MAY 2010 Journal of Legal Action Group

LegalAction

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S COLLINS, CENTRAL CHAMBERS (2006); EDWARD GRIEVES, 10-11 GRAY'S INN SQUARE (2005); STEPHEN KNAFLER, GARDEN COURT
S (2007); ABID MAHMOOD, NUMBER 8 CHAMBERS (2007); MAYA SIKAND, GARDEN COURT CHAMBERS (2008); DAVID WATKINSON,
NA BARLOW, LAW FOR ALL (2003); CAROLINE GREATHEAD, MERLIN PHILLIPS (2003); NICOLA MACKINTOSH, MACKINTOSH DUNCAN (2003);
2003); CLAIRE SEPHTON, SHELTER (2003); PETER THORNHILL, THORNHILL (2003); THALEJ VASHISHTA, BERRYMAN SHACKLOCK (2003)
; RAVINDRA CHANDRAPALA, GREESMAN & CO (2003); RICHARD EGAN, TUCKERS (2003); GREG FOXSMITH, HODGE JONES & ALLEN (2005);
LIVERSIDGE, FORBES (2008); ROBERT LIZAR, ROBERT LIZAR (2003); ROGER PEACH, PEACH GREY & CO (2007); GREG POWELL, POWELL
IM TODNER (2007); JOHN WEATE, RMNJ (2008) FAMILY FINALISTS: JENNY BECK, TV EDWARDS (2006); YVONNE BROWN, YVONNE BROWN
004); ANNE MARIE HUTCHINSON, DAWSON CORNWELL (2004); MARK JEWELS, JJ LAW (2003); PHILIP KIDD, TOZERS (2003); SAMANTHA
S, ATKINS HOPE (2005); NIGEL PRIESTLEY, RIDLEY AND HALL (2008); PEGGY RAY, GOODMAN RAY (2005); NEIL ROBINSON, NOWELL MELLER
INNS, SWITALSKIS (2005); RICHARD CHARLTON, KAIM TODNER (2004); DAVID ENRIGHT, HOWE & CO (2006); DAVID GRAY, DAVID GRAY
& CO (2005); KALVIR KAUR, IMMIGRATION ADVISORY SERVICE (2008); JAWAID LUQMANI, LUQMANI THOMPSON AND PARTNERS (2008);
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CENTRE® (2005); CAROLYN TAYLOR, TAYLOR NICHOL (2004); PHILIP TURPIN, TURPIN MILLER & HIGGINS (2004); THALEJ VASISHTA,
EEDS (2008); JACKSON AND CANTER, LIVERPOOL (2008); SWITALSKIS LLP, WEST YORKSHIRE (2008) MENTAL HEALTH FINALISTS: CHRISTOPHER
2007); ANDREW HOWARTH, TERRY JONES (2008); MICHAEL KENNEDY, SWITALSKIS (2007); SOPHY MILES, MILES & PARTNERS (2007 AND 2008)
GALLAGHER, SHELTER LEGAL SERVICES (2007); JOHN HALFORD, BINDMANS (2007); YVONNE HOSSACKS, HOSSACKS (2004); CHRIS JOHNSON,
VANEY, COMMUNITY LAW PARTNERSHIP (2008); DAWN MCPHERSON, FISHER MEREDITH (2008); FINOLA O'NEILL, WANDSWORTH & MERTON LAW
ATER MANCHESTER IMMIGRATION AID UNIT (2007); PIERCE GLYNN (2007); TENDRING OUTREACH SERVICE, FISHER JONES GREENWOOD (2007)
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CO (2005); PARAGON LAW, LEGAL AID TEAM (2006) TRAINEE SOLICITOR FINALISTS: ALEX FITZGERALD, EDWARD HUGHES SOLICITORS (2003);
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R CITIZENS ADVICE BUREAU; ERSUN SEYTANOGLU, SHEIKH & CO (2007); AIKA STEPHENSON, LAWRENCE & CO (2007)

LEGAL AID LAWYER OF THE YEAR AWARDS FINALIST 2010

LAG

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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Promises and choices

At the time of writing, the general election campaign is in full swing but readers of this editorial will of course know the result. Therefore, LAG is taking this opportunity to offer our thoughts on what any incoming administration should do regarding legal aid and access to justice issues. Of course, this being the UK, the reality of our election system is that only people voting in around 150 marginal seats out of the total of 650 parliamentary constituencies will have had any real say in whichever party (or parties) is now forming government. At the last election, Labour won on only 35 per cent of the vote and turnout overall was 61 per cent of those eligible to vote. The parliamentary expenses scandal has led to even greater disenchantment with the political process. Whichever party is now in power will need to address this issue and reform the election system, as there is an increasing mismatch between who is elected and for whom the voters have voted. This is not good for the health of our democracy and should be seen as an urgent issue for constitutional reform.

Fallout from the expenses scandal made legal aid an election issue in the early stages of the campaign. Of the MPs and the peer facing criminal charges, three claimed legal aid to fund their defence. The government was quick to point out that they had only succeeded because means-testing has not as yet been rolled out to the Crown Court centres in London. In LAG's view this case again illustrates the point that decisions on legal aid entitlement need to be made independently of government. The new parliament is likely to consider legislation at an early stage on the reform of the Legal Services Commission (LSC). This needs to include provisions to enshrine an independent appeals system to review decisions on entitlement to legal aid.

A further cause of people's disenchantment with politics is that they have become weary of the mismatch between the rhetoric of rights and their ability to enforce them. LAG believes that any new legislation to reform the LSC is an opportunity to enshrine in law the principle that access to justice is a constitutional right which applies equally in criminal and civil matters, and that the state has to put in place the means to make this commitment a reality. This is the main promise which LAG would like to see the new government make and keep.
As discussed in this month's news feature (see page 5 of this issue), the Labour party has indicated that legal aid would be subject to further cuts if it was re-elected. In contrast, the Conservatives have not been drawn on whether or not they would make cuts, preferring to emphasise the alternative methods of funding which they would like to put in place for legal aid. The Liberal Democrats make no threat of cuts, but on the other hand they do not promise any new cash. An important point to make is that any new funding arrangements will take time to put in place and might well require legislation. This would most probably need to be incorporated into the bill dealing with the reform of the LSC.

A significant promise which both Labour and the Conservatives have made to LAG is to preserve the expenditure on social welfare law. Many *Legal Action readers* will be pleased to hear this as they are dealing with increased numbers of clients because of the recession. Experience from previous recessions shows that unemployment and its related legal problems increase as the country emerges from recession, feeding the demand for legal services. Whatever the result of this election has been, we will need to ensure, for the sake of clients, that the promises made about the social welfare law budget are kept.

One of the most negative trends in recent years has been the government's tendency to criticise the decisions of the courts. LAG believes that political discussion around the law and its application is important, but all too often this is conducted in a way that panders to news agendas rather than encourages rational debate. This is illustrated by the way in which ministers have often attacked decisions of the courts when human rights principles are engaged. This has fed to some degree the public's cynicism about the Human Rights Act (HRA) 1998. Many seem to see it as an instrument for protecting only marginalised groups such as prisoners and asylum-seekers, rather than as a legal framework which protects everyone's human rights. The Conservatives have promised a bill to reform the HRA, whereas Labour and the Liberal Democrats support the Act in its current form. If a Conservative government is now in power, any replacement for the HRA will need to square the circle of complying with the European Convention on Human Rights and satisfying its critics, who are mostly on the right of the Conservative party: an impossible task, LAG would suggest. Instead, the new government needs to concentrate on building political consensus and widespread public support for human rights principles. A step in the right direction would be a promise not to be so quick to criticise the decisions of the courts in a manner that undermines the rule of law.

Criminal advocates' fees cut

The Ministry of Justice (MoJ) introduced cuts to advocates' fees in criminal cases just before parliament was dissolved to make way for the general election, in a move that was condemned by practitioner groups. The measures were brought in by the Criminal Defence Service (Funding) (Amendment No 2) Order 2010 SI No 1181. The majority of the provisions came into force on 27 April:

- From 27 April, fees in criminal cases have been cut by 4.5 per cent.
- Over the next two years, there will be further cuts of 4.5 per cent each year, leading to a total cut of 13.5 per cent.

Cuts to the fees paid in Very High Cost Cases (VHCC) have also been announced. VHCC cost around ten per cent of the total criminal legal aid budget. Last year, 100 VHCC cost £112 million. From 14 July, the threshold at which the fees take effect will be raised. Only those trials that are expected to last over 60 days will attract the fees, as opposed to the current 40-day rule. According to the MoJ, at present, defence advocate teams are paid around £300,000 on average per case.

Paul Mendelle QC, chairperson of the Criminal Bar Association, expressed his dismay at the short period between the end of the consultation on 1 April and the announcement of the cuts on 6 April. He said that the government had 'done exactly what it planned to do all along'.

Royal assent for Equality Act 2010

Last month the Equality Act (EqA) 2010, which consolidates the various statutes dealing with equality law into one Act, was approved by parliament. The new EqA has been welcomed by equality campaigners.

Catherine Rayner, a barrister at Tooks Chambers and the author of *Legal Action*'s six-monthly 'Discrimination law update' articles, said: 'I welcome the greater clarity which we all hope the Act will bring to this complex area of law. While the Act can be criticised in some respects, what is really important is the gathering together of all strands of discrimination in one Act, with unified tests for discrimination, harassment and victimisation. I am hopeful that this will help to make it easier for people to understand and to access their legal rights.'

Access to justice review launched

A consultation paper that calls for 'original thinking' and a 'willingness to challenge outdated assumptions' in order to create a stable, long-term future for legal aid has just been published by the Law Society. The *Access to justice review* argues that the legal aid system is at breaking point and cites the fact that the November 2009 National Audit Office report, *The procurement of criminal legal aid in England and Wales by the Legal Services Commission*, found that just under 50 per cent of solicitors' firms were making between zero per cent and ten per cent profit on legal aid work.

In a realistic assessment, the paper observes that the three main political parties agreed that there would be no more money from central government for legal aid. As a result, the *Access to justice review* calls for a 'more sophisticated approach to eligibility' than by looking merely at an individual's means. It suggests that one of the possible options for the future is for legal aid to focus on funding litigation after people have received some initial advice; the paper goes on to describe a system that does this in Holland.

- Available at: www.lawsociety.org.uk/new/documents/2010/access-to-justice-interim-review.pdf.
- The closing date for responses is 30 June 2010.

Citizens Advice has appointed Gillian Guy as its new chief executive. Currently she is chief executive of Victim Support and will take up her new post in early July. She said: 'I am thrilled to be joining Citizens Advice. The [Citizens Advice Bureau] service has a significant place in our communities, rooted in volunteering and addressing social injustice. This is a particularly exciting time to be joining given the challenges and opportunities Citizens Advice is facing and I look forward to being a part of its strong and dynamic future.'

MPs' committee criticises debt advice

The strategy for tackling consumer debt is described as 'seriously deficient' in a report by the influential House of Commons Committee of Public Accounts. The report, *The Department for Business, Innovation and Skills: helping over-indebted consumers*, acknowledges the success of the face-to-face advice work funded by the Department for Business, Innovation and Skills, but pointed to the lack of co-ordination between the 51 different interventions across government to help people struggling with consumer debt. The £130 million given to fund the face-to-face debt advice project will end in March 2011. The report says that any renewal of funding will be dependent on whether or not money is made available in the next spending review.

- *The Department for Business, Innovation and Skills: helping over–indebted consumers, Thirty–first Report of Session 2009–10*, available at: www.publications.parliament.uk/pa/cm200910/cmselect/cmpubacc/475/475.pdf.
- See: www.legalactiongroupnews.blogspot.com.

IN BRIEF

- Garden Court Chambers has set up Garden Court Mediation to provide an additional service to the public in a perceived area of unmet need. It has 23 lawyers who are trained and accredited in mediation skills. To find out more about the new service, visit: www.gardencourtchambers.co.uk/resources/mediation/iframe_index.cfm.

news feature

Access to justice: what the party manifestos said ...

LAG's examination of the election manifestos of the three main political parties revealed scant detail about their policies on legal aid and legal services, and unfortunately little else was gleaned from politicians' pronouncements about access to justice on the campaign trail, apart from dire warnings about the lack of money for any growth in legal aid expenditure.

Legal aid

On 12 April, the day the Labour party manifesto, *A future fair for all*, was launched, John Humphrys, journalist and presenter of BBC Radio 4's 'Today' programme, asked Cabinet Minister Ed Miliband to give examples of where services would be cut back if his party was returned to government. He replied that: 'Regeneration and legal aid are going to be part of the £5 billion in reductions we are going to find.' This response is consistent with the spending plans announced by the Ministry of Justice (MoJ) in March, when Jack Straw, the then Justice Secretary, said: 'We have already made excellent progress towards £1 billion of savings the department committed to make within the current spending review.' The MoJ promised that a further £360 million 'savings' would be made through reforms across the criminal justice system and legal aid, including proposals to restructure the criminal legal aid market by 'consolidating the number of providers and increasing competition'. Speaking to LAG just before the election, former legal aid minister Lord Bach said that, if re-elected, the Labour party would preserve expenditure on social welfare law; however, he confirmed that spending on criminal legal aid would be cut.

The Conservative manifesto, *Invitation to join the government of Britain*, said: 'We will carry out a fundamental review of legal aid to make it work more efficiently, and examine ways of bringing in alternative sources of funding.' Speaking to LAG just before the election, Henry Bellingham, the Conservative party's former Shadow Justice Minister, said that his party in government would match Lord Bach's commitment not to cut the social welfare law budget. He was also keen to emphasise that a Conservative government would look at ways of bringing more money into the legal aid system by considering alternative methods of funding. For example, he believed that where solicitors held money on clients' behalf, a levy could be made on any interest accrued. According to Henry Bellingham, this system operates in France where, in this way, €300 million are raised for legal aid services. Before the election, the Conservative party floated the idea of a levy of £200 on every legally-aided defendant convicted in the criminal courts to help fund legal aid.

Criminal justice

A future fair for all pledged to increase the use of virtual courts to 'move from arrest, to trial, to sentencing in hours rather than weeks or months'. The manifesto also promised to create a National Victims Service which will provide greater support to people who fall victim to crime. It confirmed the Labour party's commitment to expanding prison places. It has created over 26,000 places since 1997 and ensures a total of 96,000 by 2014. *A future fair for all* promised to use the tax system to 'claw back from higher-earning offenders a proportion of the costs of prison'. In perhaps the Labour party's most novel suggestion, the manifesto promised that every community will have the right to vote on how to use assets confiscated from criminals to pay back to the community.

Invitation to join the government of Britain promised a policy of 'honesty in sentencing' by looking at greater parliamentary scrutiny of sentencing guidance. The Conservative party in government looked set to follow the Labour party's policy attempts to penalise anti-social behaviour by introducing 'grounding orders' as an instant police sanction against such behaviour.

The Conservative manifesto broadly supported the Labour party's prison-building programme. In contrast the Liberal Democrat manifesto, *Change that works for you: building a fairer Britain*, promised to cancel the programme and save £795 millon in 2011/2012. In addition, it pledged to replace prison sentences of less than six months with community sentences to ease the pressure on prisons.

Civil liberties

There was a clear dividing line in the manifestos between the Labour party and the Conservatives and Liberal Democrats over the issue of identity cards. *A future fair for all* was committed to plans for the cards to go ahead and claimed that they would be self-financing. While both *Invitation to join the government of Britain* and *Change that works for you* promised to scrap identity cards, in order to save money.

The Conservative manifesto confirmed the party's commitment to replacing the Human Rights Act 1998 with a UK Bill of Rights. There were no details of how a Conservative government would do this while still maintaining the UK's commitment to the European Convention on Human Rights. Other pledges were to review family law, libel law and the criminal record regime. The Liberal Democrat manifesto promised a judicial investigation into allegations of British involvement in torture and state kidnapping.

Immigration

All three manifestos outlined the parties' plans to curb immigration. *A future fair for all* promised an 'Australian-style points-based system' to limit immigration to people who have skills needed by the UK economy. *Change that works for you* promised a similar 'regional' points-based system; in addition, an independent agency would decide asylum claims, and it pledged to end the detention of children for immigration purposes. *Invitation to join the government of Britain* promised an annual limit on immigration numbers to 'take net migration back to the levels of the 1990s'. On the issue of border control, *A future fair for all* confirmed that 'our borders are stronger than ever. A new Border Agency has police-level powers' and *Invitation to join the government of Britain* promised to create a new Border Police Force to prevent illegal immigration. The Labour party promised a more rigorous English test for migrants and to 'ensure it is taken by all applicants before they arrive'. Controversially, the Conservative party promised an English language test for 'anyone coming here to get married'.

LEGAL AID LAWYER OF THE YEAR AWARDS FINALIST 2010

The standard of entrants for the eighth Legal Aid Lawyer of the Year (LALY) awards was exceptionally high, and the finalists are announced below. The winners will be presented with their awards by Cherie Booth QC at a ceremony in central London this month.

The LALYs 2010 finalists

Criminal defence lawyer sponsored by Criminal Law Solicitors' Association

PETER MAHY
(Howells LLP, Sheffield)

Peter was recognised for his exceptional tenacity in winning the landmark case of *S and Marper v UK*, where the judges ruled unanimously that retaining an innocent person's DNA was a disproportionate interference in the applicant's right to respect for private life.

