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REFORMING THE TEST FOR UNFITNESS TO PLEAD

LAG

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The purpose of the Legal Action Group, a national, independent charity, is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

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Protecting debt advice

LAG's opinion poll research on the availability of advice has found that people in the lowest income groups are the most likely to seek advice from local advice centres (see page 5 of this issue). Our research also found that they are the most likely to need advice with debt problems. These findings will come as no surprise to those money advisers working in advice centres. Debt advice makes up the largest proportion of the over seven million enquiries which Citizens Advice Bureaux dealt with in 2009/10.

Enquiries about debt matters are increasing; for example, Citizens Advice reported a staggering leap of 38 per cent in enquiries relating to bailiffs in the year ending March 2010 compared with the previous year. In light of this increase in debt problems, it is worrying that the government appears to be planning drastically to cut back on specialist debt advice services. The Financial Inclusion Fund (FIF) was launched six years ago. The FIF's current £130 million fund, of which £45 million is spent on face-to-face services in advice centres, runs out in March 2011. As yet, no decision has been taken by the government on the FIF's replacement, so hundreds of money advisers are now facing redundancy. LAG understands that in London alone, 57 advisers could be out of work by the end of March: all this at a time when the demand for debt advice services has never been higher.

Admittedly, the FIF came in for some heavy criticism this year from parliament's Public Accounts Committee (PAC) in *The Department for Business, Innovation and Skills: helping over-indebted consumers*. The PAC scrutinises government spending, focusing on value for money. The committee found that there was a lack of co-ordination in the work of the FIF, with 51 different interventions having no overall direction. The PAC called the face-to-face element of the FIF a 'noticeable gleam of light', as it was popular with the public and had helped 300,000 people with debt problems, all for less than was budgeted for originally. The PAC also noted that the services were hard pressed because of rising demand.

It might be argued by the government that more debt advice could be delivered by telephone or by private sector advice services. LAG believes that advice lines do have a role to play, particularly in increasing access to services; used in conjunction with the internet and other self-help resources, they can be useful in helping people to deal with problems themselves. However, advisers tell LAG that large numbers of debt clients have language, mental health and other problems, which mean that telephone and self-help services are not suitable. Debt clients often face legal problems which need untangling, along with the need for detailed negotiations with creditors; both these tasks are best carried out by specialist advisers or lawyers.

Debt management companies are of little use to the clients seen in advice centres. Most are only concerned with consolidating debts into another loan, so clients continue to be charged interest. Also, debt management companies do not want to advise on legal issues or get involved in complex negotiations.

Currently the Treasury is undertaking a review of face-to-face debt advice services. LAG and everyone connected with the legal advice world are well aware of the financial pressures the government is under, but we hope that the cash can be found to continue providing these services. Legal advice centres will be facing cuts from both local government and in legal aid over the coming months. It is therefore imperative that the FIF is not cut completely early next year.

LAG suggests that roll-on funding is put in place to ensure continuity of service, while an alternative fund is established to pay for debt advice. We would also argue that any new fund needs to look at securing large-scale support from lenders, as this is one area of law in which the 'polluter pays' principle should be made to apply. A levy could be raised on all credit agreements; for example, a £1 charge could be added on an annual basis to rolling credit agreements, such as credit cards. At the very least, lenders should be encouraged to provide substantially more funding for debt advice on a voluntary basis, as they have a direct interest in ensuring that their customers can negotiate fair payments when they get into financial difficulties. Given the cutbacks, including a likely £350 million reduction in legal aid which the CSR outlined last month, surely the time has come for lenders to start to pay the price for a recession caused in large part by their bad lending policies?

Civil contracts: LSC 'will not appeal'

The Legal Services Commission (LSC) has confirmed that it will not be appealing against the judgment made on the Law Society's judicial review of the family law tender process. The LSC had 14 days from 14 October 2010, when the transcript of the judicial review was published, to decide whether or not to pursue an appeal.

In announcing the decision not to appeal, LSC chairperson Sir Bill Callaghan said: 'Our priority must always be to ensure family legal aid clients get the help and legal advice they need. We still have some work to do but we hope that this constructive engagement with the profession will help to provide certainty for clients and providers.'

The LSC had extended the current family contracts until 14 December, pending a decision on whether or not to appeal the High Court's judgment. The judgment quashed the result of the tender round for family and family with housing matters, after finding that the process was illegal (*Law Society of England and Wales v Legal Services Commission and (1) Creighton Group (2) Lock and Marlborough Group (3) National Youth Advocacy Service (interveners)* [2010] EWHC 2550 (Admin), 30 September 2010). See 'Judicial review victory for the Law Society', October 2010 *Legal Action* 5.

LAG understands that the LSC is now in negotiations with practitioner groups to thrash out a way forward in managing the family legal aid contracts. The commission said that it is keen to encourage dialogue with the practitioner groups in order to minimise disruption of services to clients. It is likely that the LSC will be forced to extend the current contracts and has the option of doing this until April 2012. It also wants to push through already planned changes in family fees to ensure that the same fees are paid to both barristers and solicitors.

'We believe the LSC is not ruling out a further bid round in family to allocate matter starts. The looming problem is that the government is going to consult on planned changes to scope, which is likely to include areas of family law such as divorce and ancillary relief, in the next few weeks. It would seem pointless to run a tender round for contracts which might not be viable in a year or two when these expected changes are introduced,' said LAG's director, Steve Hynes.

Non-family legal aid contracts and family mediation contracts will start on 15 November. These contracts had been delayed for a month due to the Law Society's judicial review. The LSC had argued initially in the judicial review that the non-family contracts were interlinked with the family contracts, but had not pursued this line of argument further at the full hearing. LAG understands that at least four judicial reviews relating to these contracts are pending, but these could be settled before the hearing in circumstances similar to the successful challenge brought by the Community Law Partnership, which withdrew its case after the LSC reversed its decision not to offer it a contract (see 'Community Law Partnership triumphs', October 2010 *Legal Action* 4).

Two more Law Centres forced to close

LAG has learnt that Devon Law Centre® and Saltley and Nechells Law Centre in Birmingham are to close mainly because of problems with Legal Services Commission (LSC) contracts. According to Julie Bishop, director of the Law Centres Federation, while the pending closure of these Law Centres and, as reported in *Legal Action* last month, the probable closure of South Manchester Law Centre and Wythenshawe Law Centre are setbacks, potentially there are three new Law Centres in the pipeline. Julie Bishop sees the future of Law Centres as embracing the coalition government's Big Society agenda. She believes that: 'Law Centres need to find ways to best use their limited resources at a time of growing demand, but they also need to keep their local community links as they are the community response to legal issues.' Over the past three years, seven other Law Centres have closed their doors, ie, Enfield, Gateshead, Hounslow, Leicester, Lewisham, Liverpool and Stockport.

Nick Woolf, who served as Saltley and Nechells Law Centre's honorary treasurer over many years, said: 'We tried hard to keep the Law Centre going, but without local authority support, we were heavily over-dependent on our LSC contract. The extreme contract culture of the LSC, the impact of fixed fees and payment only on completion of cases stripped us of our limited cash reserves. The LSC took a further £62,000 out of our cash flow earlier this year – including a £34,000 LSC debt we were unaware of at the time of merging with another legal advice centre – and, in the end, this proved [to be] the killer blow.'

Minister's budget cut warning confirmed in CSR

Speaking at a packed fringe meeting at the Conservative party conference last month, just two weeks before the details of the Comprehensive Spending Review (CSR) were announced, Jonathan Djanogly, the legal aid minister, warned that the Ministry of Justice (MoJ) had to find 'significant cuts' and that the legal aid budget would be a target. The minister gave no indication of the amount that would be cut from the £2.2 billion legal aid budget, but said that the MoJ had to find 25 per cent in savings.

At the meeting, the minister confirmed that a green paper on legal aid was 'imminent' and that the government wanted to look at a 'total review of scope and eligibility' rather than 'going down the road of a salami-slicing review'. 'What we need to do is to reform the system so that vulnerable people have access to justice.' He argued that legal aid spending in England and Wales was higher than in any other EU country, ie, £38 per head of population compared with, for example, £5 and £3 per head of population in Germany and France respectively. 'Spending on legal aid had doubled in real terms in the last 20 years,' he said.

Steve Hynes, LAG's director, spoke at the meeting and, in answer to the minister's comments, referred to research which the MoJ published last year: *International comparison of publicly funded legal services and justice systems*. Steve Hynes argued that while it is correct to say that England and Wales is probably the highest spending jurisdiction in the world, once the entire costs of the criminal and civil justice systems are taken into account the spending levels are comparable to the inquisitorial justice systems in continental Europe. He also pointed out that 'legal aid is essential to ensure equality before the law and to guarantee civil liberties'.

Members of the audience pressed Jonathan Djanogly to comment on the Jackson review of civil litigation costs, as he is responsible for the current consultation on the implementation of this area. The minister said that he believed that: 'There is too little risk in litigation. We have a system that has become too claimant friendly.' In reply to a question about whether or not the MoJ would have a say in any appeal against the Law Society's successful judicial review of the family tender round, he

confirmed that: 'The choice of whether to appeal or not is with the LSC not the Ministry of Justice.'

Meanwhile, after details of the CSR were announced, it was confirmed that a total of £350 million is to be cut from the legal aid budget over the next four years. The MoJ has said that it intends to manage the reduction by consulting on how to channel legal aid to the cases that most require it.

■ Lord Justice Jackson will present 'The costs of civil litigation' at LAG's annual lecture event on 29 November 2010. In the lecture, Lord Justice Jackson will pick up themes from his report, *Review of civil litigation costs: final report*. For further details, see the back page of this issue.

IN BRIEF

■ The next meeting of the All Party Parliamentary Group (APPG) on Legal Aid will be held on Wednesday 24 November in Committee Room 14, House of Commons, London, from 2 pm to 4 pm. Jonathan Djanogly MP, the legal aid minister, will be the speaker. It is anticipated that the Ministry of Justice's consultation about the legal aid budget will have been announced by the date of the APPG's meeting.

Ministry of Justice announces 'reform' of public bodies

The Ministry of Justice (MoJ) is to abolish six non-departmental public bodies (NDPBs) that it operates currently, as part of the coalition government's public bodies review programme. The following will no longer operate as NDPBs:

■ The Youth Justice Board (YJB) for England and Wales will be abolished and its functions brought within the MoJ.
■ The Legal Services Commission will become an executive agency of the MoJ.
■ The Victim's Advisory Panel will be abolished.
■ The Administrative Justice and Tribunals Council will be abolished.
■ Courts boards (19 in total) will be abolished.
■ The Crown Court Rule Committee's functions will be transferred to the Lord Chief Justice in consultation with other rule committees.

Commenting on the YJB, the legal aid minister Jonathan Djanogly said: 'This organisation has helped to transform the delivery of youth justice and has fulfilled an important role in reducing offending and reoffending by young people. Now is the right time to look more radically at the arrangement of youth justice, including the role of the YJB, ensuring that a dedicated focus on rehabilitation needs of young people is driven forward in the future.'

Alex Chard, co-author of LAG's book *Defending Young People*, commented: 'The abolition of the YJB signals a clear shift towards greater local autonomy in the delivery of youth justice services. However, a number of key questions remain. The most significant of which relate to whether the statutory duty on local areas to collaborate and provide youth offending teams and a range of youth justice services will continue.'

news feature

LAG opinion poll research confirms 'what is fair about social welfare law'

A report on the revealing results of opinion poll research conducted on LAG's behalf will be launched at the group's legal aid conference 'Social Welfare Law Matters' in November. This will be the first in a series of reports about ongoing research which LAG is undertaking to assess the availability of social welfare law services to members of the public. Some of the initial findings of the research, which was funded by the Baring Foundation and carried out by the market research company GfK NOP, are summarised below.

■ A total of 239 people out of a sample of 1,000 reported having experienced one or more problems in housing, employment, benefits or debt in the last year. The largest number of respondents sought advice from a local advice centre such as a Citizens Advice Bureau (37 per cent). Seventeen per cent of respondents went to a solicitor.
■ The research found that full-time employees were most likely to access advice services through telephone advice lines or the internet (43 per cent). People in the lowest social class, DE, were least likely to access advice via an advice line or the internet (26 per cent); this social class of people was also the most likely to experience a social welfare law problem. Of the 125 people who reported a problem with benefits, just under 49 per cent came from social class DE. Overall, people in social class DE were twice as likely as people in all other social classes to experience problems with debts or benefits.
■ Employment law problems were the most evenly distributed by social class. Respondents who had experienced an employment law problem in the last year were as follows:
– 20 people in social class AB;
– 31 people in social class C1;
– 26 people in social class C2; and
– 35 people in social class DE.
■ Housing problems were more evenly distributed too. Respondents who had experienced a housing problem in the last year were as follows:
– 17 people in social class AB;
– 18 people in social class C1;
– 15 people in social class C2; and
– 27 people in social class DE.
■ People from social classes C2 (43 per cent) and DE (52 per cent) were twice as likely to have sought advice from a local advice centre.
■ 65 per cent of people who had obtained advice had travelled five miles or fewer to do so.

'What is clear from our findings on the availability of advice is that the less well off are the most reliant on local legal advice services and they are the least likely to use internet or telephone-based services to access advice. The clear message to local and national government is cutting back on these services will hit the poorest hardest,' said Steve Hynes, LAG's director.

■ For further details about LAG's 'Social Welfare Law Matters' conference, see page two of this issue or visit: www.lag.org.uk/legalaidconference.

Facts about the research

■ The interviews took place over the first weekend of October this year.
■ Factors such as social class and working status were included in the sample group.
■ The research had three main aims:
– To test the current access to social welfare law advice in the respondent's local area.
– To test how helpful legal advice services were in resolving people's problems.
– Whether or not respondents had direct experience of using advice services, the survey would test what their expectations of legal aid and advice services were.

The Law Commission's consultation paper *Unfitness to plead* (2010 Law Com CP No 197) aims to provide a comprehensive review of the law on unfitness to plead in criminal proceedings which is likely to be of interest to both criminal and mental health practitioners.[1] Although the paper makes proposals in relation to numerous aspects of the law, this article by Clare Wade, criminal lawyer at the Law Commission and barrister at Tooks Chambers, focuses on the proposal to reform the legal test of unfitness.

Reforming the test for unfitness to plead

Current procedure

As the paper explains, the law on unfitness to plead developed incrementally, incoherently and independently of the wider context of 'effective participation' for defendants (as developed in case-law on the right to a fair trial under article 6 of the European Convention on Human Rights which 'guarantees the right of an accused to participate effectively in a criminal trial': *Stanford v UK* App No 16757/90, 23 February 1994 at para 26. See also *T v UK* App No 24724/94 and *V v UK* App No 24888/94, 16 December 1999; (2000) 30 EHRR 121) and the use of special measures for vulnerable defendants.

The present procedure for determining whether an accused is unfit to plead is governed by the Criminal Procedure (Insanity) Act (CP(I)A) 1964 s4, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004. Previous statutory reforms have failed to address the common law test for whether a defendant is unfit to plead, which dates from 1836 (see *R v Pritchard* (1836) 7 C & P 303, 21 March 1836).

The *Pritchard* criteria for determining unfitness focus on a defendant's ability:

- to plead to the indictment;
- to understand the course of the proceedings;
- to instruct a lawyer;
- to challenge a juror; and
- to understand the evidence.

At best, these criteria are not comprehensive. They do not adequately reflect modern psychiatric thinking (see *R v Murray* [2008] EWCA Crim 1792, 16 July 2008 at para 5) and they place a disproportionate emphasis on low intellectual ability. At worst, the criteria set too high a threshold for a finding of unfitness and, as recent case-law shows, the test is inconsistent with the modern trial process because it fails to recognise the accused's decision-making capacity (see *R v Diamond* [2008] EWCA Crim 923, 29 April 2008 and *R v Moyle* [2008] EWCA Crim 3059, 18 December 2008, where the Court of Appeal held that a defendant who suffered at trial from paranoid schizophrenia had been fit to plead despite evidence that his delusions would have 'significantly impaired his ability to take a proper or valid part in his trial, and significantly affected his capacity to be properly defended in legal proceedings' (para 27)). Neither does the test necessarily accommodate defendants with reasoning difficulties caused by matters other than cognitive deficiency.

The English and Welsh position contrasts with that in Jersey where recent case-law has recognised that the capacity to make rational decisions is of relevance to the determination of unfitness (see *A-G v Harding* [2009] JRC 198, 16 October 2009).

Capacity to make decisions

A legal test for unfitness which excludes the capacity to make decisions can lead to injustice. Neither legal advisers nor judges are able to remedy flawed decisions made by defendants who, although clearly lacking capacity, are nevertheless fit to plead under the *Pritchard* test. The paradigm example is *R v Erskine* [2009] EWCA Crim 1425, 14 July 2009, where E's failure to instruct trial lawyers to plead diminished responsibility was a flawed decision attributable to his mental disorder (para 95). There is good cause to regard such an accused as unfit to plead because he lacks the capacity to assess the strengths and weaknesses of his legal position.

As a concept, unfitness can be said to cover a general state: it is not context or time-specific. Capacity, however, involves the capacity to do something, for example, to make a decision in relation to a particular set of circumstances. Capacity cannot therefore exist in the abstract. Capacity is linked intrinsically to the question of participation. For example, an assessment of a defendant's capacity to participate meaningfully by giving evidence is predicated on his/her having the ability to decide whether or not to testify, and that decision requires an understanding of the advantages and disadvantages of doing so in the particular case. If the accused's medical symptoms inhibit his/her ability to decide such matters, in our view, s/he should be treated as lacking capacity.

The Commission therefore proposes a

decision-making capacity test based closely on the capacity tests in the civil common law and under the Mental Capacity Act (MCA) 2005 (the general theory now having statutory force by the MCA (see *Local Authority X v (1) MM (by her litigation friend, the Official Solicitor) (2) KM* [2007] EWHC 2003 (Fam), 21 August 2007)). MCA s3 forms the core for the test. So, a defendant would lack decision-making capacity for the purpose of criminal proceedings if s/he was unable:

- to understand the information relevant to the decisions that s/he will have to make in the course of his/her trial;
- to retain that information;
- to use or weigh that information as part of the decision-making process; or
- to communicate his/her decisions.

Law Commission proposals

Test of decision-making capacity

Our first proposal is therefore that the *Pritchard* test be replaced by a new legal test which assesses whether or not the accused has decision-making capacity for trial and takes into account the requirements for meaningful participation. However, the paper acknowledges that the right to self-determination means that it would be unduly prescriptive to impose a requirement that an accused's capacity turned on whether or not his/her decision was 'rational'. It has been pointed out that '"rationality" is a term both in wide common use and without any clear and fixed, agreed-upon meaning, not a technical term whose meaning and application is easily restricted'.[2] Furthermore, the MCA imposes no requirement that the relevant decision has to be rational in order for a person to have capacity to make it.

Process not content of decision-making

The focus under the MCA is therefore on the decision-making process rather than the content of the decision ultimately made. Equally, in the criminal context, an evaluation of decision-making capacity should focus on the process of understanding and reasoning as opposed to the content of the decision. There is a critical divide between decisions the law should acknowledge as valid and those it should not. This divide is not between irrational decisions and unwise decisions (which the right to self-determination should allow) but between decisions taken by those who do and those who do not have the capacity to function rationally (see *Sidaway v Bethlem Royal Hospital and the Maudesley Hospital Health Authority and others* [1985] AC 871, 21 February 1985 at p904 by Lord Templeman). In practice, focusing on the decision-making process ought to alleviate the problems identified in *Erskine*. Our second proposal is therefore that there should not be a requirement that the accused's decisions must be rational or wise.

The *Pritchard* test has often been criticised because it imposes a single test: a unitary construct. This does not allow for disjunctive consideration of an accused's ability to perform very different actions including, crucially, entering a plea and participating in a full trial. Notwithstanding this criticism, the proposed test also provides a single test which assesses all aspects of what is often referred to in civil law as 'litigation capacity', as opposed to 'subject matter capacity'. Although adopting a disaggregated approach would have the benefit of allowing an accused to be found fit for a plea (of guilty) as opposed to trial, that convenient outcome is achieved by other proposals. These proposals are found in Part 4 of the paper (Special Measures) and are that more widespread use of special measures be adopted and judges tasked with determining the issue of capacity should be required to take the availability of special measures into account as part of the legal test of capacity. This would entail the consideration of whether or not a particular accused could, with the assistance of special measures, plead guilty in a relevant case.

Proportionality

The concept of 'proportionality', namely that the threshold for capacity should vary depending on the complexity and/or gravity of the decision which has to be made, is integral to the tests in civil common law (see *Masterman-Lister v Jewell & Home Counties Dairies; Same v Brutton & Co* [2002] EWHC 417 (QB), 15 March 2002 at para 21) and under the Mental Capacity Act 2005 code of practice (see para 4.13). Proportionality may, however, pose problems in the criminal context.

The problems include, first, the possibility of courts making inconsistent decisions about capacity because the question of complexity is subjective and difficult to predict. Second, criminal proceedings lack the degree of flexibility found in civil proceedings, where a party's lack of litigation capacity does not prevent determination of the ultimate issues: a litigant who lacks capacity can litigate by his/her litigation friend. In criminal proceedings, the matters to be determined change once there is a finding of unfitness. The original issue of guilt is replaced by the issue of whether or not the accused has done the act (CP(I)A s4A: Part 6 of the paper proposes reforms to the s4A procedure). Third, the role of sentencing in criminal procedure differentiates it from civil law. Modern sentencing, in particular, places an emphasis on individual responsibility which should co-exist with the right to self-determination. It is not easy to attenuate trial and sentence. This contrasts with civil law where a person may have the capacity to litigate and accept an award, but then not have the capacity to administer that award (*Masterman-Lister v (1) Brutton & Co and (2) Jewell & Home Counties Dairies* [2002] EWCA Civ 1889, 19 December 2002 at para 27). Finally, Part 5 of the paper offers proposals for a defined psychiatric test that will factor into the legal test. If this is adopted, it will further distinguish the criminal process from the civil process.

With these factors in mind, our third proposal is that the legal test should not take proportionality into account but should be one 'which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make'. However, the paper recognises that practitioners may not regard the factors above as sufficient to preclude a fully functional test in criminal law, and that the proposal to incorporate into the test the effect of special measures may itself be regarded as a functional or proportionality-based test. We therefore offer a fourth alternative provisional proposal in which the judge's evaluation of the accused's decision-making capacity should take into account the anticipated complexity of the trial and the gravity of the offence. Under this test the judge must assess both the importance of the accused's capacity to make a specific decision and how important the subject matter of that decision is in the context of the trial.

We particularly welcome the views of practitioners on these options. The consultation period is open until 27 January 2011.[3]

1 Available at: www.lawcom.gov.uk/docs/cp197_web.pdf.
2 Allen E Buchanan and Dan W Brock, *Deciding for others: the ethics of surrogate decision making*, Cambridge University Press, 1989, p69.
3 E-mail: criminal@lawcommission.gsi.gov.uk.

This is the second in a series of articles presenting research findings on community legal advice centres (CLACs) and community legal advice networks (CLANs). In this article, independent researcher Mark Sefton discusses findings from the process evaluation commissioned by the Legal Services Research Centre, which was introduced in 'CLACs and CLANs: research and evaluation', October 2010 *Legal Action* 6.*

CLACs and CLANs: process evaluation

The study

The process evaluation was an extensive qualitative study which explored the development and implementation of CLACs and CLANs from different perspectives. It covered the first five CLACs ('operational sites'), together with three out of nine sites in which proposals for a CLAC or CLAN were under discussion when the study was commissioned ('non-operational sites').

Between March and September 2009, 140 in-depth interviews were conducted. Providers taking part included CLAC managers and advisers, strategic managers in CLAC provider organisations, unsuccessful bidders in operational sites, prospective bidders in non-operational sites and other providers whose funding was potentially affected by developments. Interviews were also conducted with Legal Services Commission (LSC) and local authority personnel responsible for joint commissioning in each site, and with LSC officials and other stakeholders at national level.

The report of the study presents many detailed findings and makes a substantial number of recommendations for operational practice. It also makes strategic recommendations in key areas. The remainder of this article highlights some learning points of practical relevance, in particular, to providers contemplating bidding if a CLAC or CLAN – or similar change involving integration of provision – is on the agenda. However, it should also be of interest to commissioners and others.

Complexity

Making the first wave of CLACs and CLANs happen involved a number of complex and challenging processes. This was due to both the novelty of joint commissioning of integrated advice provision and the range of stakeholders which needed to be engaged. An extra dimension in CLAN sites was the involvement of multiple local authorities. It might be expected that in time processes should become less complex as greater know-how is gained. However, local political considerations, in particular, suggest that they are unlikely to become entirely straightforward.

Timescales

In operational sites, CLACs took in the region of two years to establish. In the main, that was because of the pace of negotiations between commissioners, obtaining local political approval, and matters such as agreeing service specifications, before invitations to tender could be issued. Timescales from award of contracts to opening were, however, short: around three months in most sites. All this had significant implications. Not only did it involve major demands on resources at certain times; it also meant that change had to be managed during prolonged periods of uncertainty.

Costs

Costs of development, and bidding and implementation in operational sites, tended to be substantial. They included staff time, the cost of external consultants in some sites and set up costs (in particular, the cost of acquiring or adapting premises). There was no prospect of recovering the costs of unsuccessful bids. Providers therefore need to weigh up the likely cost-benefits of bidding (although if their funding is at risk, providers may feel that they have little option but to bid). For those that lack experience of tendering, it may be more cost-effective to either take external advice and/or accept that another provider with the necessary expertise should lead on any bid.

Building consortia

Bidding for a CLAC or CLAN will almost invariably require consortium building in order to deliver the necessary combination of generalist advice, specialist advice across all five areas of social welfare law and, where relevant, family law advice. Technical considerations here include:

- *What is the best legal structure?* To date, the commissioners of CLACs and CLANs have wanted to contract with a single legal entity. This raises the prospect of one or more providers becoming sub-contractors of another, which some may find hard. A separate company vehicle, with everybody being sub-contractors, may provide a way around this.
- *What should providers know about each other's finances?* Without financial transparency, it may not be safe to assume that the consortium is viable. Collapse of any member is liable to force others to devote substantial time and resources to reorganisation, and will also impact on service provision for clients.
- *Governance, accountability and conflicts of interest*. Not for profit providers may have councillors and/or other interested parties (for example, solicitors) as trustees, which may give rise to potential conflicts of interest. Lines of accountability also need

to be clear; the board of a company holding a CLAC or CLAN contract needs to act in the interests of the CLAC or CLAN, which might not always be aligned with those of individual providers. Similarly, line management structures need to be clear, so that everyone knows to whom staff are accountable.

What will successful bids involve?

Prospective bidders need to scrutinise tender documents carefully and make full use of opportunities to seek clarification about what they might have to take on. For example:

- The full extent of potential liabilities to staff under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 SI No 246 needs to be established. These may arise from entitlements built up under previous, as well as current, employment.
- When service specifications for the first wave of CLACs were developed, the recession had not been predicted. A knock-on effect of the timescales involved was, therefore, that demand in certain subject areas was much higher than provided for in contracts. This indicated that, particularly where developments take a long time, capacity may need reassessing. Providers need to consider whether contracts will contain sufficient flexibility for that to happen.
- What will stated requirements regarding matters such as location of premises, opening hours and outreach provision actually mean in practice?

