disputes that impact on the public, such as the environmental impact of oil spills and accidental release of toxins—whether large-scale or smaller—and substantial residential and industrial development projects, and the interactions between the public and corporations as well as government agencies. However, the types of anger caused by the problems and the outcome of assessment of the public in not being listened to are lessons that could be applied to the situation of the individual. Although individuals who experience problems with an administrative decision are very much individual cases, individual grievants are also part of a group of unhappy and probably angry applicants. Susskind and Field suggest that the ‘powerful’, which would include government agencies, should first listen to the concerns of the other side: ‘People’s frustrations at having little to say in their lives will only be increased if their attempts to explain the situation as they see it go unheeded.’ Second, the more powerful should relinquish power in order to gain power by involving the weaker party in decision-making. What this means is not to give up control, but it does mean ‘helping to balance the accessibility of information’ (1996: 31). While Susskind and Field review solutions in terms of consensus-building between disputing parties, and even within communities, it could be argued that, in the same way, public administrators should engage in ‘consensus-building’ within the administrative relationship. As the authors assert: ‘When people feel they have not been treated fairly, or with respect, their anger multiplies’ (1996:17). Angry publics mean that public resources are also spent on dealing with conflict and, ultimately, litigation, when such resources could be better spent to ‘accomplish the tasks government has been empowered to do’ (1996: 238). This is apart from the trust that the government needs to maintain with the public in order to be able to be seen to be carrying out its governance with sufficient competence.

because of the applicant's social vulnerability. A homeless applicant might need assistance—legal or non-legal—to break the impasse he or she reaches. At the same time, the lawyer or caseworker in this situation might well become the main agent of transformation (Felstiner & Ors 1980-1981; Menkel-Meadow 1985), converting the struggles of the applicant and administrator to a dispute, by launching a claim for judicial review or possibly to make a complaint,²⁹ provided the complaint could be addressed in a timely manner to break the impasse. In the LGSCO Case of Ms B, mentioned above,³⁰ the LGSCO investigation could have been the timely intervention that Ms B had needed in order to break the impasse that the local authority had reached in refusing to provide interim accommodation in advance of the eviction date. This was despite the authority knowing about Ms B's housing circumstances since June 2019, after her landlord had served her with a notice of seeking possession, and that she had six children, some of whom had disabilities.

In general, the complaints and review mechanisms exist to address struggles that homeless applicants experience with local government decision-makers in terms of demonstrating their emergency housing need in accordance with set legal criteria. As there is no guarantee the benefit applied for would be granted, the mechanisms available to address problems between applicant and bureaucrat would need to ensure that the administrator remains accountable for his or her actions. The mechanisms would also need to be effective for applicants who are often socially vulnerable because of their personal circumstances that led to the emergency housing assistance application in the first place. Sossin discusses the substance, as opposed to the symbols of participation and accountability in relation to democratic administration and the goals courts in Canada place on participatory rights and administrative decision-making (2002: 848-849). The criticism being that the Canadian courts, as does the government, place a greater emphasis on the symbols of participation and accountability, rather than the substance.

[C] PRIVATE LIVES PROCESSED IN A PUBLIC SYSTEM

In understanding the limits of participation for an aggrieved homeless applicant, the administrative justice system can be seen to consist of both private and public elements. However, within the separate elements, there

²⁹ Alfieri discusses the lawyer's reinterpretation of the client narrative and 'the notion of poverty law advocacy as a medium of storytelling' (1991: 2111).

³⁰ Note 21 above.

is also a fluidity of movement, which could involve the use of different dispute mechanisms, at different stages of the dispute or series of disputes, which falls into both the private and public realms of the administrative justice system.

The private realm of the administrative justice system can generally be characterized as ‘informalism’ or the resort to managing disputes or struggles between the applicant and administrator using ADR processes, which, in the case of the homeless applicant, will be the complaints system. Any decision made within the informal context remains private to the parties within the struggle, in that decisions are not usually published unless the complaint has been investigated by the LGSCO and a decision made.³¹ Nor are the decisions of internal reviews usually published and made available to the general public.³² The applicant and administrator relationship, from homelessness enquiry through to the complaint stage—should one or a series of complaints arise—therefore, is essentially one that stays private and internal to the local authority. However, it should first be borne in mind that applicants are seeking assistance from local government, which is connected to public law and public resources that are also protected by the public officers. Within this context, the council officer engages in an ‘intimate’ administrative relationship (see section D below) seeking information from an applicant of what would usually be information of a private nature and which would have stayed private but for the applicant needing assistance at an extremely difficult time in his or her life. As Sarat puts it, ‘being on welfare means having a significant part of one’s life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private’ (1990: 344). The ‘intimate’ administrative and decision-making relationship is conducted under the shadow of potential last resort litigation, which is played out in an adversarial legal system, that a council officer who had issued a decision, as a representative of an authority, might need to defend. Essentially an applicant’s struggle with a public administrator, within the current administrative justice and civil litigation systems, remains within the private realm unless or until it reaches the public domain.

