PUBLIC SERVICES OMBUDSMAN

ANNUAL REPORT 2020

The Ombudsman provides a service to the public that is:

- **Impartial**
- **Independent**
- **Free of Charge**

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1) OMBUDSMAN'S INTRODUCTION

This is the 21st Annual Public Services Ombudsman's Report and my first public declaration as Ombudsman, having been appointed as such by HM Government of Gibraltar commencing on 1 May 2021. During this year, there have been a number of instrumental factors that have caused an impact on our office. Firstly, Mr Dilip Dayaram Tirathdas, MBE, JP terminated his term of office in late June 2020- entering a period of well-earned retirement after a life dedicated to public service.

On behalf of our community, I wish to publically acknowledge and thank him for all his hard work and endless enthusiasm as Gibraltar's third Ombudsman.

Secondly, the latter period of 2020 carried huge challenges in dealing with the unprecedented impact of the Covid-19 pandemic. As with all other public service providers, the Office of the Ombudsman has had to ensure it carried out its principal task of accepting and investigating complaints against maladministration, whilst focussing on the safety of our frontline staff and members of the public wishing to make a complaint. To this end, the office was operated remotely for numerous weeks by way of telephone calls, emails and the acceptance of complaints online.

In addition, it should be noted that during the second half of 2020 and up to and including the 30th April 2021, the Office continued to operate without interruption of service, in the absence of an appointed Ombudsman. Undoubtedly, this has demonstrated how determined and committed our staff have been throughout this difficult period- focussing on our Office's mission to offer sound, fair and impartial advice, investigation and judgment, on public service complaints received. With this in mind I must acknowledge and thank the work, efficiency and leadership demonstrated by our "Deputy Public Services Ombudsman" Mr Nicholas Caetano, throughout the entire period. I also of course wish to thank all the staff at the Office of the Ombudsman for their collective effort and valuable contributions to our community.

To reiterate, the services provided by our office have been impeccably delivered, particularly when measured against the unprecedented situation and circumstances resulting from the Covid crisis.

The Office of the Ombudsman has gone the extra mile in providing an important public ear whilst simultaneously balancing and recognising how the pandemic has affected us all. It will not be until the end of the current year at the earliest, when we will be able to fairly and reasonably assess the overall impact of this health crisis in relation to any maladministration. When compiling my next annual report, I hope to be able to give credit where it is deserved and strive for the betterment of public service where it may be considered necessary. Now is not the time to comment substantively on these issues. Although there will in all probability be failings, I would like to if I may, take the opportunity to congratulate our administration and in particular the Ministry for Health, in the structured organisation and unprecedented success of our Covid vaccine rollout, which deservedly has attracted both local and global recognition and praise.

It is worth repeating the following highlighted by a former Ombudsman, Mr Mario Hook, back in his 2016 Annual Report:

'As Mahatma Gandhi so eloquently reminds us in his words of wisdom: A customer is not an interruption to our work, he is the very purpose of it. '

In our public services, employees have the ability to make a difference and when this happens, there is no greater gratifying feeling. Being of service can make a huge difference to someone's life.

So, I, therefore, invite all our public servants to reflect upon this simple message and each day, ask themselves, how can I make a difference? Then, go out of your way and make that difference.

In conclusion, I have the honour of presenting this Annual Report which is my first, and invite you all to read its contents.

Ron Coram
BSc, MSc, PhD, Hon. DUniv, C. Eng, MIET, MCIBSE
Gibraltar Public Services Ombudsman
September 2021

2) HIGHLIGHTS FOR 2020

- A total of 330 complaints were received by the Office of the Public Services Ombudsman during 2020.

- 37% of all complaints (330) received by the Ombudsman were in respect to Housing matters.

- There was an influx of complaints against the Department of Social Security over delay in processing U1 certificate applications which would enable its users to claim unemployment benefit during the COVID-19 pandemic.

- Complaints against the Employment Service was on the rise, partly due to matters related to BEAT (Business Employee Assistance Terms) payments. This scheme was designed to provide direct financial support so employers could retain their staff and pay them a salary during the outbreaks of the COVID-19 pandemic.

'The Ombudsman looks at Complaints made by individual citizens who feel that they have been unfairly or poorly treated by Public Bodies'.

2.1 OWN MOTION INVESTIGATIONS

On 20th December 2019, the Gibraltar Parliament passed a Resolution providing for the Public Services Ombudsman Act 1998 to be reviewed in order to enable the Office of the Public Services Ombudsman to launch investigations of its own motion or own initiative, as recommended by the Public Services Ombudsman in 2016. This Parliamentary Resolution has been warmly welcomed by the Ombudsman and we await its implementation at the convenience of HM Government of Gibraltar.

In addition, the Ombudsman would welcome the full adoption of the 'Venice Principles' in Gibraltar. These are a set of internationally accepted standards for the proper functioning and independence of Public Services Ombudsmen. The Ombudsman is of the view that these international standards should be implemented in Gibraltar, as is being done in other European countries and indeed in many other countries in the world with advanced democratic societies like ours. For ease of reference, the following is the Draft Bill.

Draft BILL

FOR

AN ACT to amend the Public Services Ombudsman Act 1998 to extend the powers of the Ombudsman to enable investigations to be conducted on the Ombudsman's own motion, without the Ombudsman having to rely on receiving written complaints made by the public.

ENACTED by the Legislature of Gibraltar.

Title and commencement

1. This Act may be cited as the Public Services Ombudsman (Amendment) (Own Motion Investigations) Act 2020 and comes into operation on the day of its publication.

Amendment to the Public Services Ombudsman Act 1998

2. The Public Services Ombudsman Act 1998 is amended by inserting the following new section after section 13-

"Power to investigate on own motion

13A (1) The Ombudsman may investigate any administrative action taken by or on behalf of any Authority to which this Part applies, without a written complaint by a member of the public having been made to the Ombudsman.

(2) Before the Ombudsman begins an investigation under this section, the Ombudsman must-

(a) be satisfied that conducting such an investigation is in the public interest; and

(b) have a reasonable belief that there is, or has been, systemic maladministration arising from administrative action taken by or on behalf of any Authority to which this Part applies.

(3) It is for the Ombudsman to decide whether to begin, continue or discontinue an investigation under this section."

EXPLANATORY MEMORANDUM

The purpose of this Bill is to amend the Public Services Ombudsman Act 1998 ("the Act") in order to give effect to the resolution, passed by the Gibraltar Parliament on 20th December 2019, that the Act should be reviewed to enable the office of the Public Services Ombudsman to launch investigations of its own motion, as recommended by the Public Services Ombudsman in 2016.

3) OMBUDSMAN'S ROLE

As further background, the Office of the Ombudsman was opened in Gibraltar over 20 years ago, in April 1999. Before that date, there was no independent and dedicated point of contact available to the public for the submission of complaints against any act of perceived maladministration delivered by a Government Department.

The opening of the Office of the Ombudsman was therefore a big step forward in the availability of administrative justice in Gibraltar, outside of the judicial process. This was particularly the case for those citizens who did not have the required resources to pursue [their] grievances in court or indeed for those citizens who did not have the required 'networking' to afford them any realistic opportunity to pursue redress for any grievances against public bodies.

The Public Services Ombudsman Act 1998 was passed by the then House of Assembly on 10th December 1998 and the services of the Office of the Ombudsman became available to the public, free of charge, for the protection of the individual rights and interests of the citizens of Gibraltar.

Who is the Public Services Ombudsman?

Dr William Ronald Coram was appointed to carry out the functions of Ombudsman on the 1st May 2021. His appointment was confirmed by Parliament by way of Resolution on 22nd March 2021 and approved with effect from 1st May for a term of three years.

The Ombudsman is supported by a team of five officers, as follows:

Nicholas P Caetano, LLB (Hons), Barrister-at-law
Deputy Public Services Ombudsman, Head of Investigations and Staff Manager

Steffan Sanchez
Information Systems Support Executive Officer and Human Resources Manager

Nadine Pardo-Zammit
Executive Assistant to the Ombudsman and Public Relations Manager

Karen Calamaro
Executive Senior Investigating Officer and Finance Manager

Sarah De Jesus El Haitali, BA (Hons), LLM
Executive Investigating Officer

(Daniel Romero, Executive Investigating Officer, who also forms part of the Ombudsman's Office complement, was seconded to the GHA's Patients Advocacy and Liaison Office 'PALS' with effect from 1st January 2018)

What services does the Ombudsman provide?

The Ombudsman investigates complaints by the public about any alleged acts or omissions by Government entities, agencies and authorities.

The aim of the Ombudsman is to 'put things right' for members of the public who may have suffered hardship or an injustice resulting from the maladministration or poor service by a Government Department or Public Authority.

Access to the Ombudsman's services is free of charge to the public. If the Ombudsman is not able to deal with a particular matter, he/she will provide the public with advice on where best to direct the complaint.

What complaints can the Ombudsman investigate?

The Ombudsman normally investigates a complaint if this has not been adequately dealt with under the complaints procedure of the public service provider concerned. The Ombudsman, therefore, serves as a complaint mechanism of last resort.

The Ombudsman will investigate a complaint against a public service provider who has:

- Failed to deal with a complaint adequately under its complaints procedure;
- not followed its established administrative rules, procedures and practices;
- failed to respond to letters or other correspondence promptly and satisfactorily;
- treated a complainant unfairly, unreasonably or in an improper manner;
- been careless or negligent in the service provided;
- taken a decision based on irrelevant grounds or based on incorrect or incomplete information;
- taken a decision without proper authority to do so; and/or
- taken too long to deal with a matter, without reasonable excuse.

What complaints cannot be investigated by the Ombudsman?

There are some complaints against public service providers that the Ombudsman cannot normally investigate. These include where the Ombudsman considers that the Complainant has:

- An alternative and more appropriate remedy by way of proceedings in any court of law, board of enquiry or tribunal; and/or
- a more appropriate remedy by way of legal action for a claim relating to medical negligence or malpractice by medical professionals.

The Ombudsman will, therefore, not normally look at complaints related to:

- Clinical judgment by medical professionals, including diagnoses and treatment;
- negligence or Malpractice by Doctors and other Medical Professionals;
- employment Issues such as recruitment; pay and conditions of employment; contracts of employment; and/or

- other issues that may be subject to legal proceedings before the courts or independent tribunals.

What remedies can the Ombudsman provide?

The Public Services Ombudsman can offer a range of potential non-judicial remedies, which can include, but are not limited to recommending to the Public Service Provider that it should:

- Provide an apology;
- give an explanation;
- correct an error; and/or
- change its practices, procedures and systems.

How are complaints dealt with?

Many complaints are resolved by the Ombudsman's Office reasonably quickly. However, where the issues raised by Complainants are more complex, then more detailed investigations are usually required.

The Ombudsman uses an inquisitorial approach when carrying out his investigations as opposed to the adversarial approach used by the courts.

The Ombudsman investigates complaints by examining the relevant information available from both the complainant and the public service provider. This may include interviews with the relevant people involved with the complaint, including the calling and examination of witnesses; an examination of the relevant files, documents and other records available to the public service provider; an examination of any letters or other correspondence between the complainant and the public service provider; obtaining advice from relevant experts, including clinical assessors; and obtaining a written report from the public service provider.

Against which specific entities can a complaint be made to the Ombudsman?

A complaint to the Ombudsman may be made against any of the following entities:

- Gibraltar Government departments and agencies;
- Royal Gibraltar Police;
- Gibraltar Health Authority;
- Gibraltar Broadcasting Corporation;
- Gibraltar Development Corporation;
- Employment and Training Board;
- Tourism Board;
- Development and Planning Commission;
- Transport Commission;
- Care Agency;
- Gibraltar Electricity Authority;
- Gibraltar Sports Authority;
- Gibraltar Culture and Heritage Agency;
- Borders and Coastguard Agency;
- Housing Works Agency;
- Calpe House, London and Calpe House Trust;
- Gibraltar Office in London;
- Gibraltar Office in Brussels;
- New Hope Trust/Bruce's Farm Rehabilitation Centre;
- The University of Gibraltar (but only in respect of a complaint by a student);
- Any person, company or other entity providing the following public services under a contract or licence issued by the Crown or a statutory body:

- Supply of telecommunication services;
- Supply of water services;
- Collection of any moneys payable to the Government;
- The operation of any Registry;
- Environmental or public health control services;
- Clamping, tow-away or traffic management;
- The cleaning or upkeep of any part of the public highway or planted areas adjacent thereto;
- Refuse collection or incineration services;
- Car parking services;
- The management of:
    - Alameda Gardens;
    - John Mackintosh Hall;
    - Gibraltar Museum;
    - Gibraltar Airport Terminal; or
    - Any site, property or facility belonging to the Crown.
- Property management;
- Property agency;
- Rates collection services;
- Land property services;
- Immigration services;
- Entry point control;
- Terminal security;
- Philatelic supplies; and
- Emergency and transfer ambulance services.

3.1 OMBUDSMAN'S STRATEGIC OBJECTIVES

Strategic Objective (1) - To provide an efficient and effective mechanism for the public to be able to complain about any maladministration by Public Service Providers

The aims and objectives of the Public Services Ombudsman include the provision of a simple and straightforward mechanism for people to be able to complain about any maladministration by Public Service Providers.

It is important for our office that people who make a complaint to us are listened to and treated fairly. The Ombudsman's Office staff aim to deal with complaints efficiently and effectively and in addition to providing a suitable remedy and effective redress for the Complainant, a further important aim is that the learning from such complaints is used to improve the delivery of our public services.

The Public Services Ombudsman is charged by statute with the task of investigating grievances, submitted by way of complaint, of administrative action taken by or on behalf of the Government and providers of certain services to the general public. The Ombudsman's Office also provides the public with a valuable source of information and guidance about the public administration in Gibraltar.

Strategic Objective (2) - To raise general standards in the delivery of public services

One of the underlying aims of the Office of the Ombudsman is the raising of standards in the delivery of public services, for the benefit of the whole community.

We do this on a daily basis by following up specific complaints from the general public and by making recommendations for the improvement of service provision, beyond simply settling the individual dispute. In this respect, we also address systemic issues and suggest improvements to be made, where possible.

Strategic Objective (3) - To improve the in-house complaints handling procedures by public service providers

Members of the public are required to submit their complaint to the relevant Public Service Provider, in the first instance. This is so that the public service provider has an opportunity to put things right, as soon as possible. It is therefore important that Public Service Providers have an effective and efficient in-house complaints procedure in place.

The Ombudsman's Office continues to review all such in-house complaints procedures and following up those public service providers that have still to set up an in-house complaints procedure.

'We learn from engagement with complainants and organisations we investigate to improve our accessibility, efficiency and effectiveness and the quality of our decisions'.

Strategic Objective (4) - To promote public awareness of the role and function of the Ombudsman

It is important for the Ombudsman to promote public awareness of the role and function of the Ombudsman and the rights of people to complain. 'A right to complain is not a right if a person is not aware of its existence.' If an individual believes that the dispute or situation remains unresolved after having made their complaint to the relevant public service provider, they can then refer the matter to the Public Services Ombudsman who will review and investigate the complaint further.

3.2 PRINCIPLES FOR REMEDY

There are **six** internationally accepted Principles for Remedy that have been approved and adopted by the Gibraltar Ombudsman's Office. These principles have been approved and adopted by the following Public Services Ombudsmen:

1) Public Services Ombudsman - Northern Ireland;
2) Public Services Ombudsman - Wales;
3) Ombudsman and Information Commissioner - Ireland;
4) Public Services Ombudsman - Gibraltar;
5) Parliamentary Ombudsman – Malta
6) Parliamentary & Health Services Ombudsman – United Kingdom
7) LGO and Chair of the Commission for Local Administration - England; and
8) Public Services Ombudsman - Scotland

The Principles for Remedy provide an agreed framework for the remedies that are applied by Public Services Ombudsmen when dealing with cases of maladministration. The principles were approved on 14th November 2017 and the document was formally signed on 8th March 2018.

Public Services Ombudsmen – Principles for Remedy

What is the purpose of this guide to the Principles for Remedy?

This is a guide to explain how Public Services Ombudsmen in the United Kingdom and Ireland, Malta and Gibraltar (the Ombudsmen[1]) aim to put things right for members of the public who have suffered injustice or hardship resulting from maladministration or poor service by a public body in their jurisdiction. This guide outlines the Ombudsmen's general approach to recommending remedy for injustice and is based on the PHSO Principles for Remedy. In setting out six guiding Principles for Remedy, the aim is to achieve a consistent approach to remedy by the Ombudsmen.

[1] In this document, Ombudsman and Ombudsmen are to read as interchangeable.

It is important that both members of the public and public service providers in their jurisdiction are aware of how decisions on an appropriate remedy for injustice resulting from maladministration have been arrived at in any case. These Principles for Remedy are an agreed framework for the Ombudsmen to reference in order to inform, where appropriate, their approach to remedy.

What do we mean by remedy?

Identifying and where possible remedying an injustice or hardship caused by a body's maladministration or poor service is a key function of an Ombudsman. Members of the public when making a complaint to an Ombudsman are invited to identify the remedy or outcome they seek. This is important so that the Ombudsman can decide whether or not an alternative legal remedy exists for the injustice complained of, as there may be a more appropriate course of action for the complainant to pursue. Ombudsmen offer a flexible range of potential non-judicial remedies that can be applied in any case. Ombudsmen remedies can include but are not limited to:

- an apology
- an explanation
- correction of an error
- an agreement to change practices, procedures or systems
- financial redress

How can this guide be used by Ombudsmen?

It is a matter for each of the Ombudsmen to decide on an appropriate remedy based on the identified maladministration and injustice suffered by the individual in any case. This guide is not intended to limit the Ombudsmen in the exercise of their discretion in any particular case. The Ombudsmen's Principles for Remedy are intended as an agreed normative framework to inform their approach to remedy where public services have been found to have failed and also as a reference point for Ombudsmen when developing more detailed guidelines relevant to their particular legal framework.

PRINCIPLES FOR REMEDY

1 To put things right

The overarching principle when considering a remedy for injustice is to restore the individual back to the position they were in prior to the maladministration or poor service taking place. That may include recommending the award of the benefit to which the individual was entitled but had not received because of the failings of the public body concerned or recommending payment for a loss suffered as a result of the maladministration. Ombudsmen may also recommend payments for upset or 'time and trouble' where appropriate.

However, the outcome of maladministration or poor service cannot always be rectified or circumstances reversed. In such cases by offering a particular remedy the Ombudsman seeks to, at the very least, remedy the injustice sustained by the individual.

In a particular case 'Putting things Right' may also require a consideration of remediation for the public in general. In cases where the maladministration affects more than one individual because systemic failings have been identified, the Ombudsman will seek to remedy this by making recommendations in the public interest for systemic change.

Putting things right might also involve an Ombudsman drawing the attention of the relevant governing body (Parliament, Assembly, or full council of the relevant local authority) to a specific legislative failing which has resulted in an injustice.

2 To be open and accountable

The Ombudsman should be open and clear about the reasons why they have recommended a certain type of remedy. This includes publishing on their website their specific policies on remedy and providing detail of the injustice they are seeking to address by their recommendation, as well as explicit reasons for that recommendation in their report to the body and complainant.

Where a body fails to comply with a recommendation this will be reported openly and publicly to the relevant Parliament, Assembly or full council of the relevant local authority, so that the public body is accountable for its actions.

To enable public bodies to be aware of Ombudsmen's recommendations for remedy in particular cases, these will be reported on in an annual report and case digest which will be published.

3 To be empowering

The Ombudsman will take into account the views and circumstances of the complainant and consider what remedy they are seeking. In addition, where appropriate, the Ombudsman will consider the views of the complainant in relation to the issue of remedy. However, at the outset the Ombudsman should manage the expectations of a complainant regarding remedy and redress, and what can be achieved as ultimately, the Ombudsman will decide what is an appropriate remedy within the scope of his/her remit, in any particular case.

4 To be fair, reasonable & consistent

The Ombudsman will treat each case on its own merits and consider the specific circumstances of each case, ensuring that the remedy recommended is reasonable once all aspects of the injustice have been considered.

Ombudsmen may delegate decision making to staff in their offices in relation to recommending a remedy in certain cases. However, Ombudsmen will ensure that in deciding on an appropriate remedy, there is consistency with previous decisions and also a consistency in approach in reaching a decision about what is an appropriate remedy. In the case of a recommendation for financial redress, consistency does not refer to the monetary amount offered for a particular type of complaint. Where the Ombudsman is recommending financial redress and as no two complaints are ever exactly the same, the Ombudsman will consider carefully the nature of the injustice sustained and whether it is possible to put the person back in the position they would have been in but for the maladministration or service failure identified.

The Ombudsman will seek to be fair and act without bias or prejudice in addressing individual cases for remedy. To ensure a fair process the Ombudsman will indicate to both the complainant and the public body in advance of a final report on an investigation his/her considerations for remedy (in draft form) and will consider the parties views. Although, ultimately, the final recommendation is a matter for the Ombudsman.

5 To be proportionate

The Ombudsman will recommend an appropriate remedy which is fair and proportionate in all the circumstances and having particular regard to the nature of the injustice caused to the complainant by the maladministration or poor service.

6 To monitor and ensure compliance

Public Service Ombudsmen have powers to bring to the attention of their legislature (that is Parliament or Assembly or the full council of the relevant local authority) where a recommendation has not been met by the body. This is an important function of an Ombudsman as it is to the relevant legislative or governing body that he or she must report the failings in such circumstances. This in turn requires an Ombudsman, as a matter of good practice, to check routinely with public service providers to ensure that a recommendation has been fully complied with. Failure to comply with an Ombudsman's recommendation may be the subject of a 'special report' by the Ombudsman to the relevant legislature or governing body as this failure can constitute maladministration.

3.3 THE VENICE PRINCIPLES

The Venice Principles represent a set of internationally accepted standards for the proper functioning and independence of Public Services Ombudsmen.

The Ombudsman wrote to the Chief Secretary on 2nd July 2019 to inform him about the Venice Principles and to mention that he fully supported the implementation of these internationally accepted standards in Gibraltar. The Ombudsman mentioned to the Chief Secretary that it would be great if these international standards are implemented in Gibraltar, as is being done in other European countries and indeed in many other countries in the world with advanced democratic societies like ours. He also recommended that Government should give some consideration, in due course, to enshrining the Venice Principles in the Public Services Ombudsman Act.

On 2nd May 2019, the Committee of Ministers of the Council of Europe endorsed the "Principles on the Protection and Promotion of the Ombudsman Institution" ("The Venice Principles"). The 25 Principles were adopted by the Venice Commission on 15th March 2019 at its Plenary Session.

The Venice Commission is the European Commission for Democracy through Law. It is an advisory body of the Council of Europe, whose primary task is to assist and advise individual countries on constitutional matters in order to improve the functioning of democratic institutions and the protection of human rights.

In a recent press release issued by the Council of Europe, the importance of the role of Public Services Ombudsmen and the significance of the Venice Principles were explained, as follows:

"…..Ombudsmen are important for democracy, their services are free, and are thus accessible to individuals who cannot afford to pursue their complaints through the courts. They can take action independently against maladministration and alleged violations of human rights and hence play a crucial role with regard to the governments and parliaments which must accept criticism. As an interface between the administration and the citizens they are at times the first or the last resort to set a human rights violation straight.

Ombudsmen now have a unique international reference text listing the legal principles essential to their establishment and functioning in a democratic society. Drawn partly from a diversity of existing models in the world, the 25 principles are the most comprehensive checklist ever compiled…... They are meant to consolidate and empower ombudsmen institutions, which play a crucial role in strengthening democracy, the rule of law, good governance and the protection and promotion of human rights and fundamental freedoms."

The 25 Venice Principles are as follows:

1. Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model across Council of Europe Member States, the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.

2. The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.

3. The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation.

4. The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences.

5. States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country.

6. The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.

7. The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law.

8. The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.

9. The Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The Ombudsman and his or her staff shall be bound by self-regulatory codes of ethics.

10. The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.

11. The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.

12. The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.

13. The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system

14. The Ombudsman shall not be given nor follow any instruction from any authorities.

15. Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint.

16. The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector.

17. The Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution. The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman.

18. In the framework of the monitoring of the implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonization of national legislation with these instruments, the Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation.

19. Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts. The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts. The official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law.

20. The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities. This applies also to reports to be given by the Ombudsman appointed by the Executive.

21. Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.

22. The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.

23. The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.

24. States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats.

25. These principles shall be read, interpreted and used in order to consolidate and strengthen the Institution of the Ombudsman. Taking into consideration the various types, systems and legal status of Ombudsman Institutions and their staff members, states are encouraged to undertake all necessary actions including constitutional and legislative adjustments so as to provide proper conditions that strengthen and develop the Ombudsman Institutions and their capacity, independence and impartiality in the spirit and in line with the Venice Principles and thus ensure their proper, timely and effective implementation.

The full text of the Venice Principles can be downloaded from the Gibraltar Public Services Ombudsman's website at www.ombudsman.org.gi.

'Ombudsmen are important for democracy, their services are free, and are thus accessible to individuals who cannot afford to pursue their complaints through the courts.'

4) TRAINING AND DEVELOPMENT

During 2020, staff from the Office of the Ombudsman have regrettably not accessed many training opportunities with the exception of 2 members of staff who admirably have sought for personal reasons to undertake the following.

Mrs Karen Calamaro successfully completed her 'Level 2 Certificate in Counselling & Psychotherapy' from the UK Central Awarding Body (cpcab). I wish to offer my congratulations to Karen on her achievement and the skills obtained, which certainly will fit very well at the Office of the Ombudsman, when dealing with members of the public.

In addition, Ms Nadine Pardo-Zammit successfully completed the next phase of her Law Degree through the Open University. It is anticipated that Nadine will graduate next year and we wish her luck in this endeavour. Again, it goes without saying that having to balance working commitments with study time takes enormous commitment, particularly at this higher level.

Generally speaking and apart from the above excellent achievements, staff have had little opportunity to tap into external training and development, mainly because of the following.

a) There has been limited programmes available due to the Covid pandemic;

b) similarly, restrictions in training have been greatly curtailed and impacted, if not totally, the availability of recognised and established conference platforms; and

c) limited virtual on-line access has indeed been available though they, nevertheless, do not appear to provide value for money, and interest generally has not been publically forthcoming from established Ombudsperson circles.

It is anticipated that this will improve over the course of next year as organisations strive to seek alternative entrepreneurial avenues and platforms in order to recuperate levels of interest and engagement witnessed before the pandemic.

5) PERFORMANCE REVIEW 2020

A total of 330 complaints were received by the Office of the Public Services Ombudsman during 2020. Of these, a total of 340 complaints were finalised during the year, as shown below:

Complaints not yet finalized – brought forward from 2020	50
Complaints received during 2020	330
Complaints finalized during the year 2020	340
Complaints not yet finalized – carried forward to 2021	40

Of the 330 Complaints received this year, 73 related to private entities, including issues regarding private housing rent and repairs, legal issues and financial matters.

Complaints received by the Office of the Public Services Ombudsman in the last 5 years

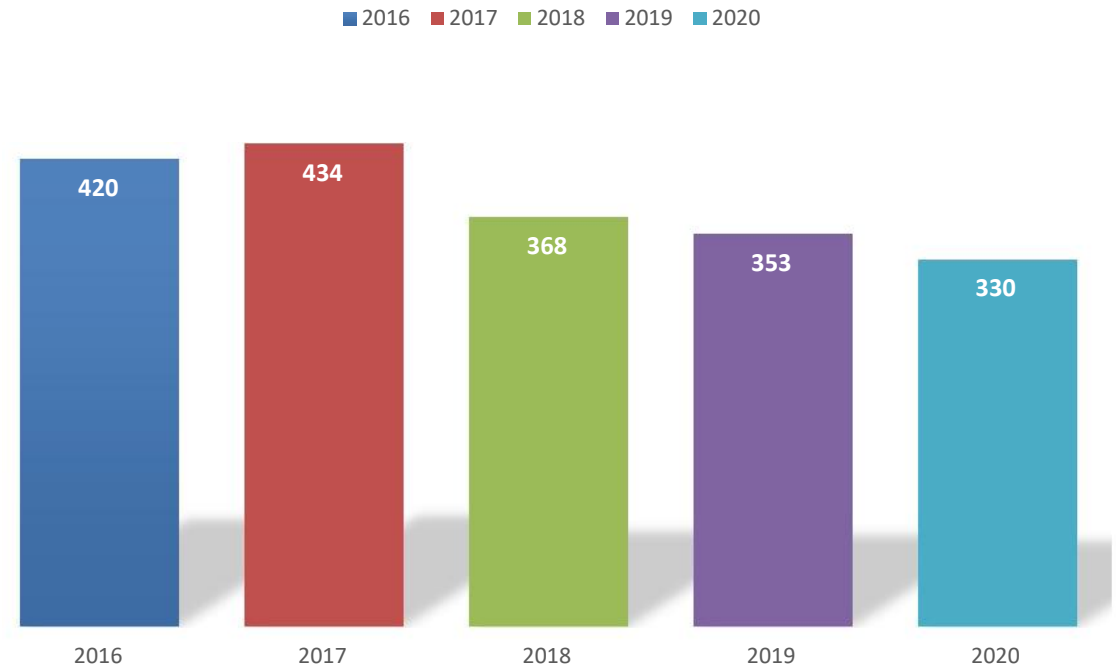
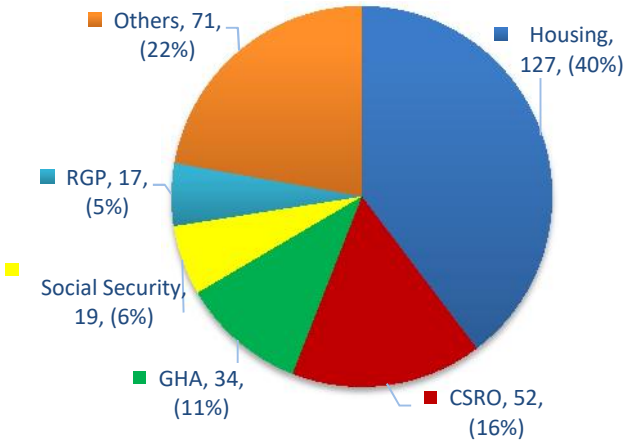


Figure 1

The remaining 257 Complaints related to Government Departments, agencies and other public service entities.

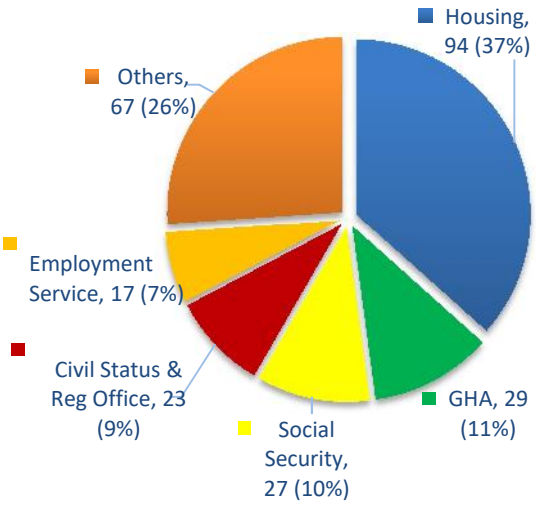
Generally, there has been an overall reduction in 2020 (i.e. 330) complaints when compared to 2019 (i.e. 353), representing a drop of around 7% when applying the factor 353 as a baseline. Further, when studying the number of complaints relating to actual Government Departments, Agencies and other public service entities in 2019, this amounted to 320. Whilst similarly, in 2020, there was a total of 257 complaints: a major drop of 63 complaints representing around 20% reduction.

***Analysis of the 320 Complaints in 2019**



***Taken from Annual Report 2019**

Analysis of the 257 Complaints in 2020



Under any normal situation this would be warmly welcomed, though in my opinion this reduction was generated, because of the onset of the Covid Pandemic, ultimately resulting in Government's decision to close service counters, in addition to introducing measures towards helping reduce the spread of the virus by encouraging staff to operate from home and online. The fact is that the most important human form of interaction, ie, face-to-face communication had for all intents and purposes been completely eradicated. In addition, the realisation and acceptance by many in the general public that Government resources were then and for good reason, being prioritised elsewhere towards Covid related operations. In my opinion this encouraged many citizens to effectively pursue a moratorium in respect to any probable complaint, hence we note a visible and sharp drop in complaints. That said, I suspect that this will change and increase over the following year as some level of normality is slowly and gradually introduced.

Let us now look at the impact of complaints on some of our more prominent public departments.