JOHN WEATE
(RMNJ Solicitors, Birkenhead)

John was instrumental in winning a pardon last year for Liverpool FC fan Michael Shields. Michael says: *'Not only had he secured my release from jail and been the best solicitor I could have asked for, he has been a tower of strength and will always be in our family for ever.'*

JULIAN YOUNG
(Julian Young & Co, London)

Julian has been a legal aid solicitor for some 33 years. His work in overturning the conviction of Sean Hodgson, jailed in 1982 for murder, won him praise from the Lord Chief Justice. Mr Hodgson was released after Julian's firm provided DNA results which destroyed the case against him.

Family legal aid lawyer sponsored by Resolution

CHRISTINA BLACKLAWS
(Blacklaws Davis LLP, London)

Christina's firm is London's largest specialist family practice. Christina is the child care representative on the Law Society Council. She represents the interests of family lawyers and their clients with huge energy and commitment and is also a respected author.

NINA HANSEN
(Freemans Solicitors, London)

Nina specialises in the challenging and emotive area of international parental child abduction. Her clients are often children caught in bitter disputes between their parents. Nina is praised for being *'tactically strong'* and having *'a sound grasp of relevant legal principles'*.

DAVID JOCKELSON
(Miles & Partners, London)

David's commitment to his clients is described as *'routinely exceptional'*. Mrs Justice Pauffley wrote about an *'entrenched and complex'* case, where David was able to *'provide advice of exceptional quality so as to achieve a supremely child-focused, consensus outcome'*.

Immigration lawyer sponsored by NatWest

AMIE HENSHALL
(Parker Rhodes Hickmotts, Rotherham)

Amie has been head of Parker Rhodes' immigration department since 2007. Before qualifying as a solicitor, Amie qualified as a barrister and spent several months working at the Asylum and Immigration Tribunal before joining her current firm as a paralegal. She has had many cases before the Court of Appeal and has an excellent success rate.

JEAN-BENOIT LOUVEAUX
(Devon Law Centre®, Devon)

Jean-Benoit has gone way beyond the remit of a legal aid lawyer by providing legal assistance to all asylum-seekers in Devon and Cornwall who have been refused controlled legal representation. He founded the innovative Asylum Appellate Project, which showed that 80 per cent of asylum-seekers were being wrongly refused legal aid for their first appeal.

JACKIE PEIRCE
(Glazer Delmar Solicitors, London)

Through her work for the Immigration Law Practitioners' Association, Jackie has fought to defend public funding for this crucial but unloved area of practice and is described as *'a lawyer's lawyer'*. One supporter says: *'She is formidably clever and just a treasure'*; another describes her as *'the quintessential legal aid lawyer'*.

Legal aid barrister sponsored by the Bar Council

STEPHEN COTTLE
(Garden Court Chambers, London)

Stephen is a member of his chambers' Gypsy and Traveller team and has been involved in numerous landmark cases. One client, who finally won full planning permission for her site after a ten-year battle, says: *'Mr Cottle is our hero as well as the best barrister we have met and please trust me when I say we have now met a few …'*

MARK HENDERSON
(Doughty Street Chambers, London)

Mark is praised for his *'agility of intellect and encyclopaedic legal knowledge combined with his forensic attention to detail'*. As well as being involved in key cases, he is also a highly-respected author and an active member of the Immigration Law Practitioners' Association.

RABINDER SINGH QC
(Matrix, London)

Rabinder has been involved in many legal aid cases, including those covering state discrimination on grounds of race and sexuality, murder and torture by British troops in Iraq, anti-terrorism legislation and refugee status. He is praised as being the *'consummate human rights and public lawyer'*.

Legal aid firm/not for profit agency sponsored by Matrix

BEDWORTH, RUGBY & NUNEATON CITIZENS ADVICE BUREAU
(Bedworth, Rugby and Nuneaton)

'BRANCAB' has shown exceptional commitment to legal aid and increasing access to justice for local people. As well as its three offices, it also runs outreach services at two prisons, offers home visits and has dedicated advice sessions for disabled people.

CAMBRIDGE HOUSE LAW CENTRE®
(London)

Cambridge House's nomination is supported by the entire housing team at Garden Court Chambers. The centre has gone from strength to strength in recent years. In 2008/09, it took on 344 new cases, mainly in housing, employment and welfare benefits. It won every single one of its eviction cases.

JUST FOR KIDS LAW/LAWRENCE & CO
(London)

The charity Just for Kids Law works in partnership with the legal aid firm Lawrence & Co to provide support, advice and representation to local young people who find themselves in difficulty with the law. It provides a holistic service, giving advice and help with education, employment, immigration and community care.

PIERCE GLYNN
(London)

Pierce Glynn was nominated by the charity Doctors of the World, which praises its '*outstanding work*' on behalf of vulnerable migrants and others denied essential medical treatment. Its work culminated in a Court of Appeal decision which led to new guidance benefiting thousands of vulnerable people.

Mental health lawyer sponsored by Allen & Overy LLP

SOPHY MILES
(Miles & Partners, London)

Sophy's nomination includes support from the Official Solicitor. One barrister writes: '*All of us who work in legal aid know that there are a handful of absolute stars who lead the rest of us … Sophy Miles is this person for mental health and mental capacity.*' A client writes: '*I am proud to say [she] is my solicitor.*'

ANDREA SPYROU
(Duncan Lewis, London)

Andrea has a long-standing commitment to mental health work. While at university, she took up a part-time position as tribunal clerk for the Mental Health Review Tribunal, and also acts as associate hospital manager for the East London Mental Health NHS Trust. She continues to work tirelessly for her clients.

RANJIT THALIWAL
(Thaliwal Bridge Solicitors, Leicester)

Ranjit has taken the firm he founded from scratch in 2002 to its current position of leading provider of mental health legal services in Leicestershire. Over 97 per cent of its work is in mental health and the firm is highly regarded by clients, medical professionals and fellow lawyers alike.

Social and welfare lawyer sponsored by Trimega Laboratories

JOCELYN COCKBURN
(Hodge Jones & Allen, London)

Jocelyn acted for Catherine Smith whose son died of heat stroke while serving in Iraq in 2003. The Court of Appeal's landmark ruling confirmed that the Human Rights Act 1998 can apply to the battlefield. The Ministry of Defence appealed and a Supreme Court decision is expected soon.

KATHY MEADE
(Tower Hamlets Law Centre®, London)

Kathy '*puts a human face on law*', says one testimonial. Stephen Knafler QC describes her as '*one of the finest solicitors in London*'. As well as her knowledge of housing law, she is praised for her expertise in asylum support and the interaction between EU law and social welfare assistance.

OLIVER STUDDERT
(MG Law Ltd, Lancaster)

Although Oliver qualified as recently as 2005, he has already built a national reputation in social and welfare law, with a focus on helping young people. One barrister supporter says: '*These are some very difficult cases and this is a track record that would usually be expected of someone much more senior.*'

Young legal aid barrister sponsored by Irwin Mitchell LLP

ALISON PICKUP
(Doughty Street Chambers, London)

Alison works mainly in the area of immigration and related areas of civil actions arising out of immigration detention, asylum support and community care, age disputes, mental health and prison law. She is praised by solicitors and support groups for her hard work, commitment and professionalism.

ADAM STRAW
(Tooks Chambers, London)

Adam is one of the leading inquest lawyers in the country. One solicitor says: '*I genuinely believe that Adam is outstanding.*' A client writes: '*At a time which proved to be the most difficult of my entire life, Adam has given me back the hope and belief that the law will abide and justice will be served.*'

FELICITY THOMAS
(Westgate Chambers, Lewes)

Felicity is nominated by the charity Shelter for her outstanding work in housing. She is described as a '*rare talent*'. Felicity is praised for her ability to communicate clearly and persuasively and for making the client feel at ease and an equal in court.

Young legal aid solicitor sponsored by the Legal Services Commission

KATHERINE CRAIG
(Christian Khan, London)

Katherine specialises in actions against the police and public law, but her commitment to access to justice spreads beyond her day-to-day practice. She is an active member of Young Legal Aid Lawyers, and was instrumental in setting up the All-Party Parliamentary Group on Legal Aid.

GILES PEAKER
(Anthony Gold, London)

In 2006, Giles set up the *Nearly Legal* website. It has rapidly become the forum for analysis and comment on key legislative and case-law developments by lawyers at all levels, even, on occasion, judges. Giles is on the executive committee of the Housing Law Practitioners Association.

CHRYSTAL THEOFANOUS
(Sills & Betteridge, Lincoln)

Chrystal specialises in representing victims of domestic violence. She goes to exceptional lengths to ensure that clients are supported and have legal representation. Chrystal holds fortnightly clinics at the local Sure Start and runs outreach services across a vast geographical area.

- The panel of judges will also be making an award for **Outstanding achievement**, which is sponsored by Manches LLP.
- The LALYs are organised by the Legal Aid Practitioners Group (LAPG). The principal sponsor of the 2010 awards is the Law Society and *Legal Action* is the awards' media partner. LAPG is grateful to all the sponsors of the LALYs.

In the second of two articles, Adam Griffith, policy officer at the Advice Services Alliance (ASA), considers the selection criteria and allocation of new matter starts (NMS) in the recently-completed bid round for social welfare law (SWL). The first article, which looked at the updated procurement plans, was published in April 2010 *Legal Action* 6.

2010 SWL bid round: selection and allocation

Having specified the number of NMS available in SWL in the updated procurement plans and the invitations to tender,[1] the Legal Services Commission (LSC) then has to select which bidders are to be awarded contracts and allocate NMS to them. In order to do this, the LSC has sought to devise a process that complies with the requirements of procurement law and takes account of its experience in previous bid rounds, by specifying selection criteria that provide it with a higher level of confidence that services bid for will actually be delivered.

The result has been a mixture of:

- 'essential' and 'selection' criteria;
- criteria that apply across the whole of SWL and those that apply to individual categories of law;
- criteria that apply to the individual office and those that apply to the organisation that is bidding; and
- criteria that apply only to particular geographical areas.

Essential criteria

The essential criteria relate:

- to the need for debt, housing and welfare benefits services to be provided together;
- to presence requirements (either permanent or part-time);
- to the need to employ a supervisor in each category of law bid for, and to meet the supervisor ratio (one full-time equivalent (FTE) supervisor for every six employed FTE caseworkers);
- to not having a confirmed peer review score of four or five in the category bid for since 26 February 2007;
- to the need to employ an approved intermediary for debt work by 14 April 2011;
- to the need to employ an authorised litigator in housing and community care in Service A areas to deliver legal representation; and
- to providing the minimum number of NMS (20 in community care, 30 in employment, and 50, 75 or 100 in debt, housing and welfare benefits).[2]

Selection criteria

The selection criteria for SWL are summarised in Table 1.[3] In relation to each criterion, bidders have to choose one out of a number of options that attract different scores, up to the maximum stated in the table. The LSC will seek confirmation from successful bidders eight weeks before the contract start date that they are able to meet the commitments which they have made.

In relation to the percentage of caseworkers which they need to recruit, bidders are allowed to put forward 'exceptional circumstances' for the LSC to consider when scoring their bids.

Bids to provide housing with family services will only be considered if the organisation bidding has been awarded a family contract.[4]

The organisation and the office

Some of the criteria relate to the organisation that is bidding, some relate to the office from which services will be delivered, and some fall between the two. The criteria concerning 'experience' relate to the organisation. The criteria concerning the location of the office, the type of presence, the need to recruit staff, the presence of the supervisor and the 'employment' of an authorised litigator (in Service A areas and in housing with family bids) relate to the office. The criteria in relation to employing an approved intermediary and having 'access' to an authorised litigator (in housing and community care in Service B areas) refer to these staff members as being 'available' to clients at the office.

Concerns

The criterion that has caused most concern is probably the one relating to welfare benefit appeals, which gives most points to organisations that have been involved in at least ten appeals to the Upper Tribunal since 26 February 2009. This could be to the advantage of organisations with large welfare benefits departments and/or organisations that operate on a regional or national basis. It is possible that scores on this one criterion could be decisive in some areas where there are competing bids to provide debt, housing and welfare benefits services. Since consortia bids will be scored by adding the scores in the individual categories, and averaging them where necessary, the fate of a consortium bid could be decided by the score of its weakest link. The announcement of the selection criteria has therefore caused a number of organisations to reconsider the membership of their proposed consortium. Some organisations may have suffered as a result.

Table 1: Summary of selection criteria for 2010 contracts: maximum points obtainable

Criterion	Debt	Housing	Welfare benefits	Community care	Employment	Housing with family
Have an office in the procurement area or access point	5	5	5	5	5	5
Experience of delivering legal services in the category (or another SWL category)	8	8	8	5 (community care cases only)	8 (employment cases only)	8
Lower percentage of caseworkers to recruit	5	5	5	5	5	5
Supervisor at the office	6	6	6	3	3	8
Type of presence	N/A	N/A	N/A	5	5	N/A
Access to or employment of an authorised litigator	N/A	5	N/A	5*	N/A	5
Employ an approved intermediary	5	N/A	N/A	N/A	N/A	N/A
Experience of welfare benefit appeals	N/A	N/A	5	N/A	N/A	N/A
Maximum points	29	29	29	23 or 28*	26	31
Additional points in specific areas	Yes	Yes	Yes	No	No	No

*Service B areas only

A wider concern is that the LSC has been unable to devise selection criteria that will distinguish between bids either effectively or credibly. In many areas, where there is competition, there is likely to be considerable bunching of scores at the higher end, and indeed at the maximum level, which could give rise to a number of allocation problems.

Perhaps the largest concern, however, is that the selection criteria are unable to distinguish between bids on any grounds that really reflect the quality of the service provided. Since success or failure may turn on margins of very few points, there is a danger that some good providers could lose out, and even be lost altogether. This may happen especially in 'overspent' areas, where there is a significant amount of competition and a reduced allocation of NMS compared to recent usage.[5]

Allocation

Where bidders bid for more NMS than are available, the LSC proposes three mechanisms for allocating NMS:

- allocation to the highest scoring bidder first, followed by the next highest, and so on, until all available NMS have been allocated;
- where bids score equally, but there are insufficient NMS to satisfy them in full, allocation on a 'pro rata' basis (in proportion to the number of NMS bid for);
- specific provisions if it is unable to award NMS in all three categories of debt, housing and welfare benefits. These allow the LSC to reallocate a certain number of NMS between categories, to award the minimum number of NMS specified in the category in question, and to apportion the minimum between consortia members if necessary.[6]

Allocation problems

A number of problems could arise, however, especially in relation to composite bids for debt, housing and welfare benefits. If there is no competition and bidders receive what they ask for, this could still produce an unbalanced allocation between the three categories, since bidders are only required to bid for the minimum NMS specified in each category (generally, 50, 75 or 100 NMS). It is not clear what would happen to any NMS that are not bid for: would the LSC retender, seek to persuade bidders to take more than they have bid for, or pull them back into the national pot, either for use elsewhere in this bid round or with a view to subsequent reallocation to meet demand elsewhere?

Where there is competition, the same problems could arise, unless the LSC can use successfully the specific provisions mentioned above. Where this happens, however, the LSC is likely to be making contract offers that are substantially different from those that organisations bid for, which may include offers of the minimum NMS required in one or more categories. The minimum numbers are low, however, and represent a fraction (40 per cent at best) of the number of cases that could be started by one FTE member of staff, according to the LSC's 'capacity test' (200 cases a year in community care; 250 in housing; and 300 in debt, welfare benefits and employment).[7] Since the bidder would need to employ a supervisor in the relevant category, it may not consider the contract offered to be financially viable. However, its ability (and possibly that of any consortium to which it belongs) to do work in any of the three categories will be at stake. This may result in contract awards being made, and accepted, that prove problematic later on.

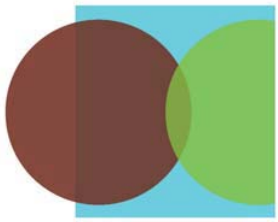
We anticipate that there will be a number of areas where bids will score equally. If this leads to allocations on a pro rata basis, there could be problems if organisations are offered significantly fewer NMS than they bid for. This could again be particularly problematic for consortia bids.

Conclusion

The LSC has had a difficult task in trying to devise a system that complies with procurement law while also having the potential to produce meaningful and viable bids. The LSC made its task more difficult by requiring composite bids in debt, housing and welfare benefits. The system devised could give rise to a number of problems. It is almost bound to have some unintended and unanticipated consequences. At this stage, all we can do is cross our fingers and hope for the best.

1 See Adam Griffith, '2010 social welfare law bid round: what is on offer?', April 2010 *Legal Action* 6.
2 See *SWL and family services information for applicants* para 7.26, available at: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
3 See Annexes B-E in *SWL and family services IFA annexes*, available at: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
4 See note 2, para 14.11.
5 See note 1.
6 See note 2, section 14.
7 See note 2, para 13.11.

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 confirms that the Equality Act 2010 has received royal assent and looks at relevant regulations. It also covers the latest case-law relating to discrimination and eligibility, discrimination concerning religion or belief, age and disability, compensation, the enforcement of employment tribunal (ET) awards, employment status and agency workers. Part 2 will be published in June 2010 *Legal Action*.

POLICY AND LEGISLATION

Equality Act 2010

The Equality Act received royal assent on 8 April. The Equality and Human Rights Commission has issued a draft *Employment statutory code of practice* (as well as one on equal pay and one on services, public functions and associations).[1] Consultation on the draft codes closed in April.

Damages-Based Agreements Regulations 2010 SI No 1206[2]

These regulations came into force on 8 April 2010 and regulate the use of contingency fee agreements (CFAs) in employment matters (defined as matters that are or could become the subject of ET proceedings). CFAs are a form of 'no win, no fee' agreement used in employment cases whereby the charge for services provided is a fixed percentage of any money recovered by way of settlement or as compensation.