Interface between generalist and specialist advice

Where several providers are responsible for meeting targets – and expect payment – in respect of different areas of work, the boundaries between generalist and specialist advice (and between specialist subject areas) may be of critical importance to how well everybody fares as part of a CLAC or CLAN. Providers therefore need to ensure that expectations here are based on mutual understanding of where the boundaries lie, and agreed approaches to potential overlaps.

Change management

Integration involves significant change. Differences in cultural backgrounds and historical ways of working need to be bridged. Commitment to the CLAC or CLAN needs to be fostered if providers are to bring staff with them. This may be particularly challenging where staff feel that they have little choice but to accept a transfer of employment under TUPE.

Strategies for change management need to pay specific attention to the perspectives of any volunteer advisers involved. For example, volunteers may have little appetite for diagnostic assessments (see below), partly because they fear de-skilling and partly because they do not perceive there to be sufficient benefit to clients.

Training requirements need to be identified and addressed as soon as possible. Community care and family law stood out here, but eligibility criteria for legal aid more generally also assume much greater importance when directing clients to specialist advice involves internal referrals. Cross-training between consortium members appears to offer a good solution and should provide opportunities for staff from different organisations to get to know each other.

Change management is also relevant to clients. Their needs and expectations need to be addressed, particularly if diagnostic assessments are introduced; many clients' expectations may be shaped by previous experience of seeing advisers at drop-ins on the basis of 'first come, first served'.

Co-location in CLACs

Achieving full co-location may be impractical, particularly where local providers continue to deliver a range of services outside the CLAC and cannot move all their staff. However, co-location of CLAC services can be of benefit in contributing to cohesion and providing a 'seamless' service to clients. The aim ought to be to achieve as great a degree of co-location as possible.

Diagnostic assessments

It is hard to see how CLACs, in particular, but also CLANs, can operate effectively without systems for quick, initial diagnostic assessments of clients' needs. Evidence from operational CLACs indicated that volumes and patterns of demand mean that 'first come, first served' is likely to involve a poor experience for many clients. However, the multiplicity of potential internal referral routes also increases the need for systems to direct clients to the right adviser(s) as early as possible.

A further consideration here is that specialist advisers are likely to be dependent on effective referrals in order to meet their targets. Diagnostic assessments ought to facilitate this.

Branding

In some operational sites, there were tensions regarding branding. Commissioners wanted to establish 'Community Legal Advice' as a brand recognisable to the public. Providers wanted to maintain their own well-established and familiar branding. Reconciling these positions may prove challenging, but branding needs to be agreed early on. This includes dealing with ostensibly routine matters such as stationery. Where there are multiple providers, and a variety of regulatory requirements to be complied with, there is potential for letterheads to become cluttered, resulting in a lack of clarity for people relating to with whom they are dealing.

Relationships with other providers

Competitive tendering involves potential for harm to relationships with other providers: not only unsuccessful bidders who lose funding but also those not in a position to be part of a bid and/or who may simply feel left out, even if their funding is unaffected. Significant bridge-building may be needed to avoid adverse effects on signposting and referrals to CLAC or CLAN providers.

Providers also need to cultivate relationships with local authority in-house advice services. The evidence indicated that local authorities may be unlikely to bring funding for these services into the CLAC or CLAN 'pot'. However, close co-operation with in-house services is likely to be required, and such services may also be expected formally to contribute to CLAC or CLAN provision.

Final comments

The Ministry of Justice's fundamental look at legal aid may have implications for the future development of CLACs and CLANs. Yet a key driver of local authority interest has been dissatisfaction with lack of co-ordination between providers. This and other developments, such as the integration of debt, housing and welfare benefits advice under 2010 legal aid contracts, suggest that future commissioning of advice services is likely to require more formal integration than in the past. Findings from the study are therefore likely to remain relevant beyond the specific context of CLACs and CLANs.

* Chris Fox, Richard Moorhead, Mark Sefton and Kevin Wong, *Community legal advice centres and networks: a process evaluation*, Legal Services Commission, 2010, available at: http://lsrc.org.uk/publications/CLACNProcessEvaluationFull.pdf.

Employment law update – Part 1

Tamara Lewis and **Philip Tsamados** continue their six-monthly update on employment and discrimination law, which is designed to keep practitioners informed of all the latest developments. This article summarises the provisions of the Equality Act (EqA) 2010 and looks at other relevant legislation and policy matters. The article also considers the latest discrimination case-law relating to disability, race and religion, and concerning contractual and employment rights and unfair dismissal. Part 2 of the article will be published in December 2010 *Legal Action*.

POLICY AND LEGISLATION

Equality Act 2010

The EqA received royal assent on 8 April 2010.[1] The Act is being implemented in stages, with the core provisions in force from 1 October 2010, including the list of protected characteristics, definitions of discrimination, a new offence of third-party harassment, new law on disability discrimination and extended power of tribunals to make recommendations (Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order (EqA 2010 (Commencement No 4) Order) 2010 SI No 2317). The EqA replaces the previous discrimination legislation, primarily set out in the following legislation:

- the Equal Pay Act 1970;
- the Sex Discrimination Act (SDA) 1975;
- the Race Relations Act (RRA) 1976;
- the Disability Discrimination Act (DDA) 1995;
- the Employment Equality (Sexual Orientation) Regulations 2003 SI No 1661;
- the Employment Equality (Religion or Belief) Regulations 2003 SI No 1660; and
- the Employment Equality (Age) Regulations 2006 SI No 1031.

The EqA does not apply to discriminatory acts wholly before 1 October 2010. The EqA does apply to acts of discrimination which started before 1 October but continued after that date.

In employment terms, the position is in general similar to before the EqA came into force, with inconsistencies ironed out and a few new features. The definitions of direct discrimination, indirect discrimination, victimisation and harassment are essentially the same as before the EqA, but with minor differences in wording. The offence of third-party harassment introduced recently into the SDA now applies in respect of all the protected characteristics. There is a new offence of indirect disability discrimination as well as a continuation of failure to make reasonable adjustments. The old definition of disability-related discrimination, which was rendered useless by *Lewisham LBC v Malcolm* [2008] IRLR 700, HL; [2008] UKHL 43, 25 June 2008, is replaced by a new offence of 'discrimination arising from disability' (EqA s15). There are also new restrictions on pre-employment enquiries about disability and health (EqA s60). The definition of 'disability' is the same except that it is no longer necessary for the affected day-to-day activities to fall within a restricted list of 'capacities'. The proposed new offence of dual discrimination: combined characteristics will hopefully be implemented in 2011, although it is still being 'considered' by the government.

The new public sector equality duty is likely to come into force in April 2011. Meanwhile, there is a consultation on the proposed new specific duties, which can be accessed on the Government Equalities Office website.[2]

The EqA is supplemented in small details by various statutory instruments. New codes of practice on employment and on equal pay from the Equality and Human Rights Commission have just been produced, though technically are drafts pending completion of the parliamentary process. The Office for Disability Issues consultation on new statutory guidance on the definition of disability closed on 31 October 2010.[3] Until the new guidance is brought into force, the previous guidance applies (Equality Act 2010 (Commencement No 4) Order article 13).

From 1 October 2010, there was also a new format for discrimination questionnaires (Equality Act 2010 (Obtaining Information) Order 2010 SI No 2194). Questionnaires must be served either before a case starts or before the end of 28 days beginning on the date proceedings started. The questionnaire cannot be served by electronic means unless the employer or employer's representative has given written permission to accept service in that way.

The government has announced its intention to abolish the default retirement age currently in age discrimination law. It is proposed that no new retirement notices will be allowed from 6 April 2011, though retirements notified before 6 April and taking effect before 1 October 2011 will still apply. The government consultation on the transitional arrangements and other details closed on 21 October 2010.[4] Further announcements are awaited.

National Minimum Wage Regulations 1999 (Amendment) Regulations 2010 SI No 1901

From 1 October 2010, the rates of the national minimum wage (NMW) were increased and changes were made to the age limits as follows:

- For adult workers (now defined as those aged 21 and over): from £5.80 to £5.93 per hour.
- For workers aged between 18 and 20: from £4.83 to £4.92 per hour.
- For workers aged under 18 (who have ceased to be of compulsory school age): from £3.57 to £3.64 per hour.
- The amount permitted to be taken into account where accommodation is provided to the employee: from £4.51 to £4.61 per day.

The regulations also bring certain apprentices within the scope of the NMW for the first time. A new NMW rate of £2.50 per hour is payable for apprentices employed under a contract of apprenticeship or engaged under certain government arrangements in England, Scotland, Northern Ireland and Wales.

Employment Relations Act 1999 (Blacklists) Regulations 2010 SI No 493

These regulations came into force from 2 March 2010 and prohibit the compilation, distribution and use of 'blacklists' intended to promote discrimination against trade union members and activists by employers and employment agencies. For further details, see 907 *IDS Employment Law Brief* 17.

Enforcement of employment tribunal awards

The fast-track service providing for enforcement of tribunal awards through the use of High Court enforcement officers (see May 2010 *Legal Action* 10) has now been extended to include Advisory, Conciliation and Arbitration Service COT3 agreements. This was achieved by amendment of Practice Direction 70 (enforcement of judgments and orders) to Civil Procedure Rules Part 70.[5] For further details see leaflet EX727, which rather confusingly is still entitled *I have an employment or an employment Appeal Tribunal award but the respondent has not paid – How do I enforce it?*[6]

DISABILITY DISCRIMINATION

Definition of disability

A worker has a disability under the DDA if s/he has a 'physical or mental impairment which has a substantial and long-term adverse effect on his[/her] ability to carry out normal day-to-day activities'. This part of the definition is the same under EqA s6. When a worker has depression, it is one of those difficult areas which sometimes falls within the definition and in other circumstances does not.

■ J v DLA Piper UK LLP

UKEAT/0263/09,
15 June 2010

The claimant was qualified as a barrister. She worked for a government department from 2004 to 2006 and suffered depressive episodes while there. In May 2006, the claimant joined a large City solicitors' firm. She suffered a further episode of depression while there. In June 2008, the claimant was offered a job with the respondents. After telling the human resources manager of her history of depression, her job offer was withdrawn on the ground that the respondent was operating a recruitment freeze because of the credit crunch. The claimant believed that the true reason was her medical history and she brought a disability discrimination claim. Her claim was rejected by the employment tribunal (ET) at a pre-hearing review on the ground that she did not have a disability at the material time. The claimant appealed.

The Employment Appeal Tribunal (EAT) upheld the appeal; it sent the case to a new tribunal to consider again. As part of the EAT's decision, it gave guidance on several aspects of deciding whether or not a claimant with depression has a disability as defined by the legislation. The EAT noted that although the definition of disability requires an impairment to be identified as well as its substantial adverse effects, it may well be easier for an ET, in certain cases, to reverse the order in which the tribunal considers these matters, ie, to decide first whether or not there are substantial adverse effects; if so, this will help the ET decide whether or not there is an impairment.

The EAT said that there is a difficulty in distinguishing between where depression amounts to an impairment (which could be called 'clinical depression') and where the low mood and anxiety is simply caused by life events, for example a reaction to problems at work. The borderline between the two is blurred, but clinicians make such distinctions routinely in practice. It can be difficult in a particular case to apply the distinction, but often the answer lies in whether or not the symptoms are long term. In most cases, if the adverse effects last for at least 12 months, they are the result of a mental impairment.

The EAT also said that the tribunal was wrong to ignore the evidence of the claimant's GP because it was not 'expert'. A GP is fully qualified to express an opinion on whether or not a patient is suffering from depression. The GP's evidence may have less weight than that of an expert consultant, all other things being equal, but it cannot be ignored if the evidence of a specialist is not available or inconclusive.

Comment: When trying to prove a claimant has a mental impairment, it is possible to get diverted into a discussion about whether his/her depression is a mental illness or simply a low mood caused by life events. GPs and workers tend to use words like 'anxiety' and 'stress'; however, as the EAT said, it is necessary to look behind the label. In practice, where the adverse effects are both substantial and long term, the tribunal is likely to find these outcomes were caused by a 'mental impairment' and that the claimant is disabled under the legislation. See also page 35 of this issue.

Reasonable adjustments

Where a provision, criterion or practice or any physical feature of the premises places a disabled worker or office holder at a substantial disadvantage, an employer must make reasonable adjustments (DDA s4A; EqA ss20 and 21 are very similar). DDA s18B(2) gives examples of reasonable adjustments, but it is not a definitive list. The EqA gives no examples, but this should not make any difference to what an employer ought to have done.

■ Chief Constable of South Yorkshire Police v Jelic

UKEAT/0491/09,
29 April 2010,
904 IDS Employment Law Brief 5, EAT

Mr Jelic was a police officer. As a result of his disability, chronic anxiety syndrome, he needed to work in a non-confrontational environment with little face-to-face public contact. In 2005, he joined a new Safer Neighbourhood Unit (SNU) where his main task was inputting data using his specialist knowledge and experience. He worked there successfully and to a high standard. By 2007, the role of an SNU police officer had evolved and required dealing directly with members of the public. After various reports and meetings, on 4 May 2008 Mr Jelic was medically retired. He brought a tribunal claim for disability discrimination under the DDA.

The ET said that the employer was under a duty to make reasonable adjustments because its policy that all SNU police officers should be able to interact face-to-face with the public placed Mr Jelic at a substantial disadvantage because of his disability. The ET then made a couple of suggestions about adjustments. Most interestingly, the tribunal suggested that the employer should have swapped Mr Jelic's role with that of a PC Franklin. Admittedly, this went further than any example given in DDA s18B(2), which only suggests transferring an employee to fill an existing vacancy. However, PC Franklin was already doing a job that was needed by the employer and which Mr Jelic could have done; PC Franklin was not on restricted duties and – subject to listening to his views – there was no reason why he could not swap. Putting it bluntly, PC Franklin could, under his contract, simply be ordered to move. The police force appealed.

The EAT rejected the appeal against this reasonable adjustment. The list of reasonable adjustments in section 18B(2) is only a set of examples. There is nothing legally wrong with the suggestion that an employer should swap the claimant's job with another employee's job or even create a new job. It all depends on what is reasonable on the facts of the particular case.

The EAT allowed the appeal against the tribunal's finding that it would be an alternative, reasonable adjustment to retire Mr Jelic on medical grounds, and then redeploy him in a police staff post. This was because the ET had explained insufficiently its reasoning on this point. If necessary, this issue would be sent to a new tribunal to hear fresh evidence and decide again.

Comment: It will be unusual for a tribunal to find that it is reasonable for an employer to require another employee to swap jobs with a disabled worker; however, in certain situations where jobs are interchangeable, it may be the case.

RACE DISCRIMINATION

Contract workers

Under RRA s7, it is unlawful for a 'principal' to discriminate against a 'contract worker'. EqA s41 contains a similar provision, though the wording is different in some respects. This provision applies where the contract worker is supplied by his/her employer to do work for the principal under a contract made between the employer and the principal. The following case concerns what is meant by doing 'work for' the principal.

■ Leeds City Council v Woodhouse and another

[2010] EWCA Civ 410,
18 March 2010,
[2010] IRLR 625, CA

Mr Woodhouse's employment was transferred from the council to West North West Homes Leeds Ltd (WN), which was an arms length management organisation. WN was wholly owned by the council and managed council properties under a management agreement with it. WN sub-contracted its building maintenance services to the council's Property Services Division (PSD) under a service agreement. Mr Woodhouse, who was black, had responsibility for checking the quality of the PSD's work. Mr Chapman was an employee within the PSD. Mr Woodhouse brought a tribunal claim for race discrimination against the council, alleging that Mr Chapman had racially discriminated against him. The ET and the EAT found that Mr Woodhouse was a contract worker of the council and that he could, therefore, make his claim against Leeds in respect of Mr Chapman's actions. The council appealed.

The Court of Appeal rejected the appeal. If the principal and employer are in the relationship of contractor and sub-contractor, the mere fact that a worker does some work under the sub-contract does not bring him/her under RRA s7 and it may be necessary for the principal to have exercised some level of influence or control over the work. However, that is not to say that it is always necessary for the principal to have any influence or control over the work.

In this case, the extreme closeness of the relationship between the contracting parties was enough to make Mr Woodhouse a 'contract worker'. There were two contractual agreements (the management agreement and the service agreement) linking WN and the council. WN was wholly owned by the council; WN existed only in order to provide management services to the council, which was its only customer. In those circumstances, everything done by WN's employees, including Mr Woodhouse, was done not only for WN but for the council. The Court of Appeal added that, in a case which is not clear and simple, the issue of whether or not the claimant is a contract worker is better heard as part of the entire case rather than hived off as a preliminary issue.

Liability for agency workers

Under RRA s32(1), employers are vicariously liable for any discrimination carried out by their employees against other employees. This means employees who are employed in the wider sense of 'employment' under RRA s78(1) as opposed to the narrower unfair dismissal definition. Under RRA s32(2), employers can be liable for discrimination by their agents (EqA s109 is almost identical to RRA s32, although it does not spell out that an agent's authority may be express or implied, precedent or subsequent). It is a question of fact whether these sections apply when discrimination is carried out by an agency worker against one of an employer's employees.

■ May & Baker Ltd t/a Sanofi-Aventis Pharma v Okerago

UKEAT/0278/09,
17 February 2010,
[2010] IRLR 394, EAT,
October 2010 Legal Action 26

Ms Okerago brought various claims for race discrimination, harassment and victimisation. Her claims for victimisation and unfair dismissal were upheld. Her other race discrimination claims were rejected, apart from one incident where an agency worker (Ms Dower) had made a racist remark to her. When Ms Okerago said that she would support her own country in the football World Cup rather than England, Ms Dower told her 'to go back to her own fucking country' (para 6).

The ET said that the company was liable for Ms Dower's remarks under RRA ss32 and 33. The tribunal appeared to say that the company was liable under section 32(1) because Ms Dower was an employee. The ET considered that she was an 'employee' because 'to all intents and purposes, she was treated as an employee on a day-to-day basis and acted as one' (para 16). The tribunal also said that the company was liable because of section 33. Under section 33(1), which is replicated broadly by EqA ss111–112 though the wording is not the same, 'a person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description' (para 19). The tribunal said that the company had 'aided' Ms Dower to do the unlawful act because it had failed to investigate the claimant's grievance and allowed an environment where such discrimination could take place. The company appealed the finding that it was liable for Ms Dower's comments.

The EAT upheld the appeal. The tribunal had not made sufficient findings of fact to support its contention that the claimant was an employee of the company in the sense required under discrimination law. The company, therefore, could not be liable under section 32(1). As for whether or not Ms Dower was the company's agent under section 32(2), the tribunal had not made any findings of fact on this issue and did not appear even to have considered it. Whether or not someone is an agent for these purposes depends on a common law analysis of agency and not merely a purposive interpretation of the RRA (ie, an interpretation which is aimed at ensuring discrimination law applies). Section 33 also did not help because it is not possible to 'aid' someone to do an act of discrimination after the event, for example, by not investigating a complaint about it; nor is permitting a certain environment to exist enough to constitute aiding the unlawful act. There was also no evidence that the company had 'knowingly' aided Ms Dower. In any event, section 33 did not apply because Ms Dower had not done an act made unlawful by the RRA because she was not an employee or agent of the company, and therefore it could not be aiding her to do an unlawful act.

Comment: It will depend on the facts whether or not an agency worker is an employee of the claimant's employer within the meaning of the discrimination legislation. Whether or not such a worker is, alternatively, an 'agent' for the purposes of section 32(2) also depends on the facts. The common law on agency is technical and needs researching if a case like this arises. Readers should note that under EqA s40, employers can in certain circumstances be liable for third-party harassment. This provision may come to the rescue in this sort of case provided the facts fit the requirements of that section.

RELIGIOUS DISCRIMINATION

'Employment law update – Part 1', May 2010 *Legal Action* 12 reported the case of *McFarlane v Relate Avon Ltd* UKEAT/0106/09, 30 November 2009; [2010] IRLR 196; 893 *IDS Employment Law Brief* 6, EAT. Mr McFarlane's application for leave to appeal to the Court of Appeal has now been rejected. The reasons are worth reading for Lord Justice Laws' response to an intervention by Lord Carey, the former Archbishop of Canterbury.

■ McFarlane v Relate Avon Ltd

[2010] EWCA Civ B1,
29 April 2010,
[2010] IRLR 872, CA

Mr McFarlane worked as a counsellor for Relate Avon Ltd, part of the Relate Federation which provides relationship counselling. As a Christian, Mr McFarlane believed that same-sex sexual relations were sinful and he was unwilling to give counselling regarding sexual matters to same-sex couples. He was dismissed because this was not in keeping with the equal opportunities policy and professional ethics policy followed by Relate. The ET rejected Mr McFarlane's direct religious discrimination claim because Relate would also have dismissed a non-Christian who was unwilling to give sexual counselling to same-sex couples. Regarding indirect discrimination, his claim failed because Relate's aim of providing full counselling services to all sections of the community was legitimate, and it was justifiable for a body in Relate's position to require its employees to adhere to those principles which it regarded as fundamental to its own ethos and that it pledged to maintain towards the public. Mr McFarlane's appeal to the EAT failed. He sought leave to appeal to the Court of Appeal.

Laws LJ, on behalf of the Court of Appeal, refused leave. He said that Mr McFarlane could not succeed because of the similarity of his case to that of *Ladele v Islington LBC and Liberty (intervener)* [2009] EWCA Civ 1357, 15 December 2009; [2010] IRLR 211; 893 *IDS Employment Law Brief* 3, CA; May 2010 *Legal Action* 11. To give effect to Mr McFarlane's position would inevitably undermine Relate's proper and legitimate policy. Laws LJ then commented on the witness statement provided by Lord Carey on Mr McFarlane's behalf. Laws LJ summarised Lord Carey's argument, in so far as he could make sense of it, as amounting to a plea that the courts ought to be more sensitive to the substance of the Christian beliefs referred to and readier to uphold them. Laws LJ strongly rejected Lord Carey's call for a specialist panel of judges with 'proven sensitivity and understanding of religious issues' to hear cases engaging religious rights. Laws LJ said that, whereas the right to hold and express religious views must be protected, the law should not uphold the content of such views purely because they were based on religious precepts. Both principles were a necessary part of a free, rational and democratic society. Laws LJ also observed that Lord Carey's views seemed to be based on the misunderstanding that if conduct is found to be discriminatory, it should necessarily be condemned as disreputable or bigoted. As far as Laws LJ was aware, no judges had equated the condemnation by some Christians of homosexuality on religious grounds with homophobia, nor had they regarded that position as disreputable.

SEX DISCRIMINATION

Victimisation

It is unlawful victimisation for an employer to treat a worker less favourably because the worker has done a 'protected act', ie, complained about sex discrimination in some way, whether formally or informally (SDA s4). There is equivalent protection where the complaint is about discrimination based on any of the protected characteristics. The definition of victimisation in EqA s27 is similar. Victimisation claims have led to some complicated case-law, which the following case tried to summarise.

■ **Pothecary Witham Weld and another v Bullimore and another and Equality and Human Rights Commission (intervener)**
UKEAT/0158/09,
29 March 2010,
[2010] IRLR 572, EAT

The claimant resigned from her position as a salaried partner at Witham Weld Solicitors and, in May 2004, brought a tribunal claim alleging unfair dismissal and sex discrimination. In March 2008, she was offered a job with Sebastians Solicitors, subject to satisfactory references. Mr Hawthorne, who had managed the department in which the claimant had worked at Witham Weld, gave her a poor reference. In addition, when asked how the claimant's employment had ended, the reference mentioned gratuitously that she had brought a tribunal claim. As a result, Sebastians' job offer was made subject to a probationary period. The claimant brought successful tribunal claims for victimisation against the then merged firm of Pothecary Witham Weld, Mr Hawthorne and Sebastians.

Pothecary Witham Weld and Mr Hawthorne appealed unsuccessfully on a number of grounds. This report is only concerned with the EAT's comments on victimisation law. In rejecting the appeal, the EAT summarised the effect of the three House of Lords' (now Supreme Court) cases on victimisation, ie, *Nagarajan v London Regional Transport* [1999] IRLR 572, HL; (1999) 15 July, HL, *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, 11 October 2001; [2001] IRLR 830, HL, and *St Helens MBC v Derbyshire* [2007] UKHL 16, 25 April 2007; [2007] IRLR 540, HL.

The EAT said that in most victimisation cases, it is only necessary to look at the straightforward guidance in *Nagarajan*. The more complex guidance in *Khan* and *Derbyshire* really only needed to be considered in cases where the employer had taken steps to protect its position in current litigation and such steps are alleged to be victimisation. This can raise tricky issues about the reason for the employer's actions. In *Khan*, for example, the claimant had brought a race discrimination claim regarding two failed promotion applications. While the tribunal claim was pending, he applied for a position with the Norfolk police, which asked for a reference. On legal advice, Mr Khan's employer refused to give a reference for fear of prejudicing his tribunal case. In *Derbyshire*, the employer had written letters to equal-pay litigants, unreasonably pressurising them to settle their cases.

The EAT said that in victimisation cases, it is necessary to ask three questions;

- Has there been less favourable treatment of the claimant?
- Is that 'by reason that' s/he did the protected act, for example, because s/he alleged discrimination?
- Did s/he suffer a detriment as a result?

Where the employer's actions are to protect itself in discrimination litigation, this should be taken as 'by reason of' the protected act. However, in deciding whether or not the claimant suffered a detriment in such cases, the question is whether or not a reasonable litigant would regard the employer's conduct as detrimental. An employer's reasonable conduct defending its position in litigation cannot reasonably be regarded as a detriment.

CONTRACTUAL AND EMPLOYMENT RIGHTS

Employment status

In order to bring a claim of unauthorised deduction from wages under Employment Rights Act (ERA) 1996 s13, the claimant has to be a 'worker' within the definition contained in ERA s230(3).

Section 230(3) defines a 'worker' as:

... an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

In the following case, the EAT provided clarification of the position of a claimant with a contract allowing him/her to provide a substitute to carry out his/her work.

■ **Community Dental Centres Ltd v Sultan-Darmon**
UKEAT/0532/09,
12 August 2010
The respondent had a contract with the primary care trust in Devon to supply dental services in the area, and in turn entered into a contract with the claimant, a dentist, to provide it with dental services from 2002 onwards. The respondent supplied the premises and dental equipment. The company introduced patients to the claimant, but the contract gave him fairly extensive rights to decline to treat any individual. The contract defined the hours when the claimant was required to work, limited the amount of time that he could take off and required him to participate in an emergency on-call roster. The claimant was paid gross and did not receive any holiday or sickness pay. He was allowed to undertake private work from the respondent's premises, with fees being shared equally with the company. Remuneration was, in the later years, calculated by reference to target units of dental activity.

The contract also contained a provision under the heading 'Absence' which stated: 'In the event of your failure (through ill health, maternity leave or other causes excluding up to 30 days' annual holiday allowance) to utilise the facilities for a continuous period of more than [five] days you shall make arrangements for the use of the facilities by a locum tenens acceptable to [the respondent] and in the event of your failure to make such arrangements [the respondent] shall have authority to appoint a locum tenens if possible to act on your behalf who should be your servant or agent and shall be paid by you' (para 5(m)).