Housing Authority

As history has already shown us, complaints against the Housing Authority continues to remain top of the list of departments, attracting the highest number of complaints. I should point out that this remains the case, mainly because of the fact that 'shelter' is an inherent behavioural necessity. It remains one of our main motivating factors throughout life. This is why Housing is and will always remain as one of the most sensitive areas of public service. The fear of not having shelter and protection from the cold and rain for one's family and/or oneself, will normally trigger the most prevalent of primeval behavioural instincts. So, whilst perhaps other public services may take a lower a priority, housing will always continue to be the most challenging for any service deliverer. This should not, however, be an excuse for poor administration. Figures for 2020 show that when compared to previous years (ie, 2016 to 2019) there has been a slow decreasing trend in number of complaints. This appears to be the case again for 2020, whereby the Housing Authority has attracted the greatest proportion at 94 complaints (37% overall). That said, this has dropped from 127 (40% overall) when compared to 2019. This is good news and we look forward to a further decrease over the next year. Nevertheless, Housing remains an area whereby most complaints are generated. Though these remain targeted generally at delays in allocation and refusal by the Authority in some applications resulting from social and/or medical grounds, there continues to be an unacceptable level of complaints relating to non-reply and/or delay in replying to letters. I am, therefore, concerned about this repetitive trait. I would have thought by now, senior management would have nipped this in the bud. For example, with the introduction of major ICT tracking facilities, in house training and awareness, I expect these delays to be eliminated and become a thing of the past.

Civil Status & Registration Office (CSRO)

When considering the number of complaints targeted at the Civil Status & Registration Office (CSRO), again I am pleased to reiterate similarly as with Housing that these have reduced. For example, in 2020 we had 23 complaints (i.e., 9% overall) whilst in 2019, there were 52 complaints (i.e., 16% overall). This is maybe due to the fact that leading up to 2019, there had been an avalanche of EU ID card applications. The fact that post Brexit, 2020, such applications have for all intents and purposes become superfluous meaning fewer delays on other processes and related administration.

Gibraltar Health Authority (GHA)

Similarly, the trend shows that Gibraltar Health Authority (GHA) complaints have reduced to 29 this year from 34 in 2019. It is difficult to realistically assess whether this is the result of better administration, or whether it's because health service prioritisation has shifted towards Covid operations, and/or indeed, as mentioned earlier, a direct result of members of the public effectively following a collective self-induced moratorium. I suspect that a more realistic picture of events will be seen next year.

Department of Social Security (DSS)

In 2020, complaints targeted at the Department of Social Security (DSS), has risen from last year. For example, there have been 27 (ie, 10% overall) when compared to 2019 which witnessed 19 complaints (i.e., 6% overall). The trend here is obviously increasing though not on a dramatic scale amounting to an increase of 8 complaints. As a result of the Covid-19 pandemic and impact it has had on employment matters (redundancies, dismissals, etc), there has been a substantial number of users applying for U1 certificates for unemployment benefits. The influx of U1 application submissions together with departmental resource shortages due to the pandemic has brought about inordinate delays in the DSS processing these. The lack of replies requesting information on these applications has also been another issue brought to the attention of the Ombudsman.

The following is a breakdown of the 340 complaints that were finalised this year:

- 76 complaints were classified as being 'Outside the Ombudsman's Jurisdiction';

- 129 complaints were closed as it was considered that the Complainant(s) had not exhausted all their avenues of redress with the Public Service Provider concerned. These refer to complaints that are lodged at the Ombudsman's Office without the Complainant having formally submitted their complaint to the relevant Public Service Provider, in the first instance. Before a complaint is made to the Ombudsman, the Complainant is required to try and resolve any issues directly with the Public Service Provider concerned under the Service Provider's own internal complaints procedure;

- 105 complaints were classified as dealt with by 'Immediate Resolution';

- 10 complaints were settled informally.

Classification of Complaints 2020

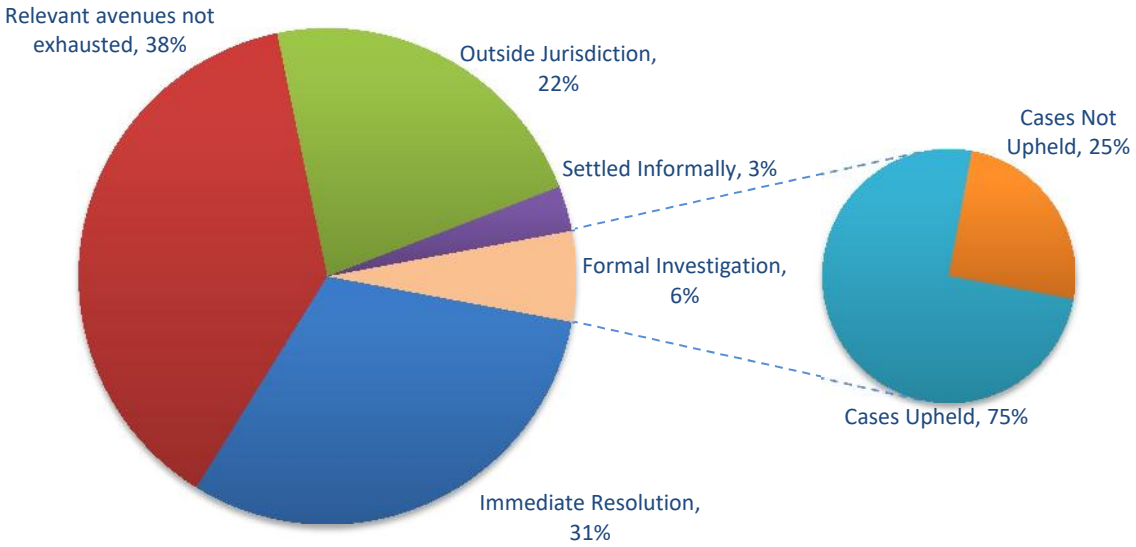
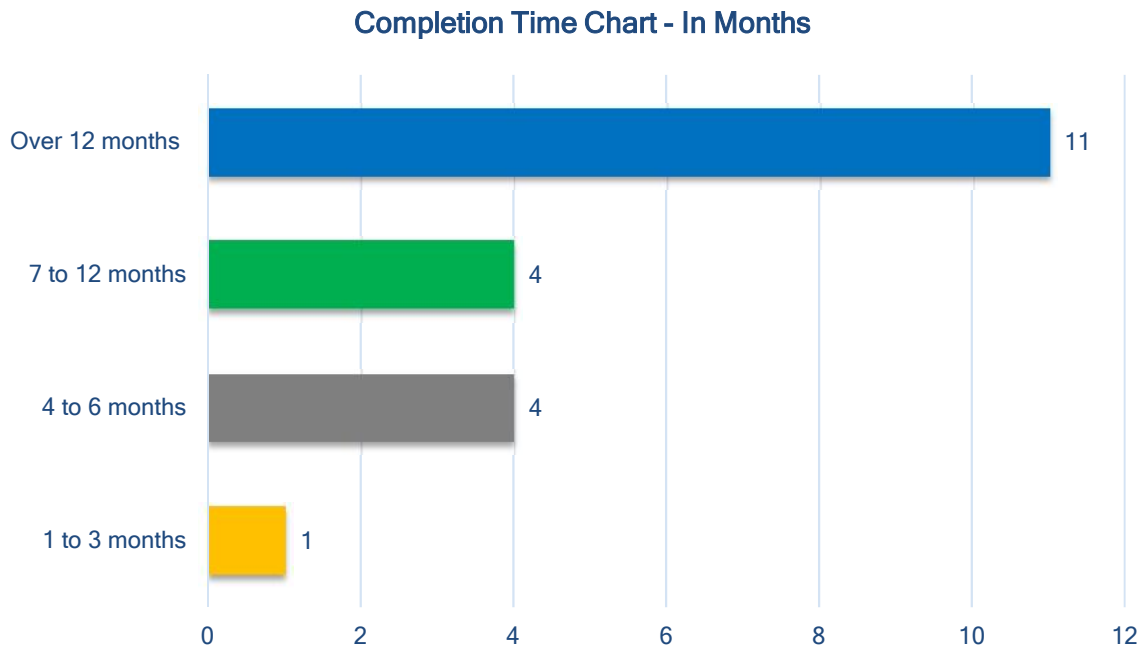


Figure 3

- 20 complaints were followed up by the Ombudsman with 'Formal Investigations', which were concluded by the end of the year. A detailed report has been written for each of these investigations. 15 of these complaints were upheld or partly upheld, whilst 5 of them were not upheld.

Formal Investigations in 2020



Of the investigations completed during 2020, the average time taken by the Ombudsman's Team to complete a 'Formal Investigation' on a complaint requiring a detailed report has been 10 months.

The following, therefore, includes a selection of complaints received by the Office of the Ombudsman. Generally, each case will entail assessing the complaint itself, undertaking an investigation (should this be deemed necessary) providing conclusions and thereafter, generating a classification, and in some cases, supplying recommendations to the relevant Department – in that order. With this in mind, I now wish to invite readers to look at the following selection of cases.

'The Office of the Ombudsman has received nearly 9000 Complaints since it was established in 1999.'

6) OMBUDSMAN'S CASEBOOK

CIVIL STATUS AND REGISTRATION OFFICE

Case 1

Complaints against the Civil Status and Registration Office ("CSRO") relating to the rejection of applications for residence, which would have granted direct family members permission to live with the respective complainants in Gibraltar.

The Complaint(s)

The Ombudsman received four individual complaints against the Civil Status and Registration Office ("CSRO"). The complaints related to the rejection of applications for residence, which would have granted direct family members permission to live with the respective complainants in Gibraltar.

The decisions were taken on the basis that the complainants' had insufficient means to support themselves and their family members.

Given the factual similarities of these complaints, the Ombudsman considered that the public interest would be best served by way of a systemic report on the matters which gave rise to the grievances.

Background [Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].

Complainant 1

Complainant 1 was a British National of Moroccan origin who had resided in Gibraltar for 43 years. He felt aggrieved with the decision taken by CSRO not to allow his wife and son to live with him in Gibraltar on account of the fact that the CSRO took the view that he had insufficient income to support them. The Complainant was in receipt of weekly wages in the amount of £317 (£1373.66 per month) and £514 monthly by way of community care. He had no recurrent expenses other than his rent which was £300 per month.

The Complainant appealed the decision taken by CSRO but received a reply almost immediately thereafter stating that the decision had been reviewed but remained unchanged.

The Complainant did not understand the decision given his earnings. He was further perplexed by it because his brother, who like him was a British national who had lived in Gibraltar for 43 years, had been given permission to bring his wife and two sons to live with him in Gibraltar. In addition, his brother had less income.

Complainant 2

Complainant 2 had resided in Gibraltar for 50 years. He was 70 years old. He explained that he had applied for his wife to be given permanent residency. Time elapsed and almost a year and a half later he was finally given a decision. His application had not been approved on account of CSRO's view that his income was insufficient to maintain her.

The Complainant deemed the decision unfair given he had an income of £805 per month (£215 community care, £395 old age pension and £197 wife's old age pension).

His rental was £43 a month and according to his calculations, after he had paid his utilities and comestibles, he still had £500 per month to live on.

He was understandably distraught at CSRO's finding and appealed the decision, arguing that he already supported his wife although she lived in Morocco. He was of the view that he did have means of supporting her. He stated he would be grateful if the decision were to be overturned but if it could not be reconsidered favourably, he wanted information on the formulae applied by CSRO as to the amount of money they considered suitable for someone to reside in Gibraltar. Not an unreasonable request in the Ombudsman's mind.

The Complainant also raised the query that if insufficient income was indeed the reason for the refusal, why then did CSRO request that the Environmental Agency prepare an accommodation report (he was sharing a flat with a friend) and why, did the negative decision take such a long period of time.

Complainant 3

Complainant 3 complained that she had not had a reply to her letter appealing the CSRO's decision not to allow her husband to live with her in Gibraltar and that the decision itself was unjust.

As with the other cases under investigation by the Ombudsman, the CSRO had dismissed her application on the basis that it had been decided that she had insufficient income to support herself and her husband.

In her letter of appeal she requested that CSRO reconsider, given that she had a monthly income of £800 and that she did not pay rent since the flat she was residing in belonged to her aunt. She also claimed her outgoings to be minimal in nature.

The Complainant also stated that her husband lived in Spain at the time of the application. The intention was to make Gibraltar their home and that once he moved here, he would be sure to take up employment immediately in order to boost their income as a family unit.

Complainant 4

Four years had elapsed since the Complainant first applied for residence for his wife and son.

In 2019 he was informed by CSRO that his application had been denied as a result of "*insufficient income.*"

The initial application was questioned by CSRO since they claimed to be in possession of documents stating that the Complainant lived in Spain. Two unsuccessful property inspections in Gibraltar, together with low meter readings for water consumption, seemed to confirm this. The Complainant explained the reasons for not having been at the flat at the time of the inspections and consumption also improved after that date.

In 2018 when he made a fresh application for residency with the help of a lawyer, CSRO informed the Complainant that the accommodation was not suitable since he shared with a flatmate. Those issues were clarified and resolved.

Although on paper there was another tenant sharing with the Complainant, the flatmate was only registered at that address and had not lived there for some time. In 2019, CRSO declared that the Complainant did not have sufficient disposable income in order to enable them to grant the application. The Complainant was annoyed and frustrated with the decision. He believed he could maintain his family. Additionally, he was aggrieved because he had not been given any information on what the income threshold was, in order to satisfy the criteria.

Investigation and Findings

The Ombudsman wrote individual letters presenting the complaints to CSRO and requesting their comments. Replies were received in respect of each of the individual applicants setting out the following:

Complainant 1

The CSRO stated in their reply to the Ombudsman that proof of income and housing accommodation are requested at the time of the application and applicants must be able to satisfy that both the income and residential accommodation are sufficient for their needs in accordance with the established criteria. In the case of Complainant 1, although his accommodation had been deemed to be suitable, his income was considered insufficient to maintain himself and his family and thus, his application could not be approved.

CSRO went on to explain *how "the current criteria used in order to determine the minimum amount of income required to maintain a household was established in February 2015, and although not made public, is based on an established figure which fluctuates in relation with the retail of index prices."* CSRO went on to state that in view that the criteria was not in the public domain, further details could be obtained by the Ombudsman from the office of HM Government of Gibraltar's Chief Secretary.

As a final point, reference was made to the Complainant's brother. It was explained that he had been given permission to reside with his family before the establishment of the current criteria. As suggested, the Ombudsman requested and attended a meeting with the Chief Secretary (not the current incumbent). A discussion was held and explanations were sought. Time elapsed but unfortunately, despite promises to revert, no substantive information was ever forthcoming.

Subsequent correspondence with CSRO culminated in them referring the Ombudsman to s55(*c)* (8) of the Immigration Asylum and Refugee Act which was the go to provision when determining income. That specific section of the legislation states that a person will be deemed to be self-sufficient if his income and that of any family member exceeds the maximum level of resources which a Gibraltarian and his family members may possess in order to be eligible for social assistance in Gibraltar.

CSRO referring the Ombudsman to this legislative provision shed no light on the issue the Ombudsman sought clarification over. It would have been desirable for cut off figures or a minimum threshold to have been provided.

Complainant 2

Similar replies were provided to the Ombudsman by CSRO in relation to the criteria applied to determine this complainant's sufficiency of income.

In regard to the delay in effecting the necessary house checks on the Complainant, the head of CSRO apologised and explained that his internal instruction for the house check request and execution had not taken place in a timely manner and that internal departmental changes had been initiated to ensure that the situation did not reoccur. The Ombudsman certainly welcomed this.

The Environmental Agency also wrote to the Ombudsman and indeed confirmed that they had experienced delay in the request reaching them and that once it had, various attempts to call in on the Complainant had been unsuccessful because he had not been at home when the house calls were made. Faced with those situations, the Environmental Agency proceeded to write to tenants/complainants requesting that they contact their office directly to schedule a visit.

Without favouring Complainant 2's plight, the Ombudsman considered his circumstances were a perfect example of the hardship faced by him and other British Nationals of Moroccan origin. Having already dealt with and investigated all complaints individually, the Ombudsman, prior to the closing stages of the investigations, sought to highlight Complainant 2 as a representation of all the others.

With that in mind and after the lapse of some time, the Ombudsman wrote to the Chief Secretary reminding him of Complainant 2's personal circumstances. He explained how the Complainant had been living at the same address for thirty years and that the rented accommodation had been accepted by the Environmental Agency as being adequate for both himself and his wife. In fact, his wife resided there when she visited the Complainant on her "Temporary VISA."

The Ombudsman explained how the couple's combined income was over £10,600 per annum (including Old Age Pension and Community Care payments). Being of an advanced age and having a modest lifestyle (their three children were now adults all living and working abroad), the couple had clearly proved to be more than able to adequately maintain themselves in Gibraltar. In fact, the wife's reliance on a temporary VISA to come to Gibraltar, rather than on a Permit of Residence, actually added to their living expenses as she was forced to periodically return to Morocco and then re-apply for a VISA return to Gibraltar.

The original decision taken by CSRO however, was upheld.

Complainant 3

As with all individual cases forming part of this systemic report, the Ombudsman set out the Complainants grievance and requested comments from CSRO in reply.

In this case, it was explained how her income was £800 per month, how her outgoings were minimal and as a result, that the Complainant did not agree that her income was insufficient to have her husband reside with her in Gibraltar. The Complainant had appealed the decision but a letter was sent to her stating that although the appeal had been reviewed, it had been dismissed. CSRO stated in the conclusion to their letter to the Complainant that "*they would be happy to reconsider a fresh application if [her] financial circumstances were to change."*

Although this was a desirable course of action to follow, the Ombudsman was of the view that it could be seen as unfair for CSRO to create an expectation which in practice was abstract, since there was no disclosed criteria which could be followed.

In their subsequent comments to the Ombudsman, the CSRO stated that "*as you are aware, proof of income and housing accommodation are requested at the time of application and applicants must be able to satisfy that both the income and the residential accommodation are sufficient for their needs in accordance with the established criterion. The current criteria does not take account of outgoings. Although [the Complainant's] housing requirements have been determined suitable, her income is considered insufficient to maintain herself and her family and therefore her application cannot be approved."*

Complainant 4

Complainant 4's application for residence for his wife and son was denied on the basis that, like complaints 1,2 and 3 he had insufficient income to support his family and that he was not permanently resident in Gibraltar (it was alleged he lived in Spain). In reply the Complainant stated that he did in fact live in Gibraltar but in the two instances that house checks were conducted, on the first occasion he was being operated in Spain and on the second, he was in Morocco to visit family since it was a religious festival. By way of appeal (made by a legal representative) against the decision not to grant the application, bank statements were made available to CSRO showing a consistent monthly deposit of 2000 Euros and a local NatWest account showed a recurring deposit of £500-600 (community care). Numerous local utilities bills were also provided as proof of residence as was evidence of minimal outgoings. Still, the application was rejected on the "*insufficient income*" basis.

Legal counsel deemed the decision and CSRO's reluctance or inability to make the criteria openly available "*unreasonable.*" The Ombudsman shared this view. Numerous attempts to have sight of written guidelines/criteria were repeatedly unsuccessful.

Conclusions and Outcome

The Ombudsman had in correspondence with the Government's Chief Secretary, brought to his attention the existence of case law regarding the rights under Article 8 of the European Convention of Human Rights (ECHR), *"the right to respect for a person's private and family life…*", which is enshrined in section 7 (1) of the Constitution of Gibraltar.

It is suggested that a British citizen living in Gibraltar has a constitutional right to enjoy family life without interference from Government. This includes the right of a worker or pensioner in Gibraltar to bring his husband, wife and dependent children from abroad to live with him or her and for them to enjoy the same rights, benefits and advantages as other nationals of Gibraltar.

One can understand the argument and criteria imposed by Government insofar as self-sufficiency is concerned in order to properly consider applications before they are granted or otherwise. The absence of an objective criteria, guideline or checklist could lead to an "*opening of floodgates*" of unmerited applications and an unwelcome drain on Government /taxpayer resources.

What is incomprehensible and indeed worrying from an administrative and democratic perspective is the lack of transparency in relation to said criteria, and the inability for the Ombudsman to opine on the mode of its application.

In the specific cases under investigation in this report, the Complainants' respective incomes varied from £800-£2500 per month and no single application was granted nor was a detailed or even reasonable explanation for the refusals given.

The Ombudsman asks therefor: is the criteria strict in its application or is any element of discretion applied by the authorities depending on personal circumstances?

It would be desirable to have sight of the criteria for numerous reasons. The first would be in the interests of openness and social justice. The second, to enable prospective applicants to take an informed view before deciding whether to embark on the process of making the relevant application or not. From a practical and administrative perspective, the publication of the criteria would also undoubtedly bring a welcome reduction in CSRO's task of accepting, processing and replying to applications. Applications which would perhaps not be made in the first place if clear guidelines/conditions for approval existed.

As a final point and independent to the rights granted and enjoyed under ECHR and our very own Constitution, the Ombudsman also considers it unjust, even inhuman to deprive applicants of family life in retirement (when in many instances, those very same applicants provided skills to our workforce and contributions to our economy at a time when Gibraltar needed them most.)

Classification Sustained

The Complaints are sustained on the basis of lack of transparency, since there exists no verifiable measure or standard by which the Ombudsman can determine sufficiency/insufficiency of income.

Update

Further to the drafting of this report, the Ombudsman received a further complaint from a gentleman ("Complainant 5"), also of Moroccan origin who had recently obtained British nationality.

Complainant 5 had previously applied, whilst in full time employment in Gibraltar, for permanent residence for his wife but his application was rightfully deemed to be premature at the time and was rejected. He made a subsequent application after he obtained his nationality (but by this point he was a pensioner). The application was denied on the basis that as a pensioner, he had insufficient income.

As with the other Complainants, CSRO failed to inform Complainant 5 what level of income he would need to achieve, in order to be issued a permit of permanent residence for his wife.

(Report extracted from Case No's 1153, 1156, 1161 & 1217)

CIVIL STATUS AND REGISTRATION OFFICE

Case 2

Complaint against the Civil Status and Registration Office ("CSRO") over the delay incurred by them in updating the Complainant's and his family's Civilian Registration Cards ("CRC") with new residential address details.

Complaint

The Complainant (a Spanish national who worked in Gibraltar and who stated that he resided in Gibraltar) explained that on the 4th September 2018 he went to the CSRO and submitted forms for the residential address to be updated on his and his family's CRCs. The Complainant stated that they had been renting a property in Gibraltar but that it had become too small after the birth of their son and a friend had offered them rent free accommodation in the Property which he owned [Ombudsman Note: The Property was ex-Government housing stock and the Deed of Underlease ("Underlease" contained conditions with respect to rental, sharing, etc. of occupation].

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

According to the Complainant, a number of weeks later, his partner approached the Gibraltar Health Authority's ("GHA") Primary Care Services ("PCS") to request an appointment with a General Practitioner ("GP") but her request was refused. She went to the registration office to find out what the problem was and claimed to have been told that the appointment was not possible because there was an issue with their residential address; they were not allowed to reside in a Government property. On the 20th September 2018, the Complainant spoke to one of the PCS manager's about the matter and was told the same thing and advised that if he wanted more information he should contact CSRO. That same day, the Complainant met with a senior member of CSRO staff and claims to have been told that their application for a change of address had been declined. The Complainant requested that CSRO provide the reason/s for the refusal in writing (email or letter) and stated that despite being told that he would receive an email within a few hours that did not materialise.

He returned to CSRO the following day and was informed that the decision had changed from 'Declined' to 'Hold', as CSRO had to investigate the matter further and discuss it with the Housing Department. The Complainant understood that those enquiries would take some time but requested that CSRO contact PCS and notify them of this development, in order that he and his family could continue to receive medical care whilst the matter was investigated. According to the Complainant, on the 24th September 2018 when his partner again attempted to make an appointment with a GP she was not able to do so as the status of her and the children's health cards showed up as 'Cancelled' on the PCS's system. The Complainant's own healthcare was not affected by the residential address issue as he worked in Gibraltar and was covered for healthcare through payment of social insurance [Ombudsman Note: Due to Gibraltar's particular geographical location, a significant number of employees in Gibraltar is comprised of persons who reside in Spain and work in Gibraltar; those persons are categorised as 'frontier workers'. Frontier workers are entitled to healthcare in Gibraltar through payment of social insurance contributions whilst the healthcare and education of their dependants is provided in their country of residence. Since residency in Gibraltar had to be confirmed for the Complainant's dependants, his partner and children were denied medical attention].

The Complainant put his complaint in writing to CSRO and to the PCS manager ("PCS Manager") on the 26th September 2018 and brought his complaint to the Ombudsman on the 2nd October 2018.

In respect to the letter to the PCS Manager, the Complainant stated he had hand delivered this and had requested the staff member to whom he handed it to, to sign a copy of the letter as acknowledgment of having received it. The Complainant was advised that the PCS Manager was on annual leave at the time [Ombudsman Note: The Ombudsman was not provided with a copy of the signed receipt].

Investigation

The Ombudsman directed his initial enquiries to the Head of CSRO ("Head"). The latter's initial response on the 4th October 2018 explained that, whilst he was unable to comment on the GHA's position on the matter, he had looked into the circumstances of the case vis-a-vis the Complainant's and his family's applications for the change of address on the CRCs.

The Head explained that according to the applications, the Complainant, his partner and their two children now resided at the Property on a rent-free basis. The property was a 6RKB (5 bedrooms) which had been purchased by the Complainant's friend in 2011 from HM Government of Gibraltar's housing stock. Whilst carrying out routine checks in their system, CSRO had ascertained that, although the Complainant claimed he was residing at the Address, there were currently ten other persons (taxpayers) registered there; a significant number of people considering the size of the property. Additionally, the Head stated that they had received written representations from the Complainant and his partner for a residence permit and CRC to be issued to the partner's father (who was unemployed and resided in Madrid) to be allowed to reside at the Address as their dependant. The Head explained that it was not CSRO's intention to delay applications but that checks needed to be carried out and, in this case, legal advice had to be sought as clarification was required on whether the Complainant's friend could have 'guests' at the Address. The Head referred the Ombudsman to Clause 23 of the Underlease of the Property (excerpt below) and the fact that they had to be clear so that there was no misinterpretation of the said clause. CSRO stated that they had checked with the lessor of the property and the latter had confirmed that the lessee held no agreement with the lessor for permission to rent or share occupation. According to the Head, the Complainant was fully aware that CSRO were seeking legal advice on the matter and that he would be informed once this was received and a decision made. The Head advised that he would send an email to the Complainant in response to his email to CSRO of the 26th September 2018.

(Excerpt Underlease of the Property)

> *23. The Lessee shall not underlet, license or part with possession of or otherwise share the occupation or use of the Premises without the previous consent in writing of the Lessor which shall be granted subject to the following conditions:-*
>
> *(a) the Lessee's tenant shall be an eligible person (as defined in sub-paragraph 1 of the Ninth Schedule hereto);*
>
> *(b) .....*
>
> *(c) .....*
>
> *(d) .....*

PROVIDED *that nothing in this paragraph contained shall excuse the Lessee from its obligations towards the Lessor or the Management Company and that such obligations shall in the event of a sub-letting bind the Lessee and the sub-underlessee both jointly and severally.*

THE NINTH SCHEDULE

"Lessee's covenants and obligations with the Lessor on an assignment or legacy of the Premises"

1. *An assignment of the whole of the un-expired residue of the Terms of the Premises created by this Underlease shall only be permitted if the assignee is:-*

(a) A natural person who satisfies the provisions of the Housing Allocation Scheme (Revised 1994) or any Scheme amending or substituting the same issued under the Housing Act or any Act amending or substituting the same and shall be a natural person entitled to be on Government's housing waiting list but on condition that such natural person is not a registered tenant of another Government dwelling;

(b) the Lessor or any company wholly owned directly or indirectly by the Government; or

(c) a natural person who is not eligible to be on the Government's housing waiting list by virtue of their status as non Gibraltarians but have been lawfully resident in Gibraltar for at least 15 years immediately before the date of the proposed assignment to them and would not otherwise be ineligible if they were Gibraltarian but on condition that such natural person is not a registered tenant of another Government dwelling.

(hereinafter referred to as an "eligible person") ***AND PROVIDED ALWAYS THAT*** *any such assignment shall contain the same terms and provisions covenants and reservations as are herein contained and shall be approved by the Lessor prior to the date of such assignment.*

CSRO emailed the Complainant on the 5th October 2018 and referred to verbal information provided to him with respect to not being able to issue CRCs and permits of residence at the Address. CSRO added that they had requested legal advice on the matter but were unable to provide a timeframe as to when a decision would be made until the legal advice was received.

The Complainant was distressed at the fact that no deadline date had been provided and stated that until a decision was made they should be provided with the updated CRCs, the lack of which would deem them to be non-residents in Gibraltar or anywhere else in the world for that matter.

On the 8th October 2018, the Ombudsman contacted the Head about the Complainant's concern and was informed that the current CRCs had not been cancelled and they could therefore continue to use those as valid documentation whilst the Property issue was investigated. The Ombudsman notified the Complainant who remained unhappy with the interim solution offered, mainly due to the fact that if the PCS reactivated their medical cards using their old address, any correspondence sent by PCS to them would in effect be sent to the wrong address. The Complainant stated that the only acceptable solution was to get temporary CRCs with the new Address until the legal advice was received and the matter resolved.

In January 2019, the Ombudsman contacted the Complainant to enquire if the health cards issue had been resolved. The Complainant's response in February 2019 stated that he had not received any response from CSRO but did not provide the information requested by the Ombudsman with regards to PCS [Ombudsman Note: The Ombudsman contacted PCS at a later stage and according to them, the medical cards had remained active until the 29th August 2019].

The Ombudsman continued to pursue the matter with CSRO and in April 2019 the Head advised that they had been provided with the legal advice requested, which concluded that the Underlease did not prohibit a rent-free agreement. This differed with the interpretation of the lessor with respect to Clause 23 (as per above) whereby allowing someone to reside at the Property, even if it was rent-free, without the previous consent of the lessor, would constitute a breach of the terms of the Underlease. The lessor had reiterated to CSRO that they had not authorised the lessee to have anyone else registered at the Property and it was their view that even though the Complainant and his family may have had permission from the lessee they had not authorised this action.

Given the opposing views, the Head stated that this was one out of a number of outstanding accommodation related issues that required discussion and steer from Government but that a meeting with the pertinent Minister was taking longer than anticipated because of significant workload due to 'Brexit' (United Kingdom's departure from the EU).

In the interim, the Head advised that the Complainant had terminated his employment on the 2nd November 2018 but to date continued to enjoy a valid CRC under 'Worker' status from the previous address.

(a) The Ombudsman requested a copy of the legal advice. Upon reviewing this, the Ombudsman noted what had already been stated by the Head but also the fact that the legal advice was that even if the Underlease did prohibit a rent free arrangement, that was a matter between the lessor and the lessee and not an immigration question that affected the status of the Complainant and his family.

(b) In relation to the number of persons registered at the Address, the legal advice stated that issues of overcrowding were also separate to that analysis and would not in themselves affect the immigration status of the family.

(c) The legal advice further stated that if CSRO knew that the Complainant and his family were not residing at the Address, or elsewhere in Gibraltar, then that would be a legitimate basis (all things being equal) to revoke their residence permits and CRCs.

(d) To conclude, the legal advice was that the CRCs and resident permits should be issued under the new address for the remainder of the term (2023) but reiterated that if an investigation revealed that they were not resident at the Property or anywhere else in Gibraltar, CSRO could revoke the documentation at any time before the expiry of the term.

In order to verify if the Complainant and his family were residing in Gibraltar, house checks had to be undertaken. In an investigation carried out by the Ombudsman in case CS1186 he was made aware that since March 2019 no address checks were being undertaken. This was again confirmed at a meeting with the Head in August 2019. At that meeting the Head advised that the CRCs continued to remain active whilst they awaited the steer from Government, due to the conflicting interpretations of the underlease from the lessor and the legal advisers. The Ombudsman informed the Head that in relation to the investigation, he had been in communication with the PCS deputy manager who had found that the Complainant had terminated his employment on the 2nd November 2018. The Head explained that under those circumstances, the Complainant should have informed CSRO accordingly and he would have been given 'Job Seeker' status. At the present time, an EU national can remain in Gibraltar as a job seeker (not permit holder) for a short period of time.

The Complainant would have also had to register with the Employment Service and provide CSRO with proof that he was actively looking for a job.

CSRO raised the issue that the Property was a hotspot now well known to CSRO and GHA as there were quite a number of persons registered as residing there rent free. The Ombudsman enquired as to how, considering the circumstances of this case, had that had been allowed, and the Head stated that it had not been picked up at the time. It had only been as a result of a CSRO officer realising at the time when the Complainant applied for the change of Address that there were numerous individuals registered there, that it was identified that the property was ex-housing stock. As to the Ombudsman's enquiry on whether the CSRO had notified the Complainant's address issue to the PCS, the Head confirmed that the PCS deputy manager and PCS Manager had been copied into emails and that had resulted in healthcare being stopped.