³¹ Gulland examined the informal stage of local authority complaint procedures for users of social care services, which includes decisions on charging and allocation of services. There is a first-stage informal process. In practice, the authorities did not record the details of the informal complaints (2011: 484-486).

³² Interestingly, the Law Commission has categorized internal and external reviews as managerial responses (2006: paras 5.33-5.37).

The public realm of the administrative justice system could generally be seen as ‘formalism’ or the resort to dispute-processing mechanisms that would lead to the publication or public announcement of the outcome of the management of the dispute. In the homeless applicant’s situation, this could be a LGSCO-published decision,³³ judgment subsequent to judicial review or an appeal: a so-called objective and external assessment of the homeless application dispute leading to the publication of the outcome. It could be argued that the statutory appeal process a homeless applicant would need to engage in as a result of an unsatisfactory decision demonstrates the fluidity of the public and private realms of the administrative justice system. An applicant would need to request a statutory review first—which falls within the private realm—until and provided the circumstances allow the applicant to appeal an unsatisfactory review decision to the county court on a point of law. Once the statutory appeal process has been initiated, values connected to the adversarial culture become part of the process. Yet, for most of the time, the applicant and administrator relationship has been conducted within the private realm of the administrative justice system, with the applicant divulging knowledge that is ‘inward’—of an intimate nature (Sossin 2002: 826). The applicant is essentially ‘bargaining’ in the shadow of litigation as a last resort, even if the applicant is not aware, or does not become aware until after he or she seeks legal advice and representation. This article does not focus on the applicant and decision-maker dispute within the public domain but on the possibility of this occurring.

Given the social vulnerability of homeless people, legal advice and assistance, as well as representation, are important factors. Yet, there has been a decrease in access to justice since 2010 in England (Hynes 2012), in terms of legal advice and representation (Law Society 2019), as well as the closing down of local courts (Caird & Priddy 2018)—widely documented—which includes a mandatory imposition to settle. Within the context of the low number of homeless applicants requesting reviews subsequent to a negative decision, good administration will lessen the daily living hardship that applicants would experience as a result of maladministration causing injustice. Following Sossin’s argument below, an acknowledgment and a willingness for the administrator to honour the ‘intimate’ relationship, within a framework for the mutual exchange of ‘inward knowledge’, might prevent maladministration or wrongful, unjust or unfair decisions being made.

³³ Although the identity of the complainant remains anonymous.

[D] THE APPLICANT AND DECISION-MAKER RELATIONSHIP

It is worth remembering at this point the social vulnerability of the homeless applicant in terms of the interconnected problems experienced which cause fatigue in daily living. That fatigue could also be a significant reason as to why there is a low rate of challenges to negative homelessness applications. Being homeless means that daily living fatigue is part of an accumulative effect that impacts on an applicant's ability to challenge any negative welfare applications, also termed 'applicant fatigue'. Or the applicant could just have accepted a negative decision as nothing more significant than only an event in his or her life, just as an applicant might just accept the power imbalance within the applicant-administrator relationship.

There have been different characterizations of the administrator. The bureaucrat works within an organizational culture that might well include discrimination and racism (Halliday 2000), with organizational culture viewing applicants as 'undeserving' (Cowan, Halliday & Ors 2003). Bureaucrats have also been characterized as socially constructing applicants. For example, this could mean that, if an applicant had a physical illness which was apparent, such as using a walking stick, shortness of breath or amputated limbs, this was 'a strong indicator of vulnerability' (Bretherton & Ors 2013). There is a body of literature which focuses on the decision-maker as a 'street-level bureaucrat' working within a context where there is 'fiscal crisis' or tight budgetary controls, with bureaucrats restricting access to public services (Lipsky 2010; Hunter & Ors 2010). The working environment is one where there is a need to balance efficiency against administrative outcomes or targets set by managers that have to be met by the local government department. In this environment, administrators develop routines of practice and 'narrow their range of perceptions' of the applicants to public services (Lipsky 2010: 83-86). This makes it easier for bureaucrats to reject an application. With the latitude administrators have within the decision-making process because they are able to exercise discretion, the administrative relationship becomes more complex. Discussions have also focused on the impact of judicial review decisions on decision-making within local government (Halliday 2000). Yet, regardless of the characterization of the administrator working with homeless applicants, 'gatekeeper'—or the practice of the deterrence of the making of homeless applications—continues to be a role that has been associated with such bureaucrats (Alden 2015a; House of Commons Communities and Local Government Committee 2016: 16-19, 22-24).