In 2009, the contract came to an end and the claimant brought a claim in respect of unauthorised deductions from wages. At a pre-hearing review, the ET, first, had to establish whether or not the claimant was a 'worker' within ERA section 230(3) and so entitled to bring the claim. The tribunal found that the claimant was a 'worker' because, under the terms of the contract, he was either obliged to provide his own services as a dentist or supply a locum, and so he had a personal obligation to ensure that the dental services he was contracted to carry out were being provided. The tribunal relied on *Redrow Homes (Yorkshire) Ltd v Buckborough and another* [2009] IRLR 34, EAT, in which the EAT stated that the reference to 'work or services' within section 230(3) included not just a requirement to provide the claimant's own labour, but covered the situation where there was a personal obligation on the claimant to provide the labour of others. The respondent appealed.

The EAT overturned the tribunal's decision. It held that the claimant was not a worker. The EAT found that the view expressed in *Redrow Homes* (above) was inconsistent with the Court of Appeal's decision in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367, CA; November 1999 *Legal Action* 20; (1999) 11 March, CA and should not have been followed. In *Tanton*, the Court of Appeal held that a contractual requirement to provide a substitute driver at the claimant's expense if he was unable or unwilling to work was inconsistent with the contention that he was an employee, in that he was not required to provide personal services, and in fact was consistent with a self-employed relationship (thus, for the current purpose taking the relationship outside the scope of the definition of 'worker').

The EAT took the opportunity to review the previous authorities and confirmed that the correct position was that where a party had an unfettered right not to perform his/her contract obligations and could delegate them to someone else, s/he was not a 'worker'. The position was different if the right not to perform was limited to a specified event, such as where that party was unable to perform the obligation. In the current case, the clause was wide, allowing the claimant to appoint a substitute in the event of not just his ill health or maternity leave, but in the event of 'other causes'.

UNFAIR DISMISSAL

Compensation

■ **Tao Herbs & Acupuncture Ltd v Jin**
UKEATPA/1477/09,
14 July 2010
The EAT held that in calculating the compensatory award for unfair dismissal under ERA s123, a tribunal was not required to take into account the ability of the respondent to pay that award. In calculating the loss for unfair dismissal, the tribunal was concerned with arriving at an amount which was 'just and equitable' (para 8) having regard to the loss suffered by the claimant attributable to the action of the respondent employer.

Time limits

Under ERA s111(2), an ET does not have jurisdiction to consider a complaint of unfair dismissal:

... unless it is presented to the tribunal –
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

The following case considered the position of a claimant presenting an out-of-time claim as a result of incorrect advice and the relevance, in turn, of the reasonableness of that advice.

■ **Northamptonshire CC v Entwhistle**
UKEAT/0540/09,
25 May 2010,
[2010] IRLR 740, EAT,
906 IDS Employment Law Brief 3
On 13 November 2008, the claimant was dismissed for gross misconduct. He appealed against this but the appeal was not concluded until 20 March 2009. On 26 March 2009, the respondent wrote to the claimant confirming that the dismissal stood and the appeal had been rejected. The letter stated: 'If you believe that you do have grounds to appeal against this decision you do have the right to apply to an employment tribunal within three months of receipt of this decision' (para 2(2)). This was incorrect for a number of reasons. First, the time limit ran from the effective date of termination, ie, 13 November 2008. Second, at that time, the statutory dispute resolution procedures applied, and so the primary time limit for presentation of an ET claim expired on 12 February 2009; however, given that the statutory dismissal and disciplinary procedure applied and was still being followed at that date, the time limit was extended to 12 May 2009 (Employment Act 2002 (Dispute Resolution) Regulations 2004 SI No 752 reg 15). As a result, the claimant had approximately six weeks within which to present his tribunal claim and not three months as the letter stated.

Unfortunately, the claimant's solicitor failed to spot the error in the respondent's letter. He and the claimant proceeded on the basis that they had until 27 June 2009 to present a claim of unfair dismissal. The claim was presented on 27 May 2009 and so was out of time by just over a fortnight.

The ET found that for the purposes of ERA s111(2)(b), it had not been reasonably practicable for the claimant to bring the claim within the extended period of six months (then applying) and that the claim had been brought within a reasonable period thereafter, despite what the tribunal viewed as the solicitor's negligence in overlooking the error in the respondent's letter.

The employer appealed. It relied on *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379, CA. The employer argued that *Dedman* states that a claimant cannot claim to be in reasonable ignorance of the time limit if s/he has

RECOMMENDED READING

IDS Employment Law Brief

- Encouraging the not-quite fit back to work 904
- Disciplinary proceedings – an update 906
- Adjustments for the mentally impaired 908
- Industrial action balloting requirements 909
- Working abroad: statutory employment rights 911
- Compensatory awards – 'Polkey reductions' 912

Equal Opportunities Review

- Compensation awards 2009: part 1 201
- Compensation awards 2009: part 2 202

Other

- *Employment tribunal and EAT statistics 2009-10 (GB): 1 April 2009 to 31 March 2010* is available at: www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf.

consulted a skilled adviser, even if that adviser failed to advise him/her correctly.

The EAT found that the ET was wrong to say that it was not reasonably practicable to present the claim in time. The EAT stated that it was right that ERA s111(2)(b) should be given a liberal construction in favour of the employee. As a result, it has consistently been held to be not reasonably practicable for an employee to present a claim within the requisite time limit, if s/he was reasonably in ignorance of that time limit.

The EAT considered that in *Dedman*, the Court of Appeal appeared to hold categorically that a claimant could not claim to be in reasonable ignorance of the time limit if s/he had consulted a skilled adviser, even if that adviser had failed to advise him/her correctly. However, the EAT said that it is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice was itself reasonable, and therefore where it would not be reasonably practicable for the claimant to have brought the claim in time.

The EAT cited a model example of this as one where both the claimant and the adviser had been misled by the employer about some material, factual matter. It concluded that in a case where a claimant had consulted skilled advisers, the question of reasonable practicability is to be judged by what s/he could have done if s/he had been given such advice as the advisers should reasonably, in all the circumstances, have given him/her.

In the present case, the error made by the claimant's solicitor was negligent. The respondent's letter might have been misleading, but the solicitor should not have been misled by it. He should have checked the respondent's statement for himself and not simply taken it on trust; the solicitor had not given the claimant the advice which he should reasonably, in all the circumstances, have given him.

1 Available at: www.legislation.gov.uk/ukpga/2010/15/contents.
2 *Equality Act 2010: the public sector equality duty. Promoting equality through transparency. A consultation* is available at: www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf. The consultation closes on 10 November 2010.
3 The EqA 2010 draft guidance and the consultation paper are available at: www.officefordisability.gov.uk/docs/wor/new/ea-guide.pdf and www.officefordisability.gov.uk/docs/wor/new/ea-consult.pdf respectively.
4 *Phasing out the default retirement age: consultation document* is available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation.pdf.
5 See: www.justice.gov.uk/civil/procrules_fin/index.htm.
6 Available at: www.hmcourts-service.gov.uk/courtfinder/forms/EX727_web_1010.pdf.

Tamara Lewis is a solicitor in the employment unit at the Central London Law Centre® (CLLC). Philip Tsamados is a solicitor. Readers are invited to send in innovative, unreported cases, information on significant cases in which appeals have been lodged and examples of the use of new legislation. Contributions to be included in the update in May 2011 *Legal Action* may be sent to Tamara Lewis at CLLC, 14 Irving Street, London WC2H 7AF, tel: 020 7839 2998. Tamara Lewis is the author of *Employment law: an adviser's handbook*, LAG, 8th edition, 2009, £35.

Recent developments in housing law

Nic Madge and **Jan Luba QC** continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Assured tenancies

On 1 October 2010, the Assured Tenancies (Amendment) (England) Order 2010 SI No 908 took effect. The Order lifted the rent ceiling, above which a tenancy cannot be an assured tenancy, from £25,000 to £100,000 per annum: Housing Act (HA) 1988 Sch 1 para 2(1)(b). The result was that thousands more tenants became assured tenants overnight.

For those with tenancies originally commencing on or after 28 February 1997, the tenancy will normally be an assured shorthold. Some landlords have treated the change as requiring them to place deposits taken from existing tenants under the protection of a tenancy deposit scheme. Communities and Local Government (CLG) has created a webpage of frequently asked questions about the change to assist landlords and tenants.[1]

Tenants in mortgaged property

CLG has issued a free booklet of non-statutory guidance on the Mortgage Repossessions (Protection of Tenants etc) Act 2010 and the regulations made under it, which came into force on 1 October 2010 (as described in October 2010 *Legal Action* 28): *Guidance to the Mortgage Repossessions (Protection of Tenants etc) Act 2010.*[2]

Scottish private rented sector

Although the coalition government has abandoned the Labour government's plans for further regulation of private sector landlords in England, a wholly different approach is being taken in Scotland. In October 2010, the Scottish Parliament began consideration of the Private Rented Housing (Scotland) Bill (SP Bill 54) designed to tighten further the regulation of that sector in Scotland.

Housing benefit

In September 2010, the Department for Work and Pensions published three research papers addressing topics related to private sector tenancy rents and housing benefit. They are:

- *Low income working households in the private rented sector.*[3]
- *Private landlords and the local housing allowance system of housing benefit.*[4]
- *Tenants' and advisers' early experiences of the local housing allowance national rollout.*[5]

Local authority housing benefit departments are required to refer claims for housing benefit from tenants living in the private rented sector to the Valuation Office Agency (VOA). The rent officers employed by the VOA carry out a series of determinations in every case referred. A monthly data table of the local reference rents produced by that exercise can now be accessed by both landlords and tenants.[6]

Homelessness

In September 2010, the coalition government issued new non-statutory guidance to local authorities in England to help them evaluate more accurately the number of rough sleepers in their areas: *Evaluating the extent of rough sleeping: a new approach* (CLG, September 2010).[7]

The guidance follows completion of a consultation exercise in respect of which a summary of responses has been published: *Consultation on proposed changes to guidance on evaluating the extent of rough sleeping. Summary of responses* (CLG, September 2010).[8]

Housing grants

The Housing Renewal Grants (Prescribed Form and Particulars) (Revocation) (England) Regulations 2010 SI No 2417 came into force on 31 October 2010. They repeal a host of earlier regulations prescribing the content of applications for disabled facilities grants and other housing grants. The intention is that local authorities should be left free to devise their own application forms.

Housing associations in Wales

The Welsh Assembly Government (WAG) has published the new guidelines against which it will assess the performance of housing associations in Wales: *Developing a modern regulatory framework for housing associations in Wales: delivery outcomes* (WAG, September 2010).[9]

Social housing sales

The latest statistics on social housing sales to sitting tenants in England during 2009–10 were released in September 2010: *Social housing sales to sitting tenants, England, 2009–10* (CLG, September 2010).[10] The figures cover sales through Right to Buy, Preserved Right to Buy, Right to Acquire, Social HomeBuy and other outright or shared equity sales to sitting tenants.

HUMAN RIGHTS

Article 8

■ Kay v UK

App No 37341/06, 21 September 2010

For the facts of this case, see *Lambeth LBC v Kay*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465; May 2006 *Legal Action* 37.

In the European Court of Human Rights (ECtHR), the UK government did not dispute either that the properties in question were the 'homes' of the occupants for the purposes of article 8(1) of the European Convention on Human Rights ('the convention') or that Lambeth's decision to seek possession orders and the subsequent granting of the orders constituted an 'interference' with their right to respect for their homes. Both the government and the occupants agreed that the interference was in keeping with the law and pursued the legitimate aim of protecting the rights and freedoms of others. It protected the local authority's right to regain possession of its property from someone who had no contractual right to be there and ensured that the statutory scheme for housing provision was properly applied. The central question for the ECtHR to examine was whether or not the interference was proportionate to the aim pursued and thus 'necessary in a democratic society' (para 50).

The ECtHR stated as follows:

- An interference will be considered 'necessary in a democratic society' in pursuance of a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of

necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the ECtHR for conformity with the requirements of the convention (para 65).
In making their initial assessment of the necessity of the measure, the national authorities enjoy a margin of appreciation in recognition of the fact that they are better placed than international courts to evaluate local needs and conditions. The margin afforded to national authorities will vary depending on the convention right in issue and its importance for the individual in question (para 66).
■ The requirement under article 8(2) that the interference be 'necessary in a democratic society' raises a question of procedure as well as one of substance (para 67).
■ The court welcomed:

... the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8. A number of their lordships in [Doherty and others v Birmingham City Council *[2008] UKHL 57*] *alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional* Wednesbury *grounds ... To the extent that, in light of* Doherty*, the gateway (b) test set out by Lord Hope in* Kay *should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order, the court emphasises that this development occurred after the disposal of the applicants' proceedings* (para 73).

The ECtHR found a breach of article 8 in its procedural aspect because the decision by the county court to strike out the occupants' article 8 defences meant that the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not observed. As a result, they were dispossessed of their homes without any possibility of having the proportionality of the measure determined by an independent tribunal (para 74).

It was far from clear that, had a domestic tribunal been in a position to assess the proportionality of the eviction, the possession order would not still have been granted.
The court therefore awarded €2,000 non-pecuniary damages to each occupant to compensate for feelings of frustration and injustice (para 78). An article on this important ECtHR judgment will appear in December 2010 *Legal Action*. See also page 31 of this issue.

■ Neville v South Dublin CC

[2010] IEHC 67,
19 March 2010
Mr Neville's parents rented a home from the council, but both died. After their deaths, Mr Neville discharged an illegally held firearm and fled to the UK. He was extradited and given a three-year suspended sentence together with a 12-month probation bond. When the council heard about this, it decided that:
■ he was a person who had engaged in anti-social behaviour;
■ he was not the tenant of the dwelling; and
■ he was residing there without permission.

The council sought to repossess the house through a summary process by which the Gardai (police) removed the front door and downstairs window and directed Mr Neville to leave the dwelling in keeping with the Irish Housing (Miscellaneous Provisions) Act 1997 s20. He sought judicial review.

O'Neill J refused to grant mandamus. The judge considered the applicability of article 8 of the convention. He found that the nature and extent of Mr Neville's occupation of the house fell beneath the threshold for asserting that it was his 'home' for the purpose of engaging his article 8 rights. Furthermore, although the eviction was unlawful and ultra vires the council's powers under section 20, Mr Neville had not been entitled to succeed to the tenancy. He was a trespasser and the council was entitled to recover possession.

■ Quinn v Athlone Town Council

[2010] IEHC 270,
8 July 2010
Ms Quinn was a tenant of the council. Following service of a notice to quit in September 2008, the council sought an order for possession. Ms Quinn defended those proceedings, but an order was made because she had no security of tenure and the local court was required to grant the order in those circumstances. In July 2009, she sought judicial review, contending that the process of eviction without providing her with an opportunity to defend the claim on its merits was a violation of her rights under article 8.

The Irish High Court rejected her claim. The proper target of her challenge should have been the service of the notice to quit which ended her tenancy. Her claim for judicial review of that decision was out of time.

Article 6 and delay

■ Băjănaru v Romania

App No 884/04,
21 September 2010[11]
Ms Băjănaru obtained the title to two plots of agricultural land in 1991. There was then a dispute about that title which was resolved in her favour. The decision was confirmed by the Court of Appeal in Bucharest in September 1999. She became entitled to possession of the land in March 2002. She was not able to obtain possession of it until April 2005. She complained to the ECtHR.

The ECtHR found violations of article 6(1) (right of access to a court) and article 1 of Protocol No 1 (protection of property). It was not disputed that the delays were attributable to the Romanian authorities. In the absence of a valid excuse, failure by the authorities to execute a final judgment within a reasonable time amounted to a violation of article 6. The government had not put forward any arguments leading to a different conclusion. The court concluded that the state had not deployed the necessary steps to execute the judgment. The court awarded damages of €3,000.

POSSESSION CLAIMS

Assured shorthold tenancies

■ Suvini v Anderson

Staines County Court,
13 August 2010[12]
Ms Suvini let a property to Mr Anderson on an assured shorthold tenancy from 18 August 2007 to 17 August 2008 with a rent of £1,200 payable on 15 August 2007 and 15 January 2008. A further tenancy was granted for another 12 months from 18 August 2008 to 17 August 2009, rent being payable bi-monthly in advance starting on 11 August 2008. After August 2009, the tenancy continued on a periodic basis. A notice under HA 1988 s21(4)(a) was served on 1 April 2010 seeking possession 'after 17 June 2010 or, if later, the day on which a complete period of your tenancy expires next after the end of two months from the service of this notice'.

At the subsequent possession hearing, the landlord argued that the periods of the tenancy were as set out in the tenancy agreement and so possession should be given. The tenant argued that the start and finish dates of the periods had been changed by the changed payment provision. If that was the case, the notice did not expire until 10 August and the landlord would have to rely on the saving provision. As proceedings were issued before 10 August, there would be a defence to the claim.

After referring to *Church Commissioners for England v Meya* [2006] EWCA Civ 821; [2007] HLR 4, District Judge Batcup ruled that the notice was valid and made a possession order. The tenant is seeking to appeal to a circuit judge.

After the possession order

■ Islington LBC v Markland

Clerkenwell and Shoreditch County Court, 13 July 2010[13]

Mr and Mrs Markland were joint secure tenants. Their relationship broke down and in December 2008 Mrs Markland left the premises. In May 2009, she served a notice to quit determining the tenancy. She alleged that she was the victim of domestic violence. As a result of this, she was rehoused. In July 2009, Islington notified Mr Markland that it would not be granting him a sole tenancy of the premises as he was a perpetrator of domestic violence. He disputed these allegations. Islington issued a possession claim, which was listed before a district judge in January 2010. Mr Markland appeared unrepresented. He handed in a pro forma defence and a written note, the substance of which was that he was the victim, had not been afforded a fair hearing by Islington and had a public law defence. He was given no opportunity to elaborate on his possible defence. The judge proceeded on the basis that he had no defence, as the joint tenancy had been lawfully determined. She made a possession order and gave a money judgment for £1,995.

Relying on *Forcelux Ltd v Binnie* [2009] EWCA Civ 854; December 2009 *Legal Action* 16, Mr Markland applied to set aside the possession order under Civil Procedure Rules (CPR) 3.1(2)(m) and/or CPR 3.1(7). He filed a draft fully pleaded defence asserting a gateway (b) defence, namely that Islington had failed to make a lawful determination about whether to grant him a sole tenancy of the premises or to secure suitable alternative accommodation under Islington's relationship breakdown policy.

District Judge Sterlini dismissed that application, holding that he had no jurisdiction to set aside the possession order. The appropriate procedure was an appeal under CPR 52. He granted permission to appeal.

HHJ Cryan dismissed the appeal against District Judge Sterlini's judgment but extended time to appeal against the possession order. He granted permission to appeal, allowed the appeal and gave case management directions. At the first hearing, the district judge had the options of either:

- deciding the case; or
- giving case management directions (CPR 55.8(1)).

When a claim is genuinely disputed on grounds which appear to be substantial, the court should give case management directions (CPR 55.8(2)). The powers under CPR 3 were residual and were not to be used where provision is made elsewhere in the rules. In *Forcelux v Binnie*, the Court of Appeal had had to fall back on CPR 3 because there was no other provision under which the court could have acted. In this case, Mr Markland had attended and had produced a defence. The district judge had decided that there was no substantive defence. She made a final order. To permit an application to set aside such an order would offend the principle of finality. CPR 52 provided the appropriate remedy where it was contended that there had been any procedural unfairness at a hearing. HHJ Cryan had no hesitation in allowing the appeal. Although the district judge had read the defence and note, she had given Mr Markland no opportunity to explain what he meant by a possible public law defence and he had been shut out from presenting a fuller case. Busy possession lists present a judicial challenge; however, the procedure adopted had been unfair and fatally flawed.

■ Southern Housing Group v Doran

Clerkenwell and Shoreditch County Court, 13 September 2010[14]

An outright possession order based on HA 1988 Sch 2 Grounds 12 and 14 was made against Ms Doran in June 2010 in her absence. Islington obtained a warrant for possession which was due to be executed at 12.20 pm on Monday, September 13. On Friday, September 10, Ms Doran made an application to set aside the possession order, or, in the alternative, to suspend the warrant.

District Judge Stary dismissed that application because it was not supported by evidence, particularly in relation to her claim to have discontinued her defence of the possession claim as a result of her chronic alcohol dependency, domestic violence and intimidation from her former partner. At the hearing, Islington made an application that she be debarred from making any further application to suspend the warrant. District Judge Stary refused this, but ordered that any further application could only be made if supported by evidence.

Evidence about alcoholism was obtained from the Family Drug and Alcohol Court late on Friday, September 10. However, Ms Doran only gave instructions to her solicitors at 11.40 am on Monday, September 13. As a result, it was not possible to issue the application before execution of the warrant. Ms Doran's solicitors contacted Islington and told the council that an application to suspend would be made. Islington was asked to direct the court bailiff to refrain from executing the warrant so that the application could be made. The council was put on notice that if the warrant was executed, an application to set it aside on the ground of oppression would be made. This request was refused and the warrant was executed at 12.20 pm. An application to set aside the warrant was made and heard later the same day.

District Judge Sterlini found oppression and set aside the warrant. He found that Islington's insistence on its strict legal rights to enforce the possession order and execute the warrant was, in the circumstances of the case, manifestly unfair (*Southwark LBC v Sarfo* (2000) 32 HLR 602 at 609). He granted permission to appeal.

SERVICE CHARGES

■ Southern Housing Group Ltd v Leasehold Valuation Tribunal

[2010] UKUT 237 (LC), 15 July 2010

Tenants of two social landlords applied to the Leasehold Valuation Tribunal (LVT) to review their service charges. The LVT decided that it had jurisdiction because in each case the tenancy agreements provided for 'variable' charges within Landlord and Tenant Act (LTA) 1985 s18(1)(b). The landlords appealed.

The Upper Tribunal dismissed the appeals. In each case the LVT had correctly construed the tenancy agreements as providing for variation of charges which fell within the LTA.

■ Phillips v Plymouth Community Homes Ltd

Southern Rent Assessment Panel, 27 July 2010[15]

Mr Phillips was the lessee of a flat, but did not live there. He was liable under his lease to pay service charges. He requested that communications be sent to his home address. Before replacing the roof, the landlord sent consultation letters to the flat, not to Mr Phillips' home address. The first he knew about the replacement of the roof was a demand for £3,654 as his contribution towards its cost. He applied to the rent assessment panel (RAP) for a determination of his liability to pay service charges.

The RAP found that the landlord had not complied with the consultation requirements contained in LTA s20. Some of the consultation letters failed to give reasons for carrying out works and did not give addresses to which observations should be sent or dates by which such observations had to be received. Furthermore, consultation letters had not been sent to the address specified by Mr Phillips. Accordingly, the maximum amount recoverable for the cost of roof works and the administration and supervision of the contract was £250. The RAP rejected the landlord's application to dispense with the consultation requirements. Furthermore, even if the landlord had complied with the statutory requirements, the lease did not provide for

the recovery of the cost of improvements, as opposed to repairs. There was no evidence of leaks or disrepair making it reasonable to replace the roof.

HOMELESSNESS

Definition of homelessness

■ Hashi v Birmingham City Council

Birmingham County Court, 20 August 2010[16]

The claimant was the tenant of a small flat which she occupied with her three children. She applied to the council for homelessness assistance under HA 1996 Part 7 on the basis that her home was so overcrowded that it was no longer reasonable to occupy it: s175(3). Her solicitors submitted a report from an independent environmental health consultant who advised that while the property was not statutorily overcrowded within the meaning of HA 1985 Part X, there was a Category 1 'Crowding and Space' hazard for the purposes of HA 2004. The council decided that the claimant was not homeless because she did not meet 'the prescribed assessment criteria for local authorities to consider', ie, the HA 1985 statutory overcrowding standards. On a review of that decision, the council arranged an inspection which found that there was a 'significant Category 2 Crowding and Space hazard'. The reviewing officer upheld the earlier decision.

HHJ Oliver Jones QC allowed an appeal and quashed that decision. He held that:

■ there had been either a total reliance or an over-reliance on the test of statutory overcrowding which 'was wholly wrong';

■ there had been a failure to give a rational explanation for rejecting the independent advice in favour of the council's own assessment of the degree of hazard. Although a reviewing officer could prefer the latter, s/he was obliged to give reasons for doing so;

■ the reviewing officer had taken into account an irrelevant consideration, namely that the claimant had been awarded priority points for overcrowding on the council's allocation scheme. The real issue for determination was whether or not it was reasonable for the claimant to continue in occupation.

The judge commended the *Regulation of 'crowding and space' in residential premises guidance* (LACoRS, June 2009) as an 'essential tool' in the assessment of overcrowding.[17]

Intentional homelessness

■ Mondeh v Southwark LBC

Lambeth County Court, 25 August 2010[18]

The claimant was an assured shorthold tenant of a one-bedroom flat which he occupied with his wife and their two children. The landlord served notice seeking possession under HA 1988 s21. A few weeks after it expired, the claimant left. The claimant then applied to the council for homelessness assistance. His application form referred to an 'illegal eviction' and to the landlord using force. The council decided that he had become homeless intentionally. On a review of that decision, the claimant was interviewed and gave further details of racial abuse and harassment that had escalated after service of the notice. He said that it had got so bad that he had had to leave. The reviewing officer upheld the original decision noting that the claimant had not given a full account until after the council's initial adverse decision.

HHJ Welchman allowed the appeal and quashed the review decision. He held as follows:

■ The failure to give the full information earlier was readily explained by the council's lack of further inquiry into the information initially provided on application. The reviewing officer had not been justified in finding that it suggested that the claimant's account was unreliable.

■ The reviewing officer's decision, while noting the fact that the claimant had earlier coped with the landlord's conduct, had failed to address the real question of whether it would have been reasonable to have remained at the point at which he left. The fact that he had coped earlier was not necessarily evidence that he could have continued to do so.

■ The review decision failed to mention the *Homelessness code of guidance for local authorities* (July 2006) para 8.32, which provides:

> *… where a person applies for accommodation or assistance in obtaining accommodation, and:*
>
> *(a) the person is an assured shorthold tenant who has received proper notice in accordance with s21 of the Housing Act 1988;*
>
> *(b) the housing authority is satisfied that the landlord intends to seek possession; and*
>
> *(c) there would be no defence to an application for a possession order;*
>
> *then it is unlikely to be reasonable for the applicant to continue to occupy the accommodation beyond the date given in the s21 notice, unless the housing authority is taking steps to persuade the landlord to withdraw the notice or allow the tenant to continue to occupy the accommodation for a reasonable period to provide an opportunity for alternative accommodation to be found.*

While the guidance was not binding and a reviewing officer was free to depart from it, the officer should have at least addressed the guidance and given reasons for departing from it.

Local connection

■ X v Ealing LBC

Brentford County Court, 14 July 2010[19]

The claimant and her children fled their homeland and applied for asylum in the UK. They were provided with National Asylum Support Service (NASS) accommodation in the north of England. When the claimant's application for asylum was granted, she was required to leave the NASS accommodation. The claimant decided to apply for homelessness assistance in Ealing because her daughter had secured a bursary to study at a private school in its area. The council provided interim accommodation in Hounslow while it considered her application. Ealing decided that it owed the main housing duty (HA 1996 s193) but that the claimant had no connection with its area (HA 1996 s199). The council notified her that it had decided to refer her application to the authority for the area in which NASS had earlier placed her. The decision was upheld on review. The reviewing officer was not satisfied that the school place amounted to 'special circumstances' sufficient to give rise to a local connection with its area: s199(1)(d).