As part of the investigation, and as stated above, the Ombudsman contacted the PCS deputy manager with his enquiries. The PCS deputy manager's response stated that further to the Ombudsman's queries, they had undertaken checks and found that neither the Complainant nor his partner were presently in employment in Gibraltar; the Complainant had ceased employment and social insurance contributions on the 2nd November 2018. As proof of address was still pending (as per note on PCS system dated 14th September 2018) the PCS deputy manager stated he had recently attempted to contact them by phone to clarify the matter but was unsuccessful as the telephone number had been suspended. As a result, the medical cards were suspended on the 29th August 2019. The Ombudsman had requested details of cancellation/suspension/reactivation of medical cards between September 2018 to date (29th August 2019). The PCS deputy manager confirmed that the medical cards had remained active until that point and stated that their records showed that they had seen a GP on the 18th September 2018 and had subsequent appointments. He therefore failed to understand why the Complainant had stated that appointments had been refused. In reference to the letter of complaint the Complainant claimed to have sent to the PCS Manager, the PCS deputy manager stated that he had enquired and the PCS Manager had responded that she had never received a complaint from the Complainant [Ombudsman

Note: The PCS Manager informed the Ombudsman that when she was on annual leave (at the time when the Complainant claimed to have handed in the letter) the PCS deputy manager was acting PCS Manager for her and the letter would have been passed on to him. The Complainant had not provided a copy of the signed receipted letter].

Conclusions

The Complaint brought to the Ombudsman was one of delay on the part of CSRO in updating the Complainant's and his family's CRC with their new residential address details. The submission for the update was made on the 4th September 2018. CSRO identified two main issues with the Property. The first one being that it was ex- Government housing stock and under the terms of the Underlease, the lessee could not share the occupation of the Property without having previously obtained the lessor's consent in writing.

The second issue being that when carrying out a search in their system, CSRO identified that there were ten taxpayers registered as residing in the Property. CSRO put the CRCs update request on hold, pending legal advice on the issues; the legal advice was received in April 2019. Their view was that the Underlease did not prohibit a rent-free arrangement and even if it did, it was a matter between the lessor and the owner/lessee of the Property and not an immigration question that affected the status of the Complainant and his family.

In relation to the number of persons registered at the Address, the legal advice stated that issues of overcrowding were also separate to that analysis and would not in themselves affect the immigration status of the family.

The legal advice to CSRO was that the CRCs and resident permits should be issued under the new address for the remainder of the term (2023) but reiterated that if an investigation revealed that they were not resident at the Property or anywhere else in Gibraltar, CSRO could revoke the documentation at any time before the expiry of the term.

On the basis of the above, the Ombudsman sustains this complaint. Despite the lessor's interpretation of the application of Clause 23 in the Underlease being different to the view of the legal advice provided, CSRO should have followed the legal advice and updated the CRCs with the new address. This would also be in keeping with Principles of Good Administration with regards to maintaining proper and appropriate records, until such time as Government made a decision on the matter.

Referring to point (c) of the legal advice contained in the 'Investigation Section' of this report, the Ombudsman noted that address checks are still not being undertaken in Gibraltar and refers to the recommendation he made in case CS1186 (see under Recommendations heading).

Regarding the issues allegedly experienced by the Complainant and his partner at the PCS, the Ombudsman contrasted the information they had provided with that submitted by the PCS deputy manager which was that the medical cards had remained active until August 2019 and that they had seen a GP on the 18th September 2018 and had subsequent appointments. On the basis of the facts provided by the PCS, the Ombudsman deems that there was no maladministration with respect to medical cards having been cancelled but is critical about the fact that the medical cards had not been updated with the new address details until CSRO were provided with a decision from Government.

On the matter of the letter the Complainant stated he hand delivered to a staff member of the PCS for the PCS Manager, the latter stated that she was on annual leave at the time and the PCS deputy manager was acting PCS Manager. The letter was never received by either of the managers, despite the Complainant stating that he had a signed copy as acknowledgement of receipt of the letter by a staff member of the PCS. The Ombudsman has not been provided with a copy of this receipt and as such cannot confirm or deny that the letter was handed in. Notwithstanding this, the temporary suspension of the medical cards on the part of PCS was due to the action taken by CSRO; the medical cards remained active until they were suspended in August 2019 for the reasons set out in this report.

According to the legal advice given to CSRO, the accommodation in which a person resides in Gibraltar is not a matter for immigration.. To date, CSRO appears to have been carrying out the role of 'gatekeepers' and have been undertaking due diligence enquiries with respect to addresses. CSRO request pertinent documentation by way of tenancy agreements, deeds, etc. as proof that applicants for CRCs or Identity Cards are entitled to reside there. This raises the question as to which public service provider should be carrying out this function. The importance of these checks are to ensure that persons who state that they are residing in Gibraltar actually are doing so.

The particular issue with Gibraltar is that it could be the case that persons are providing an address to be able to benefit from schools, university scholarships and medical care (dependents could only be eligible for these benefits if they were residing in Gibraltar) but could in fact be residing in Spain where rentals are lower than in Gibraltar and where space comes at a premium. The issues raised by CSRO in this case refer to ten rent-free taxpayers already registered in the Property prior to the Complainant's application for update CRCs. Without carrying out the appropriate checks, the question of who resides in a particular property can therefore not be verified.

Classification Sustained

Recommendations

Regarding the carrying out of address checks, the Ombudsman is concerned that there is currently no system or entity in place to carry out this important task for the pertinent Government departments and public services. In the Ombudsman's view, these address checks are essential in order to ensure that persons who are not permanently resident in Gibraltar are not able to avail themselves of the benefits that they would otherwise be entitled to.

(Report extracted from Case No 1199)

CIVIL STATUS AND REGISTRATION OFFICE

Case 3

Delay in processing an application for a permit of residence ("Permit") for the Complainant's fourteen year old daughter ("DB").

Complaint

The Complainant was aggrieved because of the delay on the part of the Civil Status and Registration Office (CSRO) in processing an application for a Permit for his fourteen year old daughter ("DB"). [Ombudsman Note: The Complainant had two daughters and DB was the younger of the two].

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant was naturalised as a British national in December 2014 at the age of 59. He was of Moroccan origin and had resided and worked in Gibraltar since 1981 (26 years old at the time). Having resided apart from his family all his life, other than during holidays when he visited them in Morocco or vice versa, upon obtaining British nationality, the Complainant submitted a request to CSRO for Permits for his family; his wife and two daughters aged 10 and 13 years old at that time, with the understandable objective of reuniting his family with him in Gibraltar.

On the 28th January 2015, further to complying with CSRO's request for pertinent documentation to be submitted, CSRO wrote to the Complainant and informed him that the request was being processed and he would be notified of the decision once that was made known to CSRO. In December 2015 he was informed by CSRO that as part of the Permit application process for his wife and daughters, the Environmental Agency ("EA") had attempted to carry out checks of the accommodation but had been unable to gain access to the property. As such, they asked the Complainant to contact the EA and make the necessary arrangements to undertake the inspection as they were unable to proceed with his request until that was done. [Ombudsman Note: The inspection was finally carried out in July 2016. In the course of the investigation undertaken by the Ombudsman, enquiries

were made about the reason/s why it took one and a half years from the date of the application to the inspection being undertaken.
The investigation established that the delay was not due to the EA or CSRO and more detailed information is contained in the 'Investigation' section in this report].

In August 2016, CSRO informed the Complainant that the application had not been approved on the grounds that the accommodation was deemed unsuitable to house his wife and children and his income was considered insufficient.

A year later, on the 2nd August 2017, the Complainant submitted an application for a Permit, on this occasion for his wife only, and further to submitting the pertinent documentation, CSRO approved the application by way of letter on the 14th September 2017.

In September 2018, the Complainant's mother-in-law who looked after the Complainant's daughters in Morocco, passed away. Under the circumstances, the Complainant resolved to reapply for Permits for his daughters but claimed to have been told by CSRO that he should apply for each daughter individually. As such, the Complainant applied for a Permit for his older daughter ("DA") on the 27th September 2018. On the 8th October 2018 he received a letter from CSRO informing him that the EA's report in July 2016 had confirmed that his accommodation was adequate for only two persons and if he wanted DA to reside with him and his wife in Gibraltar, he would have to find alternative accommodation which was suitable for three persons. CSRO advised that if his accommodation circumstances changed, they would be happy to receive a fresh application.

In March 2019, the Complainant found alternative accommodation and on the 10th April 2019, informed CSRO. The EA carried out an initial inspection of the new accommodation on the 16th April 2019 and a second one on the 5th June 2019. According to the Complainant, the accommodation was a two bedroom flat with a bathroom.

On the 20th June 2019, the Complainant received a letter from CSRO which informed him that permission for DA could not be approved as she was no longer a minor. DA had turned 18 on the 16th June 2019. The Complainant and his wife complained about the unfairness of the decision as the Application had been made much earlier than the date on which DA ceased to be a minor, and on the 1st August 2019, CSRO overturned their decision. A letter was sent to the Complainant informing him of this.

On the 21st August 2019, the Complainant applied for a Permit for DB and on the 23rd August 2019 received a letter from CSRO requesting supporting documentation which according to the Complainant he provided immediately despite this being in the main, documentation CSRO already had in their possession from DA's Permit application.

Due to the imminent commencement of the school year in September, the Complainant and his wife were anxious that DB would not miss out on continuing her full-time education locally, and made enquiries about the Permit application to CSRO in subsequent weeks and claimed to have been told on each occasion that the EA had to inspect the accommodation before the application could be processed. The Complainant claimed to have told CSRO that the flat had already been inspected on two prior occasions and that he could not understand the process.

The Complainant stated that whilst they waited for a decision, the whole family was suffering due to the uncertainty but highlighted that DB was the one who felt the most anxious and stressed knowing that all her family had permission to reside in Gibraltar except her.

In parallel to the above and because the Permit was taking longer than they had anticipated, the Complainant's wife contacted the Department of Education on the 17th September 2019, in order to enrol DB into full time education. She explained the delay they were experiencing on the part of CSRO issuing a Permit and was given an application form. According to the Complainant, they completed the form and handed in documentation requested and were informed that they would be contacted in the course of the next two weeks.

By the 10th October 2019, not having received a decision from CSRO, the Complainant lodged his complaint with the Ombudsman.

Investigation

On the 11th October 2019, in the initial stage of the investigation, the Ombudsman spoke to CSRO. He referred to the information provided by the Complainant regarding the delay in the issue of the residence Permit being due to the EA not having undertaken the inspection of the accommodation. Under the circumstances, the Ombudsman enquired as to whether it was necessary for the EA to undertake a further inspection, considering that this had been carried out a few months earlier in conjunction with DA's Permit application.

The CSRO responded that this was a new application and the inspection had to be carried out. Notwithstanding, CSRO informed the Ombudsman that the Complainant did not meet the financial threshold requirements for his second daughter to reside in Gibraltar. In the course of the conversation, CSRO highlighted that DB might be in Gibraltar illegally as her visa waiver might have expired and they advised they would revert with that information.

The Ombudsman informed CSRO that he had not been made aware by the Complainant of any visa waiver issues.

Prior to discussing the complaint with CSRO, the Ombudsman had contacted one of the Department of Education's advisers for an update on the child's school enrolment, as they had informed the Complainant's wife that she would be contacted by the end of September 2019 and to date that had not materialised. The adviser stated that she was on her way to the school and would revert.

On the 14th October 2019, CSRO contacted the Ombudsman and informed him that the child's visa had expired on the 15th September 2019. CSRO provided the following timeline:

- The Complainant applied for a Permit for DB on the 21st August 2019;
- CSRO acknowledged receipt on the 23rd August 2019 and requested documentation;
- On the 7th October 2019, CSRO sent a letter to the Complainant requesting that he contact the EA to arrange an inspection of the premises;
- On the 9th October 2019, CSRO sent an email to the EA requesting that they carry out the inspection.
- The inspection was undertaken on the 14th October 2019.

In an effort to assist the Complainant, the Ombudsman contacted the Borders & Coastguards Agency ("BCA"), tasked with the issuing of visa waivers, to enquire if the child's visa waiver could be extended whilst CSRO made the decision on the Permit application. BCA responded that if the visa waiver had expired there was nothing they could do. The Ombudsman also contacted CSRO on the matter but was informed that was not possible as the child was in Gibraltar illegally.

On the 15th October 2019, the Ombudsman met with the Complainant. The latter advised that the school had contacted them for DB to start her full-time education in Gibraltar. The Ombudsman informed the Complainant that he had just been made aware that DB was in Gibraltar illegally and the onus was on the family to resolve the issue.

The Complainant stated that if DB went back to Morocco she would not be entitled to education. The Ombudsman stated that he could not condone the fact that DB was in Gibraltar without a visa and that the Complainant should make arrangements to speak to CSRO.

On the 12th November 2019, CSRO provided to the Ombudsman, substantial documentation related to the Complainant's requests for Permits for his family. As per the information provided by the Complainant, the first application was made on the 12th December 2014 and was refused in August 2016. The refusal was based on the inspection carried out by EA in July 2016 which deemed that a maximum of two persons could be allowed to sleep in the premises. The Ombudsman found that the EA had attempted to inspect the premises on three different occasions throughout 2015 and left calling cards for the Complainant to contact them. In December 2015, CSRO sent a letter to the Complainant requesting that he contact the EA but that did not materialise until July 2016. Based on the documentation provided, the Ombudsman is satisfied that neither the CSRO or the EA caused the delay in the undertaking of this first inspection but rather, the Complainant not having contacted the EA as requested.

The Complainant waited one year before requesting a Permit for his wife on the 2nd August 2017. CSRO acknowledged the application on the 7th August 2017 and requested pertinent documentation. On the 14th September 2017, CSRO wrote to the Complainant informing him that the application had been accepted; the process taking a period of approximately six weeks.

On the 27th September 2018, a year later, the Complainant wrote to CSRO requesting a Permit for DA. CSRO refuted the Complainant's allegation that they had advised him to apply for each daughter individually. CSRO stated that the Complainant had informed them that the younger daughter would remain in Morocco and was being looked after by an aunt.

CSRO refused the application on the 8th October 2018 (eleven days) on the basis that the accommodation was adequate for only two persons and advised that if his accommodation circumstances changed they would be happy to receive a fresh application.

The Complainant wrote to CSRO in December 2018 and explained that because properties in Gibraltar were very expensive he was trying to sell all his assets in Morocco in order to purchase a property locally to be able to have all his family together. Until then, he asked that they grant a Permit to DA to allow her to reside with him in Gibraltar, as his wife and other child were residing in Morocco due to personal reasons.

In January 2019, CSRO requested pertinent documentation for the application to be processed and on the 10th April 2019, the Complainant informed CSRO that he had found alternative accommodation. Arrangements were made for the EA to inspect the property and this was done on the 16th April 2019. The Ombudsman reviewed the EA's report which determined that the new property had been stripped and was in the process of being refurbished. There were no facilities and all internal walls had been removed and as such, it was not possible to assess the living conditions. The contractor advised that the works would take about four weeks to complete and the EA concluded that they would carry out a second visit. This was carried out on the 9th May 2019 and the report emailed to CSRO on the 5th June 2019. The report stated that the flat had been fitted with kitchen and bathroom facilities and consisted of a two bedroom flat. It concluded that there would be no overcrowding if DA resided there. Despite this report, CSRO wrote to the Complainant on the 20th June 2019, refusing the application on the basis that DA was no longer a minor. A subsequent letter on the 1st August 2019 approved the Permit. According to CSRO, the 20th June 2019 letter was sent before considering EA's report. Once that was reviewed, the Permit was approved [Ombudsman Note: Although this incident is not part of the complaint, the Ombudsman wants to highlight that CSRO should have provided the family with an explanation as to why the decision was overturned and an apology, none were forthcoming].

Regarding the substantive complaint, the Complainant applied for a Permit for DB on the 21st August 2019 but claimed that in subsequent enquiries to the CSRO had been told that the EA had to carry out an inspection of the accommodation. CSRO refuted that claim in a conversation with the Ombudsman on the 11th October 2019.

CSRO also stated that the Complainant did not meet the financial threshold. Amongst the documentation provided by CSRO to the Ombudsman, a letter dated 7th October 2019 (approximately seven weeks from the date of application) from CSRO to the Complainant requested that he contact the EA to arrange an inspection. This substantiates the Complainant's information that the delay was due to the EA inspection arrangements.

The telephone conversation between CSRO and the Ombudsman resulted in CSRO making enquiries to BCA about DB's visa waiver and established that this had been issued for the period 30th July 2019 and expired on the 15th September 2019. The Ombudsman reviewed the email thread which ensued between CSRO and BCA between the 14th and 15th October 2019, due to the circumstances of the case.

The CSRO advised BCA that the Permit application for DB made in August 2019 had still not been finalised. They referred to a telephone conversation with the Ombudsman in which the latter had informed CSRO that the Complainant and his wife had complained as the EA's report was taking too long and DB was not at school which had triggered CSRO's enquiry about the visa waiver expiry date. CSRO referred BCA to the fact that DB had overstayed and enquired if there was any procedure in place on the part of BCA with respect to notifying sponsors/parents of overstayers into which CSRO could be copied into for the purpose of residence permit applications to prevent a similar recurrence of this situation. CSRO pointed out that DB had overstayed for one month and they had only found out about this as a result of the complaint to the Ombudsman. CSRO informed BCA that the Ombudsman had advised DB's parents to register for school in Gibraltar [Ombudsman Note: The Ombudsman did not advise the parents to register DB for school. As explained above in this report, it was the Complainant and his wife who approached the Department of Education and were then provided with a school application. The Ombudsman's involvement in this respect was to have contacted the Department of Education for an update on the application].

CSRO referred BCA to the fact that they had in the past been tasked with the issue of visas and waivers for Moroccan nationals, and noted that they kept a close watch on overstayers and asked the sponsors/parents to ensure that their family visitors left at the end of the permitted period of stay. CSRO noted that contrary to verbal information BCA had provided to them that Moroccan summer visitors had left, that did not appear to be the case.

CSRO stated that the case of overstayers placed them in a very difficult position given that they processed applications for residence documentation from non-EEA family members of residents, who needed to provide evidence that they could fully maintain and accommodate the family without recourse to public funds. CSRO believed that pertinent entities had to work together and suggested seeking guidance from the Chief Secretary in order to seek a policy steer from Government.

BCA stated that they had issued the visa waiver to a 14 year old girl whose father resided in Gibraltar as a naturalised British national and the visa waiver was issued for the duration of the school holidays as agreed with the Moroccan Community Association. BCA stated that they were provided with a certificate that DB was attending a school in Morocco. BCA were satisfied that DB met the criteria and that the application was made in good faith and according to standard practice.

BCA pointed out that as occurs in all countries, overstayers were an inevitable risk when granting visit visas and it was the manner in which those problems were dealt with that would reduce the risk. BCA confirmed that they would not be issuing a visa waiver to DB in the coming year. BCA stated that they were not aware that DB had overstayed.

BCA referred to the telephone conversation with the Ombudsman with respect to the possibility of an extension to the visa waiver in which BCA advised that would only be considered in urgent medical situations. BCA noted that they had discussed the minor in the conversation with the Ombudsman through which they found out that a previous Permit application had been unsuccessful. BCA deduced that unless the family circumstances had significantly changed, it was bound to be refused again. BCA advised that Ombudsman that the application could be considered whilst the minor remained in her country of origin, should her application be successful, she could return. BCA advised the Ombudsman that the minor was in breach of immigration legislation and her guardian should make arrangements for her to leave Gibraltar. BCA stated they were not supportive of persons who applied in this manner, attempting to become a resident whilst at the same time having a disregard for the laws and almost holding them all to ransom with comments that the minor was missing school.

Regarding the comments made by CSRO on requesting guidance from the Chief Secretary, BCA stated that they were drafting a policy which would be distributed to all stakeholders before presenting it to the Chief Minister for consideration.

BCA finalised that email by stating that they were duty bound to inform the Royal Gibraltar Police ("RGP") that DB had overstayed and were including them in the email BCA would liaise with the RGP on the issue. Notwithstanding, BCA requested confirmation that the residence application was to be refused.

The person responding on behalf of CSRO stated that she did not know if the request would be approved as she was not dealing with that application. She did however highlight that the Ombudsman had made representations to the Department of Education in relation to the enrolment in school of a minor, whose circumstances were similar to those of this case and concurred with BCA that the sooner they were all given specific guidelines from HM Government the better.

BCA responded that all residence applications from persons who remained unlawfully should be automatically refused. If that were to happen it would send out a clear message. BCA concurred that they needed direction on this and should be discussed with all stakeholders. It would be a waste of BCA and RGP resources if they were to contact the sponsor to make arrangements for the minor to be returned to Morocco, only to have her back shortly if the application was successful. BCA requested that CSRO advise them on the probable outcome but understood that the application would take time to be fully considered and would be unfair for CSRO to have to rush through the application which was almost forced on them.

On the 29th October 2019, CSRO sent a letter to the Complainant refusing the Permit for DB on the grounds of insufficient income.

Upon being informed of the outcome by the Complainant, the Ombudsman wrote to the Chief Secretary setting out the details of the case and adding that this was a gross injustice and a clear breach of human rights. The Ombudsman asked the Chief Secretary for his assistance in regularising this situation. The Chief Secretary provided a prompt response and advised that he would contact CSRO for their views. A meeting was subsequently held on the 26th November 2019 between the Chief Secretary, the Ombudsman and CSRO in which this case as well as a number of other cases were discussed.

On the 29th November 2019 the Complainant contacted the Ombudsman and informed him that they had received a call from CSRO and DB would be getting her Permit.

The Ombudsman contacted CSRO for confirmation of the above. This was confirmed and the reason given by CSRO for the granting of the Permit was because once a child has been admitted into school no action would be taken to deport them.

Conclusions

The complaint brought to the Ombudsman was one of delay on the part of CSRO in issuing a Permit to a fourteen year old girl. The application was made on the 21st August 2019 and it took CSRO approximately seven weeks to send a letter to the Complainant to make arrangements for the EA to inspect the accommodation, which incidentally had been inspected two months earlier. In contrast, it took six weeks for the Permit application for the Complainant's wife to be approved.

According to CSRO, in the conversation with the Ombudsman on the 11th October 2019, it was the fact that the Complainant did not meet the financial threshold that was holding back a decision to be made on the Permit application. In contrast, from information provided by the Complainant, he claimed that upon enquiring, CSRO had informed him that they were waiting for the EA to inspect the accommodation. From the documentation reviewed by the Ombudsman, it has been established that the EA inspection was undertaken on the 14th October 2019, a period of approximately eight weeks from the time when the Permit application was made, an unreasonable and inordinate delay.

The Ombudsman sustains the complaint of delay. If CSRO were already aware on the 11th October 2019 that the Permit would be refused on the grounds that the Complainant did not meet the financial threshold, there was no reason to have caused further anxiety or hardship to the Complainant and his family by prolonging the agony. The letter refusing the Permit dated 29th October 2019 refers.

The Ombudsman will now look into other issues arisen in the course of this investigation.

The first issue is that of DB having been illegally in Gibraltar at the time when the Complainant lodged his complaint with the Ombudsman; a fact which the Ombudsman was totally unaware of. Rest assured that going forward, if and when a similar situation arises, that will be the first check to be made.

Notwithstanding, in this case, once the Ombudsman was made aware of the fact that DB's visa waiver had expired, he discussed the matter with the Complainant and informed him that he could not condone the fact that DB was in Gibraltar without a visa and as such, he should make arrangements to speak to CSRO. Notwithstanding the aforementioned, the fact is that the Complainant applied for DB's Permit weeks before her visa waiver expired.

The email thread between BCA and CSRO on the 14th and 15th October 2019 found that BCA were not aware that DB had overstayed in Gibraltar further to the expiry of her visa waiver on the 15th September 2019. It is clear that the process BCA has in place to ensure compliance by persons who are issued visitor visa waivers to leave Gibraltar upon expiry of said visa waivers, failed in this instance. As such, the Ombudsman welcomes CSRO's suggestion of being included in communications between BCA and sponsors/parents of visa waiver holders who overstay, as that will impact the application of residence permits.

The Ombudsman also welcomes the fact that BCA were already in the process of drafting a policy which would include input from other stakeholders and would make provision, amongst other issues, for dealing with overstayers.

Regarding what should have happened in this case, it is clear that upon expiry of the visa waiver, the Complainant should have ensured that DB went back to Morocco to school, as according to BCA, they had been provided with a school certificate for the purpose of the issue of the visa waiver and were satisfied that upon expiry of said visa, she would return to Morocco to full time education. What happened was what the Complainant had set out to do from the moment he was naturalised in December 2014, to reunite his family with him in Gibraltar. At the time of application for DB's Permit, apart from the minor in that family, the rest all had Permits. Under those circumstances, it did not cross the Complainant's mind that the Permit would be refused.

It is without doubt that the Ombudsman's request for assistance from the Chief Secretary on this matter is what brought this matter to a satisfactory conclusion for the Complainant. It is clear that CSRO did not consider the human rights aspect when dealing with this exceptional case.

Regarding the individual Permit application for his daughters, it is clear from the way in which the Complainant applied (once DA's Permit was approved he submitted the Permit application for DB) that he must have, in all probability, applied for the Permits in that consecutive order as a result of advice received. It has not been established however, where that advice came from. CSRO deny that it was them who provided it and the Complainant, who alleges that they did, only has his word to rely on. The Complainant was unable to present to the Ombudsman, clear or hard evidence to substantiate his claim.

Classification Sustained

(Report extracted from Case No 1212)

DRIVER AND LICENSING VEHICLE DEPARTMENT

Case 4

Complaint against the Driver and Vehicle Licensing Department (DVLD) in regard to issues relating to the alleged inadequate customer service received and nonsensical approach applied to the Complainants application for a duplicate driving licence.

Complaint

The Complainant was aggrieved because of the delay on the part of CSRO in processing an application for a Permit for his fourteen year old daughter ("DB"). [Ombudsman Note: The Complainant had two daughters and DB was the younger of the two].

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant complained as follows:

1. Primarily that his request for a duplicate driving licence had been put on hold until such time as he provided the DVLD with a medical letter explaining his disability and the type of modification required to be carried out on his vehicle.

2. Lack of professional counter service received at the DVLD including the fact that they were aware that said medical letter could only be obtained by paying a fee at a private medical facility yet they did not inform him that this was the case.

3. Unhappy with the attitude from the DVLD manager ("the Manager") who the Complainant considered showed no common sense and was, allegedly discriminatory against his disability.

The Complainant explained how both he and his wife had misplaced their driving licences and that after having unsuccessfully searched for them, decided to apply to the DVLD for duplicates. As a result, they visited the DVLD, filled out the necessary forms and paid the fee of £37 per applicant. Upon submitting the applications, the Complainant was informed

that as a result of his disability (he is in a wheelchair), he would have to obtain a medical letter confirming his fitness to drive.

The Complainant, somewhat baffled by the request since he was already in possession of a valid driving licence, proceeded to make an appointment at the GHA Health Centre, to see a doctor and thereby obtain said letter. After having attended the appointment, it transpired that the GHA did not provide that service and the Complainant was advised at the GHA to seek a private medical appointment in order to obtain the letter he required.

The following day, the Complainant returned to the DVLD and explained that he had been unable to obtain the letter from the public health service provider. Counter staff allegedly confirmed that they were indeed aware that only private medical practitioners issued "fitness to drive" letters. When the Complainant questioned the need to produce the letter given he was simply requesting a duplicate licence and not a renewal, counter staff insisted that the procedure had to be followed.

The Complainant explained to the Ombudsman that after a long discussion at the counter, the frontline staff agreed to consult with their Manager. They informed the Complainant they would telephone him at home once they had. The Complainant never received a call.

In a final attempt to seek clarification, the Complainant returned to the DVLD and after waiting some time, was invited to speak to the Manager in person.

The Complainant explained the position and although the Manger was sympathetic, he informed the Complainant that his hands were tied insofar as procedure was concerned. When the Complainant challenged him as to why he would have to obtain a letter (at his cost), the Manager allegedly replied that if the GHA did not provide a free service for that type of request, there was little he could do. When the Complainant explained that his disability had not changed or evolved since he had obtained his driving licence, the Manager's reply was simply that "*that was the law.*" He needed to remain satisfied that he was fit to drive. When the Complainant asked whether he still held a valid driving licence (since the original had been misplaced), he was told he did not and that as result, he could not drive.

The Complainant was also dissatisfied with the fact that he was given no information of any DVLD complaints mechanism he could turn to. He was also of the opinion that if they needed a letter confirming his fitness to drive in order to satisfy their procedures, they should "*have a system for this to be carried out at their expense and not pass the problem to the service user."*

In summary, the Complainants application for a duplicate driving licence had not been accepted, his fee of £37 was not returned, and he remained unable to drive until he was able to "*satisfy the legal requirements"*. As a result of this predicament, the Complainant lodged his complaint with the Office of the Ombudsman.

Investigation

The Ombudsman reviewed email exchanges between the Complainant and DVLD and subsequently wrote to the Manager setting out the complaint in writing for the DVLD's attention and comments, as per standard Ombudsman practice.

The Manager gave his explanation of events. An entire chronology of his departments' dealings with the Complainant, including his personal intervention and explanations to him were provided. In his conclusion, the Manager confirmed that although he was required to address the Complainant's concerns, given the fact that he does not "*accept or assume the facts, I consider it prudent not to engage in further correspondence [with the Complainant]."* Given that the Complainant's complaints were being reviewed independently (by the Ombudsman and also by the Disability Society) and given that the Manager had already provided the Complainant with his departments view on matters, it was perfectly reasonable from an administrative and complaints handling perspective, for the Manager to adopt that stance.

Under cover of his letter, the Manager also supplied the Ombudsman with a draft copy of an application for a duplicate licence, for his perusal. He confirmed that the Complainant had completed the following question with an affirmative reply….. "*have you ever had or do you at present suffer from any of these conditions- continuing/permanent difficulty in the use of your arms or legs?"* According to the Manager's interpretation of the legislation, by the Complainant having answered "**yes**" to that question, he was obliged by law to provide a medical letter certifying fitness to drive.

The Manager went on to state that *"notwithstanding, in the event that [the Complainant's] disability is static, as stated in the legislation, future driving licences may be issued or renewed without the applicant being subject to regular medical examination as long as I have initial confirmation from a professional that this is the case."*

The Manager further explained to the Ombudsman that the Complainant was not an isolated case. Any person wishing to be issued with, or applying for a renewal of a driving licence who declared that they suffered from a condition that could affect their driving, must by law produce the appropriate medical certificate of fitness.

The Manager's primary concern in seeking the fitness certificate was based upon the unlikely but not impossible scenario of the Complainant being involved in a traffic accident causing injury or fatalities to himself or another. If, during any ensuing investigation, it was discovered that the Complainant had declared that he suffered from a continuing or permanent condition affecting his driving, then the DVLD would be found to be in breach of the law by having provided the Complainant with his duplicate licence.

The Ombudsman did not share this view.

A legal opinion was sought by the DVLD on specific sections of the Gibraltar Traffic Act and Regulations. The ensuing legal advice dismissed reliance on the sections on which instructions had been issued and instead, advice was centred on sections 32 and 36 of the Traffic Act. In a nutshell, section 32 addresses "***Issue, Validity and Renewal of driving licences"*** Section 36 deals with the ***"Suspension of licences***". 36(1) states that "*if it appears to the licencing authority that the holder of a driving licence is suffering from any such physical or mental disease or disability as is likely to cause the driving by him of a motor vehicle a source of danger to the public, he may, by notice in writing to such person, suspend the licence."*

The advice to DVLD concluded that the legal basis for seeking medical evidence on the Complainant's fitness, could only be obtained under section 36.

Conclusions

With the greatest respect to the DVLD and to counsel who issued the advice, the Ombudsman considered that both were misdirected in their approach to the fact in issue.

The Ombudsman's view was that Section 32 of the statute under consideration, did not apply to the predicament under examination. That section dealt with "*Issue, Validity and Renewal*" and not the granting of a duplicate licence (namely, providing a legal "copy" of a previously issued original document.

Under section 36 of the Act, the DVLD indeed has power to suspend a licence if, under subsection (1) "*it appears to the licencing authority that the holder of a driving licence is suffering from any such physical or mental disease or disability as is likely to cause the driving by him of a motor vehicle a source of danger to the public, he may, by notice in writing to such person, suspend the licence".*

The DVLD never did issue any notice of suspension, whether formal or otherwise. The Complainant was simply informed that he could not drive until the letter/certificate was produced. The Manager was therefore acting *ultra vires* in that respect.