As many homeless applicants do not have legal representation when making a homeless application, it is possible to characterize the administrative relationship during the homelessness enquiry stage as one of negotiation (Ng forthcoming 2020). Following Gulliver's developmental aspect of his negotiation model, we are able to view an 'essential patterning' (Gulliver 1979: 174) of different negotiating stages. The patterning in the negotiation journey the parties are on takes them from a position of 'relative ignorance, uncertainty, and antagonism toward increased understanding, greater certainty, and co-ordination' (Gulliver 1979: 173). However, phases may sometimes overlap, and parties might return to earlier stages or might even skip phases. Although the approach is more commonly used to explain how an outcome is arrived at following the initial emergence of a dispute (Gulliver 1979: 121), the negotiating stages will assist to give us insight into the applicant-administrator relationship. There are eight phases:

- ◇ phase 1: search for an arena;
- ◇ phase 2: composition of agenda and definition of issues;
- ◇ phase 3: establishing the maximal limits to issues in dispute;
- ◇ phase 4: narrowing the differences;
- ◇ phase 5: preliminaries to final bargaining;
- ◇ phase 6: final bargaining;
- ◇ phase 7: ritual affirmation; and
- ◇ phase 8: execution of the agreement.

Gulliver's developmental aspect of his negotiation model interconnects with a cyclical process comprising a repetitive exchange of information and learning between the parties (Gulliver 1979: 82). The cyclical process of information exchange and learning enables both parties to reassess position and strategy each time more information is received and would also enable parties to adjust expectations and preference in their negotiations. As Gulliver puts it, 'there is a need to obtain information in order to get a better understanding of the opponent—his expectations and demands, his attitudes, strategies, strengths and weaknesses, together with any exchanges in all these matters' (1979: 84).

If we view the in-between stages of Gulliver's phases of negotiation—the point at which there is a breakdown during the transition of one phase to another—this is where an applicant and administrator would likely reach an impasse in the negotiation relationship. Applying Felstiner and colleagues' dispute transformation paradigm and asking questions about the level of legal consciousness in relation to both the applicant and administrator, might enable us to have a greater understanding of why

some applicants challenge unsatisfactory decisions. Although Gulliver's cyclical model of information exchange and knowledge helpfully provides a structure within which to view the movement of knowledge within the negotiation process, Gulliver's developmental aspect of his negotiation model has been criticized as presuming that a settlement will be reached eventually (Moore 1995: 17). In addition, Gulliver's cyclical model does not really address the power imbalance in information exchange and knowledge within the administrative negotiation relationship. However, it is here that Sossin (2002) might be able to assist.

Focusing on the impartiality, fairness and reasonableness in the administrative process and the benefit that an applicant hopes to be successful in gaining from a public administrator, Sossin asserts that the applicant-administrator relationship is one that is based on an intimate relationship. The list of characteristics that would be present in an intimate relationship include trust, interdependence—which would involve transparency because of a level of 'inward knowledge' required about 'how the other thinks and acts' (2002: 811)—fairness (2002: 822-827), honesty (2002: 832), vulnerability (2002: 851) and the capacity to listen to each other (2002: 855).

Based on the understanding that the administrative relationship is 'predicated on the exchange of information', the administrative relationship comes from an administrative culture that could be characterized as remoteness, alienation and objectification, which includes 'invasive interactions' (2002: 811). In terms of information exchange, this means that the administrator 'will hold all the cards' with the applicant being entitled to minimal information and, at the same time, will be expected to 'disclose whatever facts are requested or required'. However, applicants seeking an exchange of information in relation to the bureaucratic system or about the bureaucrats themselves would be met with responses of confidentiality or irrelevance (2002: 811). Sossin suggests that an applicant-administrative model of intimacy could be based on 'the convergence of vulnerability, knowledge, trust and power in the decision-making process'. This could assist in levelling the playing field of knowledge in the applicant-administrator relationship and the perspective of each other (2002: 843). In essence, the choice is 'between administrative relationships, which enhance dignity, freedom and self-realization, and those which thwart our humanity' (2002: 848). Finally, Sossin submits that vulnerability in the administrative relationship could be addressed by viewing the relationship as 'giving rise to fiduciary-like obligations' (2002: 851).