HHJ Powles QC allowed an appeal and varied the decision to one that the claimant did have a connection with Ealing. He held that there had been two errors in the reviewing officer's decision:

■ The officer had asked first whether or not there were special circumstances that could give rise to a local connection, answered that in the negative and then decided that there was no local connection. The correct approach was to ask first whether or not an applicant had a real connection with an area (see *R v Eastleigh BC ex p Betts* [1983] 2 AC 613) and then whether or not that connection arose by reason of any of the factors in section 199(1).

■ Had the question been asked in that way, no reasonable authority could have decided otherwise than that the claimant had a connection with Ealing. By the date of the review decision, her child had been in school there for three months. The claimant had chosen specifically to seek housing in Ealing

for that reason and was living as close to the school as she could. It was irrational to suggest that she had no connection with Ealing given that this was the only area of the UK with which she had had a connection by choice. The background of the successful asylum application and the award of the school place were plainly 'special circumstances' within section 199(1)(d).

Reviews

■ Shacklady v Flintshire CC

Mold County Court, 7 May 2010[20]

The claimant sought a review of the council's decision to refer her homelessness application to another local housing authority under the 'local connection' provisions of HA 1996 Part 7. The council arranged for the review to be conducted by an independent specialist contractor. The claimant was given a letter signed by both the contractor and a senior council officer notifying her of the outcome of the review. The claimant appealed to the county court on the ground, inter alia, that the council had not contracted out the review function lawfully.

HHJ Gareth Jones allowed the appeal. He held that while a local authority is free to contract out the review function (see *De-Winter Heald v Brent LBC* [2009] EWCA Civ 930) it must do so lawfully and, in particular, must comply with the rules about authorisation of a contractor. The Deregulation and Contracting Out Act 1994 s69(5) provides that: 'An authorisation given by virtue of an order under this section– (a) shall be for such period, not exceeding 10 years, as is specified in the authorisation.' The council could not produce any written authorisation in respect of the contractor and the only document it could trace contained no time-limited authorisation or any indication of a ten-year maximum period of appointment. The absence of any written record containing a period of appointment was a serious departure from the statutory requirements and could not be waived. The authorisation to the contractor was invalid and the review decision was a nullity.

1 Available at: www.communities.gov.uk/housing/privaterentedhousing/annualrentalthreshold/.
2 Available at: www.communities.gov.uk/publications/housing/mortgagerepossessionguidance.
3 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep698.pdf.
4 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep689.pdf.
5 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep688.pdf.
6 See: www.voa.gov.uk/publications/LocalRefRents/index.htm.
7 Available at: www.communities.gov.uk/publications/housing/roughsleepingevaluate.
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9 Available at: www.chcymru.org.uk/news/11267.html.
10 Available at: www.communities.gov.uk/publications/corporate/statistics/socialhousingsales200910.
11 This judgment is only available in French.
12 James Browne, Lamb Chambers, London.
13 Hopkin Murray Beskine, solicitors, London and Robert Latham, barrister, London.
14 Keith Clarke, Burke Niazi, solicitors, London.
15 Ann Holdsworth, Shelter, Plymouth.
16 James Stark, barrister, Manchester and Carol Harfield, Community Law Partnership, solicitors, Birmingham.
17 Available at: www.lacors.gov.uk/lacors/upload/22755.pdf.
18 Edward Fitzpatrick, barrister, London and Emma Prescott and Jenny White, Fisher Meredith, solicitors, London.
19 Patricia Tueje, barrister, London and Eugene MacLaughlin, Scully and Sowerbutts, solicitors, London.
20 Robert Latham, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 12–16 and 18–20 for transcripts or notes of judgments.

Disabled children and the right to education

In *A v Essex CC and the National Autistic Society (intervener)* [2010] UKSC 33, 14 July 2010; (2010) 13 *CCLR* 314, the Supreme Court considered the nature and extent of the right to education for disabled children.[1] Steve Broach suggests that, in the light of the decision in *A v Essex CC*, the international human right to education adds little to the protection afforded to disabled children's education by domestic law.

The right to education plays a 'fundamental role' in a democratic society, with a status similar to the right to life and the right to freedom from torture and inhuman and degrading treatment (*Timishev v Russia* App Nos 55762/00 and 55974/00, 13 December 2005 at para 64; (2007) 44 EHRR 37). The Council of Europe has identified education as a 'basic instrument of social integration' for disabled children.[2] Yet far too many disabled children in England and Wales continue to be left without any education and still more are not getting an education that meets their needs. Special educational provision remains a battlefield between parents and local authorities (LAs), with educational achievement for disabled children 'too low and the gap with their peers too wide'.[3] While not all disabled children will have special educational needs, the majority will have such needs, particularly those with more severe and complex disabilities such as autism. 'Special educational needs' means that the child has a learning difficulty calling for special educational provision: Education Act (EA) 1996 s312(1). 'Special educational provision' means provision which is additional to, or otherwise different from, educational provision made generally for children of the relevant age in local schools: EA s312(4).

This article looks at the main domestic and international guarantees of the right to education for disabled children. It focuses on the consequences of *A v Essex CC*, and suggests that, following this judgment, the domestic guarantees of education for disabled children are now more important than the right found in article 2 of Protocol No 1 to the European Convention on Human Rights ('the convention').

Duties to disabled children under the EA 1996

There are two primary domestic law duties which guarantee the right to education for disabled children in England and Wales. First, for disabled children with special educational needs which are substantial enough to require their LA to 'determine' the provision necessary to meet them through a statement

of special educational needs (SSEN), there is an absolute duty on the authority to 'arrange' this provision under EA s324(5)(a)(i), ie: 'Where a [LA] maintain a statement … then … unless the child's parent has made suitable arrangements, the authority … shall arrange that the special educational provision … is made for the child.' This duty cannot be avoided because of a shortfall in resources and any failure to arrange the specified provision can be remedied by the High Court on an application for judicial review. In *R (N) v North Tyneside BC and IPSEA (intervener)* [2010] EWCA Civ 135, 15 January 2010; [2010] ELR 312, the Court of Appeal reasserted the absolute nature of this duty. Sedley LJ reminded LAs that '[t]here is no best endeavours defence in the legislation' (para 17) in relation to any failure to implement the provision specified in a SSEN. Second, while only children with substantial special educational needs will benefit from a SSEN, all disabled children benefit from the backstop duty found in EA s19, which requires LAs to make arrangements for the provision of 'suitable … education at school or otherwise' for children who 'may not for any period receive suitable education'.

The House of Lords established in *R v East Sussex CC ex p Tandy* [1998] AC 714, 20 May 1998; July 1998 *Legal Action* 10 that the section 19 duty is not qualified by any resource considerations and that LAs have an absolute duty to provide 'suitable' education. Importantly, section 19(6) defines 'suitable' as meaning 'suitable to his age, ability and aptitude *and to any special educational needs he may have*' (author's emphasis added). So, if a disabled child has any special educational needs, the education offered to him/her must be suitable to meet those needs. As with the duty to arrange the provision specified in a statement, a breach of the section 19 duty can be remedied by the High Court on an application for judicial review.

Entitlement to 'suitable' education

Through the two duties outlined above, the domestic scheme appears to create a watertight entitlement to suitable education for disabled children:

- If a child has substantial special educational needs which require additional provision, the LA should assess those needs, and specify and quantify the provision required to meet them in a SSEN, and then arrange this provision.
- If a child is out of school (for any period), the LA must arrange suitable educational provision for him/her, whether in school or otherwise.

However, unsurprisingly, in reality the domestic scheme is not that straightforward. For example, frequently there will be a dispute between parents and the LA about what are the child's needs and/or what constitutes suitable provision to meet them, including whether or not s/he needs a SSEN. In relation to the section 19 duty, two cases show the limited extent to which the courts will interfere in assessments of suitability by LAs. First, in *R (B) v Barnet LBC* [2009] EWHC 2842 (Admin), 12 November 2009; (2009) 12 CCLR 679, the court held that section 19 had been breached as it was not reasonably practicable for a child to attend a school proposed by the LA which the head teacher of the school had himself said was unsuitable for her. As a result, the LA was compelled to offer different suitable provision by a mandatory order. Second, by contrast, in *R (HR) v Medway Council* [2010] EWHC 731 (Admin), 1 April 2010; [2010] ELR 513, the court held that the LA had discharged its section 19 duty by offering a placement in a hospital special school, even though an independent educational psychologist had said that this school was not suitable for HR. Essentially, this was because it was not sufficiently obvious that the school was unsuitable, given the LA's evidence to the contrary. The cases of *B* and *HR* together suggest that even where a disabled child is out of school for a significant period, the courts will only intervene when it is obvious that the LA has not offered 'suitable' education.

Education and the human rights convention

Given the gaps in practice in the protection of the right to education under the domestic scheme, the role of international human rights standards becomes an important consideration. In particular, the right to education contained in article 2 of Protocol No 1 to the convention could provide an important further safeguard to ensure that disabled children get the education they need. However, *A v Essex CC* appears to close down this possibility for the foreseeable future, at least until such time as the European Court of Human Rights (ECtHR) takes a more robust view of the substance of the article 2 of Protocol No 1 right in relation to disabled children.

In *A v Essex CC*, the Supreme Court heard A's appeal against the decision of the lower courts that his claim for damages for breach of his article 2 of Protocol No 1 rights should be struck out as it had no realistic prospect of success. The facts of A's case were particularly stark. First, A had very acute and complex needs, including autism, epilepsy and a severe learning disability. At the relevant time, he would self-harm, was doubly incontinent, had no conception of danger and required constant supervision. Second, the 'denial' of A's right to education was particularly clear; he was out of school for some 18 months in which time the education provided for him amounted to little more than some educational toys and irregular therapy sessions. At the end of this period, a placement was found for A at a suitable residential special school.

The question for the Supreme Court was therefore whether or not the period when A was out of school amounted to a 'denial' of his right to education. The answer from the Justices was a qualified 'no'. A majority of the Justices (Lords Clarke, Phillips and Brown) held that it was not arguable that article 2 of Protocol No 1 gave A an absolute right to education that met his special needs. However, a different majority (Lords Phillips and Kerr, and Lady Hale) held that there might have been a breach of article 2 of Protocol No 1 in the form of failure to provide more support while A was out of school, which would have mitigated the consequences of the failure to meet his needs. Despite this, all the Justices save Lady Hale agreed that time should not be extended to allow A to take his case to trial on this limited basis.

The judgment of the Supreme Court therefore provided little comfort to A or his family. The wider issue is where the judgment leaves the article 2 of Protocol No 1 right in relation to disabled children who may be 'denied' a suitable education today or in the future. The answer to this question can be found in Lord Phillips's speech, in which he concluded that it was 'possible, indeed likely' that the failure to meet A's needs 'might have been mitigated by the provision of significantly more educational assistance than was in fact provided' (para 89). Lord Phillips further stated (in agreement with Lord Kerr) that it might therefore have been that 'A was deprived of such educational provision as could have been made available and that this deprivation violated A2P1 [article 2 of Protocol No 1]'.

This test is not found in any of the Strasbourg cases. It might be thought that the concept of mitigation has no place in the assessment of whether or not a fundamental right has been breached. However, Lord Phillips's speech establishes the approach that the courts are now required to take in cases where a breach of the article 2 of Protocol No 1 right is alleged. In short, if a disabled child is out of school, the question becomes whether or not the LA is doing all that it reasonably could to mitigate the impact of this on the child. This will include considering whether or not the LA is providing him/her with any education which is available,

albeit less than suitable education. So, in clear contrast to how Sedley LJ described the duty to arrange the provision in a child's statement in the *R (N) v North Tyneside* case, Lord Phillips's speech in *A v Essex CC* establishes that there is a 'best endeavours' defence to any claim under article 2 of Protocol No 1.

In practical terms, therefore, if a child with a SSEN is out of school and not receiving suitable education, the article 2 of Protocol No 1 right adds nothing to the absolute and unqualified duty under domestic law to arrange the provision in the statement. If a disabled child does not have a SSEN, the protection afforded by section 19 still appears to render the article 2 of Protocol No 1 right practically irrelevant. The duty under section 19 is to arrange suitable provision immediately, regardless of resource constraints. By contrast, the duty under article 2 of Protocol No 1 is to use best endeavours to ameliorate the consequences of the child being without suitable provision. It is therefore hard to see what benefit the article 2 of Protocol No 1 right gives to disabled children that is not provided for more effectively by the domestic scheme.

The judgment in *A v Essex CC* is a disappointing outcome in a case where the Supreme Court had the opportunity to establish the right to education for disabled children under article 2 of Protocol No 1 as a right of substance. The ruling is, however, premised on the House of Lords' decision in *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, 22 March 2006 (known as the *Lord Grey School* case). The *Lord Grey School* case concerned a very different set of facts, which related to a pupil without any special educational needs who had been permanently excluded following allegations of arson. Lord Bingham's speech in the *Lord Grey School* case strongly influenced the decision of the Supreme Court in *A v Essex CC* (see, for example, the speeches of Lord Clarke at para 9 and Lord Phillips at para 78). Lord Bingham set out a series of guarantees that were not implicit within article 2 of Protocol No 1, and then stated that the test to be applied to establish whether or not the article 2 of Protocol No 1 right had been breached was 'have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?' (para 24).

Having posed the question in this way, the facts of the *Lord Grey School* case could lead to only one answer as the pupil had been offered a place in a pupil referral unit, which was the type of educational facility that the state provides for permanently excluded pupils. However, the answer to this question in A's case was not so clear-cut. The type of educational facility which the state provides for severely disabled pupils is either a special school or a heavily-resourced mainstream placement. A was not 'ineducable'; indeed, the Education (Handicapped Children) Act 1970 ended the classification of severely disabled children as 'unsuitable for education at school' some 40 years ago. Absent evidence that every single potential placement for A was explored, it is hard to escape the conclusion that, for the relevant 18-month period, he was denied access to 'such educational facilities as the state provides for such pupils', given that he was not in school.

Yet, a majority of the Justices took a different view. For example, Lord Clarke recognised that if only the 18-month period when A was out of school was taken into account, it could be said that he was 'deprived of an effective education' (para 45). However, in the following paragraphs, Lord Clarke set out his contrary view; he stated that the interim measures taken by Essex were 'far from perfect' (para 55), but that even though there may have been breaches of domestic law duties, A could not succeed at trial in showing a breach of article 2 of Protocol No 1. Lord Clarke concluded that:

> *... viewed in the round, A was not arguably denied the very essence of his right to education. On the contrary, he was ultimately provided with high quality education at very considerable cost* (para 57).

This disappointing conclusion can be seen as running contrary to the developing approach of the Strasbourg court. For example, in *Oršuš v Croatia* App No 15766/03, 16 March 2010, a case concerning Roma children, the ECtHR Grand Chamber, at paragraph 146, stated that article 2 of Protocol No 1 guarantees not only a right of access to educational institutions, but also the right to draw 'profit' from the education received. Previously, in the same case, the ECtHR First Section (App No 15766/03, 17 July 2008) had held that education provided must be 'adequate and appropriate' (para 58) to achieve compliance with article 2 of Protocol No 1. This case was cited by Lady Hale in *A v Essex CC* at paragraph 98.

The focus in Strasbourg on article 2 of Protocol No 1 as an individual right to effective education (see also *Eren v Turkey* App No 60856/00, 7 February 2006; (2007) 44 EHRR 28 and *DH v Czech Republic* App No 57325/00, 13 November 2007; (2008) 47 EHRR 3) is not reflected in the approach of a majority of the Supreme Court in *A v Essex CC*. However, it is clearly present in a minority of the Justices' speeches. Lady Hale stated that 'the content of the right to education may indeed differ from child to child' (para 107). Lord Kerr stated that under article 2 of Protocol No 1, A was entitled to 'a basic minimum education geared to his particular condition' (para 158). Yet even this was a step too far for a majority of the Justices.

It may, therefore, take a case involving a disabled child who has been denied an effective education to come before the Strasbourg court before the right to education in article 2 of Protocol No 1 is established as a meaningful entitlement for disabled children. However, at the very least, *A v Essex CC* has killed off the notion (resulting from a misreading of Lord Hoffmann's speech in the *Lord Grey School* case) that article 2 of Protocol No 1 is only violated if there is a total system failure in relation to the provision of education. The right to education under article 2 of Protocol No 1 is now certainly an individual right. Yet, at present, the content of this right for disabled children is minimal and the domestic scheme offers far better protection. However, given the commitment by the coalition government to review the special educational needs legal framework, it is by no means certain that this will remain the case. The convention right to education may, therefore, need to bear a greater weight than that permitted by the *A v Essex CC* judgment if disabled children's right to education is to be protected properly in future.

1 See October 2010 *Legal Action* 37 for the Upper Tribunal (Administrative Appeals Chamber) decision in this case: [2010] UKUT 74 (AAC), S/3094/2009, 8 March 2010.
2 See the *Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015*, Appendix 1, para 22.
3 *Lamb inquiry: Special educational needs and parental confidence*, Department for Children, Schools and Families, 2009, p2, available at: www.dcsf.gov.uk/lambinquiry/downloads/8553-lamb-inquiry.pdf.

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Recent developments in education law – Part 2

Angela Jackman and **Eleanor Wright** continue this twice-yearly series considering changes and developments in the law relating to education. This article includes summaries of the changes introduced by the Academies Act (AA) 2010 and the Equality Act (EqA) 2010, and discusses case-law developments relating to admissions, abuse claims and the Limitation Act (LA) 1980, assaults in schools, planning issues, attendance, higher education and exclusions. See October 2010 *Legal Action* 33 for Part 1 of this article.

POLICY AND LEGISLATION

Academies Act 2010

The AA came into force in part on 29 July 2010 and 1 September 2010, with the remaining provisions expected to come into force on 1 January 2011. The AA had an extremely rushed passage through parliament which, in itself, caused considerable concern. Space does not permit a detailed analysis of the AA in this article, but the following is a summary of some points of interest and/or concern. In essence, the AA extends the range of schools which can be academies to include primary schools, special schools and grammar schools. Where previously new academies tended to be failing schools, the government is now targeting all schools to become academies with the initial focus on outstanding schools.

The most fundamental change in the process of setting up academies is that public consultation, and consultation with the local authority, is no longer required in relation to the formal closure of a maintained school which is to become an academy. There is provision for the governors of foundation schools to consult with the foundation (section 3) and weak provision for governors to consult 'such persons as they think appropriate' (section 5(1)). Clearly this should, as a minimum, require consultation with parents and prospective parents although, if that is the case, the degree of consultation carried out by those schools which became academies in September 2010 would perhaps bear investigation. The procedure, in essence, simply requires the governing body of a maintained school to pass a resolution in favour of conversion and apply to the secretary of state for an 'Academy order' under section 3. The secretary of state can also make an order on his own initiative for eligible schools (section 4(1)(b)). If the academy will be additional to existing schools rather than a replacement, the secretary of state must take into account the impact on existing maintained schools, academies and further education institutions (section 9).

When an academy order is made, the maintained school comes to an end without any public involvement and the new academy comes into being (section 6). The school's assets pass to the new academy, including land and any financial surpluses (sections 7 and 8, and Schedule 1); however, where the school's land was originally publicly funded, in general, the local authority will retain the freehold and long leases will be set up.

Under section 12, academies set up as charitable companies, which are in general known as Academy Trusts, with a board of governors who are the company's directors, no longer require a sponsor. The directors are not required to register with the Charity Commission, and are therefore exempted from normal charity oversight and investigation. Also, the previous rule requiring academy finance directors to be qualified accountants has been relaxed. Funding comes directly via an annual grant from the Department for Education (DfE), and in practice academies which set up this September are reported to have received sums that exceed their previous budgets by between four per cent and 16 per cent.[1]

Curriculum requirements are considerably relaxed: unless the school is a special school (where it would appear curriculum issues will be dealt with under the relevant funding agreements), governors simply have to undertake to provide a curriculum offering a balanced and broadly based curriculum (section 1(6)). In the case of secondary schools, the curriculum should have an emphasis on subject areas specified in the academy arrangements. Academies therefore have considerable freedom both about subjects and the content of the curriculum and could, for example, choose to teach from a specific political, philosophical or faith viewpoint. The school must provide for pupils of different abilities and draw them wholly or mainly from its local area (section 1(6)(c) and (d)); therefore, in essence, admissions criteria should comply with the School Admissions Code of Practice. Selective schools may retain selective policies (section 6).

Section 1(7) provides that academy arrangements must include obligations for the proprietor equivalent to the obligations under Education Act (EA) 1996 Part 4 Chapter 1 in relation to special educational needs (SEN) provision. The detail about how academies are run will be set out in the funding agreements for each academy which will be entered into with the DfE. The DfE has produced draft model funding agreements which will be further amended to reflect the circumstances in different types of school. Academies currently in place will now operate under the new framework, but their funding agreements will not be amended unless this is the subject of a separate agreement.

The DfE has announced that 36 new academies opened in September 2010. All but one were secondary schools, and proposals which aimed originally to limit the number of faith schools applying to become academies appear to have been relaxed. It has been stated that several more schools have expressed an interest in becoming academies, but anecdotally it appears that schools which have simply requested information have been included in the list of such schools (and, indeed, that is the personal experience of the author as a school governor).

It is not clear whether academies will be viewed as public bodies for the purposes of judicial review action or the Human Rights Act 1998 or duties in terms of promoting race, sex and disability equality. There is no mechanism under the AA for an academy to revert to being a maintained school. In local authority areas where, in practice, all or most schools have become academies this would, in any event, cause extreme difficulties because, in that situation, local authority support services are likely to be severely run down or closed. There are clear problems in the AA which are likely to cause considerable litigation in the forthcoming months.

Equality Act 2010

The EqA came into force on 1 October 2010 and consolidates existing equality legislation.

The EqA creates a single approach to discrimination against people with different, protected characteristics. This is a massive piece of legislation which cannot be summarised easily, and of course its application goes far beyond education.

The EqA imposes duties on the following:

- All schools in the UK (Part 6 Chapter 1);
- Further and higher education providers (Part 6 Chapter 2);
- Local authorities securing further or higher education and providing recreational and training facilities (Part 6 Chapter 2);
- General qualifications bodies (Part 6 Chapter 3);
- Employers (Part 5); and
- Services providers and those carrying public functions, including local authorities (Part 3).

In schools, the EqA protects pupils from discrimination and harassment based on protected characteristics, ie, disability, race, religion or belief, sex, sexual orientation, with new (in this context) characteristics of gender reassignment and pregnancy and maternity (ss4 and 84). The EqA includes prospective pupils in relation to admissions arrangements and former pupils if there is a continuing relationship based on their having been a pupil at the school.

Discrimination includes direct discrimination (section 13) as well as discrimination based on perception or association (section 19), indirect discrimination (section 19), discrimination arising from disability (section 15), failure to make reasonable adjustments for disability (section 20) and discrimination based on pregnancy and maternity (sections 17 and 18). As before, it also covers other unlawful acts, ie, harassment (section 26), victimisation (section 27), and instructing, inducing, causing and aiding discrimination (sections 111 and 112).

The responsible body for a school must not discriminate against a person with a protected characteristic in relation to admissions, education, access to any benefits, services or facilities and exclusions (section 85). However, schools with a religious character may still select based on religion, single-sex schools can restrict admission to one sex, and selective schools can, in effect, discriminate against disabled pupils who do not meet their selection criteria (Schedule 11).

Claims must be made to the county court for all protected characteristics other than disability (Part 9 Chapter 2 and Sch 17); there remains a six-month time limit. The court can order both compensation and an injunction. However, as before, disability discrimination claims must be dealt with by independent appeal panels (IAPs) in relation to school admissions and exclusions, while everything else must be dealt with by the Special Educational Needs and Disability (SEND) tribunal. Remedies remain as before and, in particular, that means that the SEND tribunal cannot make an order for financial compensation.

However, although local authority education duties are similar to those of schools, it is no longer possible to make joint disability claims to the SEND tribunal against both a local authority and a school. Claims against local authorities will need to go to the county court, while claims against schools must go to the SEND tribunal.

The main changes are made in an attempt to rectify the consequences of the decision in *Lewisham LBC v Malcolm* [2008] 4 All ER 525; [2008] UKHL 43, 25 June 2008. EqA s13(1) uses new wording in relation to the definition of direct discrimination, in that the section states that '[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Likewise, there is new wording in terms of harassment, in that the section provides that a person harasses another if s/he engages in unwanted conduct related to a relevant protected characteristic, and this has the purpose or effect of violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person (section 26(1)). The interpretation clause now defines the term 'substantial' in relation to discrimination as being 'more than minor or trivial' (section 212).

The concept of disability-related discrimination is replaced by new wording. Section 15 provides for indirect discrimination by treating someone unfavourably because of something arising in consequence of disability, but provides that this does not apply if the alleged discriminator did not know or could not reasonably have been expected to know of the disability. Section 19 provides that there is discrimination if someone applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of another person. This is further defined in section 19(2), which states that a PCP is discriminatory if the discriminator would apply it to persons who do not share the protected characteristic, but the PCP puts people who do share the characteristic at a particular disadvantage when compared with those who do not, and in fact puts the identified person at that disadvantage. Therefore, there is, in effect, no specific comparator which needs to be identified, and the pool of people to be considered are simply those who share the same disability. Where the previous legislation provided a defence in terms of justification, the bar now is higher, ie, the alleged discriminator must demonstrate that the conduct in question was a 'proportionate means of achieving a legitimate aim'. It would be difficult to show that the treatment is proportionate if the person or body in question did not make reasonable adjustments.

Schedule 13 deals with the issue of reasonable adjustments in education. The main change here is that there will be a duty under section 20(5) and Schedule 13(2)(1) to provide auxiliary aids and services. However, this duty is not yet in force.

Section 158 provides a defence in relation to positive discrimination in favour of people with protected characteristics.

There has been considerable antagonism, particularly in the right-wing tabloid press, to the EqA; however, much of the Act simply brings together the diverse legislation that existed previously. It is hoped that the EqA will have remedied the problems caused by the *Malcolm* decision.

Children out of school

The Office for Standards in Education has issued a report *Children missing from education* (August 2010).[2] Inspectors visited 15 local authorities to evaluate the effectiveness of steps taken in relation to this issue; none was confident that it knew about all the children in its area, and there were problems in exchanging information between authorities. Children could also get lost in the system if schools failed to follow established protocols, particularly with regard to the imposition of unlawful exclusions, which all the authorities admitted happened within their areas. There was a particular problem in establishing communication with academies and independent schools, and a concern about unsafe and inappropriate procedures used by academies in taking children off their rolls. The report recommended that better systems be put in place for tracking children throughout compulsory education and sharing information, and liaising with primary care trusts about children out of school. The role of local authorities in deciding which children should be removed from schools' rolls, and when, should be strengthened. Maintained schools should ensure better communication with authorities concerning children who are excluded, absent or taken off roll and, in particular, should be advised against operating unlawful exclusions. Schools should give due weight to non-attendance and follow correct protocols for taking children off roll and reporting children out of school, and, in particular, Traveller children should be kept on roll during periods of planned absence.