The regulations set out:

- the requirements for such agreements;
- the information that must be provided to the client;
- the ways in which such agreements can be ended early and charges applying thereon; and
- set a maximum fee of 35 per cent (including VAT) of money recovered.

Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 SI No 137

From 6 April 2010, the system of providing medical certificates changed dramatically, although not as dramatically as had first been mooted in the preceding consultation process. These regulations provide that for social security benefit purposes, including claims for statutory sick pay, evidence of incapacity has to be by way of a doctor's statement which is set out in a prescribed form. This form includes the following:

- the date that the patient was seen;
- the condition giving rise to whether the patient is fit or not fit for work;
- that either the patient is not fit for work or may be fit for work taking into account certain advice;
- that advice includes a phased return to work, amended duties, altered hours and workplace adaptations or other comments;
- the period which the statement covers or expressed by reference to start and end dates; and
- whether or not the doctor will need to assess the patient's fitness for work at the end of this period.

Enforcement of ET awards

From 6 April 2010, a major change was made to the way in which ET awards can be enforced.[3] An Employment Tribunal Fast Track scheme has been introduced which allows a claimant to apply to have a High Court enforcement officer (HCEO) (in other words, a High Court bailiff) allocated from a list maintained by Registry Trust Ltd who will then take enforcement action against the respondent. The claimant simply completes a form to issue a writ of Fi Fa in the High Court and pays a fee, currently £50 (which can be remitted to claimants who receive social security benefits or on a low income).

HCEOs charge their fees to the respondent by adding them to the award owing. HCEOs are known to have a much greater success rate than county court bailiffs. If the HCEO is unsuccessful in recovering the award, s/he will not charge his/her usual abortive execution fee. However, the court fee will not be refundable. If the HCEO is successful in collecting the award, the respondent's debt will be increased to include the court fee, the interest and the HCEO's charges. See Her Majesty's Courts Service leaflet EX727, *I have an employment or an Employment Appeal Tribunal award but the respondent has not paid – How do I enforce it?*, which contains the relevant form.[4]

Comment: The Employment Tribunal Fast Track scheme only applies to ET awards and not to Advisory, Conciliation and Arbitration Service (Acas) or other types of negotiated settlements. The procedure would clearly only be appropriate if the respondent has goods available and liable to seizure by an HCEO. Thus in certain circumstances the other pre-existing methods of enforcement available from the courts might be more appropriate.[5]

DISCRIMINATION

Discrimination: eligibility

Unlike unfair dismissal law, discrimination legislation does not only protect employees. It protects a range of workers who do work personally for the employer. The following case challenged whether or not discrimination legislation can cover volunteers.

■ X v Mid Sussex Citizens Advice Bureau and another

UKEAT/0220/08; UKEAT/0511/08, 30 October 2009, [2010] IRLR 101, EAT

X worked as a volunteer for a Citizens Advice Bureau. She had signed a volunteer agreement which was stated to be 'binding in honour only … and not a contract of employment or legally binding'. She did not attend on approximately 25 to 30 per cent of occasions when she was expected and no objection was ever made. Moreover, there is no preferential treatment for volunteers when applying for paid jobs with Citizens Advice. X brought a case under the Disability Discrimination Act (DDA) 1995. The ET rejected her claim at a pre-hearing review on the ground that she was not covered by the DDA 1995 as there was no legally binding contract between X and the Citizens Advice Bureau, no obligation on X to provide services and X was not in employment. X appealed. She argued that Council Directive 2000/78/EC, known as the General Framework Directive, requires volunteers without a contract to be protected.

The Employment Appeal Tribunal (EAT) rejected X's appeal. It did not agree that the word 'occupation' in the Directive was intended to cover unpaid employment. Moreover, even if the EAT had agreed that the Directive covered volunteers, it would not

have been able to apply this principle to X who was employed in the private sector. This was not a case where the DDA 1995 could be interpreted to cover EU law.

Comment: The latter point contrasts with *Coleman* (below) where, rather unusually, the EAT felt able to interpret a discrimination statute quite differently from its apparent wording in order to be consistent with EU law.

Religion or belief discrimination

The Employment Equality (Religion or Belief) Regulations (EE(RB) Regs) 2003 SI No 1660 prohibit discrimination on the ground of religion or belief. Regulation 2(1) defines 'belief' as meaning 'any religious or philosophical belief'. There has been much debate about what kinds of belief are covered. Before an amendment to the regulations in 2007, the word 'similar' appeared before the words 'philosophical belief'. Although the government insisted that the removal of the word did not change the type of 'belief' covered, some commentators think that the removal would extend its scope.

■ Grainger PLC and others v Nicholson

UKEAT/0219/09,
3 November 2009,
[2010] IRLR 4, EAT

Mr Nicholson worked as Head of Sustainability for Grainger. He believed that he was dismissed because of his asserted philosophical belief about climate change and the environment. He said that this was not merely an opinion, but a philosophical belief which affects the way he lives his life. At a pre-hearing review, an ET accepted that this kind of belief can amount to a 'philosophical belief' which is protected by the EE(RB) Regs. Grainger appealed.

The EAT rejected the appeal and sent the case back to the tribunal to hear evidence and decide:

■ whether or not Mr Nicholson in fact held such a belief; and

■ whether or not Grainger discriminated against him.

In deciding whether or not a belief in climate change could be covered, the EAT reviewed case-law on article 9 and article 2 of Protocol 1 of the European Convention on Human Rights ('the convention'). Article 9 states that everyone has the right to freedom of thought, conscience and religion, including the right to manifest his/her religion or belief (the wording does not refer to 'philosophical' belief). Article 2 of Protocol 1, which concerns education, says that the state shall respect the right of parents to ensure that education is in conformity with 'their own religious and philosophical convictions'. The EAT considered that the following guidelines should be introduced by reference to this case-law for deciding whether or not a belief is covered by the regulations:

(i) The belief must be genuinely held.

(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief about a weighty and substantial aspect of human life and behaviour.

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

The EAT said that it does not matter whether the philosophical belief is based on science as opposed to, for example, religion. Darwinism is capable of being a philosophical belief, even though it may be based entirely on scientific conclusions, some of which may not be uncontroversial. It also does not matter that no one else shares the philosophical belief in question – just as a religious belief is protected even if no one else holds that religious belief.

The EAT agreed that support of a political party might not be a philosophical belief, but it said that a belief in a political philosophy or doctrine could qualify, for example, a belief in the philosophies of socialism, Marxism, communism or free-market capitalism. The EAT would naturally share any concern that an objectionable belief could be covered by the regulations, for example, a racist or homophobic political philosophy, but that would fall foul of criterion (v) above.

Comment: The EAT mentioned beliefs in pacifism, vegetarianism and total abstinence from alcohol as likely to be covered, but this case suggests that the scope is far wider. Case-law developments should be very interesting. The important restriction is that any protected belief 'must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others'.

The EE(RB) Regs were passed at the same time as the Employment Equality (Sexual Orientation) Regulations (EE(SO) Regs) 2003 SI No 1661. Sometimes these two sets of regulations can appear to be in conflict when employees with certain religious views do not agree with homosexuality. The overriding consideration, however, is that regardless of an employee's private views, s/he should not take discriminatory steps which impinge on the rights of others.

■ Ladele v Islington LBC and Liberty (intervener)

[2009] EWCA Civ 1357,
15 December 2009,
[2010] IRLR 211, CA,
893 IDS Employment Law Brief 3, CA

Ms Ladele worked as a registrar for Islington. She was threatened with disciplinary action because she was unwilling to carry out civil partnership ceremonies. She held the orthodox Christian view that marriage is the union of one man and one woman for life, and she felt it was contrary to her beliefs to facilitate same-sex unions. Initially the council allowed her to informally swap her civil partnership duties with others, but it took action after some gay colleagues complained. Ms Ladele brought an ET claim for religious discrimination. The tribunal upheld her claims for direct and indirect discrimination and harassment. On the council's appeal, the EAT overturned the tribunal's decision, finding no discrimination. Ms Ladele appealed.

The Court of Appeal rejected the appeal. There was no direct discrimination or harassment. The council had treated Ms Ladele the way it did because she was refusing to carry out civil partnerships, not because she was a Christian. The whole point was that the council was requiring everyone, whatever their religion, to carry out these duties. As for indirect discrimination, it was true that the requirement that registrars carry out civil partnerships was one which would put people holding Ms Ladele's belief at a disadvantage compared with others. The question was whether or not such a policy could be justified as a proportionate means of meeting a legitimate aim. The tribunal had said wrongly that the council's aim was to provide an efficient civil partnership service, which had led the tribunal to say that Ms Ladele could have been excused her duties as there were other registrars.

However, the council's aim went beyond that. It was to act consistently with its equal opportunities policy and minimise discrimination in service delivery as well as internally. It was very hard to challenge the idea that this aim was legitimate in the light of Islington's 'Dignity for All' policy, current legislation and mainstream thinking. It was also proportionate of the council to require Ms Ladele to carry out civil partnerships. She was in a secular job and it did not interfere with her ability to worship privately.

The Court of Appeal said that article 9 of the convention (freedom of belief, conscience and religion) made no difference to this analysis because it was a qualified, not an absolute, right, and had to be exercised consistently with the dignity of others. Ms Ladele's proper and genuine desire to have

her religious views relating to marriage respected should not be permitted to override the council's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.

The Court of Appeal also accepted Liberty's additional argument that a refusal by Ms Ladele to conduct civil ceremonies would have been unlawful discrimination under the Equality Act (Sexual Orientation) Regulations 2007 SI No 1263. These regulations prohibit discrimination on the ground of sexual orientation in service delivery. The exceptions in respect of religious belief are extremely narrow and are essentially linked to the membership or operation of religious organisations. They do not cover Ms Ladele's situation. Therefore, it was hard to resist the argument that the council was obliged to require Ms Ladele to carry out the duties. The Court of Appeal concluded: 'however much sympathy one may have with someone such as Ms Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions' (para 73).

In *McFarlane* (below), which was decided shortly before the Court of Appeal decision in *Ladele*, the EAT reached the same conclusion.

■ **McFarlane v Relate Avon Ltd**

UKEAT/0106/09,
30 November 2009,
[2010] IRLR 196, EAT
893 IDS Employment Law Brief 6, EAT

Mr McFarlane was a Christian and former elder of a large multicultural church. He believed that Biblical teaching means same-sex sexual activity is sinful and he should not endorse such activity. In 2003, he joined Relate, which is part of a well-known national organisation that provides relationship counselling. Relate follows the code of ethics of the British Association for Sexual and Behavioural Therapy, of which it is a member, and an equal opportunities policy that, among other things, prohibits discrimination on the ground of sexual orientation. Mr McFarlane was willing to give counselling to same-sex couples about non-sexual matters, but did not want to discuss sexual matters with them or give psycho-sexual therapy. In March 2008, he was dismissed because Relate believed that he had no intention of complying with the code and equal opportunities policy in relation to work with same-sex couples and same-sex sexual activities. Mr McFarlane brought ET claims, primarily for unfair dismissal and discrimination contrary to the EE(RB) Regs. The tribunal rejected these claims and Mr McFarlane appealed.

The EAT rejected the appeal. There was no direct religious discrimination because Relate would also have dismissed a non-Christian who was unwilling to give sexual counselling to same-sex couples. Regarding indirect discrimination, the parties agreed that Relate had imposed a requirement that its counsellors make their services equally available to same-sex couples, and that this requirement put those of Mr McFarlane's religion at a particular disadvantage.

However, the EAT said that the ET was entitled to find that this requirement was justifiable. Relate's aim of providing full counselling services to all sections of the community was legitimate. The means used of achieving that aim were proportionate, even though they discriminated against those who, because of their religious views, felt unable to provide the services. Relate was entitled as a matter of principle not to exempt Mr McFarlane from providing such services (regardless of the practicalities). It must be justifiable for a body in the position of Relate to require its employees to adhere to those principles which it regards as fundamental to its own ethos and that it pledges to maintain towards the public.

Age discrimination

It is usually thought that where EU law covers an area of employment law, domestic law must be interpreted consistently with any EU Directive or case-law. Yet if that is impossible, EU law can only be relied on in a case if the claimant is employed by an emanation of the state (generally, a public sector employer). The following case throws this into question where EU equality law is concerned, but its legal basis is complex and the implications are uncertain.

■ **Kücükdeveci v Swedex GmbH & Co KG**

Case C 555/07,
19 January 2010,
896 IDS Employment Law Brief 3, ECJ

Statutory notice entitlement in Germany is set according to length of service. The longer someone has been employed, the greater the entitlement, except that years of service under 25 are discounted. This would be direct and indirect age discrimination unless it can be justified. The aim of the national legislation at issue is apparently to give employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility. In this test case, the European Court of Justice (ECJ) said that the legislation adopted is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal. The ECJ also said that the German court must disapply the national legislation, even though the dispute was between private individuals (no public sector employer was involved), and the German legislation could not be interpreted consistently with EU law (see *X* above and *Coleman* below).

Comment: It has been suggested that this might mean the UK legislation on statutory minimum notice is also unlawful. However, although UK law also gives increasing minimum entitlement with each year of service, it does not exclude years of service below 25. It was this extra element which appeared particularly to influence the ECJ on the matter of justification. An attack on the calculation of statutory redundancy pay and the unfair dismissal basic award may be more successful, as they award less pay for weeks served at younger ages.

Disability discrimination

The ECJ, in *Coleman v Attridge Law* C-303/06; [2008] IRLR 722; November 2008 *Legal Action* 14, said that harassment or direct discrimination against a non-disabled person because of his/her association with a disabled person was unlawful under Council Directive 2000/78/EC, known as the Equal Treatment Framework Directive. As Ms Coleman worked in the private sector, she cannot rely directly on European law. The question is whether or not the DDA 1995 can be interpreted so as to allow such claims.

■ **EBR Attridge Law LLP and another v Coleman (No 2)**

UKEAT/0071/09,
30 October 2009,
[2010] IRLR 10, EAT

The EAT noted that it is a principle of EU law that the courts and tribunals of member states should 'so far as possible' interpret domestic legislation in order to give effect to EU law and relevant Directives. In this case, adding words to include associative discrimination would undoubtedly change the meaning of the DDA 1995 but (as established by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557) that is permissible as long as the change is not incompatible with the underlying thrust of the legislation. The EAT therefore added a new subsection to s3A to read: '(5A) A person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of

the disability of another person' (para 15). It added a similar extra subsection to the definition of harassment.

Comment: Note that the wording is not limited to the narrow idea of 'association', but refers more generally to discrimination because of another person's disability.

Compensation

In the case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, HL, the House of Lords said that a dismissal can be unfair purely because poor procedures were followed. However, if the only unfairness was the procedures, compensation can be reduced to reflect the chance that a fair dismissal would still have taken place had fair procedures been followed. The following case applies a similar principle to discrimination cases.

■ Chagger v Abbey National PLC and another

[2009] EWCA Civ 1202,
13 November 2009,
[2010] IRLR 47, CA
893 IDS Employment Law Brief 16, CA

Mr Chagger worked as a trading risk controller with Abbey. He won his claims for unfair dismissal and race discrimination when he was made redundant. The tribunal found that Abbey had been influenced by the fact that Mr Chagger was Asian when it marked him against the redundancy selection criteria. He was awarded £2,794,962.27 (plus interest). His compensation was calculated on the basis that he would never be able to get a similar job in financial services again. He had made 111 unsuccessful job applications. It also included a two per cent uplift for breach of the statutory dispute resolution procedures. Abbey appealed the decision on liability and various aspects of the decision on compensation. Mr Chagger cross-appealed stating that the two per cent uplift was below the minimum applicable except in exceptional circumstances.

The EAT rejected the appeal on liability but upheld several aspects of the appeal on compensation. Mr Chagger appealed to the Court of Appeal.

The Court of Appeal dealt with important principles applicable to discrimination compensation. Abbey argued that the tribunal's starting point should not have been career-long loss of earnings because Mr Chagger would have, at some stage, chosen to leave Abbey anyway. The Court of Appeal said that this was irrelevant because he would not have moved on to a lesser paid job. The court also rejected Abbey's argument that it should not be liable for 'stigma loss', ie, compensation attributable to the difficulty of getting a new job because of the stigma associated with having brought a discrimination case against a former employer. Abbey felt that it should not be responsible for unlawful victimisation by prospective employers. Nevertheless, the Court of Appeal thought that the original employer could be liable for such loss. In most cases this would not be a separate item of compensation but would affect how long a tribunal thought that it would be likely for the claimant to take to get a new job.

On another point, the Court of Appeal accepted the *Polkey* argument, ie, compensation should be reduced to reflect the chance that, had Mr Chagger not been discriminated against, he might still have been selected for redundancy. On the facts here, Mr Chagger had scored two points less than his white colleague, the only other candidate in the selection pool. Abbey argued that had Mr Chagger not been marked down for discriminatory reasons, he may also have achieved maximum points. There was no evidence that his white colleague had been marked up for discriminatory reasons. A tie break would then have come into play, ie, the attendance record, on the basis of which Mr Chagger would have been selected anyway. The tribunal should have considered this possibility.

Finally, the Court of Appeal said that the tribunal was entitled to award an uplift under Employment Act 2002 s31(4) below the usual minimum of ten per cent on the basis that the overall award was so high. The court sent the case back to the tribunal to redecide compensation as a result of its findings and reconsider whether or not two per cent was still appropriate if it reduced the overall compensation.

Comment: Introducing a *Polkey* concept to the calculation of discrimination compensation is an alarming development. It is important to remember that in most cases it will not be possible to say on the facts that the result would have been the same if there was no discrimination.