The proper approach may have been to have issued the duplicate licence and then taken the action to suspend by way of notice in writing. Although, the Ombudsman's view continues to be that the DVLD had no grounds in law to seek a medical certificate of fitness on an application for a duplicate licence, that would have been the appropriate stage to have done so.

The Complainant suffered from a "static" disability. He was in a wheelchair and had been so for most of his adult life. When he originally obtained his licence he was already unfortunately suffering from the condition. There had hence been no change, added impairment, or justification for seeking any medical evidence of fitness at the duplicate application stage (at least as far as the Ombudsman was aware).

This was quite simply, a case of replacing a licence which had been lost or misplaced. A rather simple exercise which, without any element of *mala fides* by DVLD, had been blown out of all proportion in its analysis.

The Complainant was entitled to have been provided with his duplicate licence under section 14(1) of the Traffic (Licencing and Registration) Regulations, without any element of confusion or complication.

The relevant excerpt of section 14(1) states that: *" If a licence granted or a certificate of registration issued by the licencing authority under these regulations has been lost, destroyed, mutilated or accidentally defaced or the figures and particulars thereon have become illegible by fading or otherwise, the owner of the vehicle or his agent shall apply to the licensing authority…….for the grant or issue to him of a duplicate licence or certificate of registration, as the case may be, and the licensing authority upon being satisfied as to such loss, destruction, mutilation……shall issue a duplicate….and the duplicate so issued shall have the same effect as the original licence or certificate of registration."*

Given the above legal provision, the procedure for obtaining a replacement licence as a result of (in this case loss) should have been a relatively straightforward procedure.

The Ombudsman was grateful to the Complainant for having brought this complaint to our office.

Classification

1) That the Complainant's request for a duplicate driving licence had been mistakenly put on hold until such time as he provided the DVLD with a medical letter explaining his disability and the type of modification required to be carried out on his vehicle- **Sustained.**

2) Lack of professional counter service received at the DVLD including the fact that they were aware that said medical letter cold only be obtained by paying a fee at a private medical facility yet they did not inform him that this was the case- **Not sustained.**

   Note- the Ombudsman had no indication that the Complainant was treated badly or disrespectfully by counter staff. They did attend upon him when he visited DVLD offices and also acceded to his request to speak to the Manager. It may have been desirable to have informed the Complainant that he would not have been able to obtain the medical letter at the GHA and that he needed to see a doctor privately.

There was certainly no obligation to have done so. It may also have well been that at the time, they didn't even think that that advice was required.

3) Unhappy with the Manager's attitude who the Complainant considered showed no common sense and was discriminatory against his disability- **Not sustained.**

Note- *the Ombudsman cannot opine on the Manager's attitude since there was no evidence presented relating to his demeanour.*

The Manager however, did engage in numerous exchanges of correspondence with the Complainant and Ombudsman, and personally attended upon the Complainant in an attempt to explain matters. Irrespective of whether the Manager was correct in his interpretation of the law or not (the Ombudsman has opined that his interpretation was indeed flawed), his attempts to deal with the issue, even seeking legal advice on the same, were appropriate. Administratively, there was absolutely no wrongdoing on his part.

The actions of the Manager, even if misguided, appear on the evidence to have been based solely on protecting the public against any potential danger which could have been caused by the Complainant's driving, as a result of his disability. Although in practice, it was not necessary to have taken such a view and the duplicate licence should have been issued upon application, there is no doubt whatsoever in the Ombudsman's mind of anything other than the Manager's good intentions. No disability discrimination came into play. That allegation is firmly dismissed.

As an ancillary comment, the Ombudsman should also point out that if the law requires that applicants provide Medical Certificates of Fitness, he does not share the opinion that the cost should be borne by the DVLD (effectively the taxpayer). The Ombudsman would only endorse that approach where payment by the applicant would constitute a financial burden on him or her.

(Report extracted from Case No 1178)

GIBRALTAR HEALTH AUTHORITY

Case 5

Complaint relating to an investigation undertaken by the Gibraltar Health Authority Complaints Office ("Complaints Office") which was incomplete.

Complaint

The Complainant was aggrieved because the investigation undertaken by the Complaints Office into her complaint was incomplete.

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant explained to the Ombudsman that in May 2019, her daughter took the Patient (three year old boy) to a consultation with a General Practitioner ("GP") at the GHA's Primary Care Centre ("PCC"). According to the Complainant, the GP told her daughter that the Patient required antibiotics as he had a bad case of tonsillitis but despite this, did not prescribe antibiotics. She prescribed 5mls of Promethazine ("Medicine") four times a day. The Complainant stated that when the daughter returned home with the Medicine, the Complainant, having been a nurse, checked the dosage and found that the prescribed dose was double what was required for a three-year-old. The Complainant contacted the pharmacy, explained the circumstances of the Patient's case and claims to have been advised to take the Patient to the GHA's Accident & Emergency Department ("A&E"). The Patient was taken to A&E where the Complainant claimed he was prescribed antibiotics.

The Complainant lodged the following complaints with the Complaints Office:

1. Patient not prescribed antibiotics but rather a Medicine that was not appropriate for his condition;

2. Medicine dose prescribed was double to what is recommended for a three year old.

The Complaints Office undertook an investigation and once that was concluded, sent a letter ("Letter") to the Complainant with their findings. According to the Complainant, the investigation was incomplete and she reverted to the Complaints Office with her concerns. The response received from the Complaints Office informed her that if she remained unhappy with the outcome or manner in which her complaint had been investigated, or felt that insufficient explanations had been provided, she could approach the Public Services Ombudsman. As such, the Complainant lodged her complaint with the Ombudsman.

Investigation

The Ombudsman reviewed the Letter. In it, the Complaints Office noted that they had requested the GP's comments with regards the Patient's consultation. In her response the GP had stated that she was sorry to hear about the Complainant's daughter's concerns. She explained that the Patient attended the emergency clinic at the PCC with a sore throat. Clinically he was found not to be unwell and his observations were normal with a temperature of 37° (degrees). He had some exudate (oozing) from his tonsils and the GP prescribed the Medicine (5mg qds (four times a day)). The Letter then referred to the GP's best intentions to encourage best use of antibiotics as per GHA campaign in order to prevent further emergence and spread of antibiotic resistance. It continued by stating that there is a difference of medical opinion as to whether antibiotics are indicated in an otherwise well child with a sore throat which may well be viral and that 'it is advisable to use amoxicillin (penicillin antibiotic) for this (these) symptoms'. The GP stated that it would have been her normal practice to see a patient again if there were ongoing concerns after a consultation, but that was not the case on this occasion. Under the heading of 'Conclusion' in the Letter, the Complaints Office stated that the care of patients was of paramount importance to the GHA and the hospital team worked hard to ensure that the best hospital care, well-being and comfort was received by all patients. It continued by explaining that complaints were valuable learning tools and thanked the Complainant for having brought the matter to their attention. The last paragraph referred to the fact that it was their duty to notify the Complainant that if she remained unhappy with the outcome or manner in which the complaint had been investigated or insufficient explanation provided, she could approach the Ombudsman.

Considering that one of the issues in this complaint referred to the GP not having prescribed antibiotics, the Ombudsman was confused that the Letter stated that 'it was advisable to use amoxicillin' for the Patient's symptoms, and checked this against the GP's response, a copy of which had been provided to the Ombudsman. The GP had stated: 'There is a difference of opinion as to whether antibiotics are indicated in an otherwise well child with a sore throat which may well be viral, and I would not use amoxicillin for a sore throat'.

In respect of the Medicine dosage prescribed, 20mg daily, the GP stated that was slightly above the BNF's (British National Formulary) recommendation for a child under 5 years of age (the GP noted that the Patient was 3 years 9 months old at the time of the consultation) and she would be careful to note that in future. The GP was grateful to the pharmacist for having raised concerns but would have hoped that they would have informed her of them.

The GP concluded by stating that the Patient was seen towards the end of a busy evening clinic of twenty patients with five minute appointments each which may have led to poor communication on her part for which she apologised.

By way of further information, the GP's response stated that she did not recall the particular consultation but had reviewed her notes.

The Ombudsman requested documentation held by the Complaints Office in relation to this complaint, as well as copies of the Patient's GHA's PCC medical notes for the day of the consultation and A&E notes.

The Ombudsman reviewed the Patient's PCC medical notes and identified that the consultation with the GP had been at 18:37hours. The Patient's time of arrival at A&E was stated as 20:49 (approximately two hours after the consultation at the PCC). The following information was contained in the A&E notes:

Presenting Complaint:	Sore throat
Differential Diagnosis:	Upper respiratory tract infection
Outcome:	Discharged – advised to return to A&E if further problems

The examination notes showed that the Patient was well and playing actively. A number of tests had been carried out which came back as negative with respect to meningla and ENT.

The plan noted: Observe hydration and Amoxi if not subside 3/7. The Ombudsman asked for clarification on the 'plan' and was informed by A&E medical staff that this referred to delayed prescription of antibiotics which meant that these were to be taken if symptoms worsened and stated that was an accepted recommendation.

The Ombudsman referred to the 'British National Formulary for Children' ("BNF") (Accessed on 20th February 2020 - https://bnfc.nice.org.uk/drug/promethazine-hydrochloride.html#indicationsAndDoses) and noted that the Medicine was an antihistamine (allergy relief) for which the recommended dosage for children between two and five years old was 5mg twice daily or 5-15mg at night and could also be used as a short term sedation for which the prescribed dosage was 15-20mg.

Conclusions

The Ombudsman sustained the complaint.

The Complaints Office had undertaken a full investigation into the complaints brought by the Complainant but had not conveyed to the latter all their findings. No mention was made in the Letter of:

- The GP's admission that the dosage prescribed was slightly above the BNF recommendation for children under 5 years and that she would be careful to note that in future;

- The GP's comment that she would have hoped that the pharmacist would have informed her of their concerns with respect to the dosage;

- The GP's apology regarding the busy evening clinic and the five minute appointments which could have led to poor communication on her part.

The Ombudsman also found that an error in the Letter changed the GP's statement that she '...would not use amoxicillin for a sore throat...' to '...it is advisable to use amoxicillin for this (these) symptoms' and therefore conveyed erroneous information to the Complainant. The Ombudsman did not find any reference made by the GP to the GHA campaign on antibiotics having been the reason why she did not prescribe antibiotics to the Patient and can therefore only conclude that this was information included independently by the Complaints Office in the Letter.

It is clear that the contents of the Letter had not been reviewed before remitting this to the Complainant as the errors and omissions would have been identified and rectified at that stage.

Regarding the Complainant's concern that the Medicine was not appropriate for the Patient's condition, the Ombudsman decided not to request clinical advice on this issue as that would have been disproportionate in the context of this investigation taking into consideration that no Medicine was in fact administered. Notwithstanding, based on the BNF information, the Ombudsman concluded that the GP's reasoning and dosage when prescribing the Medicine was in all probability for it to be used as a sedative. On the matter of the antibiotics having been prescribed at A&E a few hours after the GP consultation, the Ombudsman notes that these were prescribed to be administered only if the symptoms worsened and not immediately.

Classification Sustained

Recommendations

The Complaints Office at the GHA should ensure that complainants are kept fully informed of the outcome and findings of their investigations.

Update

Further to having read the final draft report, the GP corrected her statement about the use of amoxicillin. She stated that she would normally use phenoy-methylpenicillin, first line, because of the risk of rashes with amoxicillin. She reiterated that she stood by her decision not to prescribe antibiotics to a child without significant fever and noted the A&E advice for a delayed script reinforced the decision she had taken. The GP stated she was mindful of the need to only prescribe antibiotics when absolutely necessary, as per GHA guidelines. The GP stated that she had reflected on the risk to patient safety of five minute consultations where there was no GP colleague support and none of the patients was known to her and explained that she had looked at ways in which she could improve communication skills, particularly with regard to checking patient understanding of the management plan, and note taking. The GP was pleased that consultation times for evening clinics were now 7.5 minutes.

(Report extracted from Case No 1208)

GIBRALTAR HEALTH AUTHORITY

Case 6

Complaint against the Primary Care Centre (PCC) relating to the denial of Gibraltar Health Authority (GHA) Medical Health Cards to which the Complainant believed he and his wife were entitled to.

Complaint

The Complainant complained that having resided in Gibraltar since 2013, he was rightfully entitled to receipt of state healthcare within the jurisdiction.

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant explained that he had written a letter to the Gibraltar Health Authority (GHA) in July 2019 (hand delivered at the PCC on 5th August 2019). In his letter he explained his living arrangements and requested health cards to which he believed he was entitled. According to the Complainant his letter remained unanswered.

The Complainant explained how he is an EEA citizen (from Sweden) that has resided in Gibraltar with his wife from 2013 (as expatriates of Sweden since 1990). They have temporary residence in Gibraltar based on the fact that they have an address here and are self-sufficient. The Complainant stated that he and his wife receive Swedish pensions that are not transferable to Gibraltar but taxed in Sweden. They also hold E111 (EHIC) cards and certificates that entitles them to Swedish healthcare when they are in their country of origin.

In 2018, when renewing their E111 card and Swedish pensioner certificates, they were asked to apply for E121 Certificates in Sweden. They were advised by the Swedish Authorities that those certificates were to be registered with their local health provider (the GHA). According to EU rules, the registration of said certificates would provide threefold access to the following; Public healthcare in Gibraltar (by virtue of GHA cards); E111 European Health Insurance Card and Swedish Public Healthcare when visiting that territory.

The applications for GHA cards were initially filed in person by the Complainant at the PCC in August 2018. Residence cards and permits were provided. After continuous contacts with the GHA, the Complainant was informed that the applications had to be endorsed by the UK as the relevant EU member state.

Sometime in March or April 2019, the Complainant was informed by way of a telephone call (from the GHA) that his applications had been approved by the UK and that he would be required to attend the PCC and provide proof of an original rental contract in Gibraltar, two passport photos for each applicant and utility bills for the past three months. The Complainant compiled the requested information and delivered it to the PCC Registration office. He was further informed that it was necessary to have a local telephone number registered. This was acquired and the number made available to the GHA.

On the 15th July 2019, the Complainant was informed over the phone that the applications had been unsuccessful on the basis that neither he or his wife were considered to be residents in Gibraltar, as the utility bills provided showed a very low consumption.

The Complainant explained that they do not spend much time in Gibraltar but nonetheless have been resident here since 2013. As pensioners, he argued, they spend time in Sweden, Spain and other holiday destinations visiting family and friends. Further letters "appealing" the GHA decision were not met with a reply and as a result, the Complainant lodged his grievance with the office of the Ombudsman.

Investigation

The Ombudsman reviewed the Complainants letter dated 29th July 2019, addressed to the PCC Manager challenging the decision made. In his letter, the Complainant referred to the 15th July phone call where he was told that his application had been unsuccessful. He stated he had not been previously informed during the process, of a requirement to consume water and electricity in order to obtain the GHA cards. (*With respect to the Complainant, the Ombudsman considered that evidence of utilities consumption would be obvious and effortless mode of proof of residency).*

The Complainant explained that he and his wife had previously been residents of Sweden, Belgium and Spain, and that their only place of residence since 2013 had been Gibraltar having tenanted various properties here since then. He further stated that utility bills were low because they travelled frequently staying with relatives, friends and in hotels and when they were in Gibraltar, they would eat out regularly. He further explained that upon information he had provided the Swedish authorities in 2018, they had determined that he was ordinarily resident in Gibraltar not Sweden.

Time elapsed and after some failed attempts to contact the Complainant on the telephone, the PCC sent the Complainant an email requesting that he contact them (telephone and extension numbers provided), in order to "*further discuss [his] entitlement*". The Ombudsman understands that once that conversation eventually took place, the PCC explained to the Complainant that they had not seen any evidence to influence a change in the decision and grant the application.

The Ombudsman proceeded to write to the PCC setting out the complaint and requesting comments as per Ombudsman complaint handling practice. Further to some delays the PCC sent the Ombudsman a substantive reply.

The PCC explained that the Complainant applied to register with an E121 (a healthcare certificate that entitles individuals and any dependants to healthcare in another EU/EEA country), and because they were unable to establish residence in Gibraltar, the application could not be accepted. It was confirmed to the Ombudsman that the situation had been explained to the Complainant over the telephone on 21 November 2019. Since then, the Complainant had submitted documents on three further occasions but on the same basis. The PCC had explained that if he wished to reapply in future after there had been a change in his circumstances, he would be of course welcome to do so. His entitlement would then be reviewed.

The letter went on to state how it was worth noting that the Complainant was a "*self-sufficient*" person and how therefore, under the provisions of the Immigration Asylum and Refugee Act (laws of Gibraltar), an EEA national would only have an entitlement to take up residence in Gibraltar under the provisions of that Act if he/she was doing so as a "*self-sufficient*" person, thereby necessitating comprehensive medical insurance cover.

A final exchange between the Ombudsman and the PCC ensued whereby the Ombudsman requested the criteria the GHA applied when reviewing applications and any copies of available guidelines. A timely reply followed.

It was explained that the rules to healthcare are essentially governed by the Medical (Group Practice Scheme) Act and Regulations ("GPMS"), UK/Gib Reciprocal Agreement and EC Regulations.

The GPMS is a contributing scheme through which entitled persons and their dependants can access healthcare. Section 4(1) of the Act provides that "*there shall be registered as members of the scheme, any person who is insured under the Social Security (Employment Injuries Insurance) Act or the Social Security (Insurance) Act".* Additionally, the Regulations (at Schedule 1) set out the classes of persons entitled to be registered as follows:

PART 1 "*Persons entitled to medical attention and treatment under the District Medical Scheme"*

PART 2 "*All persons ordinarily resident in Gibraltar other than members of the permanent cadre of the Gibraltar Regiment…"*

PART 3 "*Dependants of registered persons ordinarily resident in Gibraltar or such other dependants as the Minister for Health may in [her] discretion, accept."*

It was explained how any medical treatment a person may require at any given time will be provided by the health services in the country of residence. If that person and any member of his family visit any other EEA territory, they will need to possess a European Health Insurance Card (EHIC) to cover any necessary medical treatment.

According to the PCC's email to the Ombudsman (which the latter had no reason to bring into doubt), the Complainant did confirm to them via telephone on the 21st November, in no uncertain terms, that he lived "*two thirds of the time in Spain and only one third in Gibraltar".* That assertion clearly established that he was not "*ordinarily resident*" and hence not eligible to register with the GPMS. The email concluded that as a result, the previous application had been annulled but "*should circumstances change, he will be required to submit a new application."*

The applicable criteria established under EU/EC legislation for determining residence is explicitly **non-exhaustive**. It includes the phrases "*in particular*" in the words of the Court of Justice in *Swaddling v Adjudication Officer c-90/97* and "*may include*", as indicated by Article 11 of Regulation 987/2009). These apply whenever the place of residence of the person has to be determined:

Examples of the non-exhaustive criteria include; *"family situation (status and ties), duration and continuity of presence in the Member State concerned, employment, permanency of housing situation, the Member State in which the person is deemed to reside for tax purposes, reasons for the move and the intention [of the applicant] as it appears from all the circumstances".*

All these elements are purely factual criteria and must be assessed irrespective of their lawfulness. For instance, permanency of employment may be determined even in circumstances where the applicant is an illegal worker.

The intention of the person concerned must be assessed "*as it appears from all the circumstances*". That means that the intention of the applicant must be supported by fact and by factual evidence. The mere declaration that a person considers or wants to have his or her residence in a specific place is not sufficient.

Conclusions

Given the legislation and case law (both domestic and European), by which applications for GHA cards should be assessed; the Ombudsman's view was that the PCC had not acted incorrectly or unfairly towards the Complainant.

It is clearly the case that the Complainants email correspondence appeared to remain unanswered (at least substantively). Nonetheless, various attempts had been made to reach him on the telephone and contact details had been provided by email when those attempts had proven unsuccessful. Although the Complainant was given a full verbal explanation of matters, it would have been desirable, appropriate and in keeping with good administrative practice, to have issued him with a full written explanation.

The Complainant contended that on the explanations he had provided the Swedish authorities, **they** had determined that he was no longer a resident there and that he was for all events and purposes a resident in Gibraltar and had been since 2013. That contention however could not be endorsed by the Gibraltarian authorities themselves, particularly since they remained evidentially unsupported.

The Ombudsman had no reason to doubt the PCC's version of events insofar as the alleged content of the conversation of 21st November 2019 was concerned, where the Complainant explained to the PCC that he was "*two thirds resident in Spain",* particularly when the evidence (low utility bills consumption), appeared to substantiate that assertion. Although the Complainant did attempt to provide explanations for his prolonged absences from Gibraltar and the lack of consumption on his utility bills, case law dictates that intention must be backed by fact … *"the declaration of intention* ***must*** *be supported by factual circumstances."*

It is also noteworthy that the PCC made it clear to the Complainant that the decision taken could be reassessed and reversed if in future his living circumstances changed and he was able to provide evidence of it.

Classification

Denial of an application for GHA Medical Cards by the GHA/ PCC, to which the Complainant believed he and his wife were entitled to- **Not Sustained** (on the factual evidence presented by the Complainant to the service provider).

(Report extracted from Case No 1208)

GIBRALTAR HEALTH AUTHORITY

Case 7

Complaint against the Gibraltar Health Authority ("GHA") in relation to:

(1) Non-replies to the Complainant's letters requesting an In Vitro Fertilisation Services ("IVF") Policy document ("the Policy Document") and;

(2) An alleged administrative error in which previously approved IVF Treatment was subsequently revoked.

Complaint

The Complainant complained as follows:

1. That she had not received a reply to two letters written to the GHA requesting a copy of the Policy Document, according to which, she was allegedly not entitled to IVF treatment because she was resident in Spain.

2. That having been approved for IVF Treatment it was subsequently withdrawn on the basis that the initial approval had been an "administrative error".

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant explained how she had attended a clinic to see her General Practitioner ("GP") at the Primary Care Centre ("PCC"). She was subsequently referred for an assessment by the GHA's Consultant Obstetrician and Gynaecologist ("the Obstetrician") for IVF Treatment suitability.

A letter dated 8th January 2020 from the Obstetrician to the referring GP, confirmed that the Complainant had been seen at the Gynaecology clinic and that from there, she had been further referred for IVF to a specialist clinic.

Consequently, a letter was issued by the Obstetrician to the IVF specialist clinic in Spain on the 13th January which requested that ….."*the patient be taken over by the clinic for management of primary subfertility. All the investigations as per your guidelines have been done and she is eligible for funding through the Gibraltar Health Authority.*"

From the correspondence held on file, the Ombudsman had the opportunity to review an email forwarded internally from the GHA "Sponsored Patients" Department in February 2020. That mail made specific reference to the previously approved decision of the GHA Tertiary Referrals Board ("the Board") to fund the Complainants IVF treatment (decision dated 19th December 2019). The email identified the Complainants Obstetrician as her "*responsible consultant"* and the identity of the fertility clinic in Spain.

After the Board approval had taken place, and after having been referred, assessed and medically reapproved, the Complainant was subsequently informed by telephone (on a call from the GHA Medical Director himself), that an error had taken place and that she was in fact, not eligible for the treatment on the basis that neither her or her partner had been continuously resident in Gibraltar for the preceding five years, thereby falling short of GHA Policy for IVF treatment approval.

The Medical Director explained that the decision had been made to withdraw the approval on that sole basis.

The Complainant could not understand the reversion of the decision given all the hurdles that had been overcome. Sponsorship forms had been filled in, confirmation of the entitlement had been approved despite the contents of an "*Infertility Treatment Checklist*" having clearly showed from the outset, that she was a frontier worker.Aggrieved with the state of affairs, the Complainant sought legal advice before lodging her complaint with the Office of the Ombudsman.

Investigation

Before filing her complaint with the Ombudsman, the Complainant had instructed lawyers on the matter. Despite having sought an alternative remedy/redress which under different circumstances may have invalidated an Ombudsman investigation, the Ombudsman perused matters and exercised his statutory discretion to accept the complaint under section 14(2)(c) of the Public Services Ombudsman Act 1998.

The Ombudsman reviewed the solicitor's initial letter to the GHA which set out the chronology of matters leading to the complaint. Solicitors highlighted the initial referral, approval and subsequent revocation of the decision (by telephone call). *It was noted that "at the outset in an earlier appointment with [the Obstetrician], when the issue of IVF was discussed, the Complainant and her husband were informed of the five year residency rule, referred to by the Obstetrician as* "*the apparent rule*" *despite which, in the circumstances,* "*she felt it appropriate to proceed with the application".*

The Obstetrician did inform the Ombudsman that she was aware that the couple had been trying to conceive for quite a few years now and that IVF was their only option.

In their letter to the GHA, the solicitor's pointed out how whilst not resident in Gibraltar, the Complainant worked here, was a taxpayer and a social insurance contributor, thereby entitled to medical treatment by the GHA. They also referred to a Government of Gibraltar press release of June 2017, which, in their view, demonstrated that the GHA's IVF Policy was applicable to all "*Group Practice Medical Scheme ("GPMS") entitled persons."* The IVF treatment refusal therefore, was not justified.

The letter concluded by inviting the GHA to re-instate their original decision to treat the Complainant. In the alternative, they sought the legal basis for such refusal. Reference was also made to the "*stress and worry*" that the reversal had caused the Complainant and her partner.

Given no reply was forthcoming, two further chaser letters followed. A reply was finally issued by the GHA three months later. Apologies and an explanation for the delay were provided.

The reply stated that….. "*an administrative error led to [the Obstetrician's] secretary mistakenly informing [the Complainant] on 15th January 2020 that [her] referral for IVF Service had been approved*". An apology for the "*regrettable administrative oversight"* was also contained within the reply. The letter continued to explain that despite the error, the Complainant was not eligible for IVF services on the basis that although she had been entitled to the GPMS for the past two years, neither her or her partner (named) had been permanently resident in Gibraltar for a continuous period of five years. "*The residency requirement* ***must be fulfilled*** *in order to benefit from the IVF services policy ("the Policy").*

"*A GPMS entitled person is not automatically eligible for IVF Services- the distribution, administration and management of which are governed by the Policy. The Policy amongst other objectives, aims to ensure that the limited resources available for IVF Services are distributed equitably and fairly, through the use of objective criteria."*

The GHA also corrected the solicitor's interpretation of the June 2017 Government Press Release which had been referred to, stating that it explicitly referred to IVF eligibility being *"subject to a number of criteria… including an applicant's eligibility being contingent on their being continuously resident in Gibraltar for at least the previous five years."*

As a result, the GHA reaffirmed that the Complainant remained ineligible.

In reply, the solicitors sought a copy of the Policy document and requested an explanation as to why the Complainants case "…*was progressed to the stage in which a clinical judgment was made that she should be referred for IVF, as well as receiving approval by the clinical board for the treatment.(*The Ombudsman would add to that…. the filling out, signing and countersigning of sponsorship forms by GHA medical practitioners, an internal email from Sponsored Patients referring to the Tertiary Board's Approval and the naming of the clinic and of the specialist within that clinic, who was to perform the IVF Service.)

This the solicitor claimed, "*could not have possibly been an administrative error by a secretary as you explain."* Based upon the written evidence reviewed, the Ombudsman could only concur with that view.

It is of significance to note that the Ombudsman does not intervene in the workings of Government or its policies, unless of course that policy is deemed to be illegal or improper. The content of the Policy therefore, is not subject to Ombudsman determination. It is the transparency (or lack thereof) of that policy and the apparent mode of its administration and fairness of application, that the Ombudsman may take a view on.

On that basis, the Ombudsman wrote to the GHA on the issue of delay in replying to the Complainant and on the lack of disclosure of the Policy. The GHA immediately replied to the Ombudsman, for which he was grateful. They stated that upon legal advice received, the Medical Director was not in a position to disclose any Policy Documents since it was classed as "*internal policy not for distribution outside the organisation."*

The Ombudsman does not agree on the stance taken. In his view, made clear in his latest published Annual Report "…all protocols and policies need to be published and made readily available to the public in order to ensure procedural transparency in public services."

Conclusions

The Ombudsman could not understand, reconcile or indeed justify the administrative failings that the Complainant had been made to suffer.

The GHA had "dragged" the Complainant through a difficult and emotional process; from the commencement of her application to have the treatment approved, to medical referrals, examinations and assessments, to Board scrutiny and approval, only to have the decision reversed (and communicated over the telephone at the pre- treatment stage). Error or not, the administrative shortcomings in this case are inexcusable.

At the very least, a meeting should have been scheduled at the GHA to explain the situation to the Complainant face to face. A written explanation and full apology should have followed (admittedly the Medical Director did apologise via the Complainant's solicitors, but the Ombudsman considered this fell short of the standard expected). Instead, the Complainants subsequent written correspondence remained unanswered.

We have established that the Policy Document was not made available to the Complainant or her solicitors. Although late in the day, the Ombudsman did receive a copy of it by email for his review and safekeeping.

Upon review the Ombudsman concurred with the views which had been previously expressed by the Medical Director.

The Policy which was dated March 2018 (to be reviewed in March 2021), stated in unequivocal terms that applicants for IVF "shall be considered eligible only if they satisfy **all** the criteria [contained therein]". One of those criteria is that "the applicant must have been entitled to GPMS services for at least the previous two years and continuously resident in Gibraltar for at least the previous five years."

The document also provides that an "*eligible"* person interested in IVF services should then "*consult their GP or Nurse Practitioner who if appropriate will make a referral to the Consultant gynaecologist whom after due assessment of infertility in line with clinical protocols, may decide to sponsor the applicant for IVF services*".

The Ombudsman failed to understand and reconcile the secrecy behind the already existing IVF policy which clearly, had been given detailed thought at the time of its creation and subsequent implementation. The lack of transparency (refusal to make the Policy available to the Complainant and subsequently, to her lawyers) only served to give the false impression that decisions to grant or refuse IVF may be made "*off the cuff*" or "*on a whim."* For the purposes of this complaint, the Complainant simply did not satisfy the eligibility criteria and sight of the Policy could have easily proved that.

It is the Ombudsman's contention that had the Policy (or at the very least the list of the eligibility criteria) been made available to the Complainant, either by handing over the document or preferably by way of explanation at a face to face meeting with her and her partner, this complaint could have, in all likelihood, been contained at a very early stage.

The administrative mal-handling of this entire matter from its inception, led to the treatment being approved then revoked, the Complainant subsequently appealing the decision (which she had no grounds to appeal since she should not have been approved for the treatment in the first place), then seeking legal advice and expending funds thereon and subsequently filing a complaint with the Office of the Ombudsman. The entire complaints process and undue stress caused to the Complainant and her partner could have been avoided by a more informed and transparent GHA.

The first and crucial error was made by the GP who appeared to be seemingly misinformed and unfamiliar with the eligibility criteria since he or she referred the Complainant to the Obstetrician. That should never have taken place since the eligibility criteria for referral under the Policy, was not met.

Subsequently, the Obstetrician could have upon review, advised the Complainant that she had been wrongfully referred. Instead, she made reference to "*the apparent rule*" and sponsored the Complainant for treatment, thereby although almost certainly inadvertently, creating a false expectation.

The manner of revocation by the Medical Director was also handled most insensitively as was the appeal which as mentioned above, should never have taken place.

Despite the above although having no impact on the eligibility criteria, it also noteworthy that the IVF Form containing the Infertility Treatment Checklist which was signed by the Complainant, the Obstetrician and a co-sponsor in December 2019 and which was subsequently dispatched to the clinic in Spain, appeared to be a 2013 version of the form (which amongst other things made no reference to the Residence or GPMS registration criterion). The updated/revised 2018 version made available to the Ombudsman with the Policy, did contain the GPMS registration and Residence Tick Boxes.

Apart from the fact that the Complainant was wrongly advised and erroneously referred and sponsored for the treatment, outdated forms were also used.

Given the expectations created for this Complainant and her partner and the emotional toil the whole process will have most certainly had on her, the Ombudsman (despite the existence of the policy and because it is up for review in March 2021) suggests the following potential outcome:

If the possibility exists, however remote, of exercising any discretion to revisit and justifiably reverse the decision, that it be done under "*exceptional circumstances"*

Classification

(1)That the Complainant had written to the GHA on two occasions requesting a copy of the Policy Document stating that she was not entitled to IVF treatment because she was resident in Spain and that she had not received a reply- ***Sustained***

(2) *That having been approved for IVF Treatment it was subsequently withdrawn on the basis that the initial approval had been an "administrative error"*-**Sustained** (Although a finding of sustained has been awarded to this limb of the complaint "on the letter", the Ombudsman is satisfied that despite the atrocious handling of this entire matter by the GHA, the Complainant and her partner were not entitled to the treatment under the criteria currently in place).