Comment: This will be familiar territory to

practitioners who deal with depressing regularity with issues concerning children out of school for unacceptably long periods and schools' apparent ignorance of their duties with regard to unlawful exclusions. Anything which helps to ensure that children out of school do not fall through the net is to be welcomed.

CASE-LAW

Admissions

■ Haringey Independent Appeal Panel v R (M) and Secretary of State for Children, Schools and Families (intervener)

[2010] EWCA Civ 1103,
12 October 2010

This case concerned a child whose mother had appealed unsuccessfully to an IAP against Haringey's decision to refuse her daughter a place at her preferred school. The child's mother contended that her daughter had exceptional social need to attend the school as she risked being harassed and intimidated if she attended the school assigned by Haringey, and therefore she should have been given priority on this ground in the original admission process. The mother contended that the prejudice to her daughter by not being admitted would outweigh any prejudice to the school. At first instance, the mother succeeded in an application for judicial review of the IAP's decision. The judge held that the IAP should have applied subjective criteria when considering the issue of prejudice, including, for example, whether or not admission of the particular child would enhance the school. He also held that in dealing with the issue of whether or not prejudice to the child outweighed prejudice to the school, the IAP's decision had been flawed as the decision letter stated that the panel did not consider that there were 'exceptional' reasons for the child's admission, which was not the appropriate test, and it had wrongly considered the suitability of schools which had not allocated a place.

The Court of Appeal held that the judge was wrong in describing the inquiry into prejudice as requiring subjectivity; it is essentially an objective inquiry, following the mandate in section 86 of the School Standards and Framework Act 1998 to assess prejudice to 'the provision of efficient education or the efficient use of resources'. It was correct that exceptionality was not the appropriate test when considering whether or not prejudice to the child would outweigh prejudice to the school, but in fact the IAP had not treated this as the criterion: elsewhere, the decision letter had set out the relevant test impeccably and the reference to exceptionality seemed to be an attempt to address the mother's argument that her daughter had an exceptional social need. The IAP had not erred in considering other schools. The most relevant was the school in which the child had been allocated a place; however, it was not wrong to refer to other schools that could or might offer a place.

Neither the panel nor the first instance judge had addressed expressly the argument that the child had an exceptional social need. However, that argument was unsustainable because although the evidence might demonstrate that the child could not attend a particular school or schools in a specific neighbourhood, it did not demonstrate that she could only attend the preferred school as opposed to any other.

Comment: The original finding about the requirement for IAPs to apply subjective tests was clearly wrong and had the potential to cause chaos in admissions appeals had it been upheld. The Court of Appeal's decision gives some welcome clarification about the entitlement of the IAP to consider the availability of places at other schools. It is likely that most panels do this because there are good, practical reasons for so doing, and it is helpful that this practice has been endorsed.

Abuse claims and the Limitation Act 1980

■ Raggett v Society of Jesus Trust of 1929 for Roman Catholic Purposes and Governors of Preston Catholic College

[2010] EWCA Civ 1002,
27 August 2010

The claimant sued for damages in respect of sexual abuse by a former teacher, which was committed against him during the 1970s. The judge at first instance held that the abuse had taken place and the claim had become time barred in 1979 as the claimant must be taken to have known the nature and extent of the acts in question from the time when they were committed. She allowed the claim to proceed under LA s33, on the basis that it was equitable so to do: any prejudice caused by delay was likely to operate to the detriment of the claimant alone, since he had the burden of proving his losses. The defendants appealed. They contended that the judge should not have made a finding that the abuse had occurred before considering the exercise of her discretion under section 33, and had applied the wrong principles in so doing.

The Court of Appeal upheld the original decision. The judge was required to approach the issues of limitation and liability together and there was no reason to conclude that this had affected the exercise of her discretion. There was no formulaic template about how judgments on such issues should be constructed. In considering section 33, the judge had set out the respective contentions of the claimant and defendants. It was clear that, at that stage, she did not direct her attention to the finding of abuse but to relevant factors under section 33, namely, the reasons for delay, the cogency of the claimant's case and the evidence as against the prejudice likely to be caused to the defendants and other relevant considerations. She referred to the claimant's contention that the evidence was overwhelming, and the defendants' submissions about prejudice and the difficulties for the court in ascertaining the effects of the abuse. She had not adopted the approach that there could be no prejudice to the defendants because the teacher had been guilty of abuse. Her analysis throughout was based on the cogency of the evidence of abuse and the prejudice to the defendants.

Assault in schools

■ V v A London Borough Council

Lawtel,
LTL 6/5/2010

The claimant was a former schoolteacher who claimed damages for injuries received when she was assaulted by a pupil of a school for children with learning difficulties. The pupil was thought to have an autistic spectrum disorder. He was known to have challenging and inappropriate behaviour, but not to be violent. However, a month before the assault, the claimant had reported an incident when the pupil was violent towards her. The claimant claimed that the local authority was negligent in failing to provide her with a safe system of work to protect her.

The court held that although the school had failed to put in place a highly structured approach which was needed to teach the child, this did not mean that there was an unsafe system of work. After the first violent incident, the school should have organised a thorough assessment of the child. However, his behaviour was still not extraordinary as evidenced by the fact that the teacher herself did not think it necessary to draw this to the attention of senior management, nor did she say that she felt in danger; she coped by the use of one-to-one supervision by a teaching assistant when necessary. The assault on the claimant was sudden.

Although the local authority had failed in a number of respects, in particular, failing to implement the statementing process properly, and to identify the child as having an autistic spectrum disorder or make appropriate

educational provision for him, these failures had not caused the assault.

■ H v Crown Prosecution Service

[2010] EWHC 1374 (Admin),
14 April 2010,
[2010] 4 All ER 264

The appellant, a child with attention deficit hyperactivity disorder and conduct disorder who was placed at a special school for children with behavioural, emotional and social difficulties, appealed against his conviction for assault against a teacher. The issue was whether or not teachers at such schools impliedly consent to the use of violence against themselves.

The court refused to extend the doctrine of implied consent to include these circumstances. Usually the doctrine is used in relation to sports which are governed by strict rules and the position of teachers in special schools is not comparable. In addition, if teachers are held to consent, arguably the same would apply to non-teaching staff and other pupils, which could open the floodgates to litigation.

Planning issues involving schools

■ R (Copeland) v Tower Hamlets LBC

[2010] EWHC 1845 (Admin),
11 June 2010

This was a claim, by the parents of a school pupil, for judicial review of the grant of planning permission for the change of use of premises next to a school to permit hot food takeaway use. The planning officer advised that there was no policy preventing such premises next to a school, and that the proximity of the school was not a material consideration. The claimants challenged this on the basis that the school's healthy-eating programme was a material consideration; they also referred to the planning policy of a different authority restricting the development of takeaways in the vicinity of schools and the government's healthy-eating policy. The authority conceded that the healthy-eating programme could be a material consideration as being relevant to land use.

The application was granted on the basis that the promotion of social objectives could be a material consideration in the context of planning law and the planning officer's erroneous advice could have influenced the planning committee's decision. The court rejected the authority's argument that relief should not be granted because the outcome would have been no different had the school's proximity been taken into account. This would only apply if the authority could show that it was inevitable that the same decision should be reached. Here, it appeared that if the committee had been advised properly, it might have reached a different decision.

School attendance

■ Oxfordshire CC v L

Lawtel,
LTL 3/3/2010

This was an appeal by the local authority against a magistrates' court's decision to acquit a parent of the offence of failure to comply with a school attendance order. The parent had been home-educating her child, who had a statement of SEN (SSEN). The magistrates held that the local authority had not proved that home education was insufficient.

The High Court held that the burden of proof under EA 1996 s443(1), in relation to the sufficiency of home education, lay on the parents. This was not unjust as the relevant facts would be fully available to the parent and the burden of proving the substance of the offence fell on the local authority.

Higher education

■ Budd v Office of the Independent Adjudicator for Higher Education

[2010] EWHC 1056 (Admin),
12 May 2010

The claimant was a student who contended that there had been errors in the marking of his examination papers. He complained to the Office of the Independent Adjudicator for Higher Education (OIA), which requested the minutes of an examination and assessment board meeting where the claimant's examination script had been considered and any other documents that had been taken into account by the board. The university refused to send the script. The OIA did not uphold the complaint on the basis that it could not interfere with the operation of an institution's academic judgment, but could only consider whether or not the institution had breached its procedures or acted unfairly, and the OIA did not consider that the evidence supported the complaints made by the claimant. The claimant argued that the OIA should have considered whether or not to conduct a more intensive review into the complaint, ie, a full merits review, and called for the examination script before making a decision.

The court held that the OIA has a general duty to review complaints and decide whether or not they are justified. It was unrealistic and unnecessary to describe the OIA as having a discretion to conduct reviews at two different, fixed thresholds marking different levels of intensity, ie, a 'merits review' or a 'full merits review'. The OIA simply had to continue its investigation until it was confident that it had all the material needed to decide on an individual complaint, and then make a decision.

However, the OIA was wrong in stating that its duty was confined to deciding whether or not an institution has breached its procedures or acted unfairly. The fact that the OIA did not pursue the request for the examination script did not of itself show any irregularity. The OIA's job was to investigate complaints, but the manner in which it did so is not prescribed specifically. If the OIA considered that it needed to see an examination script, it was entitled to call for the script, but the OIA need not do so if it decided that it could resolve the complaint without seeing the script. The OIA was not bound to consider the examination script simply because previously it had asked for the script. On the evidence, the OIA was entitled to conclude that the errors suspected by the claimant had not taken place, and, having reached that conclusion, it was not bound to consider further evidence or make further investigations.

■ R (Maxwell) v Office of the Independent Adjudicator and University of Salford (interested party)

[2010] EWHC 1889 (Admin),
23 July 2010

The claimant was a student who was disabled by reason of a sleep disorder and made complaints against a university concerning its failure to implement recommendations about provision for her needs, as a result of which she struggled academically. The university accepted some fault and offered to meet her tuition fees for a repeat year. The student complained to the OIA on the basis that the university had not acted fairly and reasonably and had been guilty of discrimination on the basis of her disability. The OIA stated that in considering the issue of disability discrimination, it did not act as a court and investigate matters or make findings about disability discrimination. The student contended that the OIA had a duty to make a finding or express a view on the issue of whether or not she was a victim of disability discrimination.

The court held that a 'finding' of fact or law could not be expected from a body such as the OIA. Usually, any such finding would be made by a court or tribunal having had all the appropriate evidence placed before it, seeing and hearing that evidence being tested, and receiving arguments and submissions on the law and facts. This would give the finding intrinsic legitimacy, and a 'finding' could not be other than one that was arrived at by that process. The OIA did not conduct such a process, and therefore if a party wanted a finding in relation to discrimination it must go to the county court to obtain it. There was nothing to prevent the OIA from expressing a view as part of its review process in relation to the strength or otherwise of an allegation of disability discrimination; however, there

was no obligation for the OIA to do so in every case. It was not irrational for the OIA to have failed to do so in this case.

Exclusions

■ R (LG) v Independent Appeal Panel for Tom Hood School and Secretary of State for the Department for Children, Schools and Families (interested party)

[2010] EWCA Civ 142, 26 February 2010

(See [2009] EWHC 369 (Admin), 2 March 2009; July 2009 *Legal Action* 28 for the report on the first instance decision in this matter.) V pursued the following arguments:

■ His right to a fair hearing under article 6 of the European Convention on Human Rights ('the convention') was engaged because either the IAP decided on his civil right not to be permanently excluded from the school without good reason, or because the panel had decided on a criminal charge against him, which resulted in an infringement of his right as the decision to exclude him was based on allegations established purely on the balance of probabilities as opposed to the criminal standard of proof.

■ As regards regulation 7A(c) of the Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations ('the Exclusions and Appeals Regs') 2002 SI No 3178, V argued that the said provision was ultra vires as EA 2002 s52(3)(d) only permitted statutory instruments which determined procedure, and regulation 7A determined standard of proof.

The Court of Appeal dismissed the appeal and held that:

■ V did not have a civil right to be educated at the school in question. Article 6(1) could only apply to civil rights which were recognised under domestic law. Article 2 of Protocol No 1 of the convention (the right to education), had not been relied on because the right did not guarantee education at a particular institution (*Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, 22 March 2006; [2006] 2 AC 363). Although the definition of 'civil rights' was widening, the requirements of a fair hearing might be less onerous in those cases where article 6 applied purely as a result of widening of the meaning.

In concluding whether or not the IAP had considered a criminal charge, the emphasis had to be on the nature of the charge and the severity of the potential penalty. As the case had been disciplinary, it fell within the ordinary rule in such cases and did not give rise to a criminal charge. The sanction of permanent exclusion was insufficiently severe to render the charge against V a criminal one.

■ The court also ruled that regulation 7A(c) of the Exclusions and Appeals Regs was intra vires section 52(3)(d). When an IAP decides a question of whether or not a fact was established, a necessary part of the panel's reasoning was to apply a particular standard or proof. The procedure on appeals was equivalent with the processing of appeals.

■ The court also ruled, on an obiter basis, that the issue regarding whether or not the IAP should have applied a criminal standard of proof did not arise because article 6 did not apply. However, the argument would not have succeeded as article 6 was silent about the required standard of proof. The court also went on to rule, on an obiter basis, that the decision in *R (S) v Governing Body of YP School* [2003] EWCA Civ 1306, 11 July 2003 was not sufficiently robust authority in relation to article 6 requirements that the appropriate standard in deciding whether or not to uphold an exclusion was a criminal one; it was also inconsistent with House of Lords' authority, ie, *In Re B (Children)* [2008] UKHL 35, 11 June 2008, and *In re Doherty* [2008] UKHL 33, 11 June 2008.

■ In the matter of an application by 'JR17' for Judicial Review (Northern Ireland)

[2010] UKSC 27, 23 June 2010

X appealed against the dismissal of his application for judicial review challenging a decision by his head teacher, P, to suspend him. The school was in Northern Ireland. Following complaints to P by Y concerning allegations of sexual and violent offences against her by X, P held a risk assessment meeting which concluded that social services should undertake an assessment of the alleged incidents and any likely impact on Y. It was also decided that X should be suspended for five days as a precautionary measure. P chose not to inform X about the complaint because of concerns that Y was distressed and to protect her identity and mental health. X's suspension lasted 20 school days. Under the Education and Libraries (Northern Ireland) Order 1986 SI No 594, a pupil could only be suspended after a period of indiscipline and/or a serious incident of indiscipline, and after investigation during the course of which s/he should be allowed to give his/her version of events. X argued that:

■ he had been unlawfully suspended; and

■ there had been a breach of his right to education under article 2 of Protocol No 1 of the convention.

The Supreme Court held that the crux issues were whether or not the suspension was part of a disciplinary process, and, if so, it was only lawful if permissible under the scheme. Although X's suspension was part of a disciplinary process, P acted in a precautionary way, as the suspension was provisional and imposed to give further consideration to the allegations. It was, therefore, unlawful as the scheme made no provision for precautionary suspension. P had failed to give X his fundamental right under the scheme of an opportunity to give his version of events before the suspension, nor was he given reasons for it.

There was no breach of article 2 of Protocol No 1 as X was not denied effective access to educational facilities provided by the state. It was immaterial if the standard or quality of the education was low. X had been given access to alternative facilities for suspended pupils, therefore there was no breach.

■ R (B) v Islington LBC

[2010] EWHC 2539 (Admin), 20 August 2010[3]

B was the subject of a SSEN. He transferred to the sixth form of a school in September 2007 and was in his third year of study when he attained his 19th birthday in January 2010. B had the equivalent of 1.5 A levels and wished to stay on to complete his studies, with a view to entering higher education. The local authority, relying on the secretary of state's code of practice on SEN, decided that it would not continue to maintain the SSEN after the end of the academic year in which B turned 19, namely, July 2010. The statement accordingly lapsed. B sought to challenge the local authority's policy not to maintain SSENs after the end of the academic year in which a student turned 19 and, under that policy, not to consider maintaining his statement after July 2010. B argued that just as it had been accepted in the *Wolverhampton* case (*Wolverhampton City Council v Special Educational Needs and Disability Tribunal and Smith (interested party)* [2007] EWHC 1117 (Admin), 14 May 2007 endorsed by the Court of Appeal in *R (Hill (by his father and litigation friend Lawrence Hill)) v Bedfordshire CC* [2008] EWCA Civ 661, 16 June 2008) that a child who was not a registered pupil in a school (and therefore, on the face of it, outside EA 1996 s312(5)) but would like to be was someone for whom the local authority should consider maintaining a SSEN, so was a young person who had attained the age of 19 but wished to remain in school to complete his/her studies. Otherwise, this would cause obvious injustice in the case of someone like B, with complex needs but cognitively able, who was not able to complete his studies within the same timeframe as non-disabled students. A learning difficulties assessment of B, which was done under Learning and Skills Act 2000 s139A, had commented that

no other suitable provision had been identified locally. He obtained permission on the basis of the decision in *AW v Essex CC* [2010] UKUT 74 (AAC); S/3094/2009, 8 March 2010; October 2010 *Legal Action* 37.

B argued that a 'child' could be a 19, 23 or 30 year old and sought to rely on EA 1996 s312(5), which provided that, in the context of SEN, 'child' included 'any person who has not attained the age of 19 and is a registered pupil at a school'. B argued that the definition was inclusive in respect of both elements, thus, as long as he stayed at school he retained his entitlement to a statement, and imposing a cut off at 19 would be inconsistent with EA 1996 s2(5).

The local authority argued that the EA 1996 imposed no obligation to continue maintaining a SSEN after a pupil attained the age of 19, and where a statement lapsed in these circumstances, there was no obligation to make a determination that the statement should lapse.

The application was dismissed. The court held that Part IV of EA 1996 only required a local authority to maintain a SSEN until a person's 19th birthday and from that point, the authority had no further legal obligations. Where a SSEN lapsed because a child attained the age of 19, there is no obligation on the authority to make a determination that the statement had lapsed.

The authority's duty was to make and maintain SSEN in relation to a 'child' and the definition of 'child' in section 312(5) was inclusive, but could not be stretched to include a 23 or 30 year old. Mention of a specific age limit, namely, 19 years, meant that the definition of 'child' could not refer both to those who were under 19 and those who were over 19. Part IV of the EA 1996 did not mean that irrespective of the age of a potential student, the authority had to consider whether or not it was necessary to maintain a SSEN, nor that there was no upper age limit of a 'child' for whom a statement has to be provided. Whatever meaning was given to 'continues to attend that course' in section 2(5), this could not result in a construction whereby anybody, regardless of age, could be regarded as a 'child'.

The construction argued by B was contrary to the everyday meaning of the word 'child'. Despite the authorities in which the ordinary meaning of particular terms had not been adopted, to give words a different interpretation was exceptional, as opposed to regular, practice. To do so also had to be consistent with parliament's intention. The ordinary meaning of the word 'child' did not extend to a 23 or 30 year old. For the purpose of local authority funding of someone with SEN, it was not inconvenient, unjust, absurd or contrary to parliament's intention to adopt that ordinary meaning. There was no support in the relevant authorities for construing EA 1996 s312(5) to include those who are over the age of 19, and the authority had no obligation to continue providing a SSEN for the claimant after he attained the age of 19. *AW v Essex CC* (above) was criticised as wrong for failing properly to apply previous authorities and to explain departure from the ordinary meaning of the word 'child' in line with the accepted principles of statutory construction.

Comment: Many practitioners feel that this is a disappointing decision. Where local authorities choose to follow the ruling in *B v Islington LBC*, they should be aware of their powers to continue funding educational provision under Local Government Act 2000 s2 to bring about the promotion or improvement of the economic or social well-being of any person resident in their area.

Alison Millar, the solicitor in *B v Islington LBC*, said: 'It seems to me there is scope for appeal of this decision as there are now two conflicting decisions in concurrent jurisdictions (*AW v Essex CC and B*), and *B* appears to be causing confusion in relation to local authorities' obligations post 19. If the judge's conclusion in *B* is found to be correct, I am concerned that there is a lacuna in provision for students in B's situation which policymakers should consider.'

1 See Jessica Shepherd, 'Coalition's first academies reveal how they plan to spend extra income: Putting extra money towards music and sport will leave less for vulnerable children, council leaders fear', available at: www.guardian.co.uk/education/2010/sep/27/coalition-academies-extra-spending, and 'New academies spending extra cash on sport, music and staff, survey finds', *Guardian*, 28 September 2010, p10.
2 Available at: www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Documents-by-type/Thematic-reports/Children-missing-from-education.
3 Alison Millar, partner, Leigh Day & Co, London.

Angela Jackman and Eleanor Wright became partners at the new London office of Maxwell Gillott Solicitors in April. Readers are invited to send in unreported cases of interest and information relating to current events in education law and practice. The authors are grateful to the colleague at note 3 for notes of the judgment.

Recent developments in public law – Part 1

Kate Markus and **Martin Westgate QC** continue their six-monthly series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled. Part 2 of this article will be published in December 2010 *Legal Action*.

PRACTICE AND PROCEDURE

Administrative Court statistics and workload

In 2009/10, 17,065 cases were issued in the Administrative Court with 15,549 in London and the remainder in the four regional centres: Her Majesty's Courts Service annual report and accounts 2009–10.* Just under 48,000 other civil claims were started and so Administrative Court cases now account for over one quarter of all civil claims in the High Court.

CASE-LAW

Amenability to judicial review

■ R (Kirk) v Middlesbrough BC and others

[2010] EWHC 1035 (Admin), 10 May 2010

The claimant was a social worker who was employed by a charity through which she was placed to work on an agency basis for a local authority. The local authority for the area in which the claimant lived received a child protection complaint against her, relating to the claimant's husband. The complaint triggered an investigation during the course of which information about the complaint was passed to the charity and the authority where the claimant worked. The authority terminated the claimant's placement and the charity commenced disciplinary proceedings against her. The claimant issued judicial review proceedings against both local authorities in respect of the passing of information between them. She also sought an injunction preventing the charity from proceeding against her until the judicial review claim had been determined, and a declaration that article 6 of the European Convention on Human Rights ('the convention') entitled her to legal representation at the disciplinary hearing.

HHJ SP Grenfell dismissed the application. In seeking to discipline her, the charity was not carrying out a public law function but rather a private law employment function. The outcome of the disciplinary process did not carry the severe consequences that engaged article 6 in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, 21 January 2009; [2009] 1 AC 739 and *R (G) v X School Governors* [2010] EWCA Civ 1, 20 January 2010. Therefore the court had no jurisdiction to deal with the matter.

■ R (Cart) v The Upper Tribunal and others

[2010] EWCA Civ 859, 23 July 2010

The appellant had been refused permission by the Upper Tribunal (UT) to appeal against a decision of the First-tier Tribunal (FTT). There was no appeal against the decision of the UT and the appellant sought judicial review. The Divisional Court held that judicial review only lay against the UT on the ground of outright excess of jurisdiction or denial of procedural justice (see [2009] EWHC 3052 (Admin), 1 December 2009; June 2010 *Legal Action* 23). The Court of Appeal agreed with the Divisional Court, although in part for different reasons.

The Court of Appeal agreed with Laws LJ that to treat the statutory designation of the UT as a 'superior court of record' as excluding judicial review would violate the rule of law, and that such designation is not a reliable guide, let alone a 'definiens' of courts which are immune to judicial review (para 17). However, the court disagreed with the conclusion of Laws LJ that the UT was the alter ego of the High Court. The UT does not stand in the shoes of the High Court but in the shoes of the tribunals it has replaced. Nor had parliament taken the decision to place the UT wholly beyond the reach of judicial review. The supervisory jurisdiction of the High Court runs to all statutory tribunals unless ousted in the plainest possible statutory language of which there is none in the Tribunals, Courts and Enforcement Act (TCEA) 2007. The TCEA invests the UT with standing and powers precisely because it and the High Court are not courts of co-ordinate jurisdiction. The court recognised that this left further questions about the scope of the UT's conferred and inherent powers, but those were beyond the remit of these proceedings.

The appellant, and the Public Law Project as intervener, argued that there was no warrant for cutting down the scope of judicial review, although grant of permission and relief was discretionary and so not every grievance about the UT would secure judicial review. Sedley LJ, giving the judgment of the court, noted the constitutional importance of this submission, especially in view of the statement of the Court of Appeal in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, 28 November 2002; [2003] 1 WLR 475 at paragraph 54, that the mechanism of control in judicial review lies in discretion, not law. However, the underlying substantive principles of judicial review are a matter of law, not discretion. The complete reordering of administrative justice brought about by the TCEA calls for reconsideration of the principles of law by which judicial review of the new tribunals is to be governed. The High Court is empowered to do this because its status as a court of unlimited jurisdiction makes it the sole arbiter concerning what matters fall within its jurisdiction. In that context, it is important to take into account that the tribunal system is designed to be so far as possible a self-sufficient regime, dealing internally with errors of law made at first instance and resorting to higher appellate authority only where a legal issue of difficulty or principle requires it. By this means, serious questions of law are channelled into the legal system without the need of post-*Anisminic* (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 17 December 1968) judicial review.

Although social security has been subject to judicial review notwithstanding the high legal expertise of the Commissioners, one of the principal purposes of the TCEA is to unify the procedures of the disparate tribunals gathered into its structure. It contains no space for historical exemptions of that kind. As Sedley LJ pointed out, this could call into question the exception of asylum decisions because of their unique subject-matter, acknowledged by the court in *Sivasubramaniam*, but this was not for the court in the present case to determine.

In deciding whether the full ambit of judicial review should be available as before across the board, the court had to reconcile two legal principles: the relative autonomy of the tribunals as a whole, and the UT, in particular, and the constitutional role of the High Court as the guardian of standards of legality and due process from which the UT is not exempt. There is a true jurisprudential difference between an error of law made in the course of an adjudication that a tribunal is authorised to conduct and the conducting of an adjudication without lawful authority. This division applies only to the UT, since it is the role of the UT itself to correct errors of every kind in the FTT. The new tribunal structure represents a newly coherent and comprehensive edifice designed, among other things, to complete the process of divorcing administrative justice from departmental policy, to ensure the application across the board of proper standards of adjudication and to provide for the correction of legal error within, rather than outside, the system with recourse on second-appeal criteria to the higher appellate courts.

Access to justice

■ R (Medical Justice) v Secretary of State for the Home Department

[2010] EWHC 1925 (Admin), 26 July 2010

The claimant, a charity facilitating the provision of medical advice and representation to those detained in immigration removal centres, sought judicial review of the secretary of state's policy that certain categories of individuals who have made unsuccessful claims to enter or remain in the UK can be given little or no notice of their removal from the UK (the standard policy being to give a minimum of 72 hours' notice).

Silber J dealt with a number of preliminary points:

■ The fact that the claimant has not challenged the standard policy does not mean that it is accepted as lawful.

■ Where the challenge is to a policy rather than a claim on the facts of an individual case, the court will address the question of the intrinsic unfairness of the policy.

■ A policy is not unlawful only if it necessarily gives rise to injustice, especially where once removed it would be too late and impractical for an individual to obtain redress. The proper question is whether there is an unacceptable risk or serious possibility that the right of access to justice of those subject to removal will be or is curtailed.