As well as compensation for financial loss, discrimination awards usually include a sum for injury to feelings. Tribunals can vary greatly on the amount they are prepared to award under this heading. Some guidance was provided by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102, which set three bands:

- a top band normally between £15,000 and £25,000;
- a middle band between £5,000 and £15,000 for serious cases which do not warrant the top band; and
- a lower band between £500 and £5,000 for less serious cases.

■ Da'Bell v National Society for Prevention of Cruelty to Children

UKEAT/0227/09,
28 September 2009,
[2010] IRLR 19, EAT

In this case, the EAT uprated the *Vento* bands in line with inflation to replace £5,000, £15,000 and £25,000 with £6,000, £18,000 and £30,000 respectively. It also said that appeals against inadequate or excessive awards were more likely to succeed if they fell within the wrong band, or were about the extremes of each band. Placements within a band were more a matter of fact and impression for the tribunal. Here the employer's appeal was rejected because dispute was only between the mid-point and the lower point of the middle band.

In addition to injury to feelings, tribunals can award aggravated damages, where a worker's sense of injury is 'justifiably heightened by the manner in which or motive for which' the employer did the wrongful act: for example, where the employer acted in an insulting or oppressive way (see *Alexander v the Home Office* [1988] IRLR 190, CA). It has long been uncertain whether or not exemplary damages (purely punitive damages) can be awarded in an employment discrimination case.

■ Ministry of Defence v Fletcher

UKEAT/0044/09,
9 October 2009,
[2010] IRLR 25; EAT,
893 IDS Employment Law Brief 11, EAT

Ms Fletcher, who had joined the Army in 1996, suffered sexual harassment and extensive victimisation between 2004 and 2006. This started with appallingly inappropriate behaviour towards her by Sergeant Brown, who was her superior, and led to a series of disciplinary actions against her. Ms Fletcher won her claim for direct discrimination and harassment contrary to the Sex Discrimination Act 1975 and victimisation under the EE(SO) Regs. The tribunal found that her written complaints were dealt with in a high-handed and arbitrary manner until she eventually reached the level of Major General Loudon, who did uphold her complaints about Sergeant Brown (though not about her subsequent treatment). She was awarded:

- £30,000 for injury to feelings;
- £20,000 aggravated damages;
- £50,000 exemplary damages; and
- £10,000 costs as well as various sums for loss of earnings and pension entitlement.

Aggravated damages were awarded partly because of the range of disciplinary sanctions taken against her and the inappropriate procedures used in response to her complaints and partly because of the way in

which the Ministry of Defence (MOD) had defended the tribunal proceedings. The MOD appealed regarding the awards for aggravated and exemplary damages.

The EAT upheld the tribunal's decision to award aggravated damages in respect of the way in which the MOD had defended the tribunal claim. The case of *Zaiwalla & Co v Walia* [2002] IRLR 697, EAT, established that such an award can be made. The EAT said that a party to proceedings is entitled to defend him/herself robustly. However, the tribunal was entitled to find that the MOD had gone beyond this. The ministry had called Sergeant Brown to give evidence regarding Ms Fletcher's allegations against him and had cross-examined Ms Fletcher on this, even though Major General Loudon had upheld that aspect of her allegations. Moreover, it had unnecessarily challenged Ms Fletcher about her early psychiatric history and the origin of her sexual orientation.

It was irrelevant that the tribunal had also ordered the MOD to pay costs for unreasonably calling Sergeant Brown to give evidence. The aggravated damages award related to Ms Fletcher's injury to feelings, whereas the costs award was for a different purpose. The EAT did reduce the aggravated damages award to £8,000, but that was because the tribunal had not taken into account the overlap between the high award for injury to feelings and the award for aggravated damages in respect of the MOD's conduct at the time.

The tribunal's award of exemplary damages was made on the basis of the first category in the key case of *Rookes v Barnard and others* [1964] AC 1129, HL, ie, that there had been 'oppressive, arbitrary or unconstitutional action by the servants of the government'. Although this could in principle be awarded, the factual basis of the award, ie, the failure of the Army to provide a mechanism for redress of Ms Fletcher's complaints, though deplorable, was not sufficiently oppressive to meet the high test for exemplary damages. The EAT said that its view might have been different if the tribunal had instead based its award on the Army's use of disciplinary action to victimise Ms Fletcher for pursuing her complaints. Moreover, had an award of exemplary damages been appropriate (which it was not), the appropriate level would have been £7,500, not £50,000.

Comment: Traditionally, awards for exemplary damages have been made in cases involving wrongful arrest and false imprisonment. This case suggests that awards can in theory be made against some public authority employers for 'oppressive, arbitrary or unconstitutional' behaviour if their actions are sufficiently outrageous.

CONTRACTUAL AND EMPLOYMENT RIGHTS

Employment status

The Court of Appeal has again considered the issue of whether someone is a worker or an employee for the purposes of the Employment Rights Act (ERA) 1996 s230(3). This follows on from the Court of Appeal decision in *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365, CA; December 2009 *Legal Action* 34.

■ **Autoclenz Ltd v Belcher and others**

[2009] EWCA Civ 1046,
13 October 2009,
[2010] IRLR 70, CA,
890 IDS Employment Law Brief 6, CA

The 20 claimants worked as car valeters for Autoclenz Ltd. They signed similar contracts, which stated that they were self-employed and were taxed on that basis. In 2007 they were required to sign new contracts which had clauses emphasising that the relationship was that of an independent contractor; that they could engage one or more individuals to carry out the work on their behalf on the same basis; and that there was no obligation on the company to offer any work or for the valeter to undertake it if offered. The claimants brought proceedings in the ET seeking a declaration that they were workers or employees as defined in s230(3) and (4) and so were entitled, among other things, to holiday pay.

The tribunal held that the claimants were employees, but that if it was wrong, they were certainly workers. The basis for this was that the written terms did not reflect the reality of the relationship between the parties. The tribunal found that the claimants came to work each day and were offered work if it was there for them to do. They had to notify the company in advance if they could not work and the tribunal held this to signify an obligation to otherwise attend for work if a prior arrangement had not been made. The tribunal found that the degree of control exercised by the company was consistent with the claimants being employees. On appeal the EAT held that the claimants were workers. The claimants appealed to the Court of Appeal.

The Court of Appeal held that the ET was entitled to find that the claimants were employees. It found that following *Protectacoat*, where one party relies on the genuineness of an express term and the other disputes it, there is no need to show that there had been a common intention to mislead. The court stated that this was particularly so in the employment field given the inequality of bargaining positions between an employee and an employer. As a result it was enough that the written terms did not actually reflect the true intentions or expectations of the parties.

The Court of Appeal said that, to establish this, a court or tribunal must examine all the relevant evidence, including the written term itself, read in the context of the whole agreement, how the parties conducted themselves in practice and what their expectations of each other were. It indicated that evidence of how the parties conducted themselves in practice might be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. However, the mere fact that the parties conducted themselves in a particular way did not on its own mean that the conduct reflected accurately the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker, although never exercised in practice, but this did not mean that it was not a genuine right.

The Court of Appeal said: 'It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee' (para 69).

However, Lady Justice Smith did indicate that a claimant's claim to be an employee would become less attractive where for many years s/he had gone along with the self-employment status and enjoyed the tax advantages of this arrangement. However, s/he could not be estopped from arguing that s/he was an employee, and once asked to consider the question of employment status, a court or tribunal must do so on the basis of the true legal relationship regardless of what the parties had been happy to accept over a period of time.

Agency workers

The position of agency workers and their employment status has troubled the courts for many years. The main concern arises from the nature of the three-way working relationship whereby an agency worker is taken on by an agency and then assigned to work for an end user, seemingly as its employee and sometimes for many years.

In the following case the Court of Appeal has again considered whether an agency worker was or became an employee of the end user for the purposes of bringing claims of unfair dismissal and discrimination. This is of particular importance in bringing claims for discrimination by the end user.

■ **Muschett v HM Prison Service**

[2010] EWCA Civ 25,
2 February 2010

Mr Muschett signed a contract with the employment agency, Brook Street (UK) Ltd, on

15 January 2007. On 19 January 2007, he was offered a temporary position working as a cleaner at Feltham Young Offenders Unit (run by Her Majesty's Prison Service (HMPS), ie, the end user). His letter of appointment from Brook Street set out his duties, the address of the place of work, the commencement date of 22 January 2007, the hours of work and the rate of pay. The letter stated that the assignment may be terminated by either 'the client, yourself or us at any time without prior notice or liability', and that 'all other terms and conditions remain the same' (this reference being to the contract with Brook Street). His employment ended on 10 May 2007 and he brought claims, including unfair dismissal, sex, race and religious discrimination against both Brook Street and HMPS.

It was acknowledged by the appeal courts that the substantive claims were, on the face of it, weak. However, what was under scrutiny was the preliminary issue of jurisdiction. For the ET to have jurisdiction to hear Mr Muschett's claims, he had to establish by whom he was employed and in what capacity.

ERA s230 states that an 'employee' is 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment', being a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

Race Relations Act (RRA) 1976 s78 states that 'employment' means 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour'. This same definition is repeated within the other discrimination legislation.

The Court of Appeal, in *James v Greenwich LBC* May 2008 *Legal Action* 17; [2008] IRLR 302, CA, had already held that in a situation where an agency worker is seeking to establish that s/he has become an employee of an end user, this would only be implied if it reflected the business reality of the situation.

At a pre-hearing review, the employment judge found that Mr Muschett was not employed by the end user, HMPS, within either the unfair dismissal or discrimination definition of employment. He considered the usual tests of control, personal performance and mutuality of obligation. He found that HMPS controlled Mr Muschett when he was carrying out his work and that it was a requirement that he must carry it out personally. The judge also found that HMPS did not pay Mr Muschett and was not obliged to, that Mr Muschett was not under any obligation to work for HMPS and that he could terminate his assignment at any time and without notice. Equally, HMPS was under no obligation to provide him with work. As a result, the judge found that there was no mutuality of obligation and therefore no contract of employment. Furthermore, applying the test in *James*, the judge held that no contract of any kind could be implied between the two parties. The employment judge then looked at whether Mr Muschett's relationship with HMPS fell under the wider definition of employment under discrimination legislation. This raised the question of whether or not Mr Muschett had a contract with HMPS personally to do any work for it. The judge was satisfied that, in the absence of any mutuality of obligation, he had no such contract. The judge also found that Mr Muschett was not employed by the agency under either definition. The end result was that the claims of unfair dismissal and discrimination could not be heard by the ET.

Mr Muschett appealed to the EAT and then to the Court of Appeal regarding the finding that he was not employed by HMPS. The Court of Appeal emphasised the test in *James* and found that on the 'meagre collection of facts' presented by Mr Muschett, it could not imply such a contract between him and HMPS (para 34).

With regard to the discrimination claims, the Court of Appeal held that the employment judge was wrong to focus on the absence of any mutuality of obligation as conclusive of there not being a contract of service. However, it found that the employment judge was right to hold that there was no contract between Mr Muschett and HMPS, given that he was under no obligation to work for the service and could terminate his engagement at any time. In relation to both definitions, the Court of Appeal stated that nothing less than necessity will do as a basis for implying a contractual relationship between the agency worker and the end user.

Comment: It is important to view this case in the context of the limited facts presented and to focus on the principles. In essence, the Court of Appeal repeated the test established in *James*, but otherwise emphasised that the definition of an employee is wider under discrimination legislation than under unfair dismissal legislation, and that lack of mutuality of obligation is irrelevant under the discrimination definition.

Advisers should note that where an agency worker has been discriminated against by an end user but cannot succeed in a claim against it as being his/her employer, it might be possible to argue that s/he is a contract worker. A contract worker is someone employed by one organisation (the employer) but supplied to do work for another (the principal) under a contract between the two (RRA s7 and repeated within other discrimination legislation). It might be possible to argue that the agency is the employer and the end user the principal for these purposes, to make the principal liable under discrimination legislation for its actions against the agency worker. However, for this to succeed the agency worker would need to show that s/he was employed by the agency within the discrimination definition. Mr Muschett was not able to do this and so his claim as a contract worker also failed.

1 Visit: www.equalityhumanrights.com for the latest details.
2 See: http://195.99.1.70/si/si2010/uksi_20101206_en_1.
3 See Ministry of Justice news release, 25 March 2010, available at: www.justice.gov.uk/news/newsrelease250310e.htm.
4 Available at: www.hmcourts-service.gov.uk.
5 For more details of these see *Enforcing employment tribunal awards and settlements*, second edition, Philip Tsamados, available from CLLC, tel: 020 7839 2998.

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RECOMMENDED READING

IDS Employment Law Brief

Other

- A new Central London Law Centre® (CLLC) guide is available: *Facing disciplinary action: a guide for employees and their representatives*, Tamara Lewis. Hard copies are free in return for postage and packing, telephone CLLC's administrator on: 020 7839 2998.

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 will be published in June 2010 *Legal Action*.

CASE-LAW

Jurisdiction: exclusion of judicial review

■ Wiles v Social Security Commissioner and another

[2010] EWCA Civ 258, 16 March 2010

W's award of long-term incapacity benefit was withdrawn because of a finding that there had been a relevant change in circumstances. Her appeal was dismissed by the social security appeal tribunal and the social security commissioner refused permission to appeal. On her application for judicial review of that refusal, the secretary of state argued that conventional judicial review principles ought not to apply because of the statutory scheme. The argument rested on *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, 28 November 2002; [2003] 1 WLR 475 and *R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, 8 November 2005; [2006] 3 All ER 650. These cases established that decisions of the county court and Lands Tribunal respectively could only be subject to judicial review in exceptional circumstances, such as a mistake about jurisdiction, a fundamental failure to allow a fair hearing or possibly a failure to deal with a difficult point of law of general importance.

Dyson LJ, giving the lead judgment, held that judicial review was available on conventional public law grounds. He considered that the court should not depart from a consistent approach to this effect in this context demonstrated in the cases relied on by the claimant. However, but for this line of authority he would have taken a stricter view based on principle and the nature of the statutory scheme. He held that parliament had not intended to exclude judicial review altogether and the limits of judicial review have to be determined as a matter of judicial policy having regard to all the relevant factors (para 43). Significantly, he accepted that there is no blueprint applicable to all cases and therefore the examples relied on by the secretary of state did not apply in other contexts (para 52). The social security appellate system was different from the county court and Lands Tribunal in that:

> *They are an administrative tribunal, frequently called upon to adjudicate on significant legal issues which have far-reaching consequences well beyond the individual case, including important issues of human rights and EU law. I accept that issues such as the right to life and the right not to be tortured are unlikely to arise in a social security case. But a social security case may well involve the right of a claimant to subsistence income and so directly affect their access to the most fundamental necessities of life* (para 46).

Against this background he would have held that the same test should apply as in the case of a second appeal to the Court of Appeal; there must be either an important point of principle or practice or some other compelling reason for the Court of Appeal to hear it. This, he held, would 'strike a fair balance between the competing considerations which arise where a commissioner refuses leave to appeal' (para 48). Having held that the commissioners were in principle subject to judicial review, the court went on to hold that there had in fact been no error of law and so the commissioner was entitled to refuse permission to appeal.

Comment: As all members of the court accepted, the actual decision on jurisdiction in this case is now academic because the relevant functions have been transferred to the Upper Tribunal and the scope of judicial review in that case is much more restricted: see *R (C) v Upper Tribunal* [2009] EWHC 3052, 1 December 2009, which will be reported in 'Recent developments in public law – Part 2', June 2010 *Legal Action*.

However, this case gives valuable guidance about the approach to be adopted where a decision-maker suggests that the decision-making context restricts ordinary principles of judicial review. The decision also contains a telling antidote to 'floodgates' arguments in judicial review. Sedley LJ said:

> *I would add that the time has long gone when the floodgates argument can properly be advanced on jurisdictional issues of public law. I know of no instance in which the courts have accepted jurisdiction in a novel field of public law and been overwhelmed by a consequent deluge of litigation …*
>
> *A better principle is that enunciated by Holt CJ in* Ashby v White *(1703) 2 Ld Raym 938, a case in which the court was warned of a deluge of litigation if it started to intervene in corrupt elections by entertaining claims of misfeasance in public office:*
>
> *'[I]t is no objection to say that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too …'* (paras 82–83).

Jurisdiction: amenability to review

■ R (McIntyre) v Gentoo Group Ltd

[2010] EWHC 5 (Admin), 4 January 2010

The claimants were assured tenants of a registered social landlord (G). The tenancy was subject to a covenant not to assign without consent, with such consent not to be unreasonably withheld. The claimants sought to exchange with another of G's tenants but G imposed a condition that they first pay arrears incurred for another property. The claimants applied for judicial review.

Mr John Howell QC, the deputy High Court judge, held that the decision was amenable to judicial review in principle. Although the obligation not unreasonably to withhold consent was a contractual duty, it was taken in the exercise of the public function of managing and allocating social housing (applying *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, 18 June 2009; [2010] 1 WLR 363). Such decisions:

> *… may also involve questions about how best to meet not only the need for social housing of those tenants wishing to exchange and their families but also the need of others for it. Like a decision to terminate a tenancy, in some cases it may also engage an individual's right to respect for his or her private and family life* (para 24).

It followed that public law principles

applied and it was not necessary to show that the individual decision had some additional public law element 'whatever that might mean and involve' (para 26).