(Report extracted from Case No 1226)

GIBRALTAR HEALTH AUTHORITY

Case 8

Complaint against the Gibraltar Health Authority (GHA) for failure to provide the Complainant appropriate care after having gone through surgical procedure.

Complaint

1. Unhappy that he was not checked for clots knowing that he had had a surgical procedure recently.

2. Alleged failure to prescribe anticoagulants post-surgery to prevent clotting.

3. Aggrieved by the way he was treated by a member of staff at the Emergency Department ("A&E") while attending due to health complications.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant explained, by way of background that a on the 9th August 2016, a month prior to the events which led to his complaint, he had undergone a surgical procedure with the orthopaedic consultant "Orthopaedic Consultant" on his broken left ankle where he had a metal plate fitted.

The Complainant further explained that on the 9th September 2016 he began experiencing ongoing pain on his right torso which he claimed to worsen every time he took a deep breath. He therefore visited the General Practitioner ("GP") and according to him, the GP examined him and suspected that the pain was a combination of muscle stress caused as a direct result from the use of crutches and possibly constipation. He prescribed him with an anti-inflammatory gel and pain killers.

That same night, given that the Complainant's breathing had become "*extremely"* painful and "*difficult",* he called an ambulance and was taken to A&E where he gave an account of his symptoms and allegedly informed the staff that he had undergone surgery for a broken ankle a month earlier. The A&E doctor carried out some tests and prescribed a muscle relaxant to be taken at night if the pain persisted. The Complainant went home.

The Complainant further stated that on the following day (11th September 2016), an ambulance had to be called out at approximately 12.30 a.m. as according to him, he was in "*excruciating"* pain and his breathing had become "*extremely"* difficult.

He highlighted that upon arrival at A&E (accompanied by his mother), they were met with the same night staff as the previous night who accused his mother of being *over protective* and him of over*-reacting*. Despite their comments, the Complainant's mother insisted that he be examined thoroughly as his condition was clearly not that of muscle strain or constipation and reminded them that there was a risk of blood clots after surgery. The Complainant had several more tests performed and the results confirmed an infection in the right lung due to a blood clot. The Complainant was admitted that same morning to St Bernard's hospital for treatment and monitoring where he was started on a six month course of anticoagulation medication. He was discharged from hospital two days later.

A couple of days after his discharge, however, the Complainant started coughing up blood and further to contacting St Bernard's hospital, he was instructed to attend A&E for observation. He explained that he became *nervous* and *distressed* when he arrived at A&E and was informed that a cannula needle had to be inserted. He informed the Ombudsman that the nurse who attended to him made the derogatory remark of 'do you need your teddy bear'? The Complainant was of the opinion that this type of remark was unnecessary and a rather unprofessional approach by the nurse who he believes should have been looking after the wellbeing of patients.

The Complainant was aggrieved by his experience of the GHA in relation to the blood clot suffered and lodged his complaint with the Ombudsman in order to obtain answers regarding the following points;

1. Why wasn't he given a course of anticoagulants post-surgery to prevent clotting?

2. Knowing that blood clots were a possibility why was he so easily dismissed both by the GP and A&E later that same night (10th September 2016)?

3. Why did none of the indicators of infection and blood clot appear on the tests of the first night in A&E but were evidently clear on the second night once the Complainant's mother insisted on further tests?

4. Is it normal for trained staff to make derogatory and humiliating comments to patients who are distressed and in pain?

Investigation

The Ombudsman requested comments from the relevant practitioners involved via the Medical Director of the GHA, and the Nursing Director as per usual practice, and he also reviewed the Complainant's medical notes.

General Practitioner

In his reply to the Ombudsman's invitation for comments, the GP referred to the electronic notes made on the day of the consultation and explained that the Complainant reported abdominal pain on the "*right lower area*" and commented that although he mentioned the fact that he had undergone recent surgery, he had not mentioned any difficulty breathing or painful swelling of the lower legs, which the GP stated might have alerted him to the possible diagnosis of a thrombosis. The Complainant was prescribed medication for stomach pain and a topical anti-inflammatory gel and advised to attend A&E should his pain exacerbate.

A&E Doctor

The A&E doctor provided an account of his two encounters with the Complainant on the 10th and 11th September 2016. During the first attendance, the Complainant arrived via ambulance complaining of severe pain on his abdomen which he described as *"sharp"* and *"constant".* According to the A&E doctor, the Complainant mentioned that the pain had started suddenly after jumping backwards to avoid getting dirty with chocolate, which his brother was handling.

The Complainant alerted the A&E doctor to the fact that he had attended the primary care centre and the medication prescribed to him by the GP that morning had little to no effect and his pain seemed to worsen every time he moved. The A&E doctor commented, "*He had a fracture to left ankle one month before, and was on moon-boot, mobilising with crutches (and without them at home recently)".*

He further stated that upon examining the Complainant, he appeared unremarkable but seemed *"VERY ANXIOUS".* He stated*, "his observations were normal (including normal respiratory rate and oxygen saturation of 100%) but regular tachycardia. My diagnosis at that moment were Anxiety and muscle strain of abdominal wall, but as per location of the pain, I wanted to exclude other possibilities such as renal colic and urinary tract infection".*

The A&E doctor informed the Ombudsman that he subsequently requested blood and urine tests to be carried out and explained that he administered the Complainant with oral Diazepam for the anxiety and the suspected muscle strain. He also administered Intravenous Paracetamol for the pain and a drug known as Ondansetron for the nausea. The A&E doctor stated "*Investigations showed mild signs of infection, an echocardiogram was performed showing a sinus tachycardia of 115 bpm, otherwise unremarkable. He was feeling much better after treatment and happy to go home, so was discharged with prescription of diazepam and verbal advice (including return if any further problems)".*

The A&E doctor informed the Ombudsman that he saw the Complainant the following day (11th September 2016) as he once again attended A&E complaining of abdominal pain despite having regularly taken the medication prescribed the previous night. He also explained that the Complainant's description of pain appeared to have changed to "stabbing-like", making him short of breath and increasing when "lying flat". He further stated, "*Examination had changed from the night before, as not only regular tachycardia persisted, but he also presented febricula (37.3 C) and he was unable to lay flat completely as this made him very short of breath and exacerbated the pain. In that moment I considered the possibility of a Pulmonary Embolism, apart from a quick progressing infection*". As a result of his suspicions, the A&E doctor subsequently ordered further and more specific tests to include urine and blood samples as well as a chest X-Ray.

The A&E doctor informed the Ombudsman that it was due to the results of these tests that the possibility of Pulmonary Embolism was eventually considered and the Complainant referred to the medical in-taking team to consider his admission and the performance of a Pulmonary Angiogram CT scan as soon as possible. The Complainant was also started on antibiotics and given a dose of anti-coagulation while in A&E.

In reply to the specific complaints made by the Complainant, the A&E doctor clarified the following:

1. In regard to the treatment and general attitude displayed by the A&E staff, he assured the Ombudsman that he did not mistreat the Complainant at any time and in fact he sympathised with him and was quite concerned for his condition especially during the second A&E attendance where he suspected that the Complainant was suffering from an ailment much more serious than muscle strain.

2. The A&E doctor informed the Ombudsman that upon receiving the complaint, he checked his own A&E notes and the notes made by the ambulance staff during the Complainant's first attendance to A&E and he was unable to find any entries in relation to shortness of breath on the 10th September. The Ombudsman was able to verify this from his own copy of the Complainant's medical notes dated 10th September 2016.

3. Additionally, the A&E doctor clarified that coagulation studies were only performed when there was a clinical suspicion of a clot and commented that these were not performed in all patients "*not even in all the ones who had undergone surgery, as we (*the A&E staff*) have to do an efficient use of our resources*".

The A&E doctor summarised his position by stating that during the Complainant's first attendance the complete examination carried out was "*unremarkable*" except for the *tachycardia* which according to him was a "*very frequent sign in panic attacks / anxiety states*". He added, "*The respiratory rate and the oxygen saturation were normal. He is young and had been mobilising early after surgery performed one month before, so the possibility of pulmonary embolism (clot) was remote.*

He also mentioned the fact that at the time, he had checked the Complainant's post-surgical notes and had noted that his regular tachycardia had been recorded as 20 bpm, which he stated was *"consistent with him being so anxious".* He commented, *"There was a mild increase of infection markers, but in the absence of fever or clear focus, these are not a cause of admission or further investigations in all cases. Probably the GP discharged him so easily because he found no reason for further action based on history and examination. During his first attendance to A&E, I don't consider that he was "dismissed easily", he went through a complete process of triage, clinician assessment, investigations and treatment, and due to satisfactory progress, he was discharged…..Further investigations on the night after were not performed due to his mother insisting on it, but because of clinical deterioration and changes in examination. "Clot" didn't come on the first attendance simply because it was not requested. Inflammatory/infection markers were present but mild, and became more deranged on the second night hence the referral to the medical in-taking team.*

The A&E doctor finalised his statement to the Ombudsman by stating "*I am really sorry for the twenty four hour delay in the Complainant's final diagnosis, but I really thought there was a very low possibility of embolism (clot), as per the patient's features (young, no relevant past medical history, mobile), atypical pain (right lower lobe radiated to right flank of abdomen), unremarkable examination and essentially normal initial investigations. Sometimes it is difficult for patients to describe pain and we (doctors) can be distracted with history as it happened to me thinking about the probable muscle strain due to sudden and abnormal movement to avoid getting dirt from what his brother was throwing".*

A&E Nurse

Upon receiving a copy of the complaint, the A&E staff nurse provided the Ombudsman with a short statement to clarify the position of the nurse complained of. In her statement, the staff nurse informed the Ombudsman that she had had a meeting with the nurse complained of and commented "*There seems to have been a misunderstanding with regards to the way the nurse was perceived during the cannulation procedure, she claims she was joking around to distract him from the procedure being carried out".*

Orthopaedic Consultant

The Orthopaedic Consultant who carried out the Complainant's surgical procedure on the 9th August 2016 provided the Ombudsman with a summary of the Complainant's interactions with the surgeons before and after his surgery. He explained that during his pre-operative assessment, it was established that the Complainant had no past medical history other than a minor unrelated surgery in 1996. He stated, "*There was no medical concern. He was on no regular medication other that the recently prescribed Voltarol and Tramadol/Paracetamol for the pain caused by the fracture*". The Orthopaedic Consultant explained that the procedure in itself had been "*uneventful*" and although initially the plan was for him to be discharged on the day, he required overnight stay. He stated, "*Initially the Complainant's treatment was planned to be carried out as an outpatient in day surgery, but required overnight admission for pain relief. Routinely as an inpatient, the Complainant received a dose of anti-coagulant. At discharge anti-coagulation was probably not considered essential due to young age and unremarkable health".*

The Orthopaedic Consultant informed the Ombudsman that the Complainant's post-surgery medication had already been issued the evening before in day surgery and he believed that the discharging doctor did not prescribe anticoagulation additionally due to the Complainant's unremarkable medical history. The Orthopaedic Consultant further alerted the Ombudsman to the fact that the Complainant had had a post-operative follow up two weeks after the procedure (25th August 2016) where he had the "*backslab"* plaster removed and replaced with an orthopaedic boot which allowed the Complainant to mobilise with crutches. He explained that during the follow-up, the doctor found no suspicion of thrombosis and commented that the *"thrombotic complication*" suffered by the Complainant a month post-surgery was rare in a young and healthy patient and therefore it could not have been anticipated.

Clinical Advice

Given that the issues being complained of were entirely clinical, the Ombudsman prepared a case file and dispatched it, together with a request for independent specialist medical advice, to two experts ("Expert 1 and Expert 2") in the United Kingdom.

The questions presented by the Ombudsman to Expert 1 (a Consultant in Emergency medicine for over 31 years assessing and supervising the care of patients with venous thromboembolism "VTE") and Expert 2 (a Consultant Orthopaedic and Trauma Surgeon working at the University Hospital of North Midlands for over 23 years with a special interests in foot and ankle surgery and a member of the NICE VTE Orthopaedic Subgroup for revision of the 2010 VTE Guideline CG92 (2016-18) and the replies received (which have been summarised for the purposes of this report) were as follows;

Expert 1

Ombudsman Question 1

Was the Complainant properly assessed on his first A&E attendance dated 10th September 2016) given his history and the symptoms presented?

Expert Reply

Expert 1 reviewed the documentation from the Complainant's medical file including the A&E notes. He noted the fact that he was unable to find details of the doctor's examination in the copy of the A&E electronic notes dated 10th September 2016 and commented, "*If there are any handwritten detailed records they would be useful, particularly as to whether the chest and operation wound were examined".* Furthermore, Expert 1 highlighted that similarly, he was unable to find any nursing observations dated 10th September 2016. Expert 1 stated, "*On the basis of the records I have, the history taken, examination and investigations were appropriate. Nursing observations should have been performed.* He added, "*On the basis of the history and examination findings, the working diagnosis of a muscle strain was reasonable".* Expert 1 explained that the medication prescribed during the first A&E attendance *(Diazepam)* was a recognised treatment for both muscle spasm and anxiety.
Expert 1 however, highlighted the fact that during the Complainant's first attendance to A&E (10th September 2016), the infection markers were high enough to have warranted further examination albeit not a clot. He stated "*the white cell count was significantly raised and the CRP[2] was moderately raised; both were higher than I would expect for a month postoperatively and higher than I would expect with a muscle strain. The most likely explanation for these results would be some sort of bacterial infection.*

[2] C-reactive protein (CRP) test is another test used to help diagnose conditions that cause inflammation. CRP is produced by the liver and if there is a higher concentration of CRP than usual, it's a sign of inflammation in your body.

Urinalysis was performed but did not show any indicators of infection. The ankle was in a boot and therefore the operation site could have been inspected for signs of infection. Another possible focus would be a chest infection but there were no chest symptoms and, I assume, no abnormal chest examination findings. Had a chest x-ray been taken, it may have shown the right basal changes found the next day. As the Complainant presented with abdominal pain with no clear cause, assuming the wound looked quiet, I would expect further consideration of abdominal pathology- in the first instance probably by seeking a surgical opinion as to whether observation or further investigations such as an ultrasound or CT scan of the abdomen were merited. Having said this, abdominal pain comprises 5-10% of A&E attendances and up to 4 out of 10 of these remain undifferentiated even after further investigation and/or admission. 80% of the latter's symptoms resolve within two weeks. What would the effect on the Complainant be? Had a chest x-ray been performed and shown right basal consolidation, in my opinion the likely outcome would have been discharge on oral antibiotics for community-acquired pneumonia, for the reasons given in the reply to question 2 below. Had further investigations of the abdomen been performed, I would expect them to be normal. Had the Complainant been admitted for observation, I would have expected matters to progress much as they did after his discharge home".[3]

Ombudsman Question 2

Why did none of the indicators of infection and blood clot appear on the tests of the first night but were evidently clear on the second night? Can the expert provide a reasonable explanation for this?

Expert 1 stated, "*The indicators of infection were evident on the first attendance (see 1 above)* and clarified that the test carried out on the second night which indicated the possible existence of a clot was the D-dimer test. He explained, "*The indicator of blood clot was the D-dimer test. This would only be performed for a working diagnosis of Deep Venous Thrombosis or Pulmonary Embolism and was not performed on the first night. Pulmonary Embolism can present with nonspecific signs and symptoms; although it is an unusual cause of abdominal pain, the pain is upper abdominal, not flank or lower quadrant.*

[3] Evidence: UpToDate: Evaluation of the adult with abdominal pain in the emergency department

Pulmonary Embolism would also be expected to present with other (e.g. respiratory) symptoms, as it did the next day; to quote UpToDate on the subject, ' It seems unlikely that abdominal pain would be the sole manifestation of Pulmonary Embolism'. I think it was reasonable, therefore, not to measure the D-dimer on 10th September 2016"[4].

Ombudsman Question 3

Would the expert advising conclude that the patient received an acceptable/adequate level of care at A&E?

Expert Reply

Expert 1 highlighted that the notes from the Complainant's attendance to A&E on the second night on the 11th September were in comparison to the previous night, complete and contained detailed nursing and medical observations.

He stated*, "The Complainant attended the A&E by ambulance at 01.04 complaining of abdominal pain and shortness of breath. The triage nurse noted the pain was in the right lower quadrant as before and that the Complainant had taken Diazepam and Paracetamol that night. The doctor noted the previous history, recorded that the pain had restarted that morning and had been worsening, was now stabbing, increased by lying down and accompanied by shortness of breath".* Expert 1 reviewed the tests carried out on the second night and informed the Ombudsman that after scoring high for the presence of inflammation following a D-Dimer test, a pulmonary embolism was subsequently confirmed by a CT pulmonary angiogram. He therefore opined that the care given was satisfactory on the second night and concluded, "*On the basis of the history and examination recorded, the diagnosis of a muscle strain was reasonable* (on the first night, 10th September 2016*). However, the white cell count and CRP were raised indicating a possible infection and there does not seem to have been an attempt to explain these parameters by further investigations, a surgical opinion or a period of observation".*

[4] Evidence: UpToDate: Evaluation of the adult with abdominal pain in the emergency department & UpToDate: Clinical presentation, evaluation, and diagnosis of the non-pregnant adult with suspected acute pulmonary embolism

Expert 2

Ombudsman Question 4

Does the expert opine that the Patient should have been prescribed with anticoagulation post-surgery? Are there any guidelines/criteria in place? Is the Orthopaedic Consultant's statement reasonable to the required standard in this regard?

Given that with hindsight, the Complainant was under the impression that he should have been prescribed anticoagulants post-surgery to avoid VTE, the Ombudsman sought the opinion of Expert 2 who reviewed the Orthopaedic Consultant's statement and provided an overview of post-surgery anticoagulation.

Expert Reply

Expert 2 stated, "*Firstly, there was at least some discussion regarding VTE in the initial letter from the Orthopaedic Consultant. However, the depth of this discussion and whether a formal VTE and bleeding risk assessment was undertaken is unclear. There is a form, which had been filled in by the Complainant, presumably at pre-assessment, regarding medical history, which confirms no previous personal VTE events. It is unclear whether there is any family history. Secondly, the notes confirm that a single dose of Clexane* (anticoagulation*) was given at 10 pm in the evening after the surgery. More specifically, it is contentious whether any extended prophylaxis is required. Normal practice would include a risk assessment but the principal factors are personal and family history. If these are negative the NICE VTE 92 Guideline (January 2010) advises "consider offering" mechanical and chemical prophylaxis as the evidence does not support one way or the other definitely prescribing them. Therefore, given this, I would say that the Orthopaedic Consultant's statement is reasonable and to the required standard in this regard".*

Conclusion

Based upon the expert medical opinion, the Ombudsman could only endorse the views and findings of both Experts 1 and 2 and reached the view that in general, the Complainant's care was reasonable and in keeping with established guidelines and practice and accepted the view that anticoagulation had not been necessary post-surgery.

The Ombudsman however noted the fact that contrary to what the A&E doctor described as "*mild signs of infection"*, Expert 1 opined that these were in actual fact *"moderately raised…higher than* [he] *would expect for a month postoperatively and higher than* [he] *would expect with a muscle strain"* and therefore he would have expected the Complainant's care to have taken a different path on the 10th September 2016, (i.e., "*further investigations, a surgical opinion or a period of observation",* even though this would have not resulted on the Complainant's clot being found on the 10th September 2016 and he would have expected matters to have progressed as they did the following day following the D-Dimer test.

In regard to the Complainant's grievance about the comments received from one of the nurses, the Ombudsman considered the replies received from the A&E staff nurse and although it is impossible for the Ombudsman to comment on this type of complaint where, in essence and invariably, there are two quite diametrically opposed versions of the same event making the Ombudsman unable to reach a conclusion, it is important to note that all reports are made available to the Medical Director and Chief Executive of the Gibraltar Health Authority who will be able to make use of the learning outcomes for the improvement of the service provision.

Finally, the Ombudsman wished to highlight the comments from Expert 1 in relation to the lack of details regarding the A&E doctor's examination and the absence of nursing observations in the copy of the electronic A&E notes dated 10th September 2016.

Classification

1. Unhappy that he was not checked for clots knowing that he had had a surgical procedure recently. – Partly Sustained – The Ombudsman partly sustained this complaint based on Expert 1's opinion that he would have expected the Complainant's care to have taken a different path at A&E on the 10th September 2016 albeit the clot would not have been detected.

2. Alleged failure to prescribe anticoagulants post-surgery to prevent clotting. – Not Sustained

3. Aggrieved by the way he was treated by a member of staff at A&E while attending due to health complications. – Unable to Classify

Recommendations

The Ombudsman recommended that this report should be shared with the A&E doctors within the A&E Department.

(Report extracted from Case No 43 - HEALTH)

GIBRALTAR HEALTH AUTHORITY

Case 9

Complaint against the Gibraltar Health Authority (GHA) due to the fact that the switches on the Complainant's pacemaker were allegedly set to the wrong setting and two of her regular medications were stopped.

Complaint

Complainant was aggrieved due to the fact that the switches on her pacemaker ("the Pacemaker") were allegedly set to the wrong setting and two of her regular medications were stopped.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant explained, by way of background, that further to being treated for minor chest pains by her General Practitioner for a period of approximately three months in early 2016, she attended the Accident and Emergency Department ("A&E") at St Bernard's Hospital on the 12th July 2016 as her chest pains had become sharper. Pursuant to cardiac monitoring tests, she was transferred from St Bernard's Hospital to a tertiary referrals centre in Spain where she underwent surgery and the Pacemaker was inserted into her heart on the 14th July 2016.

Despite the insertion of the Pacemaker, the Complainant's heart problems persisted and she informed the Ombudsman that she experienced feelings of breathlessness as well as extreme fatigue for approximately six months post-surgery. The Complainant also informed the Ombudsman that she was admitted to St Bernard's Hospital after pacemaker insertion on two separate occasions where she was referred to the GHA Cardiologist ("GHA Cardiologist") who requested several tests to be performed and advised her to stop taking two of her regular medications, (Apixaban and Rosuvastatin). She maintained that her heart problems persisted and it was not until she visited her son in the United States of America ("United States") in January 2017 where her health issues were addressed and resolved there by a cardiologist ("US Cardiologist").

In fact, she was allegedly informed by the US Cardiologist, that some of the switches on her Pacemaker were set to the OFF setting and this could have led to the extreme feelings of weakness that she had been experiencing. Additionally, she was allegedly informed that she should not have been advised by the GHA Cardiologist to stop taking her medication.

According to the Complainant, once her Pacemaker settings were changed in the United States, she began her road to recovery and was able to return to Gibraltar in May 2017 feeling much better and healthier.

The Complainant told the Ombudsman that she did not understand why the switches on her Pacemaker had not been set appropriately, and could not appreciate why this had gone unnoticed during both her admissions at St Bernard's Hospital and throughout her outpatient visits to see the GHA Cardiologist. The Complainant stated that she had lost trust in the GHA's ability to deal with cardiac patients like herself, and expressed her desire to lodge her complaint with the Ombudsman in order to find out what had gone wrong with her treatment.

Investigation

The Ombudsman requested comments from the relevant practitioners involved via the Medical Director of the GHA, as per usual practice, and he also reviewed the Complainant's medical notes. In response to the request by the Ombudsman, the GHA Clinical Director provided information obtained from the GHA Cardiologist and the GHA Clinical Cardio-Respiratory Physiologist (the practitioner in charge of performing the Complainant's heart/pacemaker monitoring tests).

GHA Cardiologist

In his reply to the Ombudsman's invitation for comments, the GHA Cardiologist began by explaining that the type of pacemaker that the Complainant had had inserted in July 2016 was a Dual chamber pacemaker and stated that this type in particular, when inserted in a patient that presented with episodes of atrial fibrillation as was the case with the Complainant, was a "problem" that required "close follow-up and frequent changes in parameters in order to control the patient's symptoms".

The GHA Cardiologist claimed that, prior to her trip to the United States, the Complainant had been reviewed "many times" and commented, "Even in sinus rhythm, in DDDR mode, she experienced lots of palpitations and was uncomfortable with the pacemaker that was presenting competition with her own rhythm. That is why we decided to try VVIR mode".

The GHA Cardiologist concluded his statement by stating that, in his opinion and upon reviewing the report from the US Cardiologist, the results of the pacing test performed during the Complainant's first visit to see the US Cardiologist, "hardly explained" the severity of the Complainant's symptoms. He commented "To me, what she probably had was a condition that I am familiar with where patients complain of syncopal episodes, shortness of breath, palpitations, seizure attacks when flying long haul: "Aerotoxic syndrome" .

GHA Clinical Cardio-Respiratory Physiologist

Pursuant to reviewing the GHA Cardiologists' statement and in order to decide what course of action to take in terms of the investigation of this complaint, the Ombudsman asked a further two questions from the GHA;

1 In the period of July 2016 (date in which the Pacemaker was fitted) to 6th January 2017 (date of last review before the Complainant's travel to the US), how many times was the Complainant's Pacemaker reviewed/checked at St Bernard's Hospital?

2 Were the settings applied to the Pacemaker in the US ever used in St Bernard's Hospital?

Replies to the Ombudsman's inquiries were received from the Clinical Cardio-Respiratory Physiologist ("CCRP") who provided a timeline of the reviews that the Complainant had at the Pacing Clinic (summarised below). The timeline revealed that the settings by the US Cardiologist had, in fact, been the ones set upon insertion of the Pacemaker and that these settings remained until the 14th September when these were changed under the GHA Cardiologists' instruction.

Pacing Clinic reviews:

Visit 1 - 12.08.2016

CCRP explained that during the Complainant's initial review at the Pacing Clinic, the settings of the Complainant's Pacemaker were "as per implant: DDDR 60-130bpm, rest rate programmed to 55bpm, satisfactory pacing function (98% AP, 61% VP) Flat HRV noted on HR histograms. CCRP explained that during this review, the Complainant was noted to be "symptomatic of pacing" therefore she was referred to the GHA Cardiologist for a review due to "recent implant and symptoms".

Visit 2 - 14.09.2016

The Complainant was reviewed a month later by the GHA Cardiologist who, according to CCRP, instructed changing the Complainant's pacemaker setting to "VVIR with lower rate set at 50bpm". The Complainant was scheduled for an Electrocardiogram and was reviewed again by the GHA Cardiologist two days later on 16th September 2016.

[Ombudsman Note: In line with the timeline provided by CCRP, the Ombudsman noted, from a review of the Complainant's medical file, a letter dated 21st September 2016 addressed to the Complainants GP where he updated her on the recent changes applied to the Pacemaker settings and informed her that the Complainant would be reviewed again in three months].

Visit 3: 11.11.2016

As per the GHA Cardiologist's instructions, the Complainant was booked for a Stress Echocardiography on 11.11.16. CCRP. He explained that this was, however, not performed due to "exertional dyspnoea ++. Pacing check carried out: attended currently V Sensing (sinus rhythm) at 60bpm with 45% VP only. Base rate lowered to 45bpm to allow for more intrinsic rhythm as per GHA Cardiologist".

[Ombudsman note: The Ombudsman was able to ascertain from a GHA note provided by the Complainant, dated and signed by the GHA Cardiologist, that this was the date on which the Complainant was asked to discontinue taking the aforementioned medication].

Visit 4: 06.01.2017

According to CCRP's records, the Complainant was seen for the last time before her trip to the United States at the Critical Care Unit as she had suffered from an episode of loss of consciousness. He stated that according to the medical notes, the Complainant's heart review showed "In sinus rhythm at 49-50bpm, 42% VPACING. Device – no alerts, no saved arrhythmias, good HRV. Base rate increased to 50bpm". He furthermore noted that at that point, the plan was to review the Complainant at the Pacing Clinic once she was discharged from hospital.

[Ombudsman Note: The Complainant travelled to the United States in late January 2017 and since then had not been seen by the GHA Cardiologist or attended the GHA Pacing Clinic , at the time of lodging this complaint (May 2017)].

Clinical Advice

Given that the issues being complained of were entirely clinical, the Ombudsman prepared a case file and dispatched it, together with a request for independent specialist medical advice, to an expert ("Expert") in the United Kingdom.

The questions presented by the Ombudsman to the Expert (a Consultant Clinical Cardiac Electrophysiologist, with over 30 years' experience looking after patients with arrhythmias, and implanted cardiac devices, including pacemakers) and the replies received (which have been summarised for the purposes of this report) were as follows;

The Pacemaker

The Expert began her advice by providing the Ombudsman with an analysis of the events dating back to the Complainant's first attendance to A&E on 12th July 2016 where she was diagnosed with bradycardia due to sick sinus syndrome and referred to a tertiary referrals centre ("TRC") in Spain where a Dual chamber pacemaker was implanted. She stated, "This was a St Jude Medical Zephyr model number 5826 DDDR pacemaker. NICE guidance entitled Dual-chamber pacemakers for symptomatic bradycardia due to sick sinus syndrome and/or atrioventricular block was published in 2005. This guidance recommends that 1.1 Dual-chamber pacemakers are recommended as an option for treating symptomatic bradycardia due to sick sinus syndrome without atrioventricular block".

The Ombudsman noted that this advice contradicted the GHA Cardiologists' comments that the Pacemaker chosen for the Complainant was a "problem" requiring many changes in parameters in patients who suffered from the same complications as the Complainant.

The Expert reviewed the settings applied to the Pacemaker upon insertion and differing from what the Complainant believed, she concurred that the Complainant received an appropriate mode of pacing and asserted that the Pacemaker was "programmed appropriately in the DDDR mode (able to sense and pace both the atrium and ventricle, and with rate response, so that the heart rate would increase on exercise)".

The Expert however, pointed out that, "Unfortunately the Pacemaker implantation was complicated by a Pneumothorax (leak of air into the pleural cavity around the lung)". She clarified, however, that this was a "recognised complication of permanent pacing, but appears not to have been recognised in the TRC. During ambulance transfer back to St Bernard's Hospital, the Complainant developed hypotension, sweating; her O2 saturation was 93%. The Complainant was readmitted to St Bernard's Hospital and the Pneumothorax was treated. The discharge summary 12 – 18th July 2016 lists tachy rady syndrome [where fast heart rates and slow heart rates can alternate] and PAF [paroxysmal atrial fibrillation] among the list of diagnoses".

Mode & Settings

Upon review of the setting changes made to the Pacemaker, two months post-insertion, the Expert opined, "Changing the pacing mode to VVIR on 14th September 2016 was inappropriate. In the VVI mode, the pacemaker senses and paces the ventricle only, and ignores atrial activity. The Expert disapproved of the approach taken by the GHA Cardiologist which resulted in the change of Pacemaker settings undergone by the Complainant. He commented, "The rationale given, that the Complainant was pacing 100% of the time, was flawed. The ECGs recorded prior to this change show atrial pacing at a rate of 60 beats per minute (because the Complainant's native heart rate was lower than this).

The Expert explained to the Ombudsman by way of information, that frequent ventricular pacing, was associated with the development of heart failure, and it is therefore good practice to minimise it when possible.

She explained that in the Complainant's case, this could have been achieved by increasing the atrioventricular delay of the Pacemaker, or even by programming the Pacemaker to the AAIR mode, given that the Complainant had normal atrioventricular conduction. In this case, the Expert confirmed that altering the Pacemaker mode to VVIR actually increased the amount of ventricular pacing, rather than decreasing it as shown in the subsequent pacing checks. The Expert added, "Pacemaker syndrome, when atrioventricular synchrony is lost, or worse when there is atrioventricular conduction, so that the atrium contracts against closed valves, can be caused by VVI pacing, particularly in patients with sick sinus syndrome, who have intact atrioventricular nodal conduction".

The Expert therefore summarised her position on the changes made to the Complainant's Pacemaker by confirming that the adjustment made on the 14th September 2016 may have had at least two detrimental effects; increased ventricular pacing, and caused Pacemaker syndrome.

Commenting specifically on the switch and the function to record the heart's activity which the Complainant claimed, had both been turned off, the Expert clarified, that the Pacemaker had event counters which recorded Intracardiac Electrograms (EGMs). She commented, "Event counters may not be able to collect atrial data when the pacemaker is programmed in the VVI mode, so may not have been available in the Complainant's Pacemaker during the time it was programmed VVIR. Stored EGMs can be programmed off, in order to reduce current drain on the battery". The Expert however, highlighted the fact that it was therefore a measure of good practice, to derive as much information as possible from the pacemaker diagnostics, particularly if the patient had symptoms, for ease of diagnosis and treatment.