■ A challenge can be brought before the policy has been applied. The unlawfulness of a policy can be shown in a number of ways, for instance, if it envisages conduct which would breach a right of access to justice. In the present case, there is inevitability or at least a high probability that this right would be infringed in many cases under this policy.

Rationality

■ Gibb v Maidstone and Tunbridge Wells NHS Trust

[2010] EWCA Civ 678, 23 June 2010

The appellant had been the chief executive of the respondent trust. Following criticism of her leadership by the Healthcare Commission in a report about the outbreak of the 'super bug', C. difficile, the appellant and respondent entered into a compromise agreement by which she would leave her post and be paid notice pay and compensation. The trust subsequently refused to pay the compensation on the ground that it was irrationally generous and therefore ultra vires.

The Court of Appeal allowed the appeal from a decision at first instance upholding the trust's decision. The court reiterated what was said in *Newbold and Smyth v Leicester City Council* [1999] EWHC Admin 670, 12 July 1999; [1999] ICR 1182, that no court is going to be astute to allow public authorities to escape too easily from their commercial commitments, particularly where legitimate expectations have been aroused in the other party, where the relationship between the parties is essentially of a private law character, where it is the authority itself which is seeking to assert its own lack of vires and where that is said to stem not from the true construction of its statutory powers but rather from its own *Wednesbury* irrationality.

In the present case, the judge at first instance had erred in the following ways:

■ He had substituted his own view of what financial prudence required.

■ It cannot be assumed that, absent the compromise agreement, the trust would have settled the appellant's unfair dismissal claim for the statutory maximum and would have admitted that the appellant's dismissal was unfair.

■ It was relevant for the trust to have taken into account the appellant's many earlier years of good service and the time it might take her to find other employment. A reasonable employer is not limited to the replication of the statutory maximum available to an employee through legal redress.

Procedural and substantive fairness

■ R (Technoprint PLC and Snee) v Leeds City Council and Archbold Carshop Ltd (interested party)

[2010] EWHC 581 (Admin), 24 March 2010

The claimants had objected to an application for planning permission. Their objections made no reference to the procedure by which the application would be determined.

However, the second claimant made enquiries about that matter before the application was considered and was told that he would receive a reply to his enquiries which, in fact, was never given. Planning permission was granted by a principal planning officer under a scheme of delegation rather than by a plans panel. The claimants applied for judicial review on various grounds, including that the authority should have answered the second claimant's enquiries.

Wyn Williams J rejected the procedural unfairness ground (although he allowed the application on the ground of irrationality). The claimants had not at any time made representations to the authority that the application should be determined by a panel rather than an officer. The authority had not acted unfairly in failing to treat the second claimant's enquiries as a request that the application be determined by a panel. As a matter of good administrative practice, the authority should have responded to the enquiries but it was not under a legal obligation to do so. The claimants had no right to make representations about whether or not the application should be dealt with by a panel. It was a matter for the authority to determine. No legitimate expectation had been raised that the decision would be made by a panel.

■ R (Shoesmith) v Ofsted and others

[2010] EWHC 852 (Admin), 23 April 2010

Following the death of 'Baby P' and the ensuing criminal trial, the Office for Standards in Education, Children's Services and Skills (Ofsted) produced a report into the child-safeguarding arrangements in Haringey in north London, as a result of which the then Secretary of State for Children, Schools and Families directed that the claimant be removed from her post as Director of Children and Young People's Services in the borough. The local authority dismissed her summarily. The claimant applied for judicial review, claiming that:

■ the investigation by Ofsted was flawed by unfairness;

■ the secretary of state's decision was in consequence unfair and/or unfairly arrived at for other reasons;

■ Haringey adopted an unfair process in deciding to terminate her employment.

Foskett J dismissed the application. His judgment is lengthy and detailed. This case note is necessarily a truncated summary of the ground that the ruling covered.

Neither Ofsted nor the secretary of state were carrying out disciplinary functions. Their

true concern was the working of the agencies with responsibility for child protection. There was an urgency in finding out whether the agencies were operating effectively because there were other vulnerable children in Haringey whose interests demanded protection, and because what had happened raised concerns that in other places across the country, the relevant safeguards were not in place. These factors meant necessarily that corners would be cut, but the Ofsted inspectors did the best that they could in the circumstances. Ofsted had a duty of fairness which derived from a duty to carry out a bona fide and open-minded inspection and to report accordingly. It had to discuss its concerns with those who could illuminate the position and that would give the opportunity to influence the outcome of the inspection. The gist of most of Ofsted's concerns were raised in a way that enabled comment to be made. The claimant was well placed to pick up signs of matters of concern and to answer them. This kind of investigation cannot be equated with the process that the law envisages on terminating someone's contract of employment. No individual truly had a full, fair and considered opportunity to comment on his/her personal involvement. This did not invalidate the secretary of state's decision, but was relevant to considering the outcome of the dispute about dismissal.

With regard to the secretary of state's decision, the judge held that it was very difficult to envisage circumstances in which the right of an individual to be treated fairly should take precedence over, or should delay, an urgent decision concerning the interests of a large number of vulnerable children. However, if that leads to the individual being deprived of some ordinary notion of fairness in the process, it should not mean necessarily that s/he should be deprived of reputation or other rights. It is always possible for the decision-maker to make it clear that the decision had to be taken in the wider public interest and did not necessarily reflect anything adverse about the individual's competence or professionalism. It is also open to the individual to seek a declaration in relation to unfairness even if the clock cannot be put back. However, the process invoked by the secretary of state was appropriate in the circumstances. The secretary of state was entitled to conclude that those who might be affected by any decision he took had contributed to the investigation by Ofsted. It was not unfair for him to use the report in the way that he did. Once the judgment had been made by Ofsted that the child-safeguarding arrangements had been seriously wanting, it is difficult to see how the secretary of state could not take some action. What action he chose to take was a matter for him. If fairness in the context of the case is judged by reference to someone having to 'carry the can' for the failings of a system, it would not necessarily be unfair that the claimant was replaced. In holding the claimant to be accountable for departmental failings, the normal concept of fairness to the individual does not apply. In any event, nothing that the claimant could have said would have made any difference.

Judicial review is available to challenge the fairness of the dismissal in such circumstances, but where the employee has the right to claim unfair dismissal, judicial review must be the route of last resort. If the claimant did not have the available remedy of unfair dismissal, there were features of her case which might have persuaded the judge that her judicial review claim would have succeeded:

- Haringey overlooked the claimant's years of excellent service.
- She was the first Director of Children and Young People's Services in Haringey since the relevant provisions of the Children Act 2004 were implemented and anyone taking the risk of the post would expect significant support if something went wrong.
- Furthermore, the claimant's disciplinary appeal hearing was not procedurally fair: communications between Haringey and Ofsted over the evidence base for the report's findings were not disclosed, the statements of the chief executive gave the appearance of a predetermined outcome to the hearing and the claimant's unchallenged evidence at the hearing was rejected.

■ R (Buckinghamshire CC) v Kingston upon Thames RLBC and others

[2010] EWHC 1703 (Admin), 12 July 2010

The defendant local authority K was responsible for the provision of community care services to S. Following a community care assessment, she was moved to supported living in a bungalow in the area of the claimant authority B. K did not inform B of the move but, shortly afterwards, asked B to take over funding S's care on the ground that S was now ordinarily resident in its area. B refused to do so. This application for judicial review contended that K had breached its duty to act fairly by failing to notify B of the proposed move, failing to allow B to participate in that decision and on other grounds.

Wyn Williams J allowed B's claim that it was unreasonable for K to have moved S without making adequate enquiries into the availability of housing benefit, but dismissed the rest of the application. He held that there was no duty on K to act fairly to B. K's duty of fairness was owed to S. Although National Health Service and Community Care Act 1990 s47 (by which community care assessments are carried out) does not expressly preclude such a duty, the express provisions in section 47 for participation of another authority in an assessment in specified circumstances and the reservation to the secretary of state of a power to make directions which can be used to impose a duty to notify or consult with other authorities in appropriate circumstances are powerful indicators that the courts should be slow to accept the existence of the duties for which B contended.

The particular financial consequences of the decision in this case were a material factor in deciding whether or not a duty of fairness arose, but the wider financial considerations attendant on other similar decisions were irrelevant. The significance of the impact of the particular decision depended on the factual circumstances. It would not be permissible for a local authority, in carrying out a community care assessment or deciding how to meet needs, to take into account the financial consequences for another authority nor, if it was consulted, would it be permissible for the other authority to take into account adverse financial consequences to it. Moreover, the Local Authority Circular (LAC (93)7) for establishing ordinary residence did not apply in the present case but, even if it did, it did not lead inevitably to the conclusion that there was a duty of fairness owed to B rather than it being a guide to good practice. Even if a duty did exist, it would extend to notifying the other authority that an assessment had been undertaken and a decision reached, and consultation between the authorities before completion of the assessment, but would not afford the other authority an opportunity to participate in the decision-making process.

Proportionality and collateral challenge

■ Salford City Council v Mullen and others

[2010] EWCA Civ 336, 30 March 2010, [2010] HLR 35

■ Kay and others v UK

App No 37341/06, 21 September 2010

The Court of Appeal heard a group of cases in which the defendants had no statutory security of tenure, but sought to argue that their local authority landlords were acting unreasonably as a matter of public law in bringing claims for possession. This is what has become known as the 'gateway (b)' defence following the decisions of the House of Lords in *Kay v Lambeth LBC* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465 and

Doherty and others v Birmingham City Council [2008] UKHL 57, 30 July 2008; [2009] 1 AC 367. In those cases it was held that while the defendants could not rely directly on article 8 of the convention, they could defend proceedings by arguing that the decision was defective as a matter of public law, relying on conventional judicial review grounds. This raises two issues of wider general importance to public law practitioners.

First, in what circumstances can a public law challenge be raised as a defence in civil proceedings? In *Kay* and *Doherty* the House of Lords stated that a defence was available, relying on *Wandsworth LBC v Winder* [1985] AC 461. However, as the councils pointed out in *Mullen*, that case can be read as applying only where the defendant is asserting some pre-existing right that s/he says has been invalidly interfered with by the claimant's action (para 47). Thus, on this analysis, a trespasser could not defend a claim for possession because even if the decision to evict was unreasonable s/he would still not have any private law right to remain. For the time being this issue is resolved in this context by *Doherty*, which contemplates that any public law challenge can be raised by way of defence. This was taken further by the Court of Appeal, which held that the defendants were not confined to challenging the initial decision to seek possession but that the possession proceedings could also address any decision relevant to seeking possession, for example, a decision to continue the proceedings in the face of further material showing that the occupiers' behaviour had changed.

All of this is subject to the terms of the statutory scheme precluding a public law defence. The Court of Appeal held that in the case of an introductory tenancy, the county court cannot be an appropriate venue. A defendant in such a case will have to seek an adjournment and apply for judicial review.

The second issue is what is the scope of conventional judicial review and how far has it moved towards proportionality? In *Doherty,* Lord Hope said at paragraph 55 that it would be 'unduly formalistic' to confine the review to traditional *Wednesbury* grounds and that the considerations which can be brought into account are wider. However, he went on to say that the question was whether or not the decision to recover possession was one which 'no reasonable person would consider justifiable': in other words, the *Wednesbury* test. The Court of Appeal held at paragraph 61 that 'whilst conventional judicial review is increasingly informed by principles of fundamental rights, a public law, gateway (b) challenge to a decision by a local authority to seek possession does not permit a proportionality review …' It is not easy to know what this means and the position is not made any easier by the decision of the European Court of Human Rights (ECtHR) in *Kay v UK*. The ECtHR reviewed the domestic cases (not including *Mullen*) and at paragraph 73 said:

The court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8. A number of their lordships in Doherty *alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional* Wednesbury *grounds (see Lord Hope at paragraph 55; Lord Scott at paragraphs 70 and 84 to 85; and Lord Mance at paragraphs 133 to 135 of the House of Lords' judgment).*

However, it went on to hold that there had been a breach of the occupiers' article 8 rights because the law as it stood at the time did not permit a challenge to the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances (para 74). This reflected the fact that the majority in *Kay* thought that a defence based only on personal circumstances could never succeed, although this has since been relaxed.

Comment: The implication of the ECtHR's decision is that conventional judicial review as it is now applied may well be sufficient to protect article 8 rights, but if this is what was meant then it is difficult to follow. The cases following *Kay* have allowed personal circumstances to be taken into account and have therefore removed a limitation on the factors that might be considered. However, as a matter of domestic law the standard of review has not gone as far as proportionality. It may be that, not for the first time, the ECtHR has misunderstood domestic law. An article on this important ECtHR judgment will appear in December 2010 *Legal Action*. See also page 16 of this issue.

Material error of fact

■ R (March) v Secretary of State for Health

[2010] EWHC 765 (Admin), 16 April 2010

The claimant was one of the many people who were infected with HIV and/or hepatitis C following treatment with infected NHS blood products. An independent, non-statutory inquiry recommended that compensation be paid at a level equivalent to that paid under a scheme established in Ireland. In its response the government said that it intended to increase funding to sufferers, but the amount fell far short of that paid in Ireland. The response made no express reference to the Irish system, but in a subsequent oral answer in the House of Commons a minister of state for health said that the comparison with Ireland could not be accepted because the Irish blood transfusion service was found to be at fault whereas the NHS was not. The minister repeated the point in a parliamentary debate on the subject and stated that the Irish government decided to make the level of payments as a result of the findings of fault.

Holman J held that the government had misunderstood the position in Ireland. The Irish scheme had not been established on the basis that the government was legally liable to sufferers. The judge did not attach weight to the oral answer of the minister. It was a spontaneous answer to an oral question put without advance notice. While accountability requires that account may be taken of what is said in parliament in oral answers, it should not be subject to the same textual analysis which may be applied to drafted written documents or in topic-specific debate. Different considerations apply to what was said in debate, in which the minister can be presumed to have been briefed and to have prepared for the debate. Holman J said that although the allocation of resources is entirely a matter for the government, its reasoning was infected with a material error about the basis of the Irish scheme. It cannot be said that the error was not material because the government has agreed to pay the most that it considers it can afford, as the government had not given non-affordability for rejecting the recommendation of the inquiry.

Consultation

■ Devon CC and Norfolk CC v Secretary of State for Communities and Local Government and others

[2010] EWHC 1847 (Admin), 5 July 2010

(See also [2010] EWHC 1456 (Admin), 21 June 2010)

The secretary of state had invited proposals for unitary councils in England, and provided a set of criteria against which proposals would be assessed. Exeter and Norwich City Councils proposed that they become unitary councils. The government then published proposals for consultation, as required by statute, stating that consultees should comment on the extent to which the proposals, if implemented, would achieve the outcomes specified by the criteria. During the course of consultation, the secretary of state also sought the advice of the Boundary Committee of the Electoral Commission about

the proposals, which recommended that the proposals by the city councils should not be implemented because of doubts about whether the councils could meet some of the criteria. It made alternative recommendations which were considered and adjudged against the criteria. Throughout a lengthy consultation exercise which included the claimant authorities, the secretary of state made it clear that the ability to meet the criteria was of fundamental importance. The secretary of state decided to accept the proposals by the two city councils, even though they were not likely to meet all the criteria because of the government's present priorities for jobs and economic growth, and more new policy for developing public service delivery. The claimants sought judicial review of the decision.

Ouseley J granted the application. The statutory consultation had to meet the criteria in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168. The requirement to publish sufficient information to enable an intelligible response means that the consultee needs to know not just what is the proposal, but also the factors likely to be of substantial importance to the decision. Where the decision-maker sets out his/her crucial criteria and how s/he will use them in his/her decision-making, fairness may prevent departure from the criteria and their stated significance. A flawed consultation exercise is not always so procedurally unfair as to be unlawful. Yet the test set out in *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), 15 February 2007; [2007] Env LR 29, that something must have gone 'clearly and radically' wrong, should not become a substitute for the true test which is whether the consultation process was so unfair that it was unlawful (para 70). Nor is it useful to say that it is only the most extreme examples of bad administration which can successfully attract judicial review.

In the present case, the basis on which the secretary of state consulted was clear. He chose to set specific criteria of his own devising, and to use them not as guides but as the keys to the gateway through which each proposal had to pass. At no time did he suggest, in the consultation process or elsewhere, that he might approve a proposal if it were to fail one criterion. He maintained his position throughout, although there were many opportunities to change it and to alert consultees to the possible importance of the new policy and to invite representations about its effect. There was no opportunity for consultees to anticipate and deal with the last-minute change of stance. Although the proposals themselves were unchanged and the factors which the secretary of state took into account were legally relevant so that the decision was not irrational, that did not save the decision. An unlawful procedure can produce an otherwise lawful substantive decision. Furthermore, the judge rejected the secretary of state's submission that fresh consultation was not necessary because the new points were very closely related to the criteria and the extent of the proposals' failure against the criteria was marginal. The unfairness lay in the change to the role of the criteria without any opportunity to deal with that change or the merits of the new factors.

Reviewability

■ R (Hillingdon LBC and others) v Secretary of State for Transport and Transport for London (interested party)

[2010] EWHC 626 (Admin), 26 March 2010

The claimants challenged decisions by the secretary of state to confirm policy support for a third runway at Heathrow. The statements had first been contained in a white paper on airport strategy in which the government said that its support was conditional on certain measures concerning climate change, noise and surface access. Following a consultation process, the secretary of state informed parliament of his support and that the conditions could be met. The claimants argued, among other things, that the aviation policy needed to be revised in the light of a report by the climate change committee. The secretary of state said that under the Planning Act 2008, he would issue a national policy statement (NPS) on airports and this would take all developments into account. When issued, an NPS would have legal effect.

An issue arose on the judicial review application about the status of the defendant's policy statements. They had no substantive effect and the defendant could not limit the factors to be taken into account in formulating the national airport strategy. Despite this Carnwath LJ held that such statements were in principle subject to judicial review. However, their preliminary nature and their 'high-level' strategic character meant that the grounds for review were limited. Any failure in the consultation process could be put right at a later stage as could a failure to take account of relevant considerations. The claimants would have not only to show an error of law but that it required the court's intervention at this stage. It would, though, be different if the policy was affected by 'a "show-stopper": that is, a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado' (para 69).

Applying this approach, the arguments based on climate change and economic justification did not merit judicial review. There were technical arguments but these could be dealt with in the course of the coming policy review. However, the same was not true of the defendant's decision on surface access. The defendant had determined that this condition would be satisfied, but it was not possible to say what he had actually decided about it or how he had dealt with objections. The application succeeded to that extent, but given that the defendant's decision had no substantive effect it was not appropriate to grant a quashing order. In the event, the case appears to have been dealt with by the secretary of state giving an undertaking that he would not seek to import the policy statements into the NPS.

* Available at: www.hmcourts-service.gov.uk/cms/files/HMCS_Annual_Report2009-2010_web.pdf.

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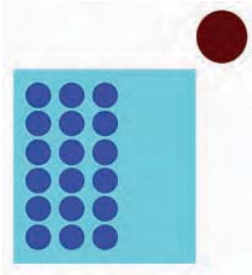
Discrimination law update – Part 2



Catherine Rayner examines case-law developments in relation to disability discrimination, perceived discrimination and disability and equal pay. Part 1 of this article was published in October 2010 *Legal Action* 23. Part 3 will be published in December 2010 *Legal Action*.

CASE-LAW

Disability discrimination

Direct discrimination in disability discrimination cases can be difficult to prove. Most adverse action taken by employers against disabled people is the result of a failure to make reasonable adjustments, or something related to the disability, such as long sickness absences, or capability. However, in cases where a claimant is suffering from a mental impairment, such as bipolar affective disorder, adverse or less favourable treatment can result from assumptions made about the illness, or unjustified and ill-founded fears about how someone will react in the workplace. Stereotyping on the ground of disability can amount to direct discrimination if a person is treated less favourably as a result of his/her disability because a person makes stereotypical assumptions about how s/he will act and what s/he can and cannot do.

In **Aylott v Stockton-on-Tees BC** [2010] EWCA Civ 910, 29 July 2010, the Court of Appeal considered, among other things, how tribunals should approach the question of stereotyping, hypothetical comparators and the crucial question of the grounds on which less favourable treatment is said to have occurred. The case is also of particular interest because Mummery LJ had the opportunity to comment on his judgment in *Madarassy v Nomura International PLC* [2007] EWCA Civ 33, 26 January 2007; [2007] IRLR 246, CA, and what sort of findings are required to shift the burden of proof (paras 49–50).

Section 3A(5) of the Disability Discrimination Act (DDA) 1995 states that: 'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.'

It is unlawful for an employer to discriminate against a disabled person whom s/he employs by dismissing him/her, or subjecting him/her to any other detriment: DDA s4(2)(d). It is usual then that the central enquiry of the employment tribunal (ET) must be why the claimant was treated as s/he was by the employer? Was it because of, or on the ground of, his/her disability or for some other reason?

Mr Aylott, who had bipolar affective disorder, was employed by the council and was disabled within the meaning of the DDA. He was dismissed on the ground of capability following a series of events culminating in his hospitalisation.

The ET made detailed findings of fact about what had occurred, and was critical of the employer. The tribunal found that the employer had made stereotypical assumptions about Mr Aylott and about his illness. These included comments made by other staff to medical experts describing the claimant's conduct as intimidating and scary, and portraying the claimant as being erratic, unpredictable and over-exuberant, which made working with him uncomfortable.

The Court of Appeal found that where an ET has made findings of fact which support a finding that there has been stereotyping of a disability, it is entitled to find that the reason for the less favourable treatment is the disability. While the question of the identity and characteristics of the hypothetical comparator are important, it is often more appropriate to take the approach set out by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, 27 February 2003; [2003] ICR 337, and consider the reason why a person has been treated as s/he has, before considering whether or not someone has been treated less favourably than a hypothetical other person. In this case, the Court of Appeal considered that the findings of the ET set out adequately the basis for its conclusion that stereotyping had taken place and that the treatment the claimant received resulted from it. The ET had found that:

18. ... The appropriate comparator is someone who had been off for a similar number of days but did not have the claimant's disability. The tribunal is satisfied that the claimant has shown that the respondent's treatment of him upon his return from sickness, by imposing deadlines and referring to his performance, and strict monitoring followed by the response to his return to work in April 2006 and his dismissal were sufficient to shift the burden of proof. A comparator who had a similar sickness record in respect of, for example, a complicated broken bone or other surgical problem, would not have been subjected to the same treatment.

The sudden change of tone in the meeting with Sue Daniels and Paul Diggins as shown in the notes of 10 and 17 February 2006, and the claimant's evidence that they were giving him conflicting advice and subjecting him to deadlines and stress represented direct discrimination on the grounds of the claimant's disability. It is clear that a decision had been made to deal with the claimant. Undue pressure was exerted on the claimant when the respondent was aware of his disability and the facts that he had been off sick as a result of stress which exacerbated his condition.

20. With regard to the claimant's return to work on 13 April 2006, the claimant's representative referred to this as a hysterical reaction to the claimant's return to work and the tribunal has some sympathy with this view. There was clearly some panic on the part of the respondent. The tribunal infers from the treatment and the surrounding events that this was as a result of stereotypical views of mental illness which Dr Vincenti referred to as 'a blight on those suffering from mental illness'. Paul Diggins ignored Sue Daniels' instructions to have a welfare/return to work meeting with the claimant and send him home. Instead he gave the claimant tasks and deadlines which provoked the heated meeting. The subsequent decision to carry out a disciplinary investigation and to suspend the claimant was extremely harsh when an informal approach would have been appropriate. Once again, the tribunal finds that this was direct discrimination based on the stereotypical view of mental illness (para 30).

The Court of Appeal found that the ET was entitled to arrive at the conclusion which it reached for the reasons it did and upheld the tribunal's finding of direct discrimination.

Perceived discrimination and disability

Two cases from the Employment Appeal Tribunal (EAT), determined within days of each other, address the question of perceived disability and come to differing conclusions.

Coleman v Attridge Law and Law C-303/06, 31 January 2008; [2008] ICR 1128 established that a person can claim discrimination even if the person with the disability which forms the ground of his/her treatment is someone other than him/herself, for example, when s/he is a carer for that person. In **Aitken v Commissioner of Police of the Metropolis** UKEAT/0226/09/ZT, 21 June 2010, the EAT considered whether the reasoning of the European Court of Justice (ECJ) in *Coleman* and Council Directive 2000/78/EC meant that a person could claim the protection of the DDA where the less favourable treatment arose because of a perception, fear or assumption that a worker had a mental impairment or illness which s/he did not in fact have. It was argued that if the Directive does cover perceived discrimination, the DDA must be interpreted to include it as well in order to give effect to the Directive.

In this case, the claimant was a police officer whose behaviour on a number of separate occasions gave serious cause for concern. He made aggressive statements and became abusive and confrontational, causing concern and putting others in fear of their personal safety. The ET found that the treatment of him by his employer was not the result of a perception that he could have a dangerous mental condition, but was because of the behaviour which he displayed. The EAT found nothing wrong with the ET's analysis. The DDA, the EAT found, requires an actual disability to exist, on which the alleged less favourable treatment is founded. In *Coleman*, there was a disability, although it was the disability of another person, which was the cause of the less favourable treatment. Therefore, in this case, even if the ET had found that the employer made assumptions about a mental impairment which caused it to treat the claimant less favourably, it would not be wrong in law to conclude that there was no discrimination. In the absence of an actual disability, there would be no discrimination.

Comment: Of course, this case differs from *Aylott* (above) where there was an actual disability and assumptions were made. In that case there was direct discrimination. However, the EAT, with the Honourable Mr Justice Underhill (President) presiding, was asked to consider the same point in *J v DLA Piper* (below). The matter was not strictly before the tribunal, but its comments are interesting and contrast with the judgment in *Aitken*.

In **J v DLA Piper UK LLP** UKEAT/0263/09/RN, 15 June 2010, the EAT considered a further case of mental impairment and the particular difficulties an ET can face in distinguishing between a case of depression, which amounts to mental impairment, and general life experience of stress and anxiety, which will not be equal to an impairment. (See page 11 of this issue for the facts of this case.)

The first question before the EAT was whether or not the claimant was disabled within the meaning of the DDA. The ET had found that she was not. The EAT found that on proper consideration of the evidence and application of the legal tests, the claimant was disabled. The judgment gives a full overview of the law and the difficulties of application in this area, and provides key guidance on the approach for tribunals in cases where mental impairments such as depression are considered.

The EAT had two basic matters to decide. First, was the ET right to find that the claimant was not disabled and, second, even if the claimant was not disabled was she refused employment because the respondent believed that she was?

A person is disabled within the meaning of the DDA if s/he satisfies section 1, as follows:

(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act 'disabled person' means a person who has a disability.

Schedule 1 paragraph 2 relates to the phrase 'long-term … effect'. It reads:

(1) The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

In this case, the EAT considered in detail the findings made by the ET about the medical impairment and its effect on the claimant. It reviewed the expert evidence and the medical evidence which had been before the ET and considered the conclusions drawn from it. The EAT then set out the correct approach to the determination of whether or not there is a disability:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in [Goodwin v Patent Office *[1999] ICR 302*]**.**

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the guidance or with the authorities referred to above. In particular, we do not regard the [College of Ripon and York St John v Hobbs *[2002] IRLR 185*] *and* [McNicol v Balfour Beatty Rail Maintenance Ltd *[2002] ICR 1498*] *cases as having been undermined by the repeal of para 1(1) of Schedule 1, and they remain authoritative save insofar as they specifically refer to the repealed provisions* (para 40).