The deputy judge rejected expressly the proposition that rights exercised in line with the terms of a contract cannot be invalid as a matter of public law. At paragraphs 31–36 he considered the relationship between breaches of a private law right and public law invalidity. He explained that similar language (for example, a duty to act reasonably) might have different consequences in public or private law. For example, the criteria to be taken into account might be different or the perspective from which reasonableness is to be judged or the burden of proof might differ. Equally, a public law body might act lawfully in public law terms even where it deliberately decides to break a contract and pay damages instead. However, when it makes a decision of that kind it must understand the scope of its private law obligations and if it does not then it will fail to have regard to relevant considerations.

As a matter of private law, the landlord was not entitled to refuse consent because the decision was taken for a reason which had nothing to do with the relationship between G and the claimants in regard to the tenancies subject to the exchange. G did not appreciate this and so had regard to an irrelevant consideration.

Despite this, judicial review was refused as a matter of discretion because it is a remedy of last resort and the claimants had a right to claim that the landlord's refusal was unreasonable as a matter of contract and also under the Landlord and Tenant Act 1988. These are procedures for deciding whether or not the landlord has acted in breach of its private law obligations, but the deputy judge held that public law invalidity could also be raised on such a claim. If the landlord had acted in breach of public law then there would be no valid refusal and so the parties' respective private law rights 'cannot be determined without an examination of the validity of a public law decision' (Lord Steyn in *Boddington v British Transport Police* [1998] UKHL 13, 2 April 1998; [1999] 2 AC 143). This brought the case within the principle in *Boddington*, which permits collateral public law challenges in private law claims.

Jurisdiction: collateral challenge

■ Mossell (Jamaica) Ltd (T/A Digicel) v Office of Utilities Regulations and others

[2010] UKPC 1,
21 January 2010

The Jamaican Office of Utilities Regulations (OUR) regulates the telecommunications market in Jamaica. The minister made a direction under the relevant Act which purported to limit the OUR's powers. The OUR took the view that the direction was ultra vires because it interfered unduly in its functions and so it went ahead and made a determination capping certain payments to be made by a mobile telephone operator. If the minister's direction had been valid then the determination would have breached it.

The Privy Council held that the direction was ultra vires but that then raised the question about what its effect had been before it was quashed. The minister argued that the OUR was obliged to act under it unless and until it was set aside. The Privy Council dismissed this argument and summarised the position as follows:

… Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found ultra vires, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called 'third actors') during the period before their invalidity is recognised by the court – see, for example, Percy v Hall *[1997] QB 924. All these issues were left open by the House in Boddington. It is, however, no more necessary that they be resolved here than there. It cannot be doubted that the OUR was perfectly entitled to act on the legal advice it received and to disregard the minister's direction* (para 44).

Principle of legality

■ HM Treasury v Ahmed and others: HM Treasury v al-Ghabra: R (Youssef) v HM Treasury

[2010] UKSC 2,
27 January 2010

■ HM Treasury v Ahmed and others: HM Treasury v al-Ghabra: R (Youssef) v HM Treasury (No 2)

[2010] UKSC 5,
4 February 2010

The claimants challenged Orders in Council allowing for the freezing of their funds, economic resources and financial services available to them. The Orders had been made under the United Nations Act (UNA) 1946 to give effect to a series of UN Security Council Resolutions (SCRs), which provided for the freezing of assets of individuals associated with, among others, the Taliban and Al-Qaida. The UNA enabled the executive to give effect to measures required by a SCR by Order in Council containing such provision as is 'necessary or expedient for enabling those measures to be effectively applied' (UNA s1(1)).

Under the Terrorism (United Nations Measures) Order (the Terrorism Order) 2006 SI No 2657, the Treasury might designate any person which it had 'reasonable grounds for suspecting' was or might be, among other things, a person who committed, attempted to commit, participated in or facilitated the commission of acts of terrorism (article 4(2)). Under the Al-Qaida and Taliban (United Nations Measures) Order (the Al-Qaida Order) 2006 SI No 2952, persons were automatically designated if they were included in a list prepared by a committee established under SCR 1267 (1999). Under the terms of the UN Charter, member states are obliged to comply with SCRs.

By a majority (Lord Brown dissenting as to the Al-Qaida Order) the Supreme Court struck down both Orders applying the principle of legality under which: 'A power conferred by parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of parliament': see *R v Secretary of State for the Home Department ex p Pierson* [1997] UKHL 37, 24 July 1997; [1998] AC 539, HL.

The Orders here were made as Orders in Council and were not subject to any direct parliamentary scrutiny. Given that they both interfered profoundly with basic rights, parliament could only be taken to have authorised them to the extent that they were strictly necessary to comply with the relevant SCR. On this test, the Terrorism Order was invalid because it allowed a designation to be made on the basis of reasonable suspicion whereas SCR 1373 (to which it gave effect) applied to those who had actually done the thing referred to in the article. The Al-Qaida Order was invalid to the extent that it allowed for automatic designation without giving the person involved an opportunity to be heard. The point here was not that such a rule could not be made at all but that it fell outside the limits of the power conferred on the executive by the UNA. If steps like this were to be taken then they had to be the subject of proper parliamentary scrutiny (see in particular the judgment of Lord Rodger at para 186).

The matter came back to the Supreme Court again on the secretary of state's application to suspend the operation of the

quashing order ([2010] UKSC 5). The defendant sought this to give a proper opportunity for parliamentary approval to be sought. In the meantime, if the order was suspended then the likelihood was that banks would continue to hold funds consistently with the freezing Orders. The majority (Lord Hope dissenting) rejected the application because it would have no practical or legal effect. The effect of the court's judgment was that the Orders were invalid to the extent stated and a quashing order simply made that clear. Suspension would not and could not give temporary validity to the Orders and might create the misleading impression that the Orders still had some status. The court held that it 'should not lend itself to a procedure that is designed to obfuscate the effect of its judgment' (para 8).

Comment: Lord Brown dissented in relation to the Al-Qaida Order and the decision of the majority here does seem to involve an extension of the principle of legality. The UK was bound to comply with the UN SCRs by taking action against people on the list and the claimants did not argue that the Al-Qaida Order did anything more than the SCR required. Their real complaint was that they could not challenge their inclusion on the UN list. This was clearly unfair because the criteria had not been made public and there was no hearing before the UN made its decision. However, a right of access to the courts in the UK could not help them with regard to that complaint. The point of the principle is to ensure that legislators face up to the political cost of enacting legislation that interferes with fundamental rights and Lord Brown's point was that there could be no such cost here in doing what the UK was obliged to do. On the other hand that may be exactly where direct parliamentary scrutiny is most necessary. The fact that the UK is bound to act in a particular way does not mean that the government is powerless to try and exert international influence over the list or that debate about its propriety is unnecessary. However, to apply the principle to this kind of case takes it away from its original role as a principle of statutory construction.

A further issue left hanging in the debate over whether to suspend the operation of the judgment is whether it will ever be possible for the court to quash a decision prospectively. This was discussed in argument but no conclusion reached. The House of Lords in *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, 30 June 2005; [2005] 2 AC 680 held that prospectively it could overrule a decision on a point of law, but as Lord Hope pointed out at paragraph 18 of the remedies decision, the position here is different because the main judgment was based on the proposition that the Orders were outside the powers under which they were purported to be made and so were void from the outset. In that case prospective overruling would contradict that premise and was not in any event what the defendant sought. This case was also the occasion for the reconsideration of anonymity orders (see below).

Delay as a ground for review

■ R (McVey and others) v Secretary of State for Health

[2010] EWHC 437 (Admin), 5 March 2010

The claimants challenged the failure of the secretary of state to adopt changes to a compensation scheme for the victims of variant CJD. The changes had been proposed in 2006 and a decision not to implement in full was made in 2008 (although the claimants argued that it had been later, in 2009). The challenges covered a number of grounds, including reasons and rationality, all of which were rejected. This note concentrates on the submissions on delay.

The claimants argued that the defendant had delayed unreasonably in coming to a decision. Integral to this complaint was a claim that the decision had in fact been made in June 2009 and not in March 2008 as the defendant's witness evidence claimed. There was no application to cross-examine the relevant witness. The claimants relied on documents that pre-dated June 2009 and which appeared to show that the minister was minded to make a particular decision and not that a decision had already been made. Silber J summarised the position where there is a dispute of fact on a critical issue of this kind as follows:

> *i) The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;*
>
> *ii) An exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that*
>
> *iii) The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies* (para 35).

Having reviewed the evidence and reminded himself of the distinction between the date when the decision was made and the date when the claimants or the trustees of the scheme were notified of it, the judge concluded that there was 'not sufficient evidence or material to enable me not to accept' the defendant's statement. The documents did not show that the statement 'must be incorrect' or that it was 'manifestly wrong' (para 43). It followed that there had not been excessive delay (indeed the judge would have found that there had been no such delay even on the later date).

However, even if there had been excessive delay that would not have given rise to any claim for judicial review. The judge accepted that it was:

> *... settled law that undue delay on the part of a public authority can lead to a remedy in public law but that is only when no decision has actually been taken. Once, as in this case, a decision had been taken by the secretary of state to reject the radical proposals, the focus of any claim had to move away from the delay and instead be directed towards the impugnability of the actual decision. After all, the remedy for delay is an order requiring the decision to be taken and that is unnecessary in this case* (para 58).

Irrationality

■ Houchin v Secretary of State for Justice

[2010] EWHC 454 (QB), 10 March 2010

H was a prisoner who had been transferred to open conditions following a statutory review by the Parole Board (the Board). He was then returned to closed conditions without notice when his risk was reassessed as 'very high' despite the fact that there had been no relevant change in circumstances. He sought judicial review of that decision. The proceedings were stayed on the defendant's agreement to refer the questions on whether or not he ought to have been returned to closed conditions and whether or not he should be recommended for immediate transfer back to open conditions to the Board for its advice. The Board held a hearing at which the witnesses were cross-examined and advised that he should be transferred to open conditions. The Board recommended that he should take the Better Lives Booster (BLB) programme before going on unescorted leave and that if that was not available in open conditions he should be offered it in closed conditions. The Board gave a detailed decision explaining its reasons and also responded to a request for further detail by providing a further decision. The defendant refused to accept the recommendation and H restored his application for judicial review.

Wilkie J accepted that the decision was *Wednesbury* unreasonable. The defendant's

decision letter wholly failed to have regard to the exceptional circumstances in which the case had been referred to the Board, or the exceptional nature of the hearing and the long and detailed reasons given by it. He concluded that:

... the way in which the [defendant] has stated his disagreement with the main conclusions of the Parole Board is so cursory and lacking any supporting argument that it is evidence of only the most superficial consideration of the decision ... I am driven to the conclusion that the views expressed by the Parole Board have scarcely been given any consideration at all (para 84).

He was supported in this conclusion by the fact that while the defendant had referred to the difficulties that the Board had encountered in assessing risk, he had not referred to the solutions proposed by the Board. This then left the question of remedy. The judge decided that remission to the defendant to reconsider would not properly reflect the defendant's error:

... the failure of the secretary of state lawfully to respond to the full and detailed decision of the Parole Board was of such an order and the need for the claimant's position to be clarified as soon as possible means that it would not be appropriate for me simply to require the secretary of state to reconsider the matter. Rather what I must attempt to do is to construct relief which will address the current position (para 103).

He then gave relief that was designed to secure the claimant's transfer to open conditions as soon as he had satisfactorily completed the BLB programme and relevant assessments.

Procedure: anonymity

■ Application by Guardian News and Media Ltd and others in HM Treasury v Ahmed and others: HM Treasury v al-Ghabra: R (Youssef) v HM Treasury

[2010] UKSC 1,
27 January 2010

This was the freezing Orders case (see above). Until it reached the Supreme Court, the claimants were identified by initials. The media then made an application to be able to report their names. The Supreme Court restated the principles on which anonymity orders should be made and explained that they required a careful balancing of the specific interests at stake. The question for the court in each case was whether or not there was sufficient general public interest in publishing a report of the proceedings which identified the party seeking protection so as to justify any resulting curtailment of his/her right, and his/her family's right, to respect for their private and family life. In these cases, the orders were set aside where a report that did not identify the individuals would be 'disembodied' and where there was a lack of any concrete evidence of harm to the individuals.

Comment: Anonymity orders had become much more common in the period leading up to this judgment, so much so that the Supreme Court was told that its first term docket resembled 'alphabet soup' (para 1). This judgment will make it much more important for advisers seeking anonymity or any other reporting restriction to explain positively what harm might flow from identification and whether or not it might, for example, cause a claimant to abandon his/her claim or make it more difficult for him/her to gather and use evidence. These cases involved adults; the same principles will not apply to children, where anonymity is still the default rule.

Discretion to withhold relief

■ R (B) v Cornwall Council and another

[2010] EWCA Civ 55,
9 February 2010

B was a learning disabled adult who had initially been assessed by Cornwall as not being liable to make any contribution towards the costs of his care. Cornwall later revised this decision to require a contribution but without any consultation or input from B. Cornwall had offered to review the decision but B rejected the offer and applied for judicial review. The court held that the decision was procedurally unfair and that Cornwall ought to carry out a proper charging assessment on the basis of the guidance given in the judgment. Cornwall argued that the judge ought to have refused relief as a matter of discretion because if the decision was declared unlawful, it would be required to take a further decision which it could not, as a matter of policy, backdate to the time of its initial decision to charge. The effect therefore would be that it could only reconsider its decision for the future. Since it had offered to review the decision but had been refused, this would be inappropriate.

The Court of Appeal quashed the decision holding that 'it would need special circumstances (eg a highly technical and understandable error), if a court were to be persuaded to exercise its discretion in favour of leaving in place an unlawful decision on the basis that the decision-maker would only be able to take a lawful decision for the future and suffer financial consequences from not having taken a lawful decision at an earlier stage' (para 6).

No such special circumstances arose in this case. The court proceeded on the basis that the defendant might not be able to make a new decision retrospectively. However, the decision under review had been fundamentally flawed. The defendant had offered an apology and had offered to reconsider, but in the meantime the decision was to remain in place and the defendant did not agree to suspend the charges coming into effect. The court held that:

... an offer which insists on reliance on a decision which is unlawful is not one which a party can be criticised for not accepting. This insistence and non-recognition of the unlawfulness would itself provide strong grounds for refusing to exercise a discretion in favour of the authority (para 21).

The position might have been different if Cornwall had accepted that the decision should be set aside and had offered to commence the process again, because in that case a fresh decision might have been taken before or very close to 1 October 2008, the date from which charging was intended to commence.

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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

Social housing

On 1 April 2010, the new regulatory regime for social housing took effect with the Tenant Services Authority (TSA) becoming fully established as the new regulator of both council and housing association landlords. The heart of the new arrangements is contained in *The regulatory framework for social housing in England from April 2010* (TSA, March 2010), which sets out six new standards for social housing.[1] The document describes the outcomes social landlords should meet for each standard and the TSA's specific expectations in respect of each of them. The standards are backed by the statutory regulation and enforcement powers vested in the TSA by the Housing and Regeneration Act (H&RA) 2008. The six standards cover:

- **Tenant involvement and empowerment** containing requirements relating to:
  - customer service, choice and complaints;
  - involvement and empowerment; and
  - understanding and responding to diverse needs of tenants.
- **Home** containing requirements relating to:
  - quality of accommodation; and
  - repairs and maintenance.
- **Tenancy** containing requirements relating to:
  - allocations;
  - rent; and
  - security of tenure.
- **Neighbourhood and community** containing requirements relating to:
  - neighbourhood management;
  - local area co-operation; and
  - anti-social behaviour (ASB).
- **Value for money**; and
- **Governance and financial viability**

The new standards apply to both local housing authorities and other providers of social housing (with the exceptions that the governance and financial viability standard and that part of the tenancy standard which relates to 'rent' do not apply to council housing).

The key to the TSA's regulatory function is that all social housing providers must register with the authority. One consequence of the new registration regime is a change in terminology for non-council landlords from 'registered social landlord' to 'private registered provider of social housing', local councils being the non-private registered providers.

Among the range of statutory and non-statutory materials requiring amendment to reflect the change are the Civil Procedure Rules (CPR), practice directions and protocols. The consequential amendments to the *Pre-action protocol for rent arrears*, among others, are contained in *52nd update March 2010* practice direction amendments.[2]

In the lead up to the establishment of the new regime, a stream of secondary legislation was made which included:

- the Housing and Regeneration Act 2008 (Consequential Provisions) (No 2) Order 2010 SI No 671;[3]
- the Housing and Regeneration Act 2008 (Penalty and Compensation Notices) Regulations 2010 SI No 662;[4]
- the Housing Management Agreements (Break Clause) (England) Regulations 2010 SI No 663;[5]
- the Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010 SI No 660;[6]
- the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 SI No 844;[7]
- the Housing and Regeneration Act 2008 (Commencement No 7 and Transitional and Saving Provisions) Order 2010 SI No 862;[8] and
- the Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 SI No 866.[9] See also page 26 of this issue.

Assured tenancies

At present, a tenancy cannot be an assured tenancy (or an assured shorthold tenancy) if the rent exceeds £25,000 per annum: Housing Act (HA) 1988 Sch 1 para 2(1)(b). As a result, many relatively modest lettings (particularly of houses let to a number of students as joint tenants) are outside statutory protection. On 25 March 2010, the government laid the Assured Tenancies (Amendment) (England) Order 2010 SI No 908, increasing the rent threshold to £100,000 per annum with effect from 1 October 2010 in England.[10]

The explanatory memorandum published with the Order contains an impact assessment dealing with the likely consequential effects, for example, in relation to protection of tenants' deposits. The change will apply to tenancies extant at the commencement date as well as to new tenancies.