Check-ups & Reviews

In reply to the Ombudsman's inquiries regarding the timing and the frequency of the Complainants' Pacemaker reviews and whether or not these fell under the required standard, the Expert concurred that the Pacemaker checks had taken place within the required timescale. She stated, " The Heart Rhythm Society/European Heart Rhythm Association expert consensus statement published in 2008 recommends that a pacemaker is checked within 72 hours of implantation, 2 – 12 weeks post implantation, and every 3 – 12 months thereafter, until the battery starts to deplete, when follow up should be more frequent. (https://academic.oup.com/europace/article/10/6/707/661858).The Complainant's Pacemaker follow up fell within this timescale.

Medication

In regard to the fact that that the Complainant's medication, namely Apixaban and Rosuvastatin, were stopped on 11th November 2016 on review by the GHA Cardiologist, the Expert explained that Rosuvastatin was used to lower patients' cholesterol and was also used as prophylaxis against vascular disease in those at risk. She stated, "The Complainant was not known to have vascular disease, although her age and her high blood pressure were risk factors. Stopping Rosuvastatin was not likely to have made much difference, either to her symptoms, or to her long term outlook".

However, in regard to the second medication stopped, the Expert disagreed with the GHA Cardiologist's decision and stated, "Apixaban is an anticoagulant used for stroke prevention in patients with atrial fibrillation. The Complainant had intermittent atrial fibrillation. Her CHA2DS2-VASc score is 4, giving her an annual risk of stroke or thromboembolism of 4%. The European Society of Cardiology 2012 focussed update on the management of atrial fibrillation (https://academic.oup.com/eurheartj/article/33/21/2719/493051) recommends anticoagulation when the CHA2DS2-VASc score is 1, or ≥2, so in the absence of complications or bleeding, the Complainant should have continued to take Apixaban".

The Expert noted however, that the US Cardiologist had started the Complainant on a medication to control her heart rate in April 2017.

Expert summary

The Expert finalised her analysis of the Complainant's case by acknowledging the fact that the Complainant's health problems had been "quite complex" given that she continued to suffer from a heart condition even though she had undergone a pacemaker insertion procedure. She commented, "The Complainant was still breathless after the pacemaker was implanted, and programmed in the correct DDDR mode, and probably after she had recovered from the pneumothorax, another cause of breathlessness. It is likely in my opinion that she was having runs of atrial fibrillation, which could have also made her feel breathless. Programming her pacemaker VVIR (14th September 2016) most likely led to deterioration and an increase in her symptoms. She has needed appropriate pacing, to prevent bradycardia and reinstate rate response, and also antiarrhythmic drug therapy to prevent or reduce the occurrence of atrial fibrillation.

It is likely that in usual clinical practice a cardiologist would have reassessed the Complainant at the 2 – 12 week pacemaker check, and, as she was still breathless at around that time, would have assessed the amount of atrial fibrillation or arrhythmia using the pacemaker diagnostics, and considered antiarrhythmic therapy at that time".

Conclusion

The Ombudsman could only endorse the Expert's views and findings. It appeared that, despite the correct settings being applied to the Pacemaker upon insertion, and the correct diagnosis and treatment being given at first instance at St Bernard's Hospital upon return from the Tertiary Referrals Centre, subsequent diagnoses and treatment, which resulted in the Complainant's Pacemaker settings being altered as well as her medication discontinued, may have very well led to the Complainant's deterioration.

Classification

The Complainant was aggrieved due to the fact that the switches on her pacemaker ("the Pacemaker") were allegedly set to the wrong setting and two of her regular medications were stopped - Sustained

Recommendations

The Ombudsman recommended that the GHA offer the Complainant an apology for their shortcomings in the Complainant's care. The Ombudsman also recommended that the GHA should take full account of the findings in this case and further urged the GHA to review its practices within the cardiology services in order to minimise the risk of a recurrence of a similar situation in the future.

Update

Upon sharing the final draft of this report with the GHA, the Medical Director informed the Ombudsman that the GHA Cardiologist involved in this complaint had since left the GHA and a different cardiologist had been employed. The Medical Director nonetheless shared the report with the GHA's new cardiologist who concurred with the findings of this report and the advice received from the Expert.

(Report extracted from Case No 55 - HEALTH)

HOUSING AUTHORITY

Case 10

Complaint against the Housing Authority over Delay in taking a decision regarding the Complainant's suspended housing application.

Complaint

The Complainant was aggrieved due to a delay on the part of the Housing Authority in reaching a decision regarding his suspended housing application.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

In early 2018, the Complainant's application for social housing (3RKB) was suspended due to the fact that he had a child with a woman who was a property owner. [Ombudsman Note: The Complainant had been married previously and since his separation, he had undergone a lengthy process to prove to the Housing Authority that the custody of their two children was equally shared with his ex-wife in order for them to be added into his housing application. He finally achieved this in early 2018.] However, shortly after, when his third child was born, the Housing Authority suspended his application on the understanding that he no longer required a government flat and would now live with his new partner. As a result, the Complainant explained to the Housing Authority that although they had a child in common, he was no longer in a relationship with her and he therefore still required a home of his own for him and his children and expressed his wish for his housing application to be reinstated. Consequently, the Housing Authority requested that he submit an *Affidavit* (a written statement of facts signed under oath) stating that indeed he was not in a relationship with the mother of his third child and therefore still required social housing. The Complainant submitted his *Affidavit* on the first week of April 2018 and subsequently chased the Housing Manager via email for a decision on the 10th April, 24th April, 4th May, 15th May, and 24th May to no avail. On 25th April he was informed by the Housing Manager that '*the Department* [was] *looking into* [his] *case and* [would] *reply shortly*', and on 1st June '*the department* [was] *still looking into the case and* [would*] provide feedback as soon as possible*'.

By the end of June 2018, three months after handing in the *Affidavit*, the Housing Authority had still not reverted with their decision. Frustrated with the delay experienced, the Complainant lodged his complaint with the Ombudsman.

Investigation

The Ombudsman wrote to the Housing Authority on 29th June 2018 setting out the Complainant's grievance. In that letter he asked the Housing Authority for their comments in relation to the delay in taking a decision in the Complainant's case and asked the Housing Authority about the procedure taken since the receipt of the Complainant's *Affidavit*.

The Ombudsman chased a response from the Housing Authority and this was received on 19th September 2018. The Housing Authority advised the Ombudsman that they were reviewing their policy in respect of applicants who had children in common with a homeowner. They explained that "*each case was different"* and needed to be "*looked at closely*" and informed the Ombudsman that they were working with their legal advisor to establish a "*correct and fair policy*".

The Housing Authority's response on the 19th September 2018 assured the Ombudsman that the Complainant had been kept regularly updated as to the progress of his application on every occasion that he had requested an update from the Housing Manager via email.

On the 7th November 2018, the Ombudsman wrote to the Housing Authority once again and inquired as to whether or not a decision had been reached vis-a-vis the Complainant, given that two months had passed since they had advised the Ombudsman that they were reviewing their policy and six months since the Complainant had handed in his *Affidavit.* In addition, the Ombudsman met with the Principal Housing Officer and the Housing Manager to discuss a separate matter on the 21st November 2018, and reminded them that a reply was still outstanding regarding the Complainant's case.

On the 11th December 2018, the Housing Authority wrote to the Ombudsman and informed him that the Housing Authority's position was still the same as previously communicated and added that the Complainant's case was "*very unique*" where the existing policy would have prevented him from being an applicant. The Housing Authority further explained that in order to assist the Complainant, they had requested "*certain additional information*" and "*noted statements made by him which denotes its peculiarity*".

The Housing Authority stated that the Complainant's case had allowed them to review and adapt the existing policy in order to accept his and other similar applications that may arise in the future. The Ombudsman was advised that the Complainant would be given a decision "very *shortly*".

On the 30th January 2019, the Ombudsman inquired as to the progress of the Complainant's case since according to the Complainant (who had continued to urge the Housing Manager for a decision despite lodging his complaint with the Ombudsman), the Housing Authority had sent him a letter containing the outcome of his case on the 21st January 2019. The Complainant informed the Ombudsman on the 30th January that he had still not received the letter. The Ombudsman requested a copy of the decision letter and for completeness, asked the Housing Authority about which additional information was requested from the Complainant as previously stated in their letter to the Ombudsman dated 11th December 2018.

The Complainant chased the Housing Manager via email dated 31st January 2019 as he had still not received the letter sent to him on the 21st January 2019. A copy was sent to him via email on the same day.

The Ombudsman was provided with a copy of the letter sent to the Complainant and informed that the additional information requested from the Complainant was confirmation of the details of his two children with his previous partner.

The outcome letter sent to the Complainant stated the following:

"I am pleased to inform you that the Housing Department has completed the review of your case along with its policies which relate to applications such as yours, as well as, considering the documents which you have presented and have accepted your circumstances and re-activated your housing application".

Conclusions

In early 2018, the Complainant who had recently managed to add his two children from a previous relationship to his social housing application, had this suspended by the Housing Authority as a direct consequence of the Complainant having had a baby with his then partner who was a homeowner.

This was in line with the Housing Authority's existing policy, where applicants who have a child with a homeowner are consequently removed from the list. The Complainant urged the Housing Authority to re-activate his application as according to him, he was not in a relationship with the mother of his third child.

In April 2018, the Complainant was advised by the Housing Authority that in order to reassess his situation he needed to submit an *Affidavit* where he declared exceptional circumstances that would allow the reactivation of his housing application. Although the Complainant chased the Housing Manager almost weekly since presenting the document, he continued to be told that his case was under consideration for a period of ten months until January 2019.

Once the Ombudsman took on the complaint and wrote to the Housing Authority on the 29th June 2018, the Housing Manager reverted on the 19th September 2018 and explained that a review of the existing policy was being carried out in order to allow for exceptional applications where an applicant had a child in common with a home owner.

During the last week of January 2019, ten months after submitting the Affidavit, the Housing Authority informed the Complainant of the positive outcome of his case. The Complainant's application was reactivated on the general housing waiting list and the social A list.

According to the correspondence received from the Housing Authority in relation to the Complainant's case, it appeared as though no real policy changes were made apart from the decision taken in April 2018 to accept Affidavits in situations such as those faced by the Complainant. In any event, the Ombudsman had seen no evidence of any change in policy. Consequently, the Ombudsman found that a period of ten months was an excessive amount of time to reach a decision. The Ombudsman therefore considered that the ten months' delay on the part of the Housing Authority, where the Complainant was subjected to unnecessary stress and anxiety, was unexplainable and tantamount to gross maladministration and as such, he sustained this complaint against the Housing Authority.

Classification Sustained

(Report extracted from Case No 1180)

HOUSING AUTHORITY

Case 11

Complaint against the Housing Authority over the delay on their part in authorising the Complainant's wife ("Wife") to reside in the Tenancy

Complaint

The Complainant was aggrieved because of the delay on the part of the Housing Authority in authorising his Wife to reside in the Tenancy.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant (British National of Moroccan origin) explained that in January 2018 he applied to the Housing Authority for his Wife (Moroccan National) to be included in the Tenancy. The Complainant stated that he submitted pertinent documentation and was informed that everything was in order. According to the Complainant, he contacted the Housing Authority in April 2018 and subsequent occasions, in order that they would confirm the inclusion, but claimed that in each instance he was told that they would contact him when the matter was finalised.

In July 2018, the Complainant and his Wife went to the Civil Status & Registration Office ("CSRO") to renew the Wife's Civilian Registration Card ("CRC"), days before it expired, and stated they were informed by the CSRO that his Wife was not a recognised tenant in the Tenancy and the CRC could not be renewed. The Wife was very concerned because she was undergoing medical treatment and feared that without a valid CRC, the medical care would cease.

The Complainant lodged a complaint with the Ombudsman against the Housing Authority.

Investigation

In July 2018, the Ombudsman wrote to the Housing Authority's Housing Manager ("HM") setting out the complaint.

In parallel with the above, the Complainant and his Wife told the Ombudsman that CSRO had contacted them and informed them that the Housing Authority had confirmed that the Wife resided in the property and they could now process the CRC renewal. The latter was issued to the Wife on the 9th August 2018. Notwithstanding this, the matter of the inclusion in the Tenancy remained outstanding.

The Ombudsman chased a response from the HM and this was received in October 2018. The HM confirmed that on the 1st February 2018, the Complainant had submitted an application for his Wife to be included in the Tenancy accompanied by copies of the Wife's CRC, medical card and their marriage certificate. According to the HM, the application was considered during February 2018 and it was identified that the Wife's CRC and medical card appeared to be invalid on the grounds that they had been issued by CSRO on the basis that the Wife was an authorised tenant in the Tenancy. The HM further stated that the Wife was not eligible to be included in the Tenancy on the grounds that: '...these premises are solely for tenants and authorised persons over the age of 60 due to this being an estate purposely built for the elderly'. The HM stated that the Housing Authority were currently reviewing their 'inclusion policy' but noted that in the interim they were prepared to grant the Wife a letter authorising her to reside in the Tenancy with the Complainant under the strict condition that the authorisation would not grant her rights as a tenant.

The Ombudsman was aware that the Tenancy was located in a residential estate that had been purposely built for pensioners. The Wife was under pensionable age (60 years old) and due to being a Moroccan national was not at that point eligible to become an applicant for Government rented accommodation. In order to qualify to be able to apply for the latter the Wife would have to obtain British nationality. On the 25th October 2018, the Housing Authority provided a letter of authorisation which granted the Complainant permission for the Wife to reside in the property with him until further notice. The letter of authorisation stipulated that it did not grant the Wife any rights under the tenancy agreement nor did it constitute any form of licence or other agreement between the Government of Gibraltar and the Wife, in respect of the property. The authorisation could be revoked at any time, including, but not limited to, upon the request of the Complainant.

To substantiate the fact that the Wife had been residing in Gibraltar since August 2016, the Complainant provided the Ombudsman with a copy of the declaration signed by the Complainant, his Wife and CSRO on the 5thAugust 2016. This was further to CSRO's approval of a permit of residence for the Wife dated 2nd August 2016 and stated that the permit was issued under certain conditions. The declaration confirmed that the Complainant had been residing in Gibraltar since August 2016. The Complainant also provided a copy of the Wife's current CRC and medical card which had been issued for a period of six months from the 18th January 2018 to the 18th July 2018 and on which the Wife's address was stated as being that of the Tenancy.

Conclusions

The Wife had been living in the Tenancy since August 2016, and up until July 2018, CSRO had accepted the Tenancy as being her address without the Wife having to submit proof of this other than that the Complainant, her husband, was the tenancy holder. At some point after the 8th January 2018 (the date on which the Wife's CRC was issued) address checks had been implemented by Government and in order for the Wife to renew her CRC and medical card she would have to provide proof of inclusion in the Tenancy. Notwithstanding, including the Wife in the Tenancy proved to be complicated due to the particular circumstances of the couple's situation. The Complainant was a British national over pensionable age and was therefore entitled to Government rented accommodation and entitled to reside in the Tenancy which were residential properties purposely built for pensioners. The Wife on the other hand was under pensionable age and a Moroccan national, and therefore not at the time of application for inclusion in the Tenancy, eligible for Government rented accommodation (as set out in the 'Investigation' section above).

The Housing Authority upon identifying in February 2018, subsequent to the Complainant's request for his Wife's inclusion, that the Wife was not eligible for inclusion in the Tenancy, should have contacted the Complainant and informed him of the situation and the fact that they would have to review the matter in order to find a solution. What in fact happened was that the Complainant chased the Housing Authority for the inclusion for four months and due to not receiving any information from them and fearing that his Wife's medical care would cease due to the non-renewal of the CRC and medical cards contacted the Ombudsman.

The Ombudsman is mindful that due to the particular circumstances of this case which the Housing Authority had possibly not encountered before, time was required for the matter to be studied and a solution found, for this and undoubtedly other cases of inclusion, as a result of which, the Housing Authority's 'inclusion policy' was reviewed. Notwithstanding, as per above, the Complainant should have been informed that the Housing Authority were addressing the problem to see whether a solution could be found. Failing this, unnecessary hardship and anxiety was caused to the Complainant and his Wife and so the Ombudsman sustains this part of the complaint.

Notwithstanding the above, the Ombudsman does recognise the proactive measure taken by the Housing Authority by verbally confirming to CSRO that the Wife resided in the Tenancy in order that CSRO could issue the CRC which would enable the renewal of the medical card and continuation of the medical treatment and therefore does not sustain this part of the complaint

Classification Partly Sustained

(Report extracted from Case No 1181)

HOUSING AUTHORITY

Case 12

Complaint against the Housing Authority ("HA") over delay on their part in authorising the Complainant's wife ("Wife") to reside in the Tenancy

Complaint

The Complainant was aggrieved because of the delay on the part of the Housing Authority in authorising his Wife to reside in the Tenancy.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

In February 2018, the Complainant (British National of Moroccan origin) wrote to the Civil Status & Registration Office ("CSRO") to request a residence permit for his Wife, a Moroccan national [Ombudsman Note: At the time of application, the Wife had a two year 'Gibraltar Visa Waiver' which permitted her to visit Gibraltar during the validity period without having to obtain a visa]. In March 2018, CSRO informed the Complainant that the application had been refused on the grounds of insufficient income. In August 2018 the Complainant wrote again to CSRO providing them with further financial information and informing them that he had a serious medical condition and needed his Wife to take care of him. Days later, the CSRO responded to the Complainant. They acknowledged the new documentation he had provided and advised him that before the application could be processed they required that he register his Wife with the Housing Authority in order that she could be registered in the Tenancy.

In February 2018, the Complainant had submitted a form to the Housing Authority applying for his Wife's inclusion in the Tenancy and had provided pertinent documentation. According to the Complainant, he subsequently contacted the Housing Authority on a number of occasions but claimed that their response each time was that no decision had been taken. In September 2018, the Complainant went to the Housing Authority's offices and stated that he was asked for copies of his marriage certificate and his Wife's passport, documents which the Complainant stated they already had on file.

Notwithstanding this, he handed in the documentation in late September 2018. By the 22nd October 2018 and further to the original February 2018 application for his Wife's inclusion in the Tenancy, the Housing Authority had not reverted with their decision and the Complainant lodged his complaint with the Ombudsman.

Investigation

The Ombudsman wrote to the Housing Authority in October 2018 setting out the complaint. In that letter he referred the Housing Authority to a similar complaint (CS1181-Moroccan national's inclusion in the Tenancy) where the Housing Authority had advised the Ombudsman that they were reviewing their policy in respect of inclusions in Government tenancies but in the interim were prepared to grant that applicant a letter authorising her to reside in the property. The Ombudsman enquired whether a similar letter of authority could also be offered to the Wife in the interim.

The Housing Authority's response on the 12th November 2018 explained that the Complainant had been kept regularly updated as to the progress of his application on every occasion that he had attended the HA's general counter and confirmed that they were now in receipt of all the requisite documentation for the application to be processed. The Housing Authority confirmed that they had been reviewing their policy of inclusion and that this was now at a very advanced stage and its implementation was imminent. Consequently, the Housing Authority did not consider it either necessary or appropriate to issue an interim authorisation letter for the Wife to reside in the premises, as a final decision would be made shortly.

On the 18th December 2018, the Housing Authority wrote to the Complainant and informed him that it had been exceptionally agreed to authorise his Wife to reside in the property with him. They stated that the authorisation did not grant the Wife any rights under the tenancy agreement and could be revoked at any time.

The authorisation letter was signed on the 2nd January 2019 and the Ombudsman was provided with a copy of the document. Further to the information provided in the Housing Authority's letter above, the authorisation stipulated that this did not constitute any form of licence or other agreement between the Government of Gibraltar and the Wife in respect of the property.

The Ombudsman was aware that, due to being a Moroccan national, the Wife was not at that point eligible to become an applicant for Government rented accommodation. In order to qualify to be able to apply for this, the Wife would have to obtain British nationality.

Due to the particular circumstances of this and a number of other cases, the Housing Authority had reviewed their inclusions policy and produced a letter of authorisation which would allow the authorised person to have an address in Gibraltar, which was required for a Civilian Registration Card ("CRC") to be issued by CSRO as well as for a medical card.

(Report extracted from Case No 1183)

HOUSING AUTHORITY

Case 13

Complaint against the Housing Authority ("HA") over the delay in including the Complainant's wife ("Wife") and two children ("Children") in the tenancy of the Flat; the lack of information from the HA as to the reasons for the delay when the Complainant requested updates and the non-reply to an email sent on the 18th September 2018.

Complaint

The Complainant was aggrieved because of the HA's delay in including the Children in the tenancy of the Flat and for the lack of information from the HA when he requested updates. He was further aggrieved because the HA failed to reply to an email sent to them on the 18th September 2018.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant (British national) explained that he and his Wife (Spanish national) were married in October 2016 and were allocated the Flat (a Government rented property) on the 8th May 2018. The Complainant was the tenancy holder of the Flat whilst his Wife and a child they had in common were authorised by the HA to reside in the tenancy. The Wife had two children from a previous relationship and on being allocated the Flat, wanted the Children to reside with them as well as attend school in Gibraltar. According to the Complainant, until that time, the Children had been living with their father in Spain and attending school there whilst the Complainant, his Wife and the child they had in common, resided with the Complainant's family in an overcrowded flat in Gibraltar which could not accommodate the Children.

The Complainant approached the HA with respect to the inclusion in the tenancy of the Flat. In order to process the request, the HA required, amongst other pertinent documentation, that the Wife submit proof that she had care and control of the Children [Ombudsman Note: The Wife's divorce proceedings had taken place in Spain and the HA required that the documents be translated from Spanish to English]. The Complainant submitted the documents in mid-August 2018 and stated he was told by one of the counter clerks that the inclusion would take a week; by November 2018 there had been no developments.

The Complainant stated that throughout that time he had frequently visited the HA's public counter to request updates but had been told on each occasion that he had to wait for a decision from management. The Complainant wanted to resolve that issue because without authority to reside in the Flat, the Children were unable to obtain Civilian Registration Cards ("CRCs") required to be submitted at the time of application for enrolment into a local school. Without that documentation, the Complainant stated that the Children had to cross the border into Spain on a daily basis to attend school there.

In the interim, on the 18th September 2018, the Complainant's Human Resources Manager ("HR Manager"), in an attempt to assist the Complainant, emailed the HA requesting a meeting with the Housing Manager on his behalf, pointing out that the Complainant was very frustrated because his attendances at the public counter had proven to be pointless.

There was no response to the above email and no resolution with respect to the Children's inclusion in the tenancy and in November 2018, the Complainant brought his complaints to the Ombudsman.

Investigation

The Ombudsman presented the above complaints to the HA and simultaneously submitted enrolment forms for the Children which were accepted by the Department of Education on the condition that they could not be processed until the CRCs were presented.

The Ombudsman made enquiries with the Civil Status & Registration Office ("CSRO") with respect to the Children's CRCs. CSRO advised that a new policy had been introduced whereby CRCs/Identity Cards ("ID") for person/s applying from a Government rented property required confirmation from the HA that those person/s were authorised to reside in the property. CSRO further advised that the Complainant and his wife would have to update their address details (to reflect their new address) in their ID and CRC respectively. CSRO would await confirmation from the HA of the inclusion and once that was obtained would process the application for the Children's CRCs. Notwithstanding, CSRO noted that the wife, an authorised tenant in the Flat, had full custody and care of the Children and committed to liaise with the HA to resolve the matter.

In December 2018, CSRO obtained the confirmation from the HA and were able to begin the processing of the CRCs. CSRO issued receipts which were accepted by the Education Department as proof of upcoming CRCs (this would be separately confirmed by CSRO to Education Department) for the purpose of the school enrolment process. The Children were accepted into the local education system as from the new term commencing in January 2019.

On the 18th December 2018, the HA provided their response to the Ombudsman's inquiries. They advised that on the 23rd August 2018 the Complainant had filed a request to include the Children in the tenancy. The HA were at that time conducting a review of their inclusion policy which led to the delay in processing the application. According to the HA, the Complainant would have been informed, as were others, that his application was being considered and the outcome would be communicated to him as soon as possible.

The HA provided the Ombudsman with a copy of the letter they had sent to the Complainant on the 14th December 2018. The letter stated that after careful consideration, the request for inclusion of the Children had been denied. The reason given was that due to overcrowding (the Flat was a two bedroom property) no other persons could be included in the tenancy. However, the HA had agreed that the Children could use the address for application purposes only; i.e. they would not attain any rights over the Flat and if the Complainant applied for larger accommodation, the aforementioned might be accepted for application purposes but no overcrowding points would be awarded.

Regarding the non-reply to the 18th September 2018 email, the HA advised that they had searched through the pertinent mail box and found that the email was received from a third party (Complainant's HR Manager) and was inadvertently not replied to. The HA agreed that a reply should have been issued but highlighted that there had been no follow up email chasing a reply which would have prompted them to look into the matter and respond immediately.

Conclusions

(i) Delay in including the Children in the tenancy of the Flat – Not Sustained

The Ombudsman did not sustain this complaint. At the time when the Complainant submitted the documentation required by the HA to consider the Children's inclusion in the tenancy (23rd August 2018) the HA were reviewing their inclusions policy, a complex exercise which required considerable attention and time.

Notwithstanding, the Ombudsman understood the Complainant's frustration regarding his allegation of having been verbally informed by the HA's counter clerk that the inclusion would take one week, especially when the Complainant's urgency in resolving the inclusion issue was so that the Children could be schooled locally.

(ii) Lack of information from the HA as to the reasons for the delay when the Complainant requested updates - Sustained

The Ombudsman sustained this complaint.

Upon receipt of the application for the inclusion of the Children, the HA should have informed the Complainant in writing that his request could not be considered until such time as the inclusions policy had been reviewed and concluded. This would have gone some way in reassuring the Complainant that his request was not being ignored by the HA and that there was a valid reason for the time lapse in reverting with a decision.

The lack of communication and appropriate information on the part of the HA has resulted in a complaint being raised which could have been averted.

(iii) Non-reply to email sent on the 18th September 2018 - Sustained

The Ombudsman sustained this complaint as there was clearly no reply from the HA to the email.

Separate to the above complaints, the Ombudsman identified that the substantive issue in this case was the Complainant's request for the Children to be included in the tenancy which was ultimately refused by the HA albeit granting them use of the address for administrative purposes. The reason for the refusal was stated as being "overcrowding". The Ombudsman's view to this response was one of incredulity. It was incomprehensible that the HA had cited this reason for the refusal, considering that the Children's mother was an authorised tenant in the Flat and had care and control of the Children. The fact that the Children did not reside in Gibraltar at the time when the Complainant applied for Government housing explains why they were not included in the Complainant's original housing application. It was only after allocation of the Flat that it was possible for the Children to reside with their mother, albeit in overcrowded conditions, and the authorisation sought from the HA. Furthermore, the fact that the HA are not recognising the Children as being authorised to reside in the Flat will delay the allocation of a larger flat. The Ombudsman's view was that the HA should review their decision.

Classification

Complaint (i)	Not Sustained
Complaint (ii)	Sustained
Complaint (iii)	Sustained

Recommendations

The Ombudsman recommends that the HA review the decision taken in this case not to accept the inclusion/authorisation of the Children in the tenancy of the Flat.

(Report extracted from Case No 1187)

HOUSING AUTHORITY

Case 14

Complaint against the Housing Authority ("HA") over alleged lack of support received from the HD in respect of impending homelessness

Complaint

The Complainant was aggrieved because of the alleged lack of support that she had received from the HA.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant contacted the Ombudsman's Office in November 2018. She was concerned about an impending eviction from her private rental and the alleged lack of support that she was receiving from the HA. Her complaint was two-fold:

I. She was aggrieved by how the HA were handling her impending homelessness during a time of high stress and anxiety for her family. She questioned why the HA were insisting that they should get an eviction order from the court even though they had already been served with a 'notice to quit' by their landlord. An eviction order would place them in financial difficulty. They questioned why they could not be categorised by HA as a social case, as this that would give them some peace of mind that action was being taken by the HA to help them through a difficult time.

II. The Complainant did not understand why her family had not been awarded any social or discretionary points to help advance their housing application. This should have been considered by HA when it had been decided not to recognise them as a social case. She had requested the award of these points as she felt that her current dire situation should be reflected in some way on her housing application.

The Complainant had spent six years on the housing waiting list and was now 50th on this list. If the Housing Allocation Committee ('the Committee') awarded points, in recognition of their impending homelessness, this would mean that her application would be enhanced and her family would feel less anxious as they would be closer to getting an allocation.

The Complainant and her partner have four children and had been on the Government Housing Waiting List for some six years.

The Premises which the Complainant had been residing in for those six years was let to them under annually renewable contracts. The latest contract was effective from 15th February 2016, for a fixed 12-month 'holiday letting' period, which expired on 25th February 2017. At the end of that period, the rental contract was not renewed. After numerous emails from the landlord asking the family to vacate the Premises, a final 'Notice to Quit' was served on them on 7th September 2017.

When their rental contract was not renewed, the Complainant wrote to the HA explaining their situation and asked if they could be considered as a social case in light of their impending homelessness. [The HA have a number of categories under which an applicant can be allocated a government flat. These are as follows:

i) the general waiting list for all applications, this includes further lists according to the number of room entitlement afforded to the applicant;

ii) the 'Social List' for applicants considered to be in need of urgent housing due to some category of homelessness; and

iii) the 'Medical list' for those applicants who need urgent government housing due to a medical consideration; both the Social and Medical list are further divided into a series of A+, A, B and C categories].

In their letter, the Complainant provided the HA with proof that they had received a number of threatening letters from their landlord asking them to vacate their property, as well as the 'Notice to Quit'. They explained to the HA that they were concerned as they could not find another rental to move into with their four children as well as all their possessions and household furniture.

Their case was considered by the Committee who decided that no assistance would be offered other than to confirm that they should remain on the general housing waiting list and await an allocation. No social points were awarded by the Committee.

A year passed and the Complainant continued to receive threatening letters from their landlord. No repairs were made to their property and the Complainant had to spend money to try and address water ingress and dampness problems. The Complainant continued to write to the HA updating them on their situation and asking for assistance.

On 10th October 2018 the family were served with a 'Notice for Possession of the Premises', by the Supreme Court. The Complainant made this document available to the HA and asked for the Committee to reconsider their case. On 12th November 2018 they received an email notification from HA stating that:

> '*The Housing Allocation Committee (had) reviewed (their) case and they had agreed that the Eviction Notice (would) have to be provided. (Their) case (would) be reviewed again by them once the Eviction Notice (was) received'*.

No sensitivity to the situation at hand was expressed and no information was communicated to the family as to how their situation would be managed by the HA. No social points were awarded to the family to enhance their application.

This situation caused the Complainant and her partner a great deal of anxiety and stress. They had been suffering with this uncertainty for over a year, not knowing what was going to happen to them and their four children from month to month. They also explained that the threatening correspondence from their landlord was being served to them at their workplace and they were concerned that as a result, they would lose their jobs.

This stress was further compounded by the fact that the HA were insisting that they needed to get an eviction order from the Court before considering their case. The letter from the HA gave no indication on how their impending homelessness would be managed, In terms of entitlement to housing or indeed timescales that would need to be considered once the eviction notice would have been served. The fact that they would have to concede to their landlord taking them to court also added financial stress to their already precarious situation. The family had been warned by lawyers that legal costs were estimated to come to £30,000.

On 9th November 2018 the Complainant wrote to the HA. She requested that, in light of the fact that they were unable to assist them any further until such time as a 'Final Eviction Notice' from the courts was issued, if they would consider awarding them social or discretionary points in order to enhance their position on the general housing list. They pointed out that they had already waited six years on the waiting list and were positioned 50th on that list and that any points would help them feel less anxious with their precarious housing situation.

On 26th November 2018 the Complainant was served with an Eviction Order by the Supreme Court. The Order stipulated that the family vacate the premises by 1st February 2019.

On 5th December 2018 the Complainant provided the HA with a copy of the Eviction Order and asked that it be added to her file so that the Committee could consider this new situation at their next meeting. In her letter she reflected on the urgency of her situation and hoped that, having provided the HA with the Eviction Order, it would mean that they would get some help. In an effort to expedite the matter they also asked for an appointment with the Minister for Housing.

On 7th December 2018 the Complainant's letter and Eviction Order was acknowledged by the HA and she was informed in writing that the information would be passed on to the Committee for consideration at their meeting on the 11th December 2018.

On 14th December 2018 the Complainant received a letter from the Housing Department stating that their case had been:

> '*Thoroughly reviewed(but)…the request presented (did) not warrant the awarding of social points nor discretionary points and (they had) agreed that (her) application should follow the standard application procedure.'*

The letter concluded by stating *'your application will continue on the Waiting List as standard procedure and you must update your file with any changes to your present accommodation'.* No mention was made of the Eviction Notice.