The EAT then noted that there is an important distinction to draw between a mental impairment which can be called depression, and general anxiety and stress, which is not a mental impairment. It noted that in some cases this appears to cause difficulties, but went on to say:

We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed

suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived (para 42).

Applying these principles, the EAT found that the ET had reached the wrong conclusion. The correct conclusion was that the claimant did have a disability.

The EAT also considered the second question of perception of disability. It found, crucially and in contrast to the EAT in *Aitken*, that the matter could not be determined without reference to the ECJ. It commented that:

While we see the analogy with the case of associative discrimination, we do not regard it as self-evidently correct. The concept of 'perceived disability' presents issues different from those presented by the question whether a person (either a claimant or a person with whom he or she is 'associated') is in fact disabled. What the putative discriminator perceives will not always be clearly identifiable as 'disability'. If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long-term (para 62).

Equal pay

The number of cases progressing currently through ETs in the UK continues to produce appeal cases on numerous and varied points of law. Many of the issues raised concern the application of the grievance procedure and time limits or other procedural matters and are not discussed here. The key matters which arise and are of interest to discrimination practitioners in other fields concern how indirect discrimination is to be considered.

The Equal Pay Act (EqPA) 1970 provides that where a woman is employed on like work, work of equal value or work rated as equivalent with her male comparator, an equality clause shall be deemed to operate, so that she is entitled to the benefit of any term or provision found in his contract, but not in hers (summary of s1(1)–(2)).

EqPA s1(3) states that: 'An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex ...'

In **Gibson v Sheffield City Council** [2010] EWCA Civ 63, 10 February 2010, the Court of Appeal had to consider whether or not the payment of bonus pay to men, but not to women, was indirect discrimination which needed to be justified.

The Court of Appeal noted that, in this case, there was no doubt that:

(a) The work of the appellants and that of the male comparators was work of equal value under section 1(2)(b) and section 1(5) of the 1970 Act,

(b) The male comparators were paid substantially more than the appellants,

(c) The appellants are women and the pay difference, as the statistics cited by the tribunal demonstrate, disadvantaged a substantially higher proportion of women (para 31).

The issue that the Court of Appeal considered in *Gibson*, and which concerns the majority of the equal pay cases going through the courts currently, is whether or not a pay difference arising from what is alleged to be a productivity bonus paid only to an almost wholly male group of workers, and not paid to the sections of the workforce which are almost wholly female, is discriminatory because the differences in gender are themselves indicative of some form of sex taint. The employers in these cases argued that they had a genuine material factor (GMF) defence which is within EqPA s1(3) (see above).

This GMF, said the employers, was the fact that the bonus was paid for good reasons related to productivity, which was possible because of the measurable nature of men's work, and which could not be paid to women because the nature of their work, among other things, would prevent it. In *Gibson*, having considered the details of the various bonus schemes, the ET and the EAT held that the reason for the disparity in pay was not the difference of sex so that the council was not required to justify the disparity objectively.

In *Enderby v Frenchay Health Authority and Secretary of State for Health* C-127/92, 27 October 1993; [1994] ICR 112, a predominantly female occupational group, speech therapists, compared their pay with two predominantly male occupational groups, pharmacists and clinical psychologists.

The ECJ answered questions posed in *Enderby*:

(1) Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article [141] of the EEC Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

(2) The fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct, and, taken separately, have in themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs (para 22 of *Gibson*).

The Court of Appeal looked at the *Enderby* rule in the context of the *Gibson* bonus schemes, which were fairly typical of bonus schemes operated by local authorities across the UK. The court found that both the ET and the EAT had made the wrong decision. The judgment is too long adequately to summarise here, but gives a clear and accessible overview of the relevant legal principles in this area and is important reading for any adviser doing these cases.

In short, the court found that the statistical gender differences between those who do, and do not, receive the bonus pay were so stark that they must point to some form of sex taint. This may be the result of historical gender stereotyping about the value of men's work and the value of women's work, and this could be a legitimate conclusion to draw. In addition, the fact that women's work is of a type that does not lend itself to productivity bonus pay tends to support the claimants' argument that there is something inherently discriminatory about the payments, since they are predicated on gender differences in work, which is a difference of gender.

Thus, where there are clear and stark differences, on gender lines, in the statistical breakdown of those receiving and those not receiving pay, this is enough to demonstrate a sex taint, so that an employer will have to justify the pay difference. In addition, even where there is an issue about whether or not the bonus scheme could in practice have been extended to women, if the reason for not extending the scheme is based on the nature of women's work, this is also a gender-tainted reason and means that justification will still be required by the employer.

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Update on the Court of Protection

Nicola Mackintosh and **Victoria Butler-Cole** write the first article in a new series on developing trends within the Court of Protection's jurisdiction and procedural matters of significance for practitioners. The issue covered in this update is deprivation of liberty and article 5 of the European Convention on Human Rights ('the convention'), and the relevant safeguards introduced in April 2009. The articles will appear in March, July and November.

Introduction

The fundamental importance of the liberty of the person is central to the operation of a democratic society and the rule of law. Although the rights of disabled people, particularly those who are unable to reach their own decisions, have in general lagged behind the promotion of the rights of other groups of vulnerable persons, in recent years there has been a much greater recognition of the need for the state to promote equality and to ensure that legal rights are upheld and enforceable. It is, therefore, all the more surprising that in the context of deprivation of liberty of persons who are unable to provide their consent to being in a care home or hospital, there has been such limited scrutiny of this client group and the state's obligations. The result has been that a large number of vulnerable people have not been afforded the legal protection to which they should have been, and are, entitled.

Deprivation of liberty of mentally-incapacitated persons: the background

Concern about the liberty of mentally-incapacitated people not detained under the Mental Health Act (MHA) 1983 or another statutory regime compliant with the requirements of article 5 of the convention (the right to liberty and security of person) came to prominence as a result of the case of *HL v UK* App No 45508/99, 5 October 2004; (2004) 40 EHRR 761, which was decided in 2004 but concerned events before the implementation of the Human Rights Act (HRA) 1998 in 2000. It is important to understand what *HL* did and did not decide in order to understand the subsequent case-law that has built up around article 5 and deprivation of liberty, and the statutory scheme under the Mental Capacity Act (MCA) 2005.

HL was an autistic man who was admitted to hospital on a 'voluntary' or 'informal' basis after displaying aggressive and challenging behaviour. He did not attempt to leave, but could not have given consent to remain because he lacked capacity to make such a decision. His carers, with whom he had been living immediately before being admitted to hospital, brought a claim for false imprisonment and habeas corpus. The claim for false imprisonment was rejected by the House of Lords, which decided that HL's care and treatment were justified by reference to the common law doctrine of necessity, and that this provided a defence to the tort of false imprisonment although, in any case on the facts, a majority decision was that HL had not been deprived of his liberty.

The European Court of Human Rights (ECtHR) came to a very different conclusion by the application of article 5 of the convention, which provides materially that:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention of persons ... of unsound mind ...

On the question of what constitutes a deprivation of liberty for the purposes of article 5, the ECtHR rejected the distinction, relevant to the tort of false imprisonment, between actual restraint of a person (which would amount to false imprisonment) and restraint that was conditional on him/her seeking to leave (which would not constitute false imprisonment). On the facts, the ECtHR found that HL had been detained because the health care professionals treating and managing him 'exercised complete and effective control over his care and movements' (para 91).

The ECtHR then went on to find that HL met the *Winterwerp* requirements (*Winterwerp v Netherlands* App No 6301/73, 24 October 1979; (1979) 2 EHRR 387) which are minimum conditions that must be met for an individual to be deprived of his/her liberty on the basis of unsoundness of mind:

- S/he must reliably be shown to be of unsound mind.
- The mental disorder must be of a kind or degree warranting compulsory confinement.
- The validity of continued confinement depends on the persistence of such a disorder.

However, fulfilling these requirements is not enough. Article 5(1) of the convention (above) is concerned to prevent arbitrary deprivation of liberty, and for arbitrariness to be avoided there must be a procedure prescribed by law to authorise or allow for such deprivations of liberty and any renewals. The common law doctrine of necessity was not sufficient because it did not provide adequate legal protection and fair and proper procedures.

The ECtHR was particularly concerned that unlike the MHA, the doctrine of necessity did not include the following:

- Any formalised admission procedures.
- A requirement to fix the exact purpose of admission.
- A time limit for detention.
- The requirement for the appointment of a representative for the incapacitated person to speak on his/her behalf.

Deprivation of liberty safeguards

As a result of *HL*, section 4A and Schedule A1 to the MCA were introduced. MCA Sch A1, known as the deprivation of liberty safeguards (DoLs), puts in place a statutory process by which assessment and authorisation can be made of the deprivation of liberty of an individual. The DoLs go beyond *HL* in that they require that a deprivation of liberty must also be in the best interests of the individual to be lawful. The DoLs Code of Practice states that:

1.13 Depriving someone who lacks the capacity to consent to the arrangements made for their care or treatment of their liberty is a serious matter, and the decision to do so should not be taken lightly. The deprivation of liberty safeguards make it clear that a person may only be deprived of their liberty:

- *in their own best interests to protect them from harm*
- *if it is a proportionate response to the likelihood and seriousness of the harm, and*
- *if there is no less restrictive alternative.*[1]

HL only decided that the deprivation of liberty must have been authorised through a lawful process in order to comply with the

requirement in article 5(1) that detention not be arbitrary. Article 5(1) is about legal procedure and avoiding arbitrary acts; it says nothing about requiring deprivations of liberty to be proportionate or in the best interests of the person concerned, although there is no doubt scope to argue that disproportionate detention, or detention not in someone's best interests, may therefore be arbitrary.

That the DoLs go further than the express requirements of article 5(1) is perhaps an inevitable result of trying to entwine the content of the British system of best interests decision-making with the procedural requirements of article 5(1). It is worth understanding the origin of the various requirements within the DoLs because there are distinctions to be drawn between acts that amount to a violation of article 5(1), those which may constitute a breach of statutory duty and those which give rise to the tort of false imprisonment.

The DoLs apply only to people detained in hospitals or care homes for the purpose of receiving care or treatment. The safeguards provide for a system of application for a standard authorisation or an urgent authorisation of the deprivation of liberty of a person who is unable to provide consent. Where deprivation of liberty exists and a valid authorisation is in place, that deprivation of liberty is lawful.

Where the detention occurs in a hospital, the managing authority and the supervisory body may often be one and the same, ie, the primary care trust (PCT) responsible for the hospital. In some cases, the supervisory body will be different from the managing authority, for example, where the PCT responsible for commissioning the treatment is not the trust responsible for the hospital where the treatment is provided. Where the detention occurs in a care home (ie, a care home required to be registered under the Care Standards Act 2000), the supervisory body is the local authority in which the care home is resident and the managing authority is the registered manager of the care home. Standard authorisations can be made by 'supervisory bodies'; urgent authorisations can be made by 'managing authorities'.

Managing authorities must request a standard authorisation where they know that an individual is likely to become a detained resident within the next 28 days, whether or not that person is already resident in the hospital or care home. Third parties may request that the supervising authority carry out an assessment under the DoLs, if the managing authority fails to do so within a reasonable period of time after having been notified that there is potentially an unauthorised deprivation of liberty occurring.

Supervisory bodies must grant a standard authorisation if the assessments required by the DoLs are all answered in the positive. There are six assessments which comprise the process of ascertaining if the deprivation of liberty should or must be authorised under the DoLs procedure:

- Age assessment: is the person aged 18 or over?
- Mental health assessment: does the person have a mental disorder within the meaning of the MHA, including a learning disability?
- Mental capacity assessment: does the person lack capacity to make decisions about his/her accommodation (including care and any treatment) in the care home or hospital?
- Best interests assessment: is it in the best interests of the person to be detained in order to prevent harm to him/her, and is the detention a proportionate response to the likelihood of that harm occurring and the seriousness of that harm?
- Eligibility assessment: this is directed to the interface between the MCA DoLs system of authorising deprivation of liberty and the detention provisions under the MHA. If a person could be detained under the compulsory provisions of the MHA, and his/her circumstances are such that s/he objects to being admitted to or in a hospital for the purposes of being given medical treatment for mental disorder, s/he will be ineligible to be deprived of his/her liberty under the DoLs. The purpose of this provision is to preserve the primacy of the MHA and to prevent professionals and assessors under the DoLs from picking and choosing between the two statutory regimes as to which is more preferable.
- No refusals assessment: has the person made a valid advance decision which conflicts with the treatment being given, or has an individual with a valid lasting power of attorney for the person made a decision that conflicts with the treatment being given?

Urgent authorisations, however, are granted where a standard authorisation is to be requested, or has been requested, but the detention needs to start before the standard authorisation can be completed. Urgent authorisations can only last for up to seven days, although a further seven-day extension can be granted by the supervisory body in exceptional circumstances. Urgent authorisations are, by necessity, put in place without the assessments having been carried out. It is, therefore, possible that a deprivation of liberty which is not in the person's best interests can, nevertheless, be authorised under an urgent authorisation, with apparently no violation of article 5 of the convention. This state of affairs will not continue for very long as the assessments must be completed for the standard authorisation before the urgent authorisation expires.

Where standard or urgent authorisations are granted, information must be given to the person concerned:

- about the authorisation and his/her right to request a review of the authorisation (for standard authorisations only); and
- about his/her right to bring legal proceedings under MCA s21A in the Court of Protection to challenge the authorisation (for urgent or standard authorisations).

A relevant person's representative (RPR) will also be appointed whose role it is to inject an element of independent scrutiny into the process. If the person who is the subject of an authorisation is to be moved to a different care home or hospital, a new authorisation must be obtained before the move takes place.

The supervisory body must review a standard authorisation if it is requested to do so:

- if the person no longer meets the qualifying requirements or there has been some other material change in circumstances; or
- if the reasons why the qualifying requirements are met have changed.

Where there is a dispute about an authorisation that has been granted, proceedings can be issued in the Court of Protection under MCA s21A, inviting the court to vary or terminate the authorisation. Non-means-tested legal aid is available for challenges by the person or his/her RPR to the court regarding a standard authorisation, although in practice there have been very few. Any challenge by another person (for example, a relative who is not a RPR) will be means tested.

Placements not covered by the DoLs

Where deprivation of liberty issues arise in placements that are not care homes or hospitals, the DoLs do not apply. Such deprivations of liberty can only be authorised by court order (from the Court of Protection), which must be obtained before the deprivation of liberty begins in order to comply with the requirements of article 5 of the convention.

Where a declaration is made by the Court of Protection authorising a deprivation of liberty, whether on an interim or final basis, liability for a breach of article 5 is avoided from the point of that declaration (*G v (1) E (by his litigation friend the Official Solicitor) (2) A Local Authority (3) F* [2010] EWCA Civ 822, 16 July 2010). The cases of *In the matter of GJ, NJ and BJ (Incapacitated Adults): Salford City Council v (1) GJ (2) NJ*

(3) BJ (by their respective litigation friends) [2008] EWHC 1097 (Fam), 16 May 2008 and *In the matter of BJ (Incapacitated Adult): Salford City Council v BJ (by his litigation friend the Official Solicitor)* [2009] EWHC 3310 (Fam), 11 December 2009 set out details of the reviews of the deprivation of liberty that local authorities and the court are required to carry out in such cases.

It is not possible to avoid obtaining the court's authorisation for a deprivation of liberty, or to use the DoLs where it applies. In the view of the authors, MCA ss5 and 6 cannot be relied on to deny liability for a breach of article 5.[2] These sections of the MCA merely incorporate into the Act the common law defence of necessity; they do not amount to a 'procedure prescribed by law' as required by article 5(1), and would fail the requirements of the ECtHR as set out in *HL*.

What amounts to a deprivation of liberty?

The question of which circumstances amount to a deprivation of liberty for the purposes of article 5 and the DoLs is not straightforward in many cases. As the DoLs Code of Practice says, there is no simple definition of deprivation of liberty. The Code of Practice gives various examples of factual circumstances which have and have not been held to amount to a deprivation of liberty, but it is quite clear that the decision is both fact-sensitive and subjective (see, for example, *HL* where the members of the House of Lords and the Court of Appeal came to different conclusions about whether or not HL had been detained).

The starting point in deciding whether or not there is a deprivation of liberty is to recognise that, in some cases, there is no bright line between restrictions on liberty and deprivation of liberty:

According to the established case-law of the court, article 5 ... (...1) is not concerned with mere restrictions on liberty of movement, which are governed by article 2 of Protocol No 4 ... In order to determine whether circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question ... The distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance ... (*Ashingdane v UK* App No 8225/78, 28 May 1985 at para 41; (1985) 7 EHRR 528).

The DoLs Code of Practice at paragraph 2.5 identifies the following features of a case which are relevant to establishing whether or not there is a deprivation of liberty:

- *Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.*
- *Staff exercise complete and effective control over the care and movement of a person for a significant period.*
- *Staff exercise control over assessments, treatment, contacts and residence.*
- *A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.*
- *A request by carers for a person to be discharged to their care is refused.*
- *The person is unable to maintain social contacts because of restrictions placed on their access to other people.*
- *The person loses autonomy because they are under continuous supervision and control.*

It is important to recognise that the DoLs Code of Practice list (above) is not exhaustive of the factors which might lead to a decision that a person has been deprived of his/her liberty. Any one of the factors might of itself lead to a conclusion that a person is being deprived of his/her liberty. Many statutory organisations have adopted criteria checklists for deciding whether or not a person is being deprived of his/her liberty which do not reflect the case-law and lead to a conclusion that the person's liberty is only being restricted and that s/he is not being detained. This is perhaps one of the reasons why there have been so few DoLs' authorisations granted since the scheme was implemented.

It is apparent from the list that if an individual is being prevented from living where s/he wishes (or his/her carers wish him/her to live), this is an important factor in deciding whether or not there is a deprivation of liberty. This is no doubt because of the case of *JE v (1) DE (by his litigation friend the Official Solicitor) (2) Surrey CC (3) EW* [2006] EWHC 3459 (Fam), 29 December 2006, which was decided before the MCA came into force. In *DE*, Munby J (as he then was) held that even where no chemical or physical restraint was used, and where the circumstances within a care home were not themselves a deprivation of liberty, the acid test was whether or not the individual was 'free to leave' (para 77(ii)(b)). Since DE was not permitted to leave the care home and go anywhere he wanted and at any time he chose, DE was deprived of his liberty. The effect of this decision has been that in any case where the person in question is not compliant and wishes to live elsewhere, it is assumed that there is a deprivation of liberty.

Thus, in *A Primary Care Trust and P v AH and A Local Authority* [2008] EWHC 1403 (Fam), 25 June 2008, it was held that living independently in the community with care staff was a deprivation of P's liberty, primarily because he was not to be allowed to return to live with his mother and because P's contact with her would be constrained. Other factors, including the control exercised by care staff, were listed by the judge as relevant factors; however, it appears from the judgment that the issue of P not being free to leave the placement was the most important consideration.

In *BB (by her litigation friend the Official Solicitor) v AM and others* [2010] EWHC 1916 (Fam), 23 July 2010, the court held that there was a deprivation of liberty in circumstances where most of the features in the DoLs Code of Practice checklist were present:

She is away from her family, in an institution under sedation in circumstances in which her contact with the outside world is strictly controlled, her capacity to have free access to her family is limited, now by court order, and her movements under the strict control and supervision of hospital staff. Taking these factors altogether, the cumulative effect in my judgment is that BB is currently being deprived of her liberty and I so declare (para 32).

In *LLBC v (1) TG (by his litigation friend the Official Solicitor) (2) JG (3) KR* [2007] EWHC 2640 (Fam), 14 November 2007, the individual was not deprived of his liberty in part because he was compliant and living happily at the care home. However, this might be decided differently now given the direction of travel in other more recent cases. It must always be remembered that HL was compliant with his detention: lack of disagreement is not an indicator that there is no deprivation of liberty, even though the existence of disagreement may well suggest that there is such deprivation.

The decision of *Surrey CC v CA and LA and MIG (Incapacitated Adult) and MEG (Incapacitated Minor) (by their litigation friend the Official Solicitor)* [2010] EWHC 785 (Fam), 15 April 2010 can be seen as an example of the emphasis on whether or not the circumstances are objected to by the person concerned, or his/her family or carers. Parker J decided that two sisters, one of whom lived with a foster family and the other in a small residential placement, were not being deprived of their liberty, notwithstanding that they lacked the freedom to leave where they were living. A central difference between

this case and those like *DE* and *BB* (above) was that no one was disputing the placements, and the individuals were not being kept apart from family members or carers who wanted them returned home.

The case has, however, been appealed to the Court of Appeal because the judge went further than the summary above sets out, and appeared to conclude that the reason why MIG and MEG were living in their placements (ie, to receive care) was relevant to the question of whether or not they were being deprived of their liberty. Parker J appears to have been influenced by comments made in *Austin and another v Commissioner of Police of the Metropolis* [2009] UKHL 5, 28 January 209, which considered the question of deprivation of liberty in the context of crowd control by the police, to the effect that the purpose or motivation in restricting liberty is important in deciding whether or not the line has been crossed between restriction and deprivation of liberty. It is difficult to see how this can be correct, at least in the context of incapacitated people, when the ECtHR found that HL was deprived of his liberty, even though the intentions of those caring for him were benign and the purpose of his detention was to receive care, and rejected the government's submission that the restrictions on HL 'did not amount to involuntary detention but rather to necessary and proper care for someone with the applicant's needs' (para 83).

Parker J also adopted the view taken in *LLBC v TG* (above) that there is such a thing as a normal level of restriction in a care home or residential placement which does not amount to a deprivation of liberty (for example, not being allowed to leave the placement alone and without informing staff). It is interesting to note that this approach contrasts with the concerns of the government, which were raised in *HL*, that to find a breach of article 5(1) would mean that all incapacitated but compliant people in care homes and nursing homes would be caught. If Parker J's view is correct, it also makes the task of identifying a deprivation of liberty even harder, since 'ordinary' restrictions have not been defined, and could refer to the quantity, quality or even frequency of restrictions.

The importance of separating the existence of a deprivation of liberty from the purpose of the deprivation (which is usually for the best of motives) should not be underestimated. Pending a decision by the Court of Appeal, practitioners will no doubt err on the side of caution and seek the court's involvement, or invoke the DoLs procedures where there is any suggestion that a deprivation of liberty is occurring.

The decision in *MIG and MEG* (above) was relied on by Munby J (as he then was) in *In the matter of A: A Local Authority v (1) A (2) B and Equality and Human Rights Commission (intervener)*; *In the matter of A: A Local Authority v (1) C (2) D (3) E and Equality and Human Rights Commission (intervener)* [2010] EWHC 978 (Fam), 4 May 2010, which concerned two individuals who were locked in their rooms, within family homes, for 10 to 12 hours every night. Again, the purpose of the restrictions imposed was found to be relevant in ascertaining whether or not there was a deprivation of liberty. Since A and C were being locked in their bedroom for their own safety only at night-time, when they would otherwise have been asleep but for the effects of their condition, were checked on by their families and were happy with their care, the court concluded that there was no deprivation of liberty, only a restriction of liberty. The fact that A and C had no say over where they lived and how they were cared for was outweighed by these considerations. Again, this is an example of confusion between the existence of deprivation of liberty and the motives behind such a deprivation, and may have resulted from the family home context in which the issue arose.

When is article 5 engaged?

It is not yet clear precisely when article 5 is engaged where the body directly responsible for a deprivation of liberty is not a public authority. Under the DoLs, private care homes and hospitals are caught. The DoLs Code of Practice says that they are included deliberately because the state is obliged to ensure that the rights enshrined in the convention are protected for all its citizens. This is a rather optimistic summary of the effect of the convention and the HRA, and no guidance is given about liability for breaches of article 5 where there is non-compliance with procedural safeguards.

In *In the matter of A: A Local Authority v (1) A* and *In the matter of A: A Local Authority v (1) C* (above), it was noted that the state owes positive obligations under article 5 to protect individuals from arbitrary interferences with their right to liberty, 'whether by state agents *or by private individuals*' (emphasis in transcript) (para 84). Local authorities must, therefore, take reasonable steps to prevent (or seek court authorisation for) a deprivation of liberty of which they are, or ought to be, aware. This includes:

- investigating whether or not there is a deprivation of liberty;
- monitoring the situation, if appropriate; and
- taking steps to end the deprivation of liberty (for example, by providing additional support services); or, if that is not possible
- bringing the matter to court.

However, on the facts of the case, the local authorities were not so directly involved with the alleged deprivation of liberty for article 5 to be engaged. The local authorities had carried out assessments and prepared care plans which involved limited domiciliary care and the provision of respite; however, they were not directly or substantially involved in providing care, in particular, at night-time.

The case concerned placements which were not covered by the DoLs, but the comments made suggest that even though managing authorities are required to trigger requests for standard authorisations under the DoLs, local authorities must take an active role in ensuring that compliance with the DoLs is taking place and checking that unauthorised deprivations of liberty are not occurring.

How are the DoLs working in practice?

The overall picture which is developing is that since the DoLs were introduced in April 2009, the new protections are being used significantly less than envisaged originally. A briefing on the DoLs published in April 2010 showed that assessments for the safeguards were fewer than imagined, and commented that 'there are probably a number of deprivations not recognised and not authorised'.[3] Five areas for improvement in practice were also identified, including how to choose the person's RPR, and the fact that relatives have not been appointed to be the person's RPR simply because they disagreed with the deprivation of liberty. The briefing also indicated that where a deprivation may arise as a result of a long-running dispute between statutory authorities and the family regarding where the person should live, rather than using the DoLs route of granting an authorisation to seek to 'resolve' the dispute, a Court of Protection resolution will be required. Another important trend identified in the briefing was that while the DoLs process could be used to reach interim decisions restricting or encouraging contact between the person and others, the Court of Protection should be used to resolve disputes regarding contact where a 'no contact' provision with a person is being sought. Usually, this is where the professional view is that the incapacitated person may be harmed or vulnerable to abuse by another. In such cases, the DoLs process should not be used to prohibit contact other than as a very short-term measure before this is decided by the court.

Figures from the Department of Health (DoH) published on 20 July 2010 confirmed that hospitals and care homes were still making less than expected use of the new

measures, and the total number of applications was much lower than expected (7,160 in England compared with the predicted number for England and Wales of around 21,000).[4] Over 50 per cent of the applications were for people with a diagnosis of dementia. There was a higher than expected number of authorisations granted following assessment (46 per cent as against an expected figure of 25 per cent).

A letter from the DoH to the chief executives of PCTs dated 13 July 2010 noted that in the first year of the DoLs having been introduced, more than 1,700 people in hospital had been assessed for the DoLs, of which 46 per cent had resulted in an authorisation being granted.[5] However, serious concern was expressed that in relation to practice, there was wide geographical variation and some PCTs had undertaken no DoLs assessments (let alone authorisations). The letter concluded: 'Chief executives are reminded that they have statutory responsibility for ensuring that no NHS care or treatment is offered without the necessary DoL safeguards in situations which amount to a deprivation of liberty.'