Housing associations and rent arrears

Rent arrears management practices in the housing association sector (TSA, March 2010) details how housing associations deal with tenants in arrears.[11] The findings indicate that:

- at the end of 2007–08, 5.3 per cent of all rent due was unpaid, which is down from 5.6 per cent in 2005;
- evictions have fallen from 9,114 in 2004–05 to 7,703 in 2008–09; and
- about 95 per cent of evictions of housing association tenants were for rent arrears.

The research also reviews the use of HA 1988 Sch 2 Ground 8 by housing associations.

Homelessness

The statistics for local housing authority statutory homelessness provision in England for the last quarter of 2009 have been published: *Statutory homelessness: October to December 2009 England* (Communities and Local Government (CLG), March 2010).[12] They indicate that despite the impact of the recession there have been further significant falls in the number of households accepted as owed the main housing duty (HA 1996 Pt 7 s193) and of the number in temporary accommodation.

The Office of the Chief Analyst at the NHS has published a comprehensive guide for those advising the single homeless: *Healthcare for single homeless people* (NHS, March 2010).[13]

Mortgage arrears and repossessions

Statistics published by the Financial Services Authority (FSA) show that over 54,000 homes were repossessed in 2009 by mortgage lenders: *MLAR statistics: March 2010 edition* (FSA, March 2010).[14] These figures are higher than those published by the Council of Mortgage Lenders (CML) because they include action by non-CML members and

repossessions under second charges.

The Social Security (Claims and Payments) Amendment Regulations 2010 SI No 796 provide that, where payments of mortgage interest are deducted from income support etc on or after 8 April 2010 and paid to a mortgage lender, any amount paid in excess of the borrower's actual mortgage interest liability will be applied first to pay off any arrears of mortgage interest, and then to repay the principal sum of that mortgage or any other liability to the lender in respect of that mortgage.[15]

Minister for Housing, John Healey MP, has announced that a further £2.5m is being committed to achieving greater publicity of the help available to homeowners in difficulties: CLG news release, 16 March 2010.[16] The new funding will be used to advertise the mortgage help website and National Debtline's free advice-line telephone number. The announcement details the 86 repossession 'hot spot areas' in which most help is being targeted.

Long leases

Long leaseholders who want to take over management of their homes need to establish right-to-manage companies and then serve appropriate notices on the landlords (Commonhold and Leasehold Reform Act 2002). The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 SI No 825, which came into force on 19 April 2010, replace the relevant documentation with new versions.[17]

HUMAN RIGHTS

Article 6 and delay

■ Anderson v UK

App No 19859/04,
9 February 2010

Edinburgh City Council served a statutory repairs notice on Mr Anderson, the owner of a building. After carrying out works in default, the council brought proceedings in the Sheriff Court against Mr Anderson to recover his share of the repair costs. He filed a counterclaim alleging that the council had trespassed by carrying out further repairs which had damaged his property. Mr Anderson also obtained a summons to bring proceedings against a commercial property company and the council in the Outer House of the Court of Session, alleging that the statutory notices were invalid on grounds of fraud and illegal conspiracy. The total length of the proceedings was six years, eight months. Mr Anderson complained to the European Court of Human Rights (ECtHR) that the length of the proceedings before the Court of Session challenging the statutory notices was incompatible with the 'reasonable time' requirement of article 6 of the European Convention on Human Rights ('the convention').

The ECtHR noted that this was not a complex case. There were no novel points of law. Mr Anderson's allegations had been rejected as unfounded and unspecified. Mr Anderson's 'civil rights and obligations' had not been decided within 'a reasonable time'. Accordingly, there was a breach of article 6. The ECtHR awarded €1,500 in respect of non-pecuniary damage.

Article 8 and possession claims

■ Salford City Council v Mullen

[2010] EWCA Civ 336,
30 March 2010

The Court of Appeal heard five appeals concerned with occupiers who were either introductory tenants or provided with accommodation as homeless persons and had raised issues relating to article 8 of the convention in possession claims. The Court of Appeal considered *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 and *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367.

The Court of Appeal gave a lengthy analysis of recent decisions, pending the hearing of the appeal in *Pinnock v Manchester City Council* [2009] EWCA Civ 852; [2010] 1 WLR 713 by the Supreme Court in July. It concluded:

> *We are thus bound to hold that gateway (b) can apply to any decision of the local authority relevant to seeking possession which could be the subject of judicial review. [However] ... in the introductory tenancy scheme as in the demoted tenancy scheme the proper construction of the legislation means that any gateway (b) attack on any decision would have to take place in the Administrative Court and the role of the county court would be limited to consideration as to whether such an attack was arguable* (paras 74 and 75).

The Court of Appeal dismissed the appeals; however, the court gave permission to appeal to the Supreme Court, in one case in each category, namely, *Hounslow LBC v Powell* and *Leeds City Council v Hall*.

■ Nettleton Road Housing Co-operative Limited v Joseph

[2010] EWCA Civ 228,
16 March 2010

The co-operative was a fully mutual housing association within the meaning of Housing Associations Act (HAA) 1985 s1(2). It was also registered as a co-operative housing association under the provisions of the Industrial Provident Societies Act 1965. Mr Joseph was one of its tenants. As a result of HAA s1(2) and HA 1988 Sch 1 para 12(h), his tenancy could not be an assured tenancy. His tenancy agreement included a prohibition on keeping any pet in the premises without the co-operative's written permission. In breach of that term, Mr Joseph kept a Staffordshire bull terrier. After a number of meetings, a notice to quit which complied with the provisions of the Protection from Eviction Act (PEA) 1977 was served and a possession claim was issued. District Judge Lee made a possession order.

Mr Joseph appealed. The principal ground of appeal was that the exclusion of any system of statutory protection by the provisions of the HA 1988 created a situation in which the tenants of fully mutual housing associations could be evicted from their houses on an arbitrary and capricious basis and in a way which was wholly incompatible with the provisions of either article 8 or article 14 of the convention.

The Court of Appeal dismissed the appeal. Even if Mr Joseph were to succeed in all his arguments on the law, his appeal would fail on the facts. The breach of covenant was a serious breach. To bring a dog like a Staffordshire bull terrier into the house without the consent and against the wishes of the other residents showed a complete disregard for the interests of the other tenants and was a breach of the fundamental principle of consent which underpins associations of this kind. The terms of the prohibition were clear. An argument that the period for compliance with the notice to quit was inadequate was 'hopeless'. It was not possible to say that the seven weeks given to Mr Joseph in which to 're-home' the dog was either inadequate or unreasonable.

■ R (Coombes) v Secretary of State for Communities and Local Government and Waltham Forest LBC

[2010] EWHC 666 (Admin),
8 March 2010

In 1954, the council granted John Coombes a tenancy of a flat. He lived in the flat until he died in 1999. His wife succeeded to the tenancy under HA 1985 s85, but she too died in 2005. In 2008, the council served a notice to quit on their son, who had lived in the flat since 1954 when he was six years old, and Mrs Coombes's personal representatives. In 2009, they brought a claim for possession in Bow County Court. Mr Coombes junior counterclaimed raising human rights issues, namely, that his personal circumstances and his long occupancy of the property, coupled with his attachment to it, offered a basis for being permitted to remain. HHJ Mitchell

transferred the claim and counterclaim to the High Court. The issue before the court was the compatibility of PEA s3 and related legislation with article 8 of the convention.

Cranston J considered *Kay* (above) and *Doherty* (above), and recent ECtHR authorities. He stated that *Doherty* did not enable the county court to substitute its view for that of the council. That court should still be asking itself whether the decision to recover possession was flawed on public law principles. He held that it was not open to him to grant a declaration of incompatibility. Section 3 of the PEA did nothing more than prohibit a property owner from repossessing property without first seeking a possession order in court. The requirement to seek a possession order, rather than to recover possession without any supervision by the court, could not be incompatible with article 8. Coupled with other legislation, PEA s3 did not fall within the exceptional category of cases which the House of Lords in *Kay* and *Doherty* identified as passing through gateway (a). He also noted that the provisions which denied Mr Coombes's right to succeed to the tenancy had been held to strike the requisite balance and to be fully compatible with article 8 (*R (Gangera) v Hounslow LBC* [2003] EWHC 794 Admin; [2003] HLR 68 and *Wandsworth LBC v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 617). Nor was it open to him to find that the manner in which county courts grant possession orders was incompatible with article 8 of the convention. However, Cranston J granted permission to appeal to the Court of Appeal.

■ Slough BC v Aden

[2009] EWCA Civ 1541, 9 December 2009

Slough granted Mr Aden a non-secure tenancy of a room in a hostel under the homelessness provisions of HA 1996 Pt 7. It was a periodic tenancy, which was terminated by a notice to quit served because of alleged rent arrears. Slough decided that Mr Aden did not have a priority need and was therefore ineligible for an allocation of housing accommodation under Part 7. A review was carried out under s202, but the decision was affirmed. An appeal to the county court was dismissed. District Judge Parker then made an order for possession. HHJ McIntyre dismissed an appeal and refused to transfer the possession claim to the High Court so that Mr Aden could seek a declaration of incompatibility. Mr Aden sought permission to being a second appeal. He argued that the absence of security of tenure for applicants for homelessness assistance under Part 7 was incompatible with article 8 of the convention.

Etherton LJ refused permission to appeal. The compatibility of Part 7, in the context of security of tenure, with article 8 was considered by the Court of Appeal in *Sheffield City Council v Smart* [2002] EWCA Civ 4; [2002] HLR 34 and *Desnousse v Newham LBC* [2006] EWCA Civ 547; [2006] HLR 38, and was held to be compliant. He did not consider that the Court of Appeal would be at liberty to depart from those previous decisions.

■ R (Husband) v Solihull MBC

[2009] EWHC 3673 (Admin), 1 December 2009

Mr and Mrs Husband were joint tenants. They had marriage problems. In June 2008, Birmingham County Court issued a non-molestation order against Mr Husband and an exclusion order lasting until 19 February 2009. On 9 February 2009, Mrs Husband indicated to Solihull that she wished to terminate the tenancy. Solihull told her of the effect this would have on Mr Husband's position. She served a notice to quit which expired on 16 March 2009. On 10 February 2009, she handed back the keys. On 17 March 2009, Solihull wrote to Mr Husband notifying him that the tenancy had ended. On 26 March 2009, a housing officer visited the house. She found that it was empty, except for a bedstead, and the locks were changed. A possession claim was issued. Mr Husband sought permission to move for judicial review of the decision to treat the premises as abandoned and to refuse to readmit him. The decision to recover possession was also challenged. He argued that the unqualified right of a landlord to possession where a co-tenant has determined a tenancy, which had been established in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, HL, was, in the light of *McCann v UK* App No 19009/04; [2008] ECHR 385, incompatible with the convention.

Beatson J dismissed a renewed application for permission to seek judicial review. The submissions based on *Monk* had been determined in other cases, including *Doherty* (above) and the decision of HHJ Bidder QC in *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin). He continued: 'In my judgment, it is not, in the state of English law now, arguable that the unqualified right to possession by a landlord is incompatible with article 8; or indeed, in the light of *Sheffield [City Council] v Smart* [2002] HLR 34, with article 1 Protocol 1 of the convention' (para 8).

PUBLIC SECTOR

Stock transfer

■ R (Hayes) v Secretary of State for Communities and Local Government

[2009] EWHC 3520 (Admin), 6 November 2009

In a claim for judicial review, the claimant, who was not legally represented, challenged the secretary of state's decision to grant consent for the transfer of the Clapham Park estate from Lambeth LBC to Clapham Park Homes Limited. Charles J rejected claims that the proposed transfer breached the claimant's rights under articles 1, 3, 8, 14 and article 1 of Protocol No 1. He also found a *Wednesbury*-unreasonable challenge alleging irrationality to be hopeless. The argument that the secretary of state had failed to take into account relevant factors in reaching her decision was 'also doomed to failure'.

ASSURED SHORTHOLD TENANCIES

Section 21 notices

■ Elias v Spencer

[2010] EWCA Civ 246, 29 January 2010

A landlord served a HA 1988 s21 notice on an assured shorthold tenant. The notice required possession: 'After: 22ND NOVEMBER 2008 or, if this notice would otherwise be ineffective, after the date being the earliest date not earlier than two months after the date of service of this notice when shall expire a period of the assured shorthold tenancy.' The date of November 22 was wrong because it was not a day on which the periodic tenancy expired. The landlord relied on the alternative formula provided in the notice. Recorder Owen QC accepted that submission and made a possession order. The tenant sought permission to appeal. Stanley Burnton LJ refused permission to appeal. He said that the present case was indistinguishable from *Lower Street Properties Ltd v Jones* [1996] 28 HLR 877.

Sir Scott Baker refused a renewed application for permission to appeal. Although *Lower Street Properties Ltd* had slightly different facts, the principle that the formula was perfectly good was clear. 'The formula was applied in this case and it obviously in the terms of the notice trumped any problem with regard to the invalidity by one day of the date' (para 6). An appeal would not have a real prospect of success.

Disability Discrimination Act 1995

■ Drum Housing Association Ltd v Thomas-Ashley

[2010] EWCA Civ 265, 17 March 2010

Ms Thomas-Ashley suffered from bipolar mood disorder that was characterised by cyclical and episodic disturbances in mood which, at their extreme, fulfilled criteria for manic as well as depressive episodes. She was an assured shorthold tenant of a flat. In breach of the terms of the tenancy, she kept a Jack Russell/Border Collie cross in the flat. After receiving complaints that the dog barked, Ms Thomas-Ashley's landlord, Drum Housing Association, served a HA 1988 s21 notice and took possession proceedings. HHJ Murphy made a possession order. He found that Ms Thomas-Ashley: 'paid no particular attention to the … terms' of the tenancy agreement. She had asked permission to have a dog, which was refused, and went on to take a risk by having it without permission. The dog did bark and was not the type of dog for which the head lessors would give consent. If the dog stayed, it was inevitable that the head lessor would bring forfeiture proceedings, against which there was no defence. Ms Thomas-Ashley appealed. She argued that the use of the s21 procedure was an attempt to enforce provisions in the tenancy agreement which were unlawfully discriminatory under the Disability Discrimination Act 1995 and that the court should not sanction the landlord's enforcement of such provisions.

The Court of Appeal dismissed the appeal. After referring to *Lewisham LBC v Malcolm* [2008] 3 WLR 194; [2008] UKHL 43, Sir Scott Baker said that this was not a case where the interpretation of the legislation could be stretched to assist Ms Thomas-Ashley.

[She] fails on the facts found by the judge both to show that the 'no animals' term discriminated against her on the grounds of her disability and that if it did there was nothing the respondents could reasonably have done about it. The 'no animals' provision was in the appellant's tenancy agreement and the head lease for a purpose (para 34).

The insurmountable problem faced by Ms Thomas-Ashley was that changing the terms of her lease would have provoked forfeiture of the housing association's lease from the head lessor.

PROCEEDS OF CRIME ACT 2002

■ Olden v Serious Organised Crime Agency

[2010] EWCA Civ 143, 26 February 2010

Mr Olden was convicted on counts of deception relating to mortgage fraud. However, his conviction was set aside on appeal. The Serious Organised Crime Agency (SOCA) then took civil recovery proceedings under the Proceeds of Crime Act (POCA) 2002. At first instance ([2009] EWHC 610 (QB)) the court made a civil recovery order and a possession order in respect of his property in favour of SOCA. Mr Olden appealed.

The Court of Appeal allowed his appeal against the possession order. POCA contained no express power to make a possession order, and the court should not imply such a power. The purpose of a recovery order was to vest the property to be recovered in the trustee. Once the property was vested in the trustee, s/he could decide to apply under CPR Part 55 for an order for possession.

HOUSING ALLOCATION

■ R (Joseph) v Newham LBC

[2009] EWHC 2983 (Admin), 20 November 2009

Mr Joseph was the tenant of a Newham council flat. He applied for a transfer. He was accorded 'reasonable preference' status under the council's choice-based lettings scheme on account of overcrowding: HA 1996 Part 6 s167(2)(c). Newham's scheme provided for reduced preference to be given to those applicants with property-related debts: HA 1996 s167(2A)(b) and *Allocation of accommodation code of guidance for local housing authorities 2006* para 5.23(b). The scheme stated:

Applicants who have any property-related debts (such as rent arrears, council tax arrears or a housing benefit overpayment) to the council, either relating to their existing home or a former home, are normally given less priority than other applicants when being considered for offers of accommodation, or when being considered for a nomination to a registered social landlord for housing, until such time as they clear all debts owed.

The council notified Mr Joseph that this provision would be applied to him because of a debt of £895 in respect of overpaid housing benefit. He sought judicial review on the basis that:

- the debt had been owing for so long that recovery of it was statute-barred; and
- the allocation scheme should not be used to compel payment of otherwise irrecoverable debt.

HHJ Thornton QC (sitting as a deputy judge of the Administrative Court) quashed the council's decision. He held that:

- in context, the provision allowing property-related debts to lead to a loss of priority in Newham's scheme was a reference to recoverable housing benefit, that was to overpaid housing benefit whose recovery has not been barred by Limitation Act 1980 s9; and
- by applying the property-related debt provision to debts that were no longer recoverable in law to the detriment of Mr Joseph, Newham was acting irrationally and contrary to his legitimate expectation of how his applications under that scheme would be dealt with and treated.

HOMELESSNESS

Applications

■ O'Callaghan v Southwark LBC

Lambeth County Court, 6 November 2009[18]

The claimant, aged 17, applied to the council when she was homeless. It did not refer her to Children's Services but dealt with her under HA 1996 Pt 7. Initially, the council provided the claimant with accommodation in bed and breakfast and later at foyer-style supported accommodation, but she was not notified of any decision on the application under Part 7. When the claimant was evicted from that accommodation, the council decided that she had become homeless intentionally. The decision was upheld on review.