The family received the letter over the Christmas period at a time when the HA was closed to the public due to the festive holidays and as such they spent Christmas concerned and anxious about their impending homelessness.

On 7th January 2019, the Complainant wrote to the HA explaining how disappointed she was and that she felt that her case had been '*poorly reviewed and handled'*. The fact that the Eviction Order had not been mentioned in their reply to her over a period of office closure was described by the Complainant as '*a joke'* and that they had been treated '*flippantly by the people who should be helping her*'. She appealed for assistance and stated that she would consider any government flat even if it needed work which she would commit to doing at her own cost. She ended the letter by stating that she would refer her case to the Ombudsman for consideration.

On 14th January 2019 the Complainant wrote a second email and highlighted that '*despite the urgency of her email from a week ago, she had not as yet received any reply or indeed acknowledgement from the HA*. She, once again, expressed her concern that her family had seventeen days to find alternative accommodation following the Evictor Order.

On 15th January 2019 the Complainant received a reply stating that, although the HA sympathised with her current situation, her case had already been presented to the Committee and no social or discretionary points had been recommended. . HA confirmed that her email would be presented to the Committee as an appeal for her case to be reconsidered. The Complainant was subsequently advised that the next meeting of the Committee would be held on the 28th January 2019. This meant that the Complainant would have to wait three days before her impending Eviction to see how the HA would be able to help her.

On 17th January 2019, the Complainant wrote another email expressing her frustration and annoyance with the fact that the HA had '*completely missed the point'* in not recognising that when they met on 11th December they should have considered her Eviction Order. The fact that they had not mentioned this in their letter to the Complainant meant that she was not appealing a decision but that they had neglected to consider this aspect of her case. She asked how the HA could claim to have reviewed her case '*thoroughly'* when this was clearly not the case. Once again, she complained that her case had been '*poorly handled'.* She expressed her uneasiness with the fact that the Committee would meet three days before the eviction date and asked, in consideration of this, if her case could be reviewed before the end of January.

Investigation

On 18th January 2019 the Ombudsman wrote to the HA outlining the Complainant's grievance and requesting their comments.

On 21st January 2019 the PSO received a reply from HA stating as follows:

1. The HA had been aware of the Complainant's case since she first brought this matter to their attention, and have been referring this to Committee whilst at the same time making preparations to provide her and her family with suitable accommodation, should this have been required.

2. On this occasion (11th December) the Committee did not deem it appropriate to award any discretionary points nor categorise her application as a social application as they were aware that the HA were actively seeking to make an offer of allocation the moment a suitable flat became available.

3. The HA had met with the Complainant and an offer of accommodation has been agreed. (The offer of accommodation was made on 21st January 2019 two days after the Ombudsman wrote to the HA and the same date as the letter).

On 23rd January 2019 the Housing Manager and another HA representative met with the Ombudsman and discussed this case and HA acknowledged that they had not managed this case appropriately.

The Housing Manager considered that the HA could have managed the family's situation with more empathy and sensitivity especially when replying to the Complainant and advising her of the Committee's decisions.

The Housing Manager confirmed that that the HA had, in fact, been monitoring the Complainant's situation. They had flagged the case and a flat had been earmarked for the family in consideration of their pending eviction. However, no information in this respect was given to the family. The Housing Manager agreed that the HA should have also managed this aspect better so as to help the Complainant cope with the situation.

As a result of this case, the Housing Manager assured the Ombudsman that:

1. Front-line staff had now been told to make management aware of cases of this nature so that expectations can be managed with empathy; and

2. HD would ask the Committee to also consider making use of the points system so as to help manage an applicant's concern and thereby enhance the prospects of their application where appropriate. It was agreed that this would also help an applicant who was going through a period of stress and anxiety.

It was confirmed by the Housing Manager that on 22nd January 2019 the family had been made an offer for a government flat, which was appropriate for their needs and that the family had accepted it.

Conclusions

Under the Housing Allocation Scheme (Revised 1994), the terms of reference for the Housing Allocation Committee are, inter alia, as follows:

> *(i) to recommend and advise the Housing Allocation Committee on the allocation of pre-war accommodation on social grounds;*

2. HOUSING ADVISORY COMMITTEE

(a) The terms of reference for the Housing Advisory Committee are -

> *(ii) to examine social reports prepared by the Department of Social Service and to -*
>
> *(aa) award social points, to a maximum of 200 points per application; or*
>
> *(bb) recommend the placing of an applicant on a Social Category List;*
>
> *(iii) to advise on any other special social matter referred to it by the Housing Allocation Committee.*

14. DISCRETIONARY PROVISIONS

In the special circumstances of any case, the Housing Allocation Committee, may in its discretion -

(a) Award discretionary points to an applicant up to a maximum of 1000 points

(b) in very exceptional circumstances, recommend that the applicant shall be allocated accommodation, after the Housing Advisory Committee and/or the Medical Board has been consulted, of the reason for the exceptional circumstances is attributable to either social and/or medical grounds;

The Committee initially considered that they would not categorise the applicant on the Social List, but would reconsider this decision once the Eviction Notice was received.

When the applicant later asked to be awarded social points this was also denied, even though the Committee is empowered to either categorise OR award points. The Committee did not award discretionary points to the applicant either.

As the Committee is the decision-making body, the Ombudsman cannot overrule a Committee's decision or comment upon it, but the HA is the service provider who communicates the Committee's decision to their service user and under the Principles of Good Administration, the HA should have communicated their decision with some sensitivity and bearing in mind their individual needs and concerns.

The HD were aware of the precarious situation that the Complainant and her family of four children were in and were actively managing the situation behind closed doors. They were '*making preparations to provide her and her family with suitable accommodation, should this have been required.'* They also made the Committee aware of this so that their decisions took this into account; '*the Committee did not deem it appropriate to award any discretionary points nor categorise her application as a social application as they were aware that the HA were actively seeking to make an offer of allocation the moment a suitable flat became available.'* However, this information was not communicated in any form to the Complainant. The Complainant was simply told that her requests had not been accepted and that she needed to continue on the general waiting list. This caused her and the family frustration and anxiety as she understood this to mean that no help was being offered to her. Public bodies should provide information and advice that is clear, accurate, complete, relevant and timely. No information was communicated to the Complainant in respect of the preparations that the HA were carrying out in order to ensure that the family did not become homeless once they were evicted from their rental. In their last letter to the Complainant dated 15th January 2019, they continued to inform her that '*although they sympathised, an appeal would be presented at the next Committee meeting on 28th January 2019'* The fact that the family were being asked to wait two days before the eviction date to get information caused them unnecessary stress and anxiety.

The HA also neglected to inform the complaint, when they wrote to her on 14th December 2018, that the Committee had indeed considered the Eviction Notice This further compounded an already stressful situation.

Complaint (i): The Complainant felt aggrieved with how her impending homelessness was being handled by the HA during a time of high stress and anxiety for the whole family

Sustained the HA *'poorly reviewed and handled'* the case.*'*

Complaint (ii): The Complainant further complained that she did not understand why they had not been awarded any discretionary or social points to help advance their housing application, especially when it had been decided not to recognise them as a social case

Sustained, as information should have been communicated with respect to the reasons for the decision.

Recommendations

The HA often use a standard letter when replying to service users whose cases have been considered by the Committee. HA, and indeed all Public Service Providers should reply to service users (adjusting any model templates) so as to take into account an individual's particular information and needs so that the communication is effective and personal to the reader. This would ensure that people are properly informed that they are being treated fairly, sensitively and with respect.

Public bodies should be open and truthful about their decisions and actions. In this respect, when communicating with a service user, public bodies should give reasons for their decisions so as to manage expectations.

(Report extracted from Case No 1188)

HOUSING AUTHORITY

Case 15

Complaint against the Housing Authority in respect to the Complainant being medically categorised and placed on the Medical B Housing Waiting List ("Medical B") and one year later still not having been allocated a Government rented flat ("Flat")

Complaint

The Complainant was aggrieved because after a year in the Medical B List, she had not been allocated a Flat.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant was 69 years old at the time of lodging her complaint with the Ombudsman in November 2019. She explained that approximately six years earlier she had applied for Government rented accommodation as a result of which, her application was placed in the General Housing Waiting List ("List").

The Complainant stated that she suffered from significant bilateral knee osteoarthritis and chronic venous insufficiency. She explained that to get to the privately rented flat she currently resided in she had to climb up three hundred steps plus a further four flights of stairs and that due to her illness, her living conditions were rendering her virtually housebound.

Due to her circumstances, in May 2018 the Complainant submitted a letter from her General Practitioner ("GP") to the Housing Authority explaining her medical condition and requesting that her case be considered for medical categorisation. Further to a number of meetings of the Housing Allocation Committee ("HAC") where the Complainant's case was considered, the Complainant's application was categorised as 'Medical B' in September 2018.

The Complainant provided the Ombudsman with a copy of HAC's letter informing her of the medical categorisation which advised that the medical category list had four classifications; A+, A, B and C and that applicants whose cases were deemed very urgent by HAC were classified as A+. HAC endeavoured to attend immediately to cases categorised in the order classified above but explained that priority was always dependent on the availability of accommodation.

In May 2019, as her condition had further deteriorated, the Complainant submitted to HAC a further letter from her GP setting out her situation and supporting her application for suitable accommodation. HAC considered the letter but made no further medical recommendation on her case.

In November 2019, the Complainant lodged her complaint with the Ombudsman.

Investigation

The Ombudsman was aware from past investigations, that housing applications that have been medically categorised and included in a medical list, continue to run in parallel on the List. The applicant would therefore be allocated a flat once the application reached the top of either of the lists. By way of further information, the List is points based whereas the medical lists operate in chronological order of entry into the list.

Noting the points-based system of the List, the Ombudsman reviewed the 2019 annual anniversary letter sent by the Housing Authority to the Complainant in 2019, and found that no medical points had been awarded to her application. In contrast, 'Waiting Time' points had been awarded to reflect the Complainant's six year period in the List [Ombudsman Note: In 2005 the Housing Allocation Scheme ("HAS") was amended in order that applications on the List be awarded "Waiting Time" points. At the end of the two year qualifying period (in recent years that was reduced to one year) applications would be awarded 100 points, and at the end of each year thereafter, the multiple by 100 of the number of years the applicant had been on the List].

When the Ombudsman presented the complaint to the Housing Authority, he referred them to the fact that the Complainant's application (on the List), had not been awarded medical points to reflect her medical categorisation.

In respect to the above issue, the Housing Authority referred the Ombudsman to Clause 3 of the HAS extract as follows:

(a) The terms of the Medical Advisory Board are –

(i) to examine medical evidence presented by applicants and to-

(aa) award medical points to a maximum of 200 points per application; or

(bb) recommend the placing of the applicant on a Medical Category List.

The Housing Authority advised that the awarding of medical points was one of the options available to HAC but that they had chosen to recommend that her application be placed on the Medical "B" category list as per 3 (a) (bb) of the HAS. In that respect, the Housing Authority stated that her medical condition had indeed been reflected in her application. As to the application of criteria on the part of HAC on whether to award points or recommend that an applicant be placed on a medical list, the Housing Authority responded that HAC awarded points when a medical category was not merited but it was acknowledged that the applicant's ailment was such that it merited additional points to assist their application on the List.

Regarding the Ombudsman's enquiry on whether the Medical A+ and Medical A Lists would have to be exhausted before an allocation was made from the Medical B, the Housing Authority confirmed that was indeed the case.

The Housing Authority added that HAC had last considered the Complainant's case in May 2019 when she submitted the letter from her GP and that the decision taken was that no further medical recommendation would be made at that time. Notwithstanding, the Housing Authority advised that the Complainant could resubmit an updated medical letter if her medical needs or circumstances changed and that would be considered by HAC. If HAC decided on further medical recommendation she would then be placed in the Medical A+ or Medical A Lists.

The Ombudsman enquired about allocations made to applicants on the Medical B. The Housing Authority advised that three applicants who had Medical B categorisation had been allocated a property via the List. As at June 2020, the Complainant was 9th on the Medical B and 288th on the List for a 1RKB.

Based on the above, the Ombudsman requested information from the Housing Authority on whether the Medical B categorisation of the above applicants gave them precedence in the List due to having been awarded medical points. The Housing Authority responded that no points were awarded to applications running on the List that have medical categorisations.

The Ombudsman met with the Housing Authority in October 2020 in relation to this and other cases. At that meeting, the Housing Authority provided the Ombudsman with the details of their newly launched in-house complaints process which would be led by their Enforcement & Compliance Officer. Service users could now send their complaints to either the Housing Authority's offices in New Harbours or via email to the following address: housing@gibraltar.gov.gi.

[Ombudsman Note: The Ombudsman's Office is an avenue of last resort and as such, a service user would be required to complain to the entity concerned before lodging a complaint with our office. This advice has also applied to service users of the Housing Authority but no doubt that a structured in-house complaints system denoting timescale for responses, etc. will be beneficial].

At that meeting, the Ombudsman proposed that the Housing Authority consider allocating medical points to applications that had been medically categorised, in order that the categorisation would be taken into account in the application running concurrently on the points based List, similar to the 'Waiting Time' points awarded.

The Housing Authority remained silent on the above and advised that Government was currently revising the HAS and Housing Act 2007.

Conclusions

The Complainant became an applicant on the List in 2013 and was subsequently medically categorised by HAC in 2018 and placed on the Medical B List. The letter sent to the Complainant by the Housing Authority informing her of the medical categorisation explained that the medical category list had four classifications. Notwithstanding, upon receipt of said letter, there is no doubt that the Complainant expected that she would soon be allocated a property because of her circumstances which had resulted in her application being included in what she believed was a priority list.

The Ombudsman's investigation found that the Medical A+ and Medical A lists would have to be exhausted before any allocations could be made from the Medical B & C lists. Furthermore, three applicants on the Medical B were allocated a flat via the List, not the former. Based on the aforementioned, unless the Complainant's medical condition deteriorated and HAC made a further medical recommendation for inclusion in either the Medical A+ or A List, the Complainant would not be allocated a Flat via the Medical B and would therefore have to wait her turn on the List.

The Ombudsman's investigation has found that Medical B & C lists have proven not to be priority lists as the example of applicants on the Medical B having been allocated via the List has proved. The Ombudsman's view therefore is that at this moment in time, those two lists do not serve their purpose. Rather than create a false hope by placing applicants in those lists where no allocation would be forthcoming, the Housing Authority should consider awarding medical points to reflect the medical circumstances of an application and in that manner obtain some element of priority over other applications as is the case with 'Waiting Time' points.

Notwithstanding the above, the Ombudsman will not make a recommendation at this time pending the outcome of Government's review of HAS and the Housing Act 2007.

The Ombudsman does not sustain this complaint as there has not been maladministration on the part of the Housing Authority who have followed the present process in place.

Classification Not Sustained

(Report extracted from Case No 1219)

HOUSING AUTHORITY

Case 16

Complaint against the Ministry for Housing ("Housing") in relation to their non- acceptance of statutory declarations and as a result, the effect on social housing entitlement by applicants

Complaint

The Complainant complained at Housing's non- acceptance of a statutory declaration ("the Declaration") setting out the shared custody, care and overnight arrangements in relation to the Complainant's young son ("the Son"), further to the Complainants matrimonial separation.

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant explained how he had amicably separated from his ex- partner (the mother of his child) and how they had mutually agreed joint care and custody of the Son. As a result the Complainant made an application for an upgrade of his housing entitlement from a one to a two bedroom flat in order to accommodate the Son.

Further to an exchange of letters, Housing requested an Affidavit setting out the exact arrangements in order to properly assess the Complainant's bedroom entitlement.

The Complainant subsequently provided the Declaration.

He failed to understand how consequently, some months later, he received a letter from Housing stating that "*the documents which you have provided have been reviewed and I must advise you that the Affidavits we hold on record do not constitute the shared residency of your son. In order to consider your request to include your son, the Housing Department requires the exact times and days that your son spends with both parents". This must be declared by way of an Affidavit and must be signed by both parents*."

The Complainant did not understand and could not reconcile the decision taken by Housing in relation to the Declaration and its content.

According to the Complainant, the Declaration already stated that the overnight care was equally shared as follows: "*I confirm that our son [name of Son], stays overnight at my [property] [address provided] on alternate weeks*."

A separate declaration attesting those same facts was also signed and presented to Housing by the Complainants ex-partner.

The Complainant wrote to Housing expressing his dissatisfaction at their request, explaining that "…*there is no need to state the exact times and days as I have a good relationship with my partner and our agreement has an element of flexibility… we have equal times as stated by the [Declarations] which are signed by my sons mother and myself."*

The Complainant informed the Ombudsman that he had verbally explained the position to Housing in a telephone interview conducted on the 15th September 2020 as well as previously, by way of letter, where he had also confirmed that the agreement was "*on alternate weeks*" from Sunday to Sunday as confirmed in the Declaration and, that as a result of that loose arrangement, there had been no mention of "*exact days and times"* between himself and his ex- partner.

In addition, The Complainant complained that given that the Declaration had been drawn up by his lawyer and witnessed by a Commissioner for Oaths upon signature, he did not understand why Housing would not accept it. Why should he be obliged to spend extra money on legal fees, when the contents of any affidavit would in effect record the exact same facts as the Declaration?

Investigation

The Ombudsman reviewed the existing correspondence between the Complainant and Housing. This included the Complainants original letter requesting that his application entitlement be increased from a 1 bedroom to a 2 bed in order to cater for the Son's overnight stays as a result of the shared custody, additional letters, the Declaration and the letter in reply from Housing requesting "the *exact times and days that [the] Son spen[t] with both his parents."*

The Office of the Ombudsman did not consider this an unreasonable request by Housing for the following reason:

Subject to any court order or agreement between the parties, parental rights are equal under Gibraltar law and a parent, in order to fulfil his/her parental responsibilities, has the right under section 10(1) Children Act 2009 to *inter alia "… have the child living with him or her and to regulate the child's residence."*

We are aware from previous dealings of how in the past, Housing used to accept standard statutory declarations for similar type applications. Unfortunately, as a result of erroneous or misleading information having been provided by some applicants in order to enter specific lists, coupled with that culture of entitlement which appears rife within a reduced section of our community, Housing felt obliged (rightfully in our view) to impose more evidence based criteria, in the form of Affidavits.

Affidavits, in essence are sworn declarations of written facts which by their very nature, make then legally admissible in court. It is in the Ombudsman's view, an appropriate method for Housing to seek confirmation of facts for housing entitlements of this nature.

It would also be helpful in such instances, if Housing were to publish booklets or guidelines in order to inform the general public as to their rights (and responsibilities) in the sensitive area that is housing entitlement and eligibility in cases of shared care and custody of children.

We have found examples from local authorities in England, where as a rule of thumb, the authorities also require "*exact dates and times"* of a child's residency. Only where it is firmly established that both parents have equal responsibility on a 50/50% basis, is the applicant considered to have met the eligibility criteria for an extra/extra bedrooms to be allocated for his or her child or children.
When the residency is shared but not equal, one parent would be considered the primary resident thereby rendering the remaining parent ineligible for an "*upgraded"* housing application.

It must certainly be for the reason of said eligibility, that Housing requests sworn Affidavits. In the absence of a court order, it is the only source of information and fact on which they can reasonably rely.

Mention must also be made of the notable, often debated and sometimes controversial legal precedent established in 2009, in the English House of Lords case of *Holmes- Moorhouse v Richmond upon Thames LBC HL [4 Feb 2009].*

In summary and as a point of special interest, that case which related to a homeless parent, established that Local Authorities should decide whether a homeless applicant can have priority need (based upon whether it is reasonable for a child to be expected to live with him).

It was held that The Local Authority ("Authority") (the equivalent of Housing) should decide, if children who already had a home with their mother should also be able to reside with the father. In answering that question, the Authority must consider any order made by the family court, along with the material they would consider in their decision making process. The Authority could decide that it was not reasonable to expect children (who were not actually homeless) to be able to live with both mother and father in separate accommodation. In determining priority need the Authority could consider the lack of housing resources but could not be used as an argument for not housing a homeless parent…

Conclusions

In this specific case brought to the Ombudsman as a complaint for investigation, it may very well be (and probably is in fact) that the Son was living with both the Complainant and his mother, in equal measure. We have seen no evidence to question of the veracity of that information.

It must be said that the Ombudsman understands the frustration which may have been suffered by this young Complainant and his genuine desire to be able to accommodate his Son within a future home, particularly when he enjoyed such a good relationship with his ex-partner, at least in relation to shared custody and care of the Son.

However, it was not unreasonable or disproportionate (in order to properly establish facts and satisfy its own criteria as explained above), for Housing to have requested that the content of the Declaration be presented in a legally sworn Affidavit.

It is important to highlight (as a general comment and not in specific reference to this complaint or Complainant) that despite the best interests and welfare of children being undoubtedly paramount at all times, it is not the responsibility of the public administration/tax payer to "automatically pick up the tab" and to accommodate children from separated parents as of right, when those children may be able to live comfortably with one parent or the other, particularly, as set out in the *Holmes-Moorhouse* case.

By the very size and nature of our community, Housing does often struggle with a shortage of suitable accommodation which must be distributed amongst the applicants within the different Housing Lists, according to need.

In the Ombudsman's mind, for the Complainant to have to "*spend [a not significant amount of] extra money on legal fees"* for the preparation of an Affidavit to present to Housing, if he is in fact entitled to be placed on a 2RKB list, is a small price to pay in his attempt to ensure that his Son is suitably housed and catered for in future.

Classification

Complainant in relation to Housing's non-acceptance of statutory declarations and as a result, the effect on social housing entitlement by applicants- **Not Sustained.**

(Report extracted from Case No 1236)

INCOME TAX OFFICE

Case 17

Complaint against the Income Tax Office ("ITO") after the Complainant having received penalty notices from the ITO and Central Arrears Unit ("CAU") for non-submission of the tax return for 2017/2018 despite having submitted this; and non-reply to two letters he sent to the ITO.

Complaint

The Complainant was aggrieved because despite having submitted the tax return for 2017/2018 before the deadline date of the 30th November 2018, he had received penalty notices from the ITO and the CAU for non-submission. Furthermore, two letters he had sent to the ITO in an attempt to resolve the issue were not replied to.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant, who was in his early sixties, explained that towards the end of November 2016 he was made redundant and decided that he would retire. He was in receipt of rental income from a property he owned and further to a meeting with an ITO PAYE ("Pay As You Earn") manager ("Manager") on the 27th September 2018 it was agreed that he should complete and file tax returns for 2016/2017 and 2017/2018 but under 'Self-Employed' status as from November 2016, the date on which he ceased employment. [Ombudsman Note: The matter at hand revolves only around the non-submission of the tax return for the year 2017/2018 (full tax year as self-employed) the deadline for submission having been the 30th November 2018].

According to the Complainant, on the 5th October 2018 he submitted the tax returns. He delivered those by hand to the ITO and posted them in the ITO's postal box accompanied by supporting documentation and a cover letter addressed to the Manager in which he invited her to contact him if she required further information.

Two months later, the Complainant received a £50- penalty notice from the ITO dated 4th December 2018 because he had failed to submit the tax return for 2018 by the deadline date of the 30th November 2018. The ITO informed him that further penalties would be incurred if he failed to comply in the next three months.

The Complainant wrote to the ITO on the 10th December 2018 explaining that he had submitted the tax return and provided the details of the submission as set out above. He mentioned that he had addressed the envelope containing the documents for the attention of the Manager, and that further to the submission he had emailed the Manager and not received any indication from her that the tax return had not been received. The Complainant therefore requested that the ITO check their records as well as confer directly with the Manager as he had in fact submitted the tax return and offered to provide a copy of this if required. He also requested that the penalty notice be cancelled as it had been issued in error. He hand delivered the letter to the ITO's 'Self Employed Section' and requested that it be date stamped by them as proof of delivery.

On the 7th March 2019 the Complainant received an email from the CAU which informed him that he now owed £350.00 in penalties due to the late submission of the 2017/18 return and requested that settlement be made by the 22nd March 2019. The Complainant responded and stated that there had been a misunderstanding and again explained that the tax return had been submitted in time and provided the details of the submission. He also referred to his December 2018 letter. The CAU reverted and advised that they had forwarded his email to the ITO's Self Employed Section. On the 12th March 2019, the Complainant contacted CAU and informed them that he had lodged a formal complaint with the ITO [Ombudsman Note: The letter of complaint was addressed to the Commissioner of ITO ("Commissioner") and was hand delivered to the ITO's Self Employed Section and again date stamped as proof of delivery].

The Complainant was further aggrieved because he had applied for Gibraltarian Status, and one of the supporting documents required for that application was confirmation from the ITO that all tax payments were up to date. The Complainant was understandably concerned that this misunderstanding could have an impact on his application and requested the ITO to resolve this issue immediately. He requested redress as follows:

- Cancellation of the penalties;
- tax file to be amended accordingly;

- that the ITO provide him with the letter confirming that all tax payments were up to date.

The Complainant informed the Commissioner that if he did not receive any communication by the 2nd April 2019 he would lodge a complaint with the Ombudsman.

No reply was received and as per above, the Complainant brought his complaint to the Ombudsman.

Investigation

The Ombudsman presented the complaint to the Commissioner.

The response provided explained that the ITO had undertaken an internal investigation and found that the Complainant had met with one of the managers of the PAYE Section on the 27th September 2018.

The Complainant had ceased to be an employee under the PAYE system in November 2016 but had requested the meeting in order to regularise his outstanding affairs. The outstanding tax return for the year of assessment 2016/2017 and the current year 2017/2018 were submitted to the ITO on the 5th October 2018 addressed to the Manager. The Commissioner stated that individuals registered under the PAYE system and those registered as self-employed were administered by different sections within the ITO and at the time of the returns being submitted, only the Complainant's PAYE affairs were regularised.

The Commissioner accepted that the penalties imposed on the Complainant arose as a result of an administrative oversight within the ITO and he had therefore instructed that all the penalties be discharged with immediate effect. The CAU had been notified and been requested to cease pursuing the recovery of the penalties from the Complainant.

The Commissioner assured the Ombudsman that measures and safeguards were continually being implemented to prevent similar occurrences of administrative oversights. He asked the Ombudsman to extend his apologies to the Complainant for the delay in rectifying the matter.

The Ombudsman noted that the Commissioner had not provided any information with respect to the non-reply to the letters sent by the Complainant and he contacted the Commissioner on this issue. The response received from the ITO stated that the non-reply to the letters was due to a general misunderstanding between the distinct sections within the ITO; although self-employed the Complainant was still being administered under the PAYE system.

The Ombudsman requested detailed information on the following issues and the ITO's response has been set out under each question for ease of reference:

1. What happened with the documentation sent to the Manager on the 5th October 2018?

ITO Reply: The documentation was handed to the Manager at the PAYE Section.

2. What should have been the standard course of action taken upon receipt of those documents, considering that the Complainant ceased to be a taxpayer under PAYE in November 2016 and was registered as self-employed in February 2017?

ITO Reply: The documents together with the pertinent file should have been passed on to the Self-Employed Section for necessary action.

3. What is the system in place at the ITO to log receipt of tax returns?

ITO Reply: Returns are logged into the system by the relevant section.

4. What happened to the 10th December 2018 letter delivered by hand by the Complainant?

ITO Reply: The documentation was handed to the Manager at the PAYE Section.

5. What would have been the standard course of action taken by the ITO upon receipt of said letter?

ITO Reply: The letter together with the pertinent file should have been passed on to the Self-Employed Section for necessary action.

6. Why was the Complainant's letter not replied to?

ITO Reply: The taxpayer's change in circumstances, from PAYE to the Self-Employed Section, required an administrative transition. This occurred during an extremely busy time of the year with the filing of thousands of income tax declarations and during a period when the Manager was conducting back-to- back taxpayer interviews in order to meet a surge of demands, including Home Purchase Allowance claims. The high volume unfortunately resulted in the Complainant's administrative transition being overlooked.

7. What happened with the 12th March 2019 letter of complaint to the Commissioner?

ITO Reply: The documentation was handed to the Manager at the PAYE Section.

8. What would have been the standard course of action taken by the ITO upon receipt of said letter?

ITO Reply: The letter together with the pertinent file should have been passed on to the Self-Employed Section for necessary action.

9. Why was the Complainant's letter not replied to?

ITO Reply: The taxpayer's change in circumstances, from PAYE to the Self-Employed Section, required an administrative transition. This occurred during an extremely busy time of the year with the filing of thousands of income tax declarations and during a period when the Manager was conducting back-to- back taxpayer interviews in order to meet a surge of demands, including Home Purchase Allowance claims. The high volume unfortunately resulted in the Complainant's administrative transition being overlooked.

The ITO added that the Manager had contacted the Complainant in April 2019, apologised for the incident and updated his tax records accordingly. The Complainant provided the Ombudsman with a copy of the email he had received from the Manager on the 17th May 2019. In the email, the Manager apologised stating it had been her fault that he had been issued with penalties for the non-submission of the tax return. She explained that she had received his documents but never logged the tax return as received.

The Manager confirmed that the matter had now been resolved and penalties issued had been cancelled. As per the Complainant's request, the Manager had attached a letter in her email which stated that he had no outstanding liabilities.

Conclusions

The Complainant had met in September 2018 with one of the managers of the PAYE section to resolve outstanding tax affairs. From the Complainant's October 2018 cover letter to the Manager (at the time of submission of the tax returns) it can be noted that he found the meeting very useful and informative and that he was from then on aware that as from November 2016 although retired, he came under self-employed status for tax purposes.

It can also be established that of the two returns submitted by the Complainant, the one for the year 2016/2017 must have been processed (possibly due to the fact that the Complainant fell under PAYE for part of that year) as no penalty notice was issued for that tax return. Regarding the 2017/2018 tax return, the Manager did not log the tax return as having been received in October 2018 and that resulted in the penalty notice being issued. The Manager in her email to the Complainant in May 2019 (seven months after the Complainant's submission) apologised for this.

Regarding the non-reply to the Complainant's December 2018 letter, the ITO explained that this had been due to a general misunderstanding between the distinct sections within the department. The Ombudsman noted that on this occasion the letter was not addressed to any particular member of staff but to the ITO and was stamped by the Self Employed Section as having been received. The letter remained unanswered whilst the penalties increased.

In respect of the Complainant's March 2018 formal letter of complaint addressed to the Commissioner and again delivered by hand and duly stamped as having been received, the Ombudsman is unable to comprehend why this letter was passed on to the Manager instead of to the addressee. Had that been the case, receipt of that letter by the Commissioner would have possibly triggered an internal investigation at the ITO, as was the case as a result of the Ombudsman's investigation, and the matter would have been resolved without the Complainant having to lodge his complaint with the Ombudsman.

The Ombudsman therefore sustains this complaint.

The Ombudsman nevertheless welcomes the Commissioner's comments that measures and safeguards were continually being implemented to prevent similar occurrences of administrative oversights.

Classification Sustained

(Report extracted from Case No 1200)

INCOME TAX OFFICE

Case 18

Complaint against the Income Tax Office ("ITO") due to Complainant not understanding why he could no longer use the Gibraltar Tax Identification Number ("TIN") which he had been issued with when he settled in Gibraltar in 2007

Complaint

The Complainant was aggrieved because he could not understand why he could no longer use the TIN he had been issued with when he settled in Gibraltar in 2007.

Background *[Ombudsman Note: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the Complaint with the Ombudsman].*

The Complainant explained that he had lived in Gibraltar since his retirement in 2007. He stated that when he first arrived in Gibraltar he registered as a Category 2 individual ("CAT 2") and was given a TIN by the ITO.

[Explanatory Note: Gibraltar Government website definition of Category 2 Individual: A Qualifying (Category 2) Individual is an individual who for the year of assessment:

- has available to him for his exclusive use approved residential accommodation in Gibraltar for the whole of the year of assessment;
- is not resident in Gibraltar and has not been in the previous five years;
- has applied to the Finance Centre Director and has been issued with a certificate qualifying him as a Category 2 individual.

An individual who has been issued with a Category 2 Individual certificate shall be liable to income tax on the first £80,000 of assessable income only and the amount of tax due and payable in any year of assessment shall be not less than £22,000 (Accessed 25th November 2020)].

In 2008, the Complainant decided that it did not make sense to remain a CAT2 as his only income was bank interest from his savings which was not taxable in Gibraltar. He deregistered and was informed by the ITO that he would no longer need to submit an annual tax return.