Conclusion

The introduction of the new safeguards has been long overdue and while extensive and intensive training of best interests assessors and clinical and social care staff has been undertaken, the low number of assessments and ultimate authorisations reveal a pressing need for further work in this area to identify the circumstances in which deprivations of liberty may be occurring. It is rather more concerning that there are some areas of England and Wales where no assessments have been carried out since the scheme was introduced. It is unclear what action is being taken by central government to address these issues and monitor improvements closely. The focus should be on those facilities operating a locked-door or secure policy, where it would be surprising if no person under such a regime was being deprived of his/her liberty.

The complexity of the DoLs scheme as drafted has attracted considerable criticism from practitioners, and may have contributed to the reluctance to identify where a deprivation of liberty is occurring. The system as drafted currently will no doubt require revision in future, once it has bedded down and trends are identified.

The obligations on the state to take positive steps to identify and safeguard one of the most vulnerable groups of people in society should, if properly understood, result in much closer collaboration between the DoH and health agencies, care homes and professionals to identify areas of concern and act swiftly, where required. Public awareness also needs to be raised. This area of adult protection needs to be given priority in view of the lamentable delay in implementing an effective regime to protect this vulnerable group, and so that compliance with the state's obligation to ensure that deprivation of liberty is in keeping with its human rights obligations is assured.

1 *Mental Capacity Act 2005. Deprivation of liberty safeguards: code of practice to supplement the main Mental Capacity Act 2005 code of practice*, available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf.
2 See a letter from the Department of Health to PCTs' chief executives, 'The NHS and people lacking mental capacity', Gateway reference number: 14504, dated 13 July 2010, at: www.dh.gov.uk/prod_ consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_117409.pdf.
3 *Briefing on Mental Capacity Act deprivation of liberty safeguards – April 2010, Gateway reference: 14353. The Mental Capacity Act 2005 deprivation of liberty safeguards – the early picture*, is available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_116357.pdf.
4 See *Mental Capacity Act 2005, Deprivation of liberty safeguards assessments (England) – First report on annual data, 2009/10*, July 2010, (but updated on 1 October 2010 to take account of an error), available at: www.ic.nhs.uk/webfiles/publications/005_Mental_Health/mentalhealth0910/Annualdolstemplate_revised.pdf. The DoH's expected figures appear in *Impact assessment of the Mental Capacity Act 2005 deprivation of liberty safeguards to accompany the code of practice and regulations*, available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_084984.pdf.
5 See note 2.


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CLARIFICATION

Elizabeth Weil, author of 'Budget 2010: changes to benefits and tax credits reviewed – Part 1', September 2010 *Legal Action* 23, would like to clarify the following paragraph:

From April 2012, those with an income of £30,000 a year and over will not receive [child tax credit (CTC)] and those earning £25,000 a year will receive a reduced family element of £460 ... CTC will not be paid to families with an income over £40,000.

To clarify, these figures, although not announced by the Chancellor, were given in Table A2 of the *Budget 2010* report as illustrative examples of tax credit entitlement per year by income levels.* The calculations are based on families with **one child over the age of one, with no entitlement to baby, childcare or disability elements and assuming no entitlement to the 30-hour element**. Table A2 shows the amount of tax credits they are currently entitled to receive, the amount they would have received in 2011–12 and the amount they will receive in 2011–12 and 2012–13 following the changes announced in the *Budget 2010* report.

In this table, families with an income of £50,000 currently get the basic family element of £545 a year, but from 2011–12 after this budget they will get nothing. Families with an income of £40,000 or more will get the basic family element of £545 until 2012–13 when they will lose their entitlement completely. Similarly, families with an income of £30,000 or more will have a nil award in 2012–13 and those with an income of £25,000 or more will see their family element reduced to £460 a year in 2012–13. Readers are referred to the section on 'Income thresholds and withdrawal rates of CTC and WTC' in Part 1 of the article, which appeared in September 2010 *Legal Action* 24.

* Available at: www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_188581.pdf.

Getting past the gatekeepers – Part 2: how to secure interim accommodation

Liz Davies and **Jan Luba QC** describe the circumstances in which a local housing authority (LHA) may have a duty to accommodate an applicant for homelessness assistance pending a decision on that application. Part 1 of this article appeared in October 2010 *Legal Action* 38 and described what constitutes an 'application'.

Introduction

Once a person has made an application for homelessness assistance (a concept described in Part 1 of this article), his/her most immediate concern will often be securing accommodation for that night and for any further period until a decision is reached on the application. For most applicants, the LHA to which they have applied will owe a duty (described below) to provide accommodation that night and until a decision is made. In the majority of circumstances, the LHA will readily comply with its duty, as might be expected.

This article is concerned with the significant minority of cases in which a LHA appears to be failing to comply with its duty or has refused to secure interim accommodation for the applicant until a decision on the application is made. Short notice accommodation for families can be difficult to find and expensive for a LHA to secure. Unfortunate local practices have sprung up. They are designed to save local resources by deflecting applications and, if that fails, evading the duty to provide interim accommodation. Commentators have described these practices as 'gatekeeping'.

By definition, advising an applicant faced with such circumstances will require an urgent response and often involves almost immediate legal action. Advisers assisting in these cases cannot effectively do so from scratch. Before seeing the first client who has not secured interim accommodation an adviser will need to have:

- the contact details (direct telephone lines and e-mail addresses) for the officers in the relevant LHA responsible for decision-making on interim accommodation;
- a checklist for urgently taking and recording relevant instructions;
- one of the two textbooks on homelessness law;[1]
- the ability to grant emergency legal aid (or to make an effective immediate referral to someone who can);
- arrangements with barristers' chambers of housing specialists able to handle emergency and out-of-hours cases;
- the contact details (direct telephone lines and e-mail addresses) for the LHA's legal department; and
- the contact details (direct telephone lines and e-mail addresses) for the officers in the relevant LHA responsible for out-of-hours services.

The duty to secure interim accommodation

The statutory provision containing the duty could not be more straightforward. Housing Act (HA) 1996 s188 sets out when the duty arises, to whom it is owed, and when it ends. It has been on the statute book, in something very like its modern form, for over 30 years. It provides that:

(1) If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part.

(2) The duty under this section arises irrespective of any possibility of the referral of the applicant's case to another local housing authority (see sections 198 to 200).

(3) The duty ceases when the authority's decision is notified to the applicant, even if the applicant requests a review of the decision (see section 202).

The duty is not one of those duties capable of being referred by one LHA to another under the local connection provisions in HA 1996. It is owed by the authority to which the applicant has applied irrespective of the absence of any prior connection with that area.

Triggering the duty

The first prerequisite, of course, is that there is a person who is an 'applicant' (section 188(1)). The wide range of circumstances in which a person can make an application for homelessness assistance and thus become an 'applicant' are described in Part 1 of this article. Unless there is an applicant, there is no duty to secure any accommodation under this provision.

The second prerequisite is that the LHA to which the application has been made has reason to believe that the applicant:

- may be homeless; and
- may be eligible; and
- may have priority need.

The word 'may' is given bold emphasis in the *Homelessness code of guidance for local authorities* (July 2006) (England), at paragraph 7.3, as if to underscore that the question is not whether there is reason to believe that the applicant is homeless, etc.[2] The question is simply whether there is reason to believe that s/he may be homeless.

Here, the statute does not use the higher standard of 'the local housing authority are satisfied that' which is used elsewhere in HA 1996 Part 7 (for example, at ss190(1), 192(1) and 193(1)). Rather, the question is whether the authority simply has 'reason to believe that' the applicant may be homeless, etc (section 188(1)). Obviously, therefore: 'The threshold for the duty is low…': *Homelessness code of guidance for local authorities,* para 7.3.

No interim duty is owed to those simply threatened with future homelessness when they apply, but if their circumstances change, post-application, such that they may now be actually homeless, a section 188 duty will arise. Likewise, a section 188 duty not initially owed because the applicant seemed to have no priority need, is triggered if subsequently the applicant develops what might be a priority need.

The interim duty applies if the simple wording of section 188 is satisfied, ie, irrespective of previous applications, any local connection elsewhere (see section 188(2)), the possibility of later referral of the main housing duty to another authority, intentional homelessness, or the availability of other routes by which the possible homelessness might be resolved (for example, by getting an injunction to allow the applicant back into a former home).

What must be provided?

The duty is cast on the LHA to 'secure' accommodation (section 188(1)). That can only be achieved by one of the three methods in HA 1996 s206 (all of which require something to be done by the authority). Nothing, for example, is secured by telling an applicant: 'Go and ask your mum if you can stay for one more night' or 'I am sure if you get in touch with the women's refuge they will let you stay a few nights'. Without more, each would be a plain breach if the duty is owed.

The duty is to secure accommodation that is 'available for [the applicant's] occupation' (section 188(1)). As with all other accommodation duties under the HA 1996, that phrase is given a special meaning by HA 1996 s176, which states:

Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him together with -

(a) any other person who normally resides with him as a member of his family, or

(b) any other person who might reasonably be expected to reside with him.

The effect is that the accommodation must be secured not only for the applicant alone but for all others within the rubric, for example, other family members with whom the applicant has been living or who would reasonably be expected to live with him/her (see *R (Ogbeni) v Tower Hamlets LBC* [2008] EWHC 2444 (Admin), October 2008 *Legal Action* 37).

The statutory presumption is that the accommodation will be in the LHA's own local government area unless, for some reason that the housing authority can identify, that is not reasonably practicable: HA 1996 s208(1) (see *R (Calgin) v Enfield LBC* [2005] EWHC 1716 (Admin); [2006] HLR 4).

The accommodation must be 'suitable' for the applicant and his/her household even though it is only interim accommodation being provided for the short period before a decision on the application is made: sections 206 and 210 (see *R v Ealing LBC ex p Surdonja* (1988) 31 HLR 686, QBD).

In England, the Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326 prohibits the use of bed and breakfast (B&B) for applicants with family commitments (which include applicants who are pregnant or have a pregnant member of their household). There is an exception which permits the use of B&B, but only where the LHA is satisfied that there is no other accommodation available anywhere and even then B&B can only be used for up to a maximum of six weeks (article 4).

Even if the exception applies, this does not mean that B&B accommodation can simply be booked for applicants with family commitments for periods up to six weeks long. The first condition of the exception is that 'no accommodation other than B&B accommodation is available for occupation by an applicant' on any night for which it is provided. The LHA will need to be satisfied that the exception is in place before renewing the B&B for a single further night after the first.

In Wales, B&B accommodation is deemed not to be suitable for all applicants who have a priority need: Homelessness (Suitability of Accommodation) (Wales) Order 2006 WSI No 650. There are limited exceptions allowing B&B to be used for maximum periods of two or six weeks depending on the type of accommodation (article 9).

In *Complaint against Canterbury City Council* 08 017 330; December 2009 *Legal Action* 17, the Local Government Ombudsman (LGO) said this about the hotel room offered to a couple:

The council says it explored all resources available to it to find suitable accommodation, but has provided no evidence to show this is the case either at the time or since. It seems unlikely that on the day in question this was the only accommodation available anywhere in the council's district (para 49).

See also *Complaint against Hammersmith and Fulham LBC* 09 001 262; March 2010 *Legal Action* 31.

For a discussion of the provision of suitable interim accommodation for those who are 'homeless at home', ie, where the LHA has 'reason to believe' that they 'may be homeless' in the home presently occupied, see *Birmingham City Council v Ali* [2009] UKHL 36; [2009] 1 WLR 1506, HL.

The duty may be performed by providing not just one but, where necessary, a series of units of suitable accommodation in the period before the application is determined (see *R (Araya) v Leeds City Council* [2009] EWHC 1962 (Admin)). It is therefore not unusual for the applicant to spend a few nights in crisis accommodation arranged by the LHA before being moved somewhere else to await a decision on the application.

When must accommodation be provided?

The immediacy of the duty is obvious from the wording of section 188 and from the statutory context of HA 1996 Part 7 (Homelessness). Despite the obviousness, even very large LHAs have sometimes put in place procedures to avoid owing immediate accommodation duties.

In *R (Kelly and Mehari) v Birmingham City Council* [2009] EWHC 3240 (Admin); January 2010 *Legal Action* 35, the claimants had applied to the council for assistance with accommodation under HA 1996 Part 7. Mr Kelly, a young man with mental health and medical problems, attended the council's offices with medical evidence and a letter from his mother confirming that she had 'kicked him out'. Mr Mehari had been sharing a house with other single men and occupied a room created by the conversion of a toilet. When his wife and child joined him, the landlord took away his keys. In both cases, the council declined to provide temporary accommodation. The claimants sought judicial review and were granted interim injunctions, rendering the claims academic.

The claims were pursued on the basis that they demonstrated that the council was systematically failing to comply with its duty to provide interim accommodation to applicants under section 188(1). Instead, the council's documents and procedures showed it to be considering whether or not applicants seeking assistance were entitled to 'emergency accommodation' before providing any interim shelter. The council admitted that there had been mistakes in the particular cases; however, it said that these were not the result of its policy but of individual officers' errors.

Hickinbottom J gave permission to apply for judicial review and allowed the claim. He rejected the proposition that the problems had been caused by officers failing to comply with instructions. He held that the general practice and procedure of the council was unlawful in respect of interim accommodation. He said:

None of the officers purported to apply the section 188 criteria. None of the council's documents explained that they should do so, nor did their external documents explain or suggest to applicants that those criteria would be applied. The section 188 duty to afford interim accommodation pending the conclusion of enquiries under section 184 is part of a comprehensive and coherent statutory scheme: but the council treated what they called the application for 'emergency accommodation' as a discrete and separate exercise, divorced from the substantive housing application. There is certainly some evidence that housing applications are not registered until after the initial approach, and even as late as the housing interview: but I do not have to make findings in that specific regard. I am satisfied that, far from the errors in these cases being of individuals who went outside the council's practice and procedures, the relevant officers

were following the practice and procedure they were encouraged to follow by the council themselves.

In my judgment, the failure of the council to apply the section 188 criteria in the two cases was symptomatic of a general failure of their practice and procedure. The approach of the council to their obligations under section 188 at the very least lacks legal coherence and a proper consideration of the relevant section 188 criteria. So far as the council are concerned that failure had and, insofar as that practice continues, continues to have, the effect of avoiding their obligations under section 188 of the 1996 Act (paras 39–40).

Enforcing the duty

There is no obligation on a LHA to provide a notification of any decision in relation to the s188 duty: HA 1996 s184(3). So there is no obligation to give reasons – even for an outright refusal or failure to act. There is no right to a review of the decision made under s188 and (by definition) no right of appeal to the county court (HA 1996 s202(1)).

So, any challenge must be brought by a claim for judicial review, usually as a matter of urgency. Proceedings should be preceded, if at all possible, by a judicial review pre-action protocol letter inviting the LHA to confirm by return that it will perform its duty (see *R (Lawer) v Restormel BC* [2008] HLR 20, Admin Ct; [2007] EWHC 2299 (Admin)).

The judicial review claim will be accompanied by a request for urgent consideration and a claim for a mandatory injunction requiring provision of accommodation pending even an initial hearing. Thankfully, judicial intervention is available 24 hours a day and many applications for injunctions are sought at night and at weekends. Most are granted and the judicial review claims rarely proceed to trial.

In that way the judges have achieved the object of keeping applicants off the streets, which is what the duty itself is designed to achieve in the first place. The result is that any unlawful gatekeeping practices can be challenged successfully even on the same day, if necessary, provided that good quality specialist advice is available immediately to applicants.

Advisers may well wish to help applicants complain to the LHA and thereafter the LGO if initially they were not provided with interim accommodation to which they were entitled. There have been several LGO investigations into failure to provide interim accommodation (see, for example, *Complaint against Haringey LBC* 06/A/12508; August 2008 *Legal Action* 42 and *Complaint against Hounslow LBC* 07/A/14216; June 2009 *Legal Action* 34. Note also [2010] 141 *Adviser* September/October, p16).

When the duty ends

The duty ends when a decision is made on the homelessness application and has been notified: s188(3). The duty is not continued simply by making a request for a review of the notified decision. An applicant who seeks a review can ask the LHA to exercise its discretionary power to provide accommodation pending review.

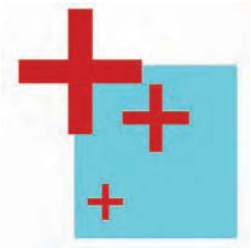
It is sometimes suggested that the duty can be brought to an end earlier than by notification of the decision. It is probably correct to suggest that the decision ends if the applicant rejects suitable accommodation that has been provided for him/her. Indeed, it might be possible to suggest that there can be an implied 'refusal', for example, by failure to comply with the terms of occupation or by destroying the property (see, by analogy, *R v Kensington and Chelsea RLBC ex p Kujtim* (2000) 32 HLR 579; [1999] EWCA Civ 1153). However, the surest way for a LHA to demonstrate that the duty has ended is by production of a notified decision letter.

Receiving an adverse decision on the application, indicating that no accommodation duty is owed, will not necessarily result in immediate loss of the s188 accommodation. The accommodation provider will need to give notice determining any tenancy or licence to occupy. Sadly, there remains an open question about whether or not the protection offered by the Protection from Eviction Act 1977 is available to all occupiers of interim accommodation (see *Mohammed v Manek* (1995) 27 HLR 439 and *Desnousse v Newham LBC* [2006] HLR 38; [2006] EWCA Civ 547).

1 Andrew Arden QC, Emily Orme and Toby Vanhegan, *Homelessness and Allocations*, 8th edition, LAG, March 2010 and Jan Luba QC and Liz Davies, *Housing Allocation and Homelessness*, 2nd edition, Jordans, March 2010. In each case, reference is needed to the new edition published in 2010.
2 Available at: www.communities.gov.uk/publications/housing/homelessnesscode.


Jan Luba QC and Liz Davies are barristers at Garden Court Chambers, London. They are the co-authors of *Housing Allocation and Homelessness*, 2nd edition, Jordans, 2010.

Legal aid round-up



In this series, Carol Storer aims to give legal aid practitioners an overview of important, topical matters of interest and concern.

Dealing with information overload

What information do busy legal aid practitioners need to keep up to date? I am acutely aware of how little time everyone has to browse the internet, so the aim of this article is to identify useful e-mail updates to which practitioners can subscribe. There are also some great legal websites but a discussion of them is outside the scope of this article.

The Legal Aid Practitioners Group (LAPG) sends an e-mail update to its members. It used to be called a monthly update but in some months there have been four or five alerts sent out because so much has been going on. It is always difficult to work out the content of updates but not as difficult as working out the tone: too much humour and it could be irritating, too little humour and it could be dry. Also, what about the timing? One practitioner provided feedback that when an update arrived on a Friday afternoon he felt that he had to read it, but would prefer them to arrive at any other time. I know that feeling.

Free e-mail updates

Most practitioners will surely be signed up to the Legal Services Commission's (LSC's) 'LSC Update' e-mail, which is sent out regularly when there is something to announce. The update was, at the time of writing, on Issue 87.[1] Helpfully it identifies what content is relevant to civil practitioners, what is relevant to criminal practitioners and what is 'cross cutting'. The LSC still produces its *Focus* magazine, but whereas when it was sent in the paper version it was useful to read while waiting at court, or on a train or bus, now it can be accessed through the LSC website.[2] Notification that a new issue of *Focus* is available appears in the 'LSC Update' e-mail.

The Law Society's 'Legal Aid Update' again appears when there is anything of relevance to the profession. It can be read online but it is much easier to subscribe to the e-newsletter.[3] While the bulk of the news is indeed on straightforward legal aid matters, there are useful professional updates as well. It came out once or twice a month over the spring, but there have been four updates already in September.

Legal consultancy DG.Legal sends out e-newsletters covering the whole of the civil and criminal law spectrum.[4] The newsletters summarise the current position on legal aid matters and also cover professional requirements as well. David Gilmore and his team are extremely well informed, which is clear from the content of the alerts. David Gilmore can count the number of people who click on the 'Read more' sections of the newsletter; what is the most read article ever? The one about a senior legal aid official in Scotland being caught up in a sex scandal.

Recently I was told about 'ilegal' ('the online forum for legal aid professionals').[5] Its free e-newsletter is called 'i-Alert'. You can also read about ilegal on Twitter and Facebook. It is run by Patrick Torsney and has very useful topic forums to discuss live issues, for example, the Law Society's judicial review. There have been past discussions on pertinent issues such as consortia. Individuals can use the site for recruitment if they are employers or upload their details if they are looking for work.

It seems unlikely that any criminal practitioner does not subscribe to 'CrimeLine'.[6] Andrew Keogh's e-newsletter is probably the most regular update, which reflects the amount of relevant information that he sends out on criminal matters. The updates cover legal news, recent cases, new legislation and details of (very low-cost) training. The e-mails are always extremely readable.

Membership organisations

There are now many membership organisations covering areas of law which have good websites. Do they send out newsletters?

- Family lawyer organisation Resolution sends out three to five e-newsletters a year for members only.[7]
- The Association of Lawyers for Children sends out a quarterly e-newsletter to members only.[8]
- The Housing Law Practitioners Association sends out minutes of the bimonthly meetings to members. Its website is updated regularly with handouts and consultation papers.[9] Some consultation papers are available to non-members.
- The Immigration Law Practitioners' Association (ILPA) is very alive to the problem of information overload and goes to enormous lengths to avoid it.[10] ILPA sorts and selects information, and thus saves its members from – rather than contributing to – said overload. ILPA sends out a hard copy mailing each month to all members which is full of documents not available elsewhere or with a limited circulation. Documents originate from ILPA, its members and others with whom they are in touch. This is introduced by a news section which contains a carefully selected number of links to the most important publications each month. Those publications are e-mailed to all members once the hard copy mailing reaches them. In addition, ILPA has e-mail lists on specific topics, for example, legal aid, children, family and general, access to justice etc, so that members can receive the information they want. Alison Harvey of ILPA said: 'We are in the middle of a project to upgrade our website which will allow the whole archive of what we have sent around to be accessed by members in a password-protected area.' Only members can receive any information which is not on ILPA's public site.

1 See: www.legalservices.gov.uk/aboutus/how/lsc_update.asp.
2 See: www.legalservices.gov.uk/civil/focus_newsletter.asp.
3 See: www.lawsociety.org.uk/defendinglegalaid.
4 See: www.dglegal.co.uk/news.html.
5 See: http://legalaidandme.proboards.com/index.cgi?.
6 See: www.wikicrimeline.co.uk/index.php?title=Main_Page.
7 See: www.resolution.org.uk/.
8 See: www.alc.org.uk/.
9 See: www.hlpa.org.uk.
10 See: www.ilpa.org.uk.

Carol Storer is director of LAPG. If readers know of any other useful legal updates which are available online and have not been mentioned in this article, please e-mail the author at: Carol.Storer@lapg.co.uk. (Photograph by Robert Aberman.)

Recent developments in practice management

Vicky Ling provides information on the responsibilities of the supervising solicitor within not for profit (NFP) organisations and recommends ways of making the role more manageable.

The Legal Services Commission's (LSC's) tender for social welfare law contracts often included the requirement to employ an 'authorised litigator' (as defined in Courts and Legal Services Act 1990 s119) in housing and community care. Most authorised litigators are solicitors and, as a result, many more NFP organisations have recruited solicitors for the first time. Under the current regulatory regime, the agencies do not become regulated entities and do not have to register with the Solicitors Regulation Authority (SRA). However, the solicitors are regulated and must comply with the code of conduct requirements for in-house practitioners.*

At a basic level, this means that if one solicitor is employed, s/he must be 'qualified to supervise'. That is, someone who has held a practising certificate for at least 36 months in the last ten years and has completed a minimum of 12 hours training on management skills. Under rule 5 of the code of conduct ('Business management in England and Wales'), the supervising solicitor is responsible for ensuring that there are arrangements 'essential to good practice and integral to compliance with supervision and other duties to clients'.

Duties of supervising solicitor

Law Centres® and other NFP agencies operate under a variety of management structures, and implement supervision requirements in different ways. Each agency can and should devise a system that works for them; however, this means that the duties imposed on the supervising solicitor need to be considered. Rule 5.01(2) states that in employed practice, there must be:

(a) adequate supervision and direction of those assisting in your in-house practice;

(b) control of undertakings; and

(c) identification of conflicts of interests.

The supervising solicitor is also responsible for ensuring that the Solicitors' Accounts Rules 1998 are complied with. Happily, usually this is not too onerous for NFP organisations, since they generally do not handle large sums of clients' money. However, it is important to ensure that LSC contract payments are posted correctly.

The SRA indicates that for in-house solicitors employed by a Law Centre, charitable organisation or similar non-commercial advice service, following management standards or procedures laid down by its management committee, the Law Centres Federation or an equivalent 'umbrella' organisation (for example, Citizens Advice or AdviceUK) will be evidence that the supervising solicitor is complying with the code of conduct.

Most supervising solicitors will also be supervisors in a category of law from the point of view of an LSC contract. They will probably also have colleagues who qualify under the LSC's requirements in other subjects. It is appropriate to delegate responsibility to them for the quality of work in that category on a day-to-day basis, which will show that 'the quality of work undertaken for clients and members of the public is checked with reasonable regularity by suitably experienced and competent persons within the firm, Law Centre or in-house legal department' (r5.03(3)).

However, the supervising solicitor needs some mechanism which allows him/her to be confident that legal work is being handled competently in other categories of law, particularly in relation to the conduct of litigation, as this is an activity which is reserved to authorised litigators. When working out systems of supervision, it is worth considering the best way to approach this if the supervising solicitor does not have line management responsibility for his/her colleagues.

Being a supervising solicitor carries a heavy burden of professional responsibility. If the agency falls short of professional standards, the supervising solicitor could be disciplined by the SRA or, at worst, lose his/her practising certificate. Colleagues and management committee members/trustees need to be aware of this and ensure that their colleague can discharge the role, otherwise s/he may be put in an unfair, even intolerable, position.

Recommendations for good practice

Consider setting up a professional standards working group or sub-committee, including the supervising solicitor, co-ordinator/manager/director and a member of the management committee/trustee board. This group could be responsible for ensuring that systems are in place to meet all appropriate professional standards and could report to the management committee/trustee board, for example, on a half-yearly basis, or if it had concerns at other times.

Other ways of making the supervising solicitor's role manageable include:

- having clearly defined roles;
- not expecting the supervising solicitor to be an expert in all areas of law and practice, but understanding that s/he needs an overview;
- providing internal education so that everyone understands their role and responsibilities;
- good communication, especially between the supervising solicitor and co-ordinator, manager or equivalent role;
- checks and balances between staff;
- a close working relationship with the management committee/trustees;
- the supervising solicitor having an open-door policy and people finding him/her approachable;
- realistic workloads – if someone is supervising solicitor and a Specialist Quality Mark supervisor, be realistic about the amount of time this takes and make adjustments to billing targets where necessary, if possible;
- a good working environment, time to consider things in a quiet place and somewhere people can discuss things in confidence;
- using time-recording data and case-management software which can make it easier to supervise effectively.

* *Solicitors' Code of Conduct 2007*, available at: www.sra.org.uk/code-of-conduct.page.

Vicky Ling is a consultant specialising in legal aid practice and a founder member of the Law Consultancy Network. E-mail: vicky@vling.demon.co.uk. Vicky Ling is presenting the civil contracts workshop at LAG's legal aid conference: 'Social welfare law matters' on 12 November 2010. See: www.lag.org.uk/legalaidconference and page 2 of this issue for further information.

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