On the claimant's appeal, the council contended that the foyer accommodation had been secured as part of its homelessness prevention arrangements and that by accepting the placement there the claimant had brought her homelessness application to an end.

HHJ Welchman allowed the appeal. He varied the decision to one that the claimant had not become homeless intentionally. As there had been no decision on the application for homelessness assistance, the loss of the interim accommodation (HA 1996 s188) could not give rise to a finding that the claimant had become homeless intentionally. The prevention of homelessness was commendable, but only against the background of the statutory Part 7 framework and not as an alternative to it. Provision of accommodation as

'homelessness prevention' could not be used as a way of seeking to avoid the council's statutory responsibilities.

■ **R (Raw) v Lambeth LBC**

[2010] EWHC 507 (Admin), 12 March 2010[19]

The claimant, a single man aged 61, applied to the council for homelessness assistance: HA 1996 Pt 7. At first interview, a housing options officer suggested that he take up the council's Lettings Direct scheme under which a private sector tenancy would be arranged for him (with a rent guarantee and a deposit paid). The claimant was not told that this would affect his homelessness application. When notified that he had been referred to the scheme, the claimant was worried and his solicitors wrote to the council seeking confirmation that his homelessness application was being dealt with. He was then given documentation for the scheme which indicated that his homelessness application would not be progressed. The claimant sought judicial review of what his representatives said was 'outrageous "gate keeping"'.

Before the claim could be tried the council agreed to proceed with the homelessness application and in due course accepted that it owed him the main duty (HA 1996 s193(2)).

Stadlen J declined an invitation to continue the claim despite it having become academic. However, the judgment (at paras 70–82) contains helpful general observations about local housing authority arrangements which may appear to be designed to avoid enquiries into homelessness applications and/or to avoid the provision of accommodation during enquiries.

■ **R (Halewood) v West Lancashire DC**

Administrative Court (sitting in Manchester), 31 July 2009[20]

Ms Halewood made an application to the council for homelessness assistance under HA 1996 Pt 7. The council decided that she lacked the necessary capacity to make an application: *R v Tower Hamlets LBC ex p Begum* [1993] 1 AC 509, HL. A consultant psychiatrist advised that she possessed the capacity to understand and respond to an offer of accommodation. However, he also considered that her mental condition would be likely to impair her ability to comply with the requirements of any future tenancy, although 'it would be not the major effect, and would only be significant on some, but not all, occasions of breach of tenancy'.

Ms Halewood sought judicial review on the grounds that:

■ it was not open to the council to refuse her application simply because her lack of capacity as a result of mental impairment was likely to have some role to play, however minor, in future tenancy breaches; and

■ the true ratio of *Begum* was that only those persons so lacking in capacity as to be unable to understand and comprehend an offer of accommodation ought to be excluded from Part 7.

HHJ Pelling QC (sitting as a deputy judge of the Administrative Court) granted a renewed application for permission to seek judicial review. The contention that the council had misapplied the *Begum* test was arguable. After the grant of permission, the council agreed to accept the application as competent and also later accepted a duty to the claimant under HA 1996 s193(2).

Intentional homelessness

■ **Gibbons v Bury MBC**

[2010] EWCA Civ 327, 26 March 2010

Mr Gibbons was an assured shorthold tenant in rent arrears. His landlords gave him two months' notice seeking possession: HA 1988 s21. Mr Gibbons completed an application form for council housing (HA 1996 Pt 6) in which he stated that he could not afford his rent, had to move out of his home 15 days later (when the notice expired) and would then become homeless.

When the notice expired, he left the property and later applied for homelessness assistance (HA 1996 Pt 7). The council decided that he had become homeless intentionally on the ground that he had left at a time when he had £7,000 in capital which he could have paid towards his rent. On review of that decision, it became plain that there had not been £7,000 capital available to clear the arrears. Following a meeting with Mr Gibbons and his representatives, the reviewing officer gave notice that she was minded to, nevertheless, uphold the decision on the basis that the tenancy had been given up voluntarily and Mr Gibbons had expended his savings frivolously instead of using them to pay rent. The representatives sought a further meeting but none was held.

HHJ Tetlow allowed an appeal and quashed the review decision. The council's appeal from that decision was dismissed.

The Court of Appeal held that:

■ the reviewing officer had failed to take account of a relevant consideration, namely that the Part 6 housing application disclosed information triggering an obligation on the council to provide advice and assistance such as might have helped the claimant avoid homelessness. Jackson LJ said:

When the council received that application form, the council clearly had reason to believe that Mr Gibbons and his daughter were threatened with homelessness. That, in my view, is sufficient to trigger the obligations of the council under Part 7 of the 1996 Act (para 31);

■ the reviewing officer had also failed to decide the question of whether or not Mr Gibbons had been ignorant of his entitlement to housing benefit and (if he had been ignorant of that matter) no finding had been made on whether or not he had acted in 'good faith': HA 1996 s191(2); and

■ there had been a deficiency in the original decision (the mistake in relation to the £7,000) and once the reviewing officer had notified an intention to uphold the decision on a different factual basis, she should have held an oral hearing as his representatives had sought: Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2).

■ **Eryurekler v Hackney LBC**

Clerkenwell and Shoreditch County Court, 9 February 2010[21]

The claimant had been a private sector tenant with a £25 per week shortfall between her housing benefit and her rent. She was dependent on income support and child tax credits. She gave up the tenancy and later applied to the council for homelessness assistance: HA 1996 Pt 7. The council decided that she had become homeless intentionally: HA 1996 s191. The decision was upheld on review. Neither decision made any reference to the *Homelessness code of guidance for local authorities* para 17.40: 'In considering an applicant's residual income after meeting the costs of the accommodation, the secretary of state recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseeker's allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit.'

On an appeal (under HA 1996 s204), it was argued that paragraph 17.40 applied and that 'income support' should be read as including child tax credits. The council argued that 'income support' should be given its natural meaning and be restricted to the amount actually paid to the claimant for herself.

HHJ Mitchell accepted that the interpretation urged by the council would lead to 'unprincipled results' which cannot have been the intention of the secretary of state. This was because it would put the claimant in a worse position than a long-term lone parent who had continued to receive income support incorporating a childcare element, and in a less favourable position compared with an adult receiving income support who had no dependent children. The reviewing officer

should have considered paragraph 17.40. The fact that the decision made no reference to the paragraph suggested that the reviewing officer had not considered it. If he had done so and chosen not to follow the secretary of state's recommendation, he would have been obliged to give reasons for so doing. In the event, the appeal was dismissed. The error made no difference because a very high level of unnecessary expenditure demonstrated that the rent had actually been affordable.

Discharge of duty

■ Connors v Birmingham City Council

Birmingham County Court, 15 January 2010[22]

The council owed Ms Connors the main housing duty under HA 1996 s193(2). It made her an offer of permanent accommodation which she declined. The council then notified her of a decision that its duty had been discharged (HA 1996 s193(7)), but no reasons were given in that notice as to why the offered accommodation was considered 'suitable'. Ms Connors sought a review. The reviewing officer acknowledged that the discharge letter had failed to give reasons, but issued a minded-to letter inviting further representations within seven days and indicating that the discharge decision was likely to be upheld for reasons the reviewing officer herself gave. No representations were received in time and the reviewing officer upheld the original decision.

HHJ Cook quashed the review decision. Had the council provided reasons in the first discharge letter, Ms Connors would have had 21 days to consider and respond to it in her review request: HA 1996 s202. Failure to give those reasons had deprived her of that opportunity. It had been unfair to give her fewer than seven days (taking into account postal delivery) to make representations once the reviewing officer had furnished some reasons in the minded-to letter.

HOUSING AND CHILDREN

■ R (O) v East Riding of Yorkshire CC

[2010] EWHC 489 (Admin), 11 March 2010

The claimant, a teenage boy, was accommodated and 'looked after' by the council under Children Act (CA) 1989 s20. Following an assessment of the claimant's special educational needs (under the Education Act (EA) 1996), the council found him a place at a residential school where he would be both educated and accommodated for 52 weeks a year. The claimant moved there. The issue was whether or not this placement brought his status as a 'looked after' child to an end.

A claim for judicial review was dismissed. Cranston J held that on a true construction of the two statutory schemes, the claimant had ceased to be a 'looked after' child because he was no longer provided with accommodation in exercise of the council's social services functions: CA s22(1)(b). Although it may represent a lacuna in the statutory scheme, the council's duties under CA s20 had come to an end on the commencement of the full-time placement arranged under the EA.

■ R (O) v Barking and Dagenham LBC

[2010] EWHC 634 (Admin), 3 March 2010

The claimant was accommodated by the council as an asylum-seeker aged under 18: CA s20. All his applications and appeals for asylum failed. After the claimant reached adulthood, the council decided to withdraw the accommodation because he would then be housed by the UK Border Agency's National Asylum Support Service scheme.

Calvert-Smith J dismissed a claim for judicial review of that decision. Nothing in the council's obligations under CA s23C(4)(c), owed to a 'former relevant child', required the council to provide accommodation itself when other accommodation was available to that 'child'.

HOUSING AND COMMUNITY CARE

■ R (M) v Hammersmith and Fulham LBC and others

[2010] EWHC 562 (Admin), 3 March 2010

The claimant sought accommodation from the council on being discharged back into the community after a period of detention under Mental Health Act 1983 s3. A judicial review claim became necessary because the local authorities for the areas in which the claimant had lived previously could not agree which was responsible for the costs of accommodating him now. The claim was linked with another case raising the same problem between Hammersmith and another local authority.

In the course of deciding the claims (by application of principles of 'residence'), Mitting J rejected the assertion of one council that there was a legitimate expectation that other councils would comply with an agreement entitled *Services for mentally ill and mentally handicapped people: responsibility for costs of accommodation and day care services*, which was made in 1988 between the Association of Metropolitan Authorities and the Association of County Councils about how such disputes between local authorities would be resolved.

1 Available at: www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf.
2 Available at: www.justice.gov.uk/civil/procrules_fin/index.htm.
3 Available at: www.opsi.gov.uk/si/si2010/uksi_20100671_en_1.
4 Available at: www.opsi.gov.uk/si/si2010/uksi_20100662_en_1.
5 Available at: www.opsi.gov.uk/si/si2010/uksi_20100663_en_1.
6 Available at: www.opsi.gov.uk/si/si2010/uksi_20100660_en_1.
7 Available at: www.opsi.gov.uk/si/si2010/uksi_20100844_en_1.
8 Available at: www.opsi.gov.uk/si/si2010/uksi_20100862_en_1.
9 Available at: www.opsi.gov.uk/si/si2010/uksi_20100866_en_1.
10 Available at: www.opsi.gov.uk/si/si2010/uksi_20100908_en_1.
11 Available at: www.tenantservicesauthority.org/upload/pdf/Rent_arrears_management_practices.pdf.
12 Available at: www.communities.gov.uk/documents/statistics/pdf/97814094.pdf.
13 Available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_114250.
14 Available at: www.fsa.gov.uk/pages/Library/Other_publications/statistics/index.shtml.
15 Available at: www.opsi.gov.uk/si/si2010/uksi_20100796_en_1.
16 See: www.communities.gov.uk/news/housing/1506373.
17 Available at: www.opsi.gov.uk/si/si2010/uksi_20100825_en_1.
18 Zia Nabi, barrister, London and Stuart Hearne, Cambridge House Law Centre®, London.
19 David Watkinson, barrister, London and David Thomas, solicitor, London.
20 Ben McCormack, barrister, Manchester and Nina Patel, solicitor, Jackson and Canter, Liverpool.
21 Martin Hodgson, barrister, London.
22 Nicholas Nicol, barrister, London and Samitra Balu, Tyndallwoods solicitors, Birmingham.

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 18–22 for transcripts or notes of judgments.

Social housing: the new regulatory framework

On 1 April 2010, the Tenant Services Authority (TSA) assumed its new regulatory powers in respect of social housing in England under the Housing and Regeneration Act (H&RA) 2008. In this article, Robert Latham considers the impact of these changes.

Introduction

Professor Martin Cave's *Every tenant matters: a review of social housing regulation* was published in June 2007.[1] The remit for his independent review was to establish a clear set of objectives for the regulation of social housing in England. The Housing Corporation (HC) had been established some 40 years earlier by the Housing Act (HA) 1964. The concept of the 'registered social landlord' (RSL) was introduced by the HA 1996.

Martin Cave identified three principles for the future regulation of social housing:

- to ensure continued provision of high quality social housing;
- to empower and protect tenants; and
- to expand the availability of choice of provider at all levels in the provision of social housing.

He concluded that the objective of expanding the supply of social housing is best promoted by the diversity of organisations engaged in ownership and management. His proposed regulatory regime allowed such alternative providers to compete on level terms. The choice afforded to tenants should extend to choice of tenure. He noted that the current failure adequately to separate policy and regulation, leading to the unacknowledged implementation of policy by regulation.

The Housing and Regeneration Act

In July 2008, the H&RA was enacted to give effect to the Cave recommendations. Part 1 established the Homes and Communities Agency (HCA). Since December 2008, its role has been to deliver more social and affordable housing and to promote regeneration.

Part 2 relates to the regulation of social housing. On 1 December 2008, the TSA replaced the HC. For its first 16 months, the TSA regulated RSLs in England using the existing statutory framework provided by HA 1996 Part 1. The HC had set standards through *The regulatory code and guidance*, 58 circulars and 12 good practice notes. The TSA has now withdrawn all of these, except for four HC circulars relating to rents. Since 1 April 2010, the RSL system has been restricted to Wales.

The TSA now regulates some 1,800 providers of social housing in England under its new powers. This includes not only those bodies that were RSLs but also those local housing authorities (LHAs) which continue to provide social housing. Only 180 out of 326 English LHAs retain a stock of social housing.

On 1 April, the following homes fell within the remit of the TSA:[2]

Provider	Homes managed (approximate)
Former RSLs	1,900,000
LHAs (retained stock)	1,300,000
Arms length management organisations	800,000

H&RA s193 permits the TSA to set standards for registered providers (RPs) about the nature, extent and quality of accommodation, facilities or services provided by them in connection with social housing. In setting a standard, the TSA shall have regard to the desirability of RPs being free to choose how to provide services and conduct business (s194(3)). The TSA may also issue a code of practice amplifying any standard it has set (s195).

The secretary of state may direct the TSA to set a standard under s193 (s197). On 10 November 2009, he issued such a direction on quality of accommodation, rent, and tenant empowerment.[3] This requires the TSA to retain four HC circulars relating to the rent-fixing regime (see below).

On 16 March 2010, the TSA issued *The regulatory framework for social housing in England from April 2010* (the *Regulatory framework*) together with four annexes to the framework document.[4] In the foreword to the *Regulatory framework*, the TSA promises to free RPs from 'red tape', enabling them to 'innovate in the best interests of their tenants'. It has set six regulatory standards. It does not intend to issue any codes of practice.

The new language

- 'Cross-domain regulation': the common regulatory framework which now applies to social housing provided both by former RSLs and homes managed by LHAs. This concept is derived from *The Cole report: delivering cross-domain regulation for social housing* (August 2008).[5]
- 'Social housing': defined to include both low-cost rental and low-cost home ownership accommodation (H&RA ss68–70).
- 'Registered providers' (RPs): bodies registered by the TSA (H&RA s80(2)).
- 'Private registered providers' (PRPs): registered bodies which are not LHAs (ie, former RSLs) (H&RA s80(3), added by the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 SI No 844 (see below)). There is no distinct phrase to encompass the 180 LHAs which are now registered.
- 'Co-regulation': the TSA's new approach to regulation whereby its standards are focused on outcomes requiring robust self-regulation from the boards and councillors that govern the delivery of social housing, incorporating effective tenant involvement (*Regulatory framework* page 9).
- 'Tenant': defined as 'a resident in social housing', a term that 'does not include leaseholders'. It is unclear whether this includes children (*Regulatory framework*, page 8).
- 'Products': the new consumer-orientated language describing the types of housing provided by RPs. Some 'products' fall outside the statutory definition of social housing. Thus the tenancy standard relating to allocations, rents and tenure will not apply to 'intermediate rent products'. Neither will this standard apply to 'low-cost home ownership' products (*Regulatory framework*, Table 1 at page 35).
- 'Local offers': to be agreed after consultation between RPs and their tenants reflecting local priorities around home, neighbourhood, community and involvement and other standards. Where agreement cannot be reached, the TSA encourages RPs and their tenants to seek independent mediation (*Regulatory framework*, page 13 and Figure 2 at page 16). However, as a small number of PRPs grow ever larger and cover wider geographical areas, this concept of local standards has a somewhat hollow ring to it.

Preparing for change

A regulatory regime to empower tenants should be both certain and accessible. There

has been 21 months to prepare for this.

H&RA s81 provides that there shall be a body corporate to be known as the Office for Tenants and Social Landlords. There is not, has not been, and will not be such a body. The Regulator for Social Housing is, rather the TSA.

H&RA s80, as enacted in July 2008, introduced the concept of the RP that was to extend to those bodies that had been RSLs on 31 March 2010 and any additional bodies that chose to register. Profit-making bodies are now eligible to register (see H&RA s115). There is little evidence of new bodies wanting to do so.[6]

On 17 March 2010, parliament approved the Registration of Local Authorities Order. This brings LHAs within the TSA's regulatory regime. Article 1 and Sch 1 para 5 amend s80 providing for the current definition of RP and PRP.