The Complainant stated that he continued to use the Gibraltar TIN in connection with the legal requirements of international banks and institutions he dealt with. In July 2018, because he had attained pensionable age and was in receipt of a small state pension from the United Kingdom ("UK") and had received a payment from a personal flexible pension fund, he contacted the ITO to enquire whether due to being in receipt of the aforementioned income he would now have to submit a tax return in Gibraltar (the Complainant stated he had submitted a UK tax return annually, as pension payments are subject to deduction at source). The ITO's response confirmed that he had ceased to be registered as a tax payer in Gibraltar on the 31st October 2008, the time when he relinquished his CAT 2 certificate and informed him that under the Income Tax Act 2010 ("Act"), the state pension and personal pension payment were not chargeable to tax and as such, it was not necessary for him to submit a tax return to the ITO.

In September 2019, the Complainant once again contacted the ITO for information on whether there had been any change in legislation in Gibraltar which would affect his tax status vis-a-vis his income. In that communication he informed the ITO that he had continued to use the Gibraltar TIN in his dealings with financial institutions and other tax authorities but thought that in his present position that might not be accurate and asked how he should best deal with this as he could encounter difficulty going forward (in other jurisdictions) if he was not registered with the Gibraltar ITO. He enquired if he should submit a tax return in Gibraltar even if his income was not liable to tax, as he preferred to have official confirmation that he was tax resident in Gibraltar and had been for the past twelve years. The ITO's response reiterated the information they had provided to him the previous year and also informed him that he was not authorised to provide any entity with the TIN which had expired and was therefore not valid. The Complainant was aggrieved with the response provided by the ITO and on the 6th November 2019 wrote to the ITO and also to the Minister for Financial Services. In his email, he stated that not being able to use the TIN had placed him in a very difficult position as he would have to inform the financial institutions he dealt with that the TIN was invalid, provide explanations as to why that was the case and inform them that he was not tax registered in the place where he resided.

The Complainant stated that this would possibly give rise to unfounded suspicion, possible investigation and most likely, prevention of further dealings. As such, he asked for the matter to be looked into for a solution to be found. Regarding the email sent to the ITO, the Complainant asked that his correspondence be passed on to the Commissioner of Income Tax ("Commissioner"). By way of further information, the Complainant noted that in other jurisdictions, a TIN was for life and stated that he had a TIN in UK and one in Spain even though he did not habitually reside in those countries.

Not having received a response by the 9th December 2019, the Complainant lodged his complaint with the Ombudsman's Office.

Investigation

The Ombudsman presented the complaint to the Commissioner in January 2020 and a reply was received in early February 2020.

In his initial response, the Commissioner referred the Ombudsman to Section 28 of the Act:

"…every person other than a company who is liable to tax or has income assessable in accordance with this Act for a year of assessment shall make a full and complete return of his income for that year by 30th November immediately following the end of that year of assessment…"

The Commissioner stated with respect to the Complainant's income, that neither a UK state pension nor bank interest constituted a source of chargeable income in accordance with the Act. As such, despite the willingness to seek a solution on behalf of the Complainant, given that there was no nexus to domestic taxation, there was no requirement to file a tax return and no TIN could be issued.

The Ombudsman updated the Complainant on the above and offered a meeting in order to discuss the matter further but that had to be cancelled due to the Covid-19 pandemic. In early April 2020, the investigation was paused in order to protect the capacity of public services during the outbreak and lockdown period. The investigation was resumed in September 2020.

The Ombudsman once again wrote to the Commissioner and enquired if there was some way in which the Complainant could obtain a TIN in Gibraltar.

The Commissioner noted that his understanding of the matter was that the Complainant sought a TIN to establish his tax residency in Gibraltar. If that was the case, the Commissioner stated:

"..that residency in Gibraltar for tax purposes was based solely on presence and not on the chargeability of the income. This arises as a result of the territoriality principle that establishes taxation on the source (i.e accrual and derivation) of the income and although indicative is not a determinant for tax residency. The domestic rules operate on a day count basis which are similar in substance to equivalent elements of residency rules in most jurisdictions. Physical presence in Gibraltar for the determination of tax residency is couched in the term 'ordinarily resident' recognised in the Act and defined in Section 74:

""ordinarily resident" when applied to an individual means an individual who irrespective of whether such individual is domiciled in Gibraltar or otherwise who in any year of assessment – (a) is present in Gibraltar for a period of, or periods together amounting to, at least 183 days; or (b) is present in Gibraltar in any year of assessment which is one of three consecutive years in which the total of the days on which the individual is present in Gibraltar exceeds 300, and for the purposes of this definition, presence in Gibraltar for any part of a 24 hour period commencing at midnight shall be counted as a day of presence whether or not any accommodation is used in Gibraltar;…"

The Commissioner stated that the ITO issues certificates of residency to applicants that are eligible to meet the designated criteria and are able to, if requested, support their claim with sufficient and reliable evidence. The Commissioner suggested that this could be pursued if that was what was being sought by the Complainant.

The Ombudsman contacted the Complainant to relay the information provided by the Commissioner. The Complainant reverted and confirmed that the reason why he required a TIN was to formally justify to other parties his position as being a tax resident in Gibraltar; without this he was in a limbo. The Ombudsman reverted to the Commissioner who in early September 2020 advised that they would review the Complainant's position and evaluate proceeding on the grounds of a residency application.

The Ombudsman updated the Complainant with this information and advised that he should be hearing from the ITO in the course of the next two weeks, perhaps with a request for information that he might need to submit to support the application. By the end of October 2020, the ITO had not contacted the Complainant and so the Ombudsman emailed the Commissioner enquiring, amongst other questions, if the Complainant's case had been evaluated in order to proceed with a residency application.

The Commissioner provided his response on the 4th November 2020 and advised that the matter had been reviewed. He asked the Ombudsman to extend his apologies for the delay to the Complainant and explained that Covid-19 continued to place a noticeable strain on their processes and procedures at the busiest time of year for their personal tax team.

The Commissioner once again referred the Ombudsman to Section 74 of the Act, which defines the term 'ordinarily resident', set out on page 3 in this report. The Commissioner explained that as part of the service extended to 'taxpayers', the ITO issues certificates of residence to eligible applicants who meet the designated criteria and are able to, if requested to do so, support their claim with sufficient and reliable evidence demonstrating that they satisfy the requirements of being 'ordinarily resident' as set out in the Act. The Commissioner stated that an individual might meet the requirements to be 'ordinarily resident' but that, although indicative, proved insufficient to justify the issue of a taxpayer reference number to register for tax purposes, particularly in those instances where there was no chargeable income in accordance with the Act. Registration for tax purposes is required where there is an underlying obligation to make a full and complete return of income and in those cases where a liability to exists, or there is income assessable in accordance with the provisions of the Act. The Commissioner explained that residency in itself is not the sole determinant for registration and issue of a taxpayer reference number. In the Complainant's case it was simply not feasible to proceed as he requested for the reasons set out above and on the basis that he does not have chargeable income in accordance with the provisions of the Act and therefore no requirement to register and/or file a return of income.

Regarding the certificate of residency, the Commissioner stated that this could not be provided either, for the reasons stated above. He explained that the ITO understood the Complainant's concerns over the need to notify financial institutions that he was not tax registered in the place where he resided and the suspicions which might arise as a result.

The Commissioner assumed that the Complainant was referring to the requirement for financial institutions to collect particular data from their customers in relation to the Common Reporting Standards ("CRS"). He explained the latter was an OECD (Organization for Economic Cooperation & Development) initiative and the standard for the automatic exchange of financial account information on a global level between tax authorities that was developed in 2014 for the purpose of combatting tax evasion. It called on participating jurisdictions to obtain such information from their financial institutions and automatically exchange with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures that should be followed by financial institutions. According to the Commissioner, one such requirement for the CRS was the need for self-certification which is the process which requires the financial institution's customers and clients, in their capacity as account holders, to provide details of where they are resident as well as disclosing their TIN. Notwithstanding that requirement, the Commissioner understands that there is scope to explain why a TIN may be unavailable, including reasons such as that no TIN is required or collected based on the domestic law of the jurisdiction.

The Commissioner noted the Complainant's view, that a permanent TIN should be provided in Gibraltar once a person was established here, as was the case with him in the UK and Spain despite not habitually residing there. The Commissioner believed that was an important point to clarify as in both those tax systems, residency is a key determinant and driver for taxation; you must be a resident for taxation to apply. The position is different in Gibraltar where it is possible to pay tax given the source of the income whilst not being ordinarily resident and similarly also be liable to tax on worldwide income, if the person is 'ordinarily resident' in Gibraltar, provided that in both cases the income is assessable to tax in accordance with the provisions of the Act.

To conclude his response, the Commissioner emphasised that the ITO did not in any way deny or refute that the Complainant resided in Gibraltar.

Conclusions

When the Complainant settled in Gibraltar in 2007, he was registered as CAT 2. As his income was not chargeable to tax, in October 2008 the Complainant relinquished the CAT 2 status which carried a minimum annual tax payment of £22,000-. Unaware that the TIN ceased to be valid as from the time he deregistered, because he claimed that TINs he had been issued with in Spain and UK remained valid for life, the Complainant continued to use the TIN for the next eleven years, in his dealings with banks and financial institutions in other jurisdictions, in order to prove tax residency. It was not until October 2019, as a result of an enquiry made by the Complainant that he found out that he was not authorised to use the TIN. In November 2019, the Complainant requested that the ITO look into the matter and find a solution for him, as not being able to use the TIN, placed him in a very difficult situation with respect to future dealings with financial institutions and proving tax residency. The Complainant's email was not responded to and this resulted in the complaint being lodged with the Ombudsman.

By way of clarification, the Ombudsman has not looked at the non-response to the Complainant. The complaint was lodged with the Ombudsman four weeks after the Complainant's email to the ITO and from that point on, the communication on the substantive issue was between the Ombudsman and the ITO.

Regarding the Complainant's request for a solution, the Commissioner pointed out in his letter to the Ombudsman that he understood there was scope for persons who were not tax registered in the place where they resided to explain to financial institutions why a TIN was unavailable. In this respect, it is the Ombudsman's view that the Complainant may have to engage the services of a professional entity to assist him in finding a resolution to enable him to continue dealing with international financial institutions without a TIN.

The Ombudsman does not find maladministration in relation to the complaint brought by the Complainant. The ITO had informed the Complainant in August 2018, in reply to an enquiry he had made, that because his income was not chargeable to tax, he was not required to register with the ITO. That same information was again relayed to the Complainant by the ITO in October 2019, once again in response to an enquiry he had made. On that occasion, the ITO informed the Complainant that he was not authorised to use the TIN as it had expired.

It was as a result of the Complainant comparing the Gibraltar jurisdiction to other countries where he stated that the TIN was in place for life, that he pursued a solution to his situation. The ITO could not provide that solution as the Complainant's circumstances are such that he has no basis for association with the ITO as long as his income remains non-taxable in Gibraltar. As per the Commissioner's explanations to the Ombudsman, because the Complainant's income is not chargeable to tax in Gibraltar, he is not a taxpayer and therefore cannot be provided with a taxpayer number.

In order to prevent a recurrence of a similar situation to that of the Complainant's, the Ombudsman suggests that in future, the ITO inform persons who deregister that they cannot continue to use the TIN.

(Report extracted from Case No 1224)

LAND PROPERTY SERVICES LIMITED

Case 19

Complaint against Land Property Services Limited ("LPS") in relation to the alleged unfair and unjust allocation of parking spaces at a housing estate ground level car parking facility ("HCP").

Complaint

The Complainant complained that although the allocation of parking spaces had historically been made by means of a system of tenant seniority, that method of allocation had allegedly not been followed in the last couple of allocations at HCP.

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainant was aggrieved because he did not understand the allocation criteria being applied for the grant of parking spaces at HCP. He complained that even though allocations had always been made by following a tenant seniority system, that method appeared not to have had been followed in the most recent allocations. Accordingly, he claimed that a vacant parking space that he was entitled to as the next most senior tenant on the list for a space, was awarded to someone else.

The Complainant explained that he had been a resident of the property for 23 years as well as a sitting member of the residents committee for most of that time. In particularising his complaint to the Ombudsman, he alleged that two allocations had been made to residents (names provided by the Complainant, although for the purposes of this investigation we shall refer to them as "X" and "Y"), who had lived in the building "*for an amount of time well below that of other residents on the [parking space allocation] waiting list".*

The Complainant stated that he had complained in person and in writing to LPS and at the Housing Department ("Housing"). He claimed to have been informed that the allocation system was no longer seniority based. The Complainant requested the new allocation criteria but was informed that he was not entitled to it.

The Complainant provided the Ombudsman with a "Tenants Information List" which he had obtained from an unnamed source. According to the information provided on that list, the Complainant is now the tenant who has resided longest and should be next in line for parking space allocation. He was therefore surprised to have been informed by both Housing and LPS towards the end of August 2019 that he was in fact in third position.

The Complainant is of the view that applying any criteria other than seniority is unjust and inequitable. He therefore proceeded to make his complaint to the Ombudsman on that basis.

Investigation

The Ombudsman reviewed all correspondence provided by the Complainant, which consisted primarily of email exchanges between the Complainant, Housing and LPS. Further to a written query and subsequent emails, the Complainant had received a reply from Housing in June 2019, stating that they could not comment on any allocation which was "*beyond their remit.*" According to them, LPS was the body tasked with managing parking allocations. Indeed they were and continue to be.

The Ombudsman proceeded to present the complaint to LPS in writing, setting out the Complainants grievance. A reply followed shortly thereafter.

LPS's letter explained by way of background information that issues with original waiting lists for the allocation of housing department estates had always existed. The waiting lists were based on the date of application by a tenant and some problems had historically been encountered. As a result, H.M. Government of Gibraltar ("HMGOG") had issued an instruction to the effect that no further applications should be added to the existing council parking lists. That policy took effect in November 1996. The intention was to exhaust the lists and then decide on the way forward.

Time elapsed and in 2006, HMGOG advised that the policy for the allocation of parking spaces was to be determined on the length of tenancy within a residential estate subject to the applicant holding a valid driving licence and being the registered owner of a motor vehicle. Since 2006, the procedure has been that LPS advises Housing when they receive notice that a space will become vacant. Housing then provides LPS with an updated list of applicants which in turn enables LPS to make the next tenant in line an offer for a space.

In direct reply to the Complaint, specifically to the representations made by him relating to Messrs X and Y, who had allegedly been allocated spaces in breach of policy, LPS "*confirmed"* to the Ombudsman that "*Mr X was allocated a parking space on the 1st January 2018 whilst Mr Y was allocated his on the 1st February 2018. Records provided by the Housing Department at the time, confirmed that they were the longest residing tenants eligible for allocation, both having lived there since 25th March 1991 and 2nd January 1995 respectively. According to Housing Department records, the Complainant has been a resident since 11th March 1997."*

In regard to the Complainants affirmation that he had been informed at Housing and LPS that the allocation system no longer followed a "*seniority*" basis, LPS stated that as a result of the representations made by the Complainant, a meeting was held in July 2019 between LPS and Housing. The Complainant was invited and attended. At that meeting, the Complainant was advised that the policy continued, namely, that allocations were made to whomever was next on the list as the longest residing tenant in any housing estate where parking spaces became available. He was further informed that he was third on the list as supplied by Housing. This give rise to a further complaint being filed by the Complainant.

In their letter to the Ombudsman, LPS went on to explain how at the meeting, the Complainant claimed to be in possession of a tenancy list. He was asked to provide a copy but declined. He further maintained that there existed irregularities with the dates as they appeared on the list. As a result and in the pursuit of transparency, Housing confirmed that they would double check their latest tenancy list before LPS was given the go ahead to proceed with further allocations.

A subsequent meeting was held on 29th August 2019 between the same parties. The Complainant was informed that he was not the next eligible tenant. He was further advised as he had been previously, that the policy approved in 2006 continued to be followed.

The letter concluded by LPS reiterating that they made allocations on the information received by Housing and they did not make any individual decisions in that regard. All they did was to follow HMGOG policy. Once information is received, the procedure is for LPS to contact the tenant prior to the offer being made and seek confirmation that they hold a valid driving licence and are the registered owner of a vehicle.

The Ombudsman wrote to LPS thanking them for their letter. He made a further request for any copies of emails in existence between LPS and Housing, relating to the recent allocation of the spaces at HCP, be made available for his review.

The Ombudsman took heed of the policy and examined the list which was made available to him for his review. He was in a position to reaffirm the statements made by LPS.

The Ombudsman's request was immediately acceded to. Email correspondence evidencing the fact that parking spaces had become vacant as a result of tenants moving out of their properties were forwarded. It was clear from the mails that LPS had written to Housing (1) informing them that spaces had indeed become available (2) requesting updated tenancy lists for their allocation and (3) in respect to one of the spaces awarded, seeking confirmation on the length of Mr Y's tenancy. From the review of this correspondence and the replies LPS received, there was no doubt in the Ombudsman's mind that LPS had acted fairly, diligently and in accordance with the policy in place insofar as the previous allocations being the subject of this complaint were concerned.

Nonetheless, for further reassurance, LPS offered the Ombudsman a meeting. The offer to meet was accepted. At the meeting, LPS repeated the contention that all matters were checked between themselves and Housing before any offers of allocation were made and that HMGOG policy was duly followed. LPS did also state that they had discovered that as a result of inadvertence, Housing had at one point in time, been in possession of two lists, one of which was erroneous because it was not fully representative of fact as a result of not having been updated.

It should however be noted, for the avoidance of doubt, that the existence of these lists appeared to be the result of inadvertence at best and error at worst. There was no indication evidence or suspicion whatsoever of any foul play or that matters had not been conducted as they should have been.

Conclusions

The Ombudsman was grateful to the Complainant for having brought this complaint to our office. The complaint was worthy of investigation and necessitated clarification, both from an administrative perspective and for the Complainants peace of mind.

As stated, the Ombudsman was able to review two lists. One dated 2017 (which did not reflect all matters contemporaneously and a newer list, updated in 2019, which did.) The Ombudsman opined that if the Complainant had been supplied with a list, either intentionally or by inadvertence, (those lists not being for public distribution), one could only deduce that the list in the Complainants possession must have been the older version or an older version still. It must be said however, that the only difference between the two was that the second list simply omitted a record of information, namely, that both tenants who had been offered the parking spaces prior to the Complainant, had resided in different flats within the Property, than the ones they currently occupied. They had sought exchanges within the same building. As a result, both had been tenants for a longer period than the Complainant had.

After said allocations, the Ombudsman wrote seeking confirmation from LPS that the Complainant was the next tenant on the list who would be offered a parking space. LPS replied stating that he was in third position. As stated previously on page 5 of this report, this gave rise to a further complaint by the Complainant. The grounds of complaint appeared to the Ombudsman to be justified in that, to the Complainant's knowledge, the person who was deemed to be first on the list did not seem to meet the criteria to be offered a space (he was elderly, infirm and allegedly did not, he believed, even possess a car or held a valid driving licence) and the second tenant, it was alleged, already enjoyed the benefit of a parking space elsewhere, thus also invalidating any future offer of parking at HCP.

The Ombudsman wrote to Housing (as the responsible body for lists information), seeking clarification.

The Ombudsman saw no evidence whatsoever of any *mala fides* by the public bodies involved in respect of the allocations which had been made and which had been the subject of the original complaint. Parking spaces had become available, proper procedure was followed and from what the Ombudsman discovered during the course of this investigation, the spaces were allocated in the appropriate manner to the tenants who were next eligible. (Documentation to this effect was provided by LPS).

However, in respect of future allocations (the Complainant allegedly being third in line for an offer to be made despite him being of the firm view that he should be first, in keeping with the allocation criteria), Housing provided the following explanations with which the Ombudsman was satisfied:

In relation to the first tenant who was next eligible for the offer of a parking space to be made, it was confirmed that the elderly tenant in question did not possess a valid driving licence and/or vehicle. However, his son ("the Son") who was also a registered tenant in his property would be the next eligible person for a space.

In relation to the allegation made by the Complainant that the tenant second in line to be made an offer enjoyed private parking facilities elsewhere, Housing confirmed that LPS would have to ensure that if that was indeed the case, the alternative space would have to be relinquished by the tenant for him to become eligible and subsequently accept the HCP parking space, at the time of offer. The Ombudsman was satisfied with this explanation.

The Deputy Ombudsman met with the Complainant after having received the above information to appraise him of developments. The Complainant argued that, in relation to the next (first) eligible tenant, the Son had allegedly resided in Spain for many years and had only returned to Gibraltar to live with his parents as a result of the Covid-19 pandemic.

The Office of the Ombudsman wrote to LPS one last time in order to satisfy themselves of whether in fact, the eligibility criteria for a parking space would still be met if the Complainants allegation of non-continuous residence could be proven.

LPS replied almost immediately stating that the issue of registered tenancies and residence generally was not their ambit and that details were supplied by Housing as and when required. In the case of the Son, Housing had confirmed to them that the date of his tenancy commenced on the 24th April 1979.

When the Ombudsman asked Housing whether or not the issue of an alleged non-continuous residence would affect the application/eligibility criteria, Housing confirmed that they do not ordinarily investigate such applications as a matter of course and that as long as the tenant was properly registered and that the tenancy had not been surrendered as a result of a Government housing stock exchange, a property purchase on the open market, the acquisition of an alternative parking facility or the death of the tenant, eligibility would continue to apply. The Ombudsman considered this approach proper and reasonable.

As a more general query, the Ombudsman had enquired whether, as a matter of policy, children of residents (forming part of the tenancy/household composition) and whose parents did not own a car, would be eligible for a space from birth, or from the time that they obtained a driving licence?

LPS stated in reply that where a request to pass a parking licence permit from parent to child was received, they required Housing confirmation that the child had been a registered tenant with the parent/s throughout. If Housing confirmed a more recent tenancy start date for the child, LPS would terminate the permit and issue it to a more senior resident (a vehicle owner with a valid parking permit). "*Any scenario out of the norm would be taken to the Land management Committee for [review] and instruction [in the interests of transparency]*"

Classification

That the established method of allocation was not properly followed by LPS in allocating [previous and future] parking spaces at HCP, thereby in breach of HMGOG policy - **Not sustained**.

Recommendations

The Ombudsman recommended that Housing perform the necessary cross checks to ensure that lists are updated and kept accurate at the time that LPS requests them, for the purposes of parking space allocations.

The Ombudsman expressed the view that he would be dissatisfied and would take further necessary action, if the appropriate checks were not conducted prior to allocation of future spaces and it subsequently emerged that any given tenant did not fully meet the eligibility criteria for a parking space (which is such a rare and coveted commodity in Gibraltar).

Observations

It was evident from the information provided and documents examined by the Ombudsman, that despite more than one tenant list having existed contemporaneously, the Complainant had suffered no prejudice or injustice. It may, as a final point, perhaps have been desirable for LPS and/or Housing to have explained the duality of lists to the Complainant when they became aware of their existence, in an attempt to allay the Complainants concerns and contention that he had not and was not treated fairly.

In any event, as stated, despite sympathising with the Complainant's frustrations and appreciating his concerns, the Ombudsman was of the view that policy (*which incidentally, the Ombudsman has no statutory power to question*) and procedure, were being objectively and appropriately followed on the evidence presented.

(Report extracted from Case No 1213)

LAND PROPERTY SERVICES LTD

Case 20

Complaint against Land Property Services Limited ("LPS") in relation to the following:-

(1) That upon their purchase of the Property they were not included in the sale of parking spaces to residents of the estate; (2) they were allegedly not properly advised of the procedure and as a result not given an opportunity to challenge the decision to be categorised as "late applicants" in time; (3) in any event they do not feel they were "late applicants" since that class of applicant was never clarified by LPS (4) whether a parking space corresponds to a property or an individual applicant.

Complaint

The crux of this complaint as particularised in the sub- headings hereinabove, was whether as purchasers of the Property after the deadline for parking space allocations had expired, the Complainants' should have been classified as "*late applicants*" by LPS despite the Vendor of their Property having applied and satisfied all the application criteria, within the prescribed timeframe.

Should the application have been transferred from the previous owner to the Complainants'?

Background *[Ombudsman Note]: The background is mainly based on the version of events provided by the Complainant, including supporting documentation, at the time of lodging the complaint with the Ombudsman.*

The Complainants' explained how they sought to complain against LPS as a result of not having been included in a recent sale of parking spaces to residents of the estate. They explained to the Ombudsman that a letter dated 29th August 2019, sent by LPS to property owners of the estate, stipulated a deadline of the 11th October 2019, for applications to be submitted by parties interested in purchasing any available parking space.

The previous owners of the Property had submitted their application in good time.

Upon the Complainants' purchase of the Property on the 31st October 2019 (20 days after the expiration date), they learned about this time restriction and subsequently, on the 14th February 2020 appealed to LPS by telephone. That call was followed up by an email expressing their wish to have the previous owner's application transferred into their joint names.

Following from this, they were given a written assurance by LPS that they would not be deemed to be new applicants but rather, that the old application would be transferred. The assurance stated in clear terms that "*I can confirm that the application form submitted by the previous owner can be transferred into your name. Please send me your name, address, telephone number and email address"*

Time elapsed and in August 2020, the Complainants' were informed by LPS that they had *"not been successful in their application due to having been considered late applicants."* The Complainants' sought an explanation for this along with (a) details of the allocation process, (b) sight of any written constitution, articles or procedures on the said process and (c) a copy of the set of rules governing late applications.

The complaint escalated on the basis that the Complainants' held the view that by not having been given the opportunity to challenge their "*late application status",* their position had been prejudiced and the possibility of having been able to acquire a parking space, nullified.

A subsequent written apology was received from LPS "*for the confusion caused"* as a result of the reply not having been, allegedly, "*explicitly clear*". They stated that nonetheless, the intention had been to communicate that there were to be classified as late applicants. The same criteria had also been applied to all applications received past the deadline. This included all "*new owners"* (proprietors who had completed on their purchases after the 11th October but who had indicated an intention to purchase an additional parking space).

The Complainants continued to feel aggrieved as they did not share the view that they were, or should have been categorised as "*late applicants"*, but simply as "*homeowners"*. The initial letter sent by LPS to applicants did not define a "late applicant." It simply stated that all ***"homeowners"*** are entitled to apply.

Investigation

The Ombudsman reviewed LPS's original offer letter to homeowners referred to above, and the subsequent correspondence which had been entered into between the Complainants' and LPS.

The Complainants' had requested an explanation as to the details rules and procedures surrounding the application process and clarification as to how it was possible that they had been classed as late applicants when it had been previously confirmed to them in writing, that the previous Property owner's application would be ***"transferred***" to them.

The reply which followed from LPS set out matters substantively.

LPS apologised for "*the confusion which had arisen with [the] matter."* They clarified that the intention behind the 19th February email was "*to confirm that there was no need to submit an application form yourselves, and that your details would be included by us in respect of your recently purchased property. However, you would have to be considered as late applicants since you were not owners of the Property at the closing date for submission of applications."*

LPS's reply admitted that this more recent explanation had not been explicitly clear in their initial mail to them but that "*…this same criteria has been applied to those who submitted applications after the closing date, as well as other current homeowners in the estate who purchased their property after the closing date."*

The letter went on to explain the application procedure (which had been previously agreed between H.M. Government of Gibraltar and the Estate's Management Company), details of which had been sent to prospective applicants when the application period for parking space allocation had opened (copy letter attached for ease of reference). That letter also confirmed that applications received after the closing date would **not** be considered. However, with the intention of not discarding late applications, it was determined that they would be considered (in the order drawn) as the final category, if any parking space remained available once offers had been made to those homeowners who applied within time. In practice, despite LPS's best intentions, the fact that there had been many more applications than there were available spaces, rendered the "*late applicant*" category worthless.

As a result, given that the application window closed on the 11th October 2019 and that the Complainant's did not complete on their purchase until the 31st October, LPS refuted the Complainants' contention that by not having been included in the draw for a space, they had been prejudiced. Despite that stance, LPS again apologised for the confusion which had been caused (by them).

The Complainants' continued and understandable dissatisfaction with matters led to them lodging their complaint with the Ombudsman.

Further to various email exchanges between a named LPS Director ("the Director") and the Deputy Ombudsman, a face to face meeting between them ensued. Productive explanations of intention, procedure and process were offered and accepted at that meeting.

The Director provided some background as to the historical parking space issue in the estate (which is of no consequence to this investigation). He continued to explain that in 2019, the current administration took the decision to sell available parking spaces located within the estates' underground garage, to interested homeowners, at the original rate.

The initial idea had been for a draw to have taken place in an open forum.

Unfortunately, as a result of COVID-19 restrictions, that method of allocation had not been possible. The draw was held in the presence of a notary public and two committee members of the estate. In total, four hundred and one applications were received for three hundred and eleven available spaces. Parking spaces were allocated in the order they were drawn with applicants being categorised under one of four headings. Those residents with (1) no parking space, (2) one parking space, (3) two parking spaces and (4) late applicants.

As applications were drawn, they were allocated to their pertinent category. By way of theoretical example, if the first application drawn was one of a late applicant, that application would be placed under the aforementioned category in first position. If during the course (and at the conclusion) of the draw, there were still parking spaces available for applicants in the fourth (last) category, that previously drawn applicant would have first position. The same process would apply to the preceding categories.

As a general comment at the meeting between the Director and the Deputy Ombudsman, it was noted that parking spaces were allocated to applicants as individuals and that additional parking spaces would **not** form part of a corresponding flats' title documentation.

Therefore, if a person who owned a specific flat, sold that flat and bought another within the estate, he or she would be able to continue to use the additional parking space purchased, as long as they continued to reside within the development. If that person sold a flat and moved out of the Estate, they would have to sell the additional parking space either to the person buying their property, or to **another resident**.

It was not possible for a person who did not own a flat, to own or occupy a parking space. It was also established that parking spaces could not be sublet to non-residents. There was however, no restriction imposed by Government on the resale price of an additional parking space.

According to LPS, it was the application of all of the above that precluded new purchasers of flats (those who had completed their purchases after the deadline for parking space applications had elapsed), from taking over any application made by the previous owner. That previous application ceased to exist once the previous owner sold their property.

The Ombudsman was of the view, given this substantial explanation offered to him by LPS, that the 19th February email sent to the Complainants' confirming the application of the transfer, was a grave error to have made.

Conclusion

The Office of the Ombudsman was satisfied with the explanations provided by the Director and in the transparency of the parking space allocation process, conducted, as we have stated, in the presence of a notary public.

Although a previously agreed policy issue, the Ombudsman could not reconcile why, an application made by a previous owner within the allocated time frame, could not be "taken over" by a new owner if that proprietor expressed a desire to do so (before the actual draw was held). However that was a generic view which stakeholders had agreed and it is not the Ombudsman's role to question policy.

Applying common sense however, although clearly there was no automatic entitlement to be given the option to purchase an additional parking space, neither was there any detriment to any other existing owner, for a new proprietor to have been included in the draw, as an ordinary (and not a late) applicant, if the previous flat owner had applied in time. This suggested rule could have been applied irrespective of when the new owner completed on their purchase, as long as it was before the draw was held. Inclusion in the draw would have simply been that; not a guarantee of a space being allocated in the applicants favour, but a fair and equal chance at the possibility of obtaining one, at the reduced offer price.

It is also significant to note that although the Complainants' surely suffered disappointment at having been categorised as late applicants, they suffered no contractual detriment or financial hardship as a result, given that they did not purchase the Property in reliance of being entered into the draw for the potential second parking space. Despite that, and although LPS has described the content of the 19th February email as a "*misunderstanding"* and offered apologies, the Ombudsman considered it more a miscommunication and an error. Said mishap could have been rectified by LPS having taken the exceptional view, given the special circumstances, to have allowed the Complainants' inclusion in the draw as ordinary, (as opposed to late) applicants.

Classification

(1) That upon their purchase of the Property they were not included in the sale of parking spaces to residents of the Estate;- **Sustained** (they were included as "late applicants" but given the amount of applications received and the number of spaces available, there was no reasonable prospect of the Complainants' having successfully obtained a space);

(2) they were allegedly not properly advised of the procedure and as a result not given an opportunity to challenge the decision to be categorised as "late applicants" in time;- **Sustained** (particularly given the assurance contained in LPS's 19th February 2019 email addressed to the Complainant's);

(3) they do not feel they were "late applicants" since that class of applicant was never clarified by LPS;- **Not Sustained** (according to the Management Company's policy, they were, in fact, late applicants despite having been erroneously advised to the contrary);

(4) whether a parking space corresponds to a property or an individual applicant;- this is not a complaint per se and therefore it is "**Unable to Classify".** From the conduct of our investigation, the Office of the Ombudsman was able to determine that additional parking spaces obtained after the execution of respective flat underleases, did not form part of title documentation and therefore did not correspond to a flat, but to the individual who purchased the additional space. As explained above, there existed subletting and sale conditions to the spaces.

(Report extracted from Case No 1228)