Viewed from the perspective of an intimate relationship, it would be clearly evident that an ‘intimate’ administrative relationship contradicts the remedies available when there are problems with the decision-making relationship (Sossin 2002).³⁴ The effects of the adversarial processes are more likely to cause a greater rift than to have a restorative effect. Sossin asks ‘how can a quintessentially private experience (i.e. an intimate relationship) enhance a quintessentially public process (i.e. administrative decision-making)?’ (2002: 813).

Gulliver’s and Sossin’s views appear to be mutually supportive of each other. Additionally, the interconnected frameworks of legal consciousness, dispute transformation process and intersectionality could provide us with greater insight into the applicant–administrator relationship. While there is a well-developed literature on the individual analytical tools, an assessment that combines all three ideas enables us to appreciate not only why some applicants do not challenge negative decisions, while others do, but that understanding will come from an individual as well as at group level. For example, if we were to view the applicant–administrator relationship through the prism of intersectionality, we would be asking questions about the background of both the applicant and administrator, in terms of their ethnicity, class, gender, age, ability, to name some examples. A factor to consider is that homeless applicants do not belong to a homogeneous group and that homelessness has been socially constructed through both political debate and in the media (Hutson & Clapham 1999). If we consider the possibility that anybody could become homeless—through circumstances and personal decision-making about life events which occur simultaneously with decisions made by other people in our lives, which then bring about a series of events eventually causing homelessness—then we are already aware that people do not become homeless through only one set of circumstances.

In terms of a combined analytical approach, Hefner (2013) argued for the incorporation of intersectionality theory into the analysis of the emergence and transformation of disputes. In addition, with regard to the question of whether someone has legal consciousness, and the extent of legal consciousness that an administrator has (Hunter & Ors 2016), why some applicants are more likely to have legal consciousness could be explored via the dispute transformation process and the intersectionality framework.

³⁴ Sossin clearly states that it is not the content of information exchanged between decision-makers and affected parties that is of public concern, but the nature of the relationship between the two groups (2002: 813).

[E] CONCLUSION

The homeless are some of the most vulnerable people within any society, experiencing a range of practical, health and legal problems that interconnect, and in their entirety have an effect of causing fatigue and exhaustion in daily living. When faced with problems during the homelessness enquiry or in relation to a negative decision in terms of an emergency housing assistance application, having to challenge and sustain any legal contest at any level, with or without assistance and representation, becomes a burden. Such stresses have an accumulative effect on an applicant's fatigue connected to daily living. This might explain why some applicants who have been issued with a dissatisfactory decision might not take any action to challenge. Alternatively, given the circumstances of someone who is homeless, a negative decision could be viewed as just one in a series of events occurring in the homeless person's life, at a time when he or she might have felt powerless to take any action to resolve problems in any area of their life.

The emphasis of litigation as a last resort post-2000 after the implementation of the Access to Justice Act 1999 might well have caused greater hardship and problems for homeless applicants over the years—particularly so since 2010 and LASPOA, leading to the restriction of legal aid, given the environment within which the administrative justice system has been operating. The homeless applicant in need of government assistance through litigation has been confronted with a civil justice system emphasizing informality at the expense of formality. Informalism could be effective within the context of a well-resourced legal advice and representation system. Although, at the same time, informalism also means the making of individual decisions in private and which, in the main, are not published. This could work, provided local government policies are also revised in line with the LGSCO decisions to prevent systemic problems from continuing, and provided working practices are also reflected in the change in policies. Unfortunately, financial resources are finite in terms of the provision of local public services.

Public resources should be protected, as should the applicant and administrator relationship be honest, open and transparent. Sossin has argued that vulnerability in the administrative relationship could be addressed by viewing the relationship as 'giving rise to fiduciary-like obligations' (2002: 851). Should Sossin's argument be accepted, then trust, interdependence, honesty and the capacity to listen to each other within the 'intimate' applicant-administrator relationship could mean that many homeless applicants who end up 'accepting' negative decisions

might understand and accept that decision without feeling they have been treated wrongly, unfairly or unjustly, which would only add accumulatively to the fatigue and burden of living life in difficult circumstances.

However, protection of public resources does not mean that the dominating culture within the civil justice system should be conciliatory if it means that cases that require litigation, especially ones that involve public law, end up being side-lined by an ADR process because cost is the dominating factor.

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