Questions had been asked about how LHAs will be able to discharge their statutory duties under HA 1996 Parts 6 and 7 since parliament omitted, when enacting the H&RA, to amend HA 1996 ss170 and 213 (co-operation between RSLs and LHAs). On 17 March 2010, parliament made the Housing and Regeneration Act 2008 (Consequential Provisions) Order (the Consequential Provisions Order) 2010 SI No 866.[7] Articles 102 and 103 make the necessary amendments imposing the duty to co-operate on PRPs. One hundred and nineteen further amendments were made to a raft of primary legislation which could, and should, have been included in the H&RA.

On 16 March 2010, the TSA promised that it will ensure that over eight million tenants of LHAs, housing associations and co-operatives will 'get similar levels of protection and services regardless of who their landlord happens to be' in a press release which accompanied the publication of the *Regulatory framework*.[8]

A missed opportunity

Parliament has signally failed to enact the primary legislation necessary to achieve this level playing field for applicants seeking access to, and for tenants occupying, social housing. First, it should have provided a common statutory framework within which LHAs and PRPs allocate accommodation. This should provide for common housing registers and allocation schemes within any housing district. Instead, the 326 LHAs in England must adopt an allocation scheme in line with HA 1996 Part 6, having regard to the statutory guidance issued by Communities and Local Government (CLG). All RPs, including 180 of the 326 English LHAs, must also have regard to the allocation provisions which form part of the 'tenancy standard' (see below).

Second, tenants of social landlords should occupy their homes under a common statutory framework. A blueprint for this is provided in the Rented Homes Bill which the Law Commission published in May 2006. While the tenants of the 180 RPs which are LHAs occupy under secure tenancies within HA 1985 Part 4, tenants of PRPs occupy under assured tenancies within HA 1988 Part 1, the regime tailored for private sector tenants. These statutory codes make different provision for:

- security of tenure (it being open to PRPs to grant assured shorthold tenancies and use HA 1988 Sch 2 Ground 8);
- rights of succession;
- rights to assign; and
- the right to buy.

An unsuccessful attempt was made to introduce an amendment to the H&RA which would have prevented PRPs from using Ground 8. In March, the TSA published *Rent arrears management practices in the housing association sector*.[9] This report demonstrates the use of Ground 8 across the sector with a disproportionate use in London where half of the RSLs make some use of it.

The TSA takes the view that security of tenure is a matter for the government. The drafting of the tenancy standard is aimed at ensuring that this is consistent with government policy and that no changes are introduced as a result of the regulatory standard on the issue (see footnote 22 in the *Regulatory framework*). Thus, while the HC thought it appropriate to provide guidance about how RSLs might use assured shorthold tenancies as 'starter tenancies' to mirror introductory tenancies granted by LHAs, the TSA considers this to be outside its remit.

Third, primary legislation should provide expressly that PRPs are public authorities for the purposes of judicial review, the Human Rights Act 1998 and the equality duties. The Court of Appeal decision in *R (Weaver) v London & Quadrant Housing Trust and Equality and Human Rights Commission (intervening)* [2009] EWCA Civ 587, 18 June 2009; [2010] 1 WLR 363 is currently binding authority. However, no one believes that it is the final word on this complex issue. The *Regulatory framework* is framed within the current law, but does not address the implications of this decision.

Fourth, certain standards do not apply to LHAs, namely, those relating to rents, governance and financial viability. These remain within the remit of CLG for the time being.

The background to the regulatory guidance on rent is the Department of the Environment, Transport and the Regions' (DETR) housing policy statement, *Quality and choice: a decent home for all. The way forward for housing* (December 2000). This set out the government's objective that rent setting in the social housing sector be brought on to a common system based on relative property values and local earnings levels. This was to apply to both LHAs and RSLs. In March 2001, the DETR issued *Guide to social rent reforms*.

The HC first issued guidance on rent in HC Circular 27/01, which was amplified in three subsequent circulars. These required RSLs to begin restructuring their rents and to comply with the requirements set out in HC guidance: *Rent influencing regime. Implementing the rent restructuring framework* (October 2001). The restructuring programme contemplated a ten-year implementation period starting from 1 April 2002. By 31 March 2012, rents on individual properties should normally be within a band between five per cent higher and five per cent lower than the target rent. RSLs should use the Retail Prices Index (RPI) inflation figure for the September before the year of assessment. Circulars were issued each year to confirm the guideline limit. The TSA issued the most recent guidance in November 2009.[10] This caused some disquiet to RSLs as the RPI for September 2009 was –1.4 per cent leading to a change in the rent cap level of –0.4 per cent.

It is to be noted that this regime only applies to low-cost rental accommodation of PRPs. It does not extend to accommodation at intermediate rents or which is specifically exempted. It thus excludes vast tracts of accommodation provided under key worker schemes or as temporary accommodation for homeless families. CLG is jealously guarding its control over rents fixed by LHAs because of the impact on the housing benefit budget.

The new standards

In the *Regulatory framework*, the TSA has set six standards for RPs, three of which incorporate the CLG's Direction (see above). The six standards are as follows:

- Tenant involvement and empowerment, including customer service, choice and complaints, and understanding and responding to diverse needs. A required outcome is that RPs should have an approach to complaints that is clear, simple and accessible and that ensures that complaints are resolved promptly, politely and fairly. RPs are also required to 'demonstrate that they understand the different needs of their tenants, including in relation to the seven equality strands and tenants with additional support needs' (page 20).
- Home, including repairs and maintenance and quality of accommodation. A required

outcome is that RPs should ensure that their homes meet the government's Decent Homes Standard by 31 December 2010 and continue to maintain their homes to at least this standard after that date.

- Tenancy, including allocations, rents and tenure.
- Neighbourhood and community, including neighbourhood management, local area co-operation and anti-social behaviour.
- Value for money, which gives tenants new rights to scrutinise their landlord's performance as part of promoting self-improvement and accountability.
- Governance and financial viability, where the onus is placed on those which govern providers to ensure that there is effective governance and performance.

For each standard, the TSA specifies 'required outcomes' and 'specific expectations'. By 1 October 2010, and annually thereafter, RPs are required to publish a report for their tenants, to be shared with the TSA, on how they are meeting these standards. It must specify how they measure their compliance against the standards. It should note any gaps and associated improvements. It should set out how the RP has provided opportunities for tenants to scrutinise performance and how it has made use of external validation, peer review and benchmarking.

The TSA gives examples of how these standards may work in respect of, for example, tenant involvement and empowerment.[11] The TSA performance indicators suggested that repairs and some tenant satisfaction ratings were poor at Birmingham-based Family Housing Association (FHA). A notice inspection arranged by the TSA confirmed this. FHA acted to tackle the issues raised by inspection and it put its tenants at the centre of that process. Its tenant panel was involved in developing and monitoring an action plan which acted as a focus for more meaningful engagement with tenants. Seventy-six per cent of FHA tenants now say their views are taken into account, against 50 per cent in 2008–09. The satisfaction rates with the repairs service have gone up by ten per cent in a year.

Housing lawyers will focus on the 'tenancy standard' in respect of tenure. The required outcomes are:

[RPs] shall offer and issue the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community. They shall meet all applicable statutory and legal requirements in relation to the form and use of tenancy agreements.

[RPs] shall set out in an annual report for tenants how they are meeting these obligations and how they intend to meet them in the future. The provider shall then meet the commitments it has made to its tenants (*Regulatory framework*, page 25).

The specific expectation on tenure is:

[RPs] shall publish clear and accessible policies which outline their approach to tenancy management. They shall develop and provide services that will support tenants to maintain their tenancy and prevent unnecessary evictions. The approach should set out how [RPs] will make sure that the home continues to be occupied by the tenant they let the home to (*Regulatory framework*, page 28).

The *Regulatory framework* provides little for the housing lawyer to latch on to in arguing that any eviction by a PRP is disproportionate. The TSA approach is to focus on outcomes which concern tenants, rather than detailed processes. The outcome is the 'local offer' agreed between the RP and its tenants. The danger is that tenants who engage with the process are those who expect their neighbours to comply with all their contractual obligations and have little sympathy for the more vulnerable and disadvantaged tenants who find it difficult to do so. The tenant involvement and empowerment standard requires RPs to ensure that the voices of all tenants are heard.

The future

On 10 March 2010, when the Delegated Legislation Committee debated the Consequential Provisions Order, the Conservative spokesman, Stewart Jackson, confirmed that a future Conservative government would abolish the TSA, believing it to be an expensive and unnecessary quango.[12] On 27 January 2010, the TSA announced plans to slash £3.5m from its annual budget of £38.5m.[13]

There is much to commend the new regulatory approach. It heralds an end to paternalism. It aims to empower tenants and increase their rights in their homes. However, many RPs seem unprepared for the new regime. Research carried out by the Chartered Institute of Housing in April found that 45 per cent of respondents thought that it would have minimal impact and were unsure what the changes would mean.[14]

The regret is that parliament has failed to provide a legislative framework whereby all tenants of social landlords have similar rights with regard to security of tenure and sub-market rents. The H&RA restricts 'social housing' to low-cost rental, thereby excluding large swathes of accommodation provided by both LHAs and PRPs.

Thirteen years ago, Lord Woolf called for housing law to be consolidated and simplified in *Access to justice* (July 1996). This call has now been echoed by Lord Justice Jackson in his *Review of civil litigation costs: final report* (January 2010).[15] This is the challenge for the future.

1 Available at: www.communities.gov.uk/documents/housing/pdf/320365.pdf.
2 The statistics are taken from *Every tenant matters*, see note 1.
3 Available at: www.communities.gov.uk/documents/housing/pdf/1385784.pdf.
4 Available at: www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf and www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_for_social_housing_-_annexes.pdf respectively.
5 Available at: www.communities.gov.uk/documents/housing/pdf/thecolereport.
6 See 'Party poopers', Isabel Hardman, 1 April 2010, available at: www.insidehousing.co.uk/story.aspx?storycode=6509253.
7 Available at: www.opsi.gov.uk/si/si2010/pdf/uksi_20100866_en.pdf.
8 See *Six standards for landlords set to benefit eight million tenants*, 16 March 2010, available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20179/changeNav/14567.
9 Available at: www.tenantservicesauthority.org/upload/pdf/Rent_arrears_management_practices.pdf.
10 See *Rents, rent differentials and service charges for housing associations 2010–11*, available at: www.tenantservicesauthority.org/upload/pdf/Rents_differentials_and_s_charges.pdf.
11 See note 8 above.
12 See: www.publications.parliament.uk/pa/cm200910/cmgeneral/deleg8/100310/100310s01.htm.
13 See *Social housing regulator outlines plans for cutting £3.5 million in running costs*, available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20025/changeNav/14567.
14 *Inside Housing*, 15 February 2010 available at: www.cih.org/news/view.pphp?id=1178.
15 Available at: www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf.

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Dealing with infestations: legal remedies – Part 2

In this article, Deirdre Forster provides information about the dangers of some common pests infesting British housing. The author also discusses legal solutions to the problem of infestation, including the possibility of moving out of the premises and the tenant's right to damages. Part 1 of this article, published in April 2010 *Legal Action* 28, discussed the various legal remedies that may be available to a tenant living in infested premises.

TYPES OF INFESTATION

■ Cockroaches: there are two breeds of cockroach active in the UK, the German cockroach and its smaller but equally unpleasant cousin the Oriental cockroach. They are up to 25mm in size and can cause allergic reactions in humans. They can contaminate food causing gastroenteritis and even typhoid. They are an endemic problem in tower blocks.

■ Pharaoh ants: these insects are small (2mm long) and flourish in heated apartment blocks where they travel between dwellings via the service ducts. They are yellow or reddish brown in colour and carry bacteria into food.

■ Bed bugs: these insects live in clusters and are about 5mm in size. They are reddish brown in colour, turning purple after a blood meal. They live in mattress seams, the crevices of bed frames and even behind loose wallpaper. They are nocturnal and locate their human prey by detecting carbon dioxide. They are not known to spread disease but their bites can cause serious allergic reactions.

■ Fleas: the human flea is now rare in the UK but cat and dog fleas can and do bite humans and can cause severe irritation. Fleas can survive for months between meals and thrive in fitted carpets.

■ Mice: have a body length of approximately 50mm with a tail which is much longer than the body. They can fit through a hole the size of a pen and reproduce at an alarming rate. They contaminate food with their urine and faeces. They can cause salmonella and gastroenteritis. Some languages do not have a word for mouse because it has been traditionally assumed in many countries that mice are small rats.

■ Rats: are much larger and heavier than mice with a large blunt head and a shorter but more muscular tail. They are good climbers and can cause damage to housing through gnawing and burrowing. They can spread salmonella and Weil's disease.

■ Squirrels: the grey squirrel can gain access to a roof space through a hole no bigger than its head. They are extremely destructive and can cause fires by gnawing through electric cabling.

■ Pigeons: feral pigeons like to infest loft spaces which they often enter through disrepair such as slipped roof slates. They carry more diseases than rats and can cause respiratory illness in humans. Their feathers and droppings can block drainage pipes and contaminate water tanks.

ESCAPING FROM THE TENANCY

Secure and assured tenancies

The tenant of infested premises will often want to move out as soon as possible. If the tenant is living in social housing, the tenancy is likely to be periodic, ie, running from week to week or from month to month. If so, there will be no problem in giving notice, but by doing so the tenant could be giving up a home with long-term security. In parts of England and Wales where there is a shortage of social housing, the better approach will be to try to force the landlord to eradicate the infestation using one of the legal remedies discussed in Part 1 of this article.

If the infestation is severe and the tenant is determined to leave, it may be possible to argue that the tenant is homeless as set out in Housing Act (HA) 1996 s175(3) on the basis that there is no accommodation that it is reasonable for the tenant to continue to occupy. This will only assist a person who is in priority need for accommodation as defined by HA 1996 s189. It is a dangerous strategy because the decision about whether or not the accommodation is unsuitable to occupy will be made by the local authority; it is only possible to appeal against an adverse decision on a point of law.

Where the infestation is curable in a relatively short period, the local authority may well be entitled to decide that the tenant is not homeless. See by analogy *R v Brent LBC ex p Awua* [1995] UKHL 23, 6 July; [1996] 1 AC 55; 27 HLR 453, HL, in which it was held that whether or not it is reasonable to continue to occupy unsatisfactory accommodation may depend on the time that a person is expected to stay in it.[1]

Assured shorthold tenancies

If the property is privately rented accommodation, it is likely that the tenant will want to leave and find alternative accommodation. This can present real problems where the tenant has signed a fixed-term tenancy, because the landlord may be unwilling to accept surrender. Where a tenant moves out before the end of the tenancy, without the landlord's consent, the starting point is that rent will still be payable for the remainder of the term. There is no duty on the landlord to mitigate the loss by finding a replacement tenant. This was confirmed in the case of *Reichman and Dunn v Beveridge and Gauntlett* [2006] EWCA Civ 1659, 13 December 2006; [2007] L&TR 18.[2]

Advisers should therefore consider whether or not the contractual remedies of misrepresentation and fundamental breach might enable the tenant to give up the tenancy against the landlord's wishes.

Misrepresentation

This remedy arises where the tenant was induced to enter the contract by representations made by the landlord or an agent. The representation must be a statement made before formation of the contract, for example, during negotiations.

The statement must be one of fact. The case of *Bisset v Wilkinson and another* [1927] AC 177 stated that an opinion or a mere commendation will not be enough to amount to a misrepresentation. Statements qualified by 'I think' or 'I believe' will not normally result in a successful action for misrepresentation. An opinion may, however, be regarded as a statement of fact where one party possesses greater skill or knowledge than the other (see *Smith v Land House Property* (1884) 28 Ch D 7).

■ Example 1: *Sally is being shown around a flat by a letting agent who says: 'This is a lovely flat, I am sure you will be happy here.' Sally moves in to find that the flat is badly infested with mice. She cannot claim misrepresentation because the agent's words*

are a commendation rather than a statement of fact.

■ Example 2: *This time the agent has been managing the property for years. Sally notices a bait box in the flat and asks about it. The agent replies that he thinks that the box has been placed in the flat as a precaution and continues by saying 'I do not think the property is infested'. This might be a representation since it is given by a person with detailed knowledge of the property and its letting history.*

Similarly, a statement of future intentions will only amount to misrepresentation if the tenant can prove that at the time the landlord made the statement, there was no intention to carry out the promise. This will be extremely hard to do in the absence of written documents showing a contrary intention: text and e-mail messages can be invaluable here.

■ Example 3: *Robert notices mouse droppings in the kitchen when viewing a flat. He raises the matter with the landlord who promises to call in a pest management company before Robert moves in. After Robert moves in, he asks the landlord about the pest control company and is told that the landlord has changed his mind. Robert has no way of proving that the landlord did not intend to keep his promise at the time that he made it.*

■ Example 4: *This time Robert receives an e-mail from his landlord that is attached to an earlier string in which the landlord has told his agent that the only way to persuade Robert to take the flat is to tell him that he is going to send in a pest control company but that the landlord has no intention of doing so and the agent must not agree to do this. Robert can now prove that the landlord has been fraudulent and will be able to rescind the tenancy agreement.*

There is a long line of case-law going back to the eighteenth century stating that silence does not normally amount to misrepresentation; there is no rule that the landlord or agent must disclose facts to a prospective tenant. This is the principle of caveat emptor (let the buyer beware) or, in housing cases, caveat lessee (let the tenant beware). However, this will not protect a landlord who allows half truths to be told about the property; if the landlord makes a representation at all, s/he must ensure that s/he is not withholding part of the story. So, a landlord who says that the property is not infested by mice, when s/he knows that in fact it is infested by rats, will be liable for misrepresentation.

The tenant must have been induced to enter the contract by the misrepresentation. In other words, had the tenant known about the infestation this would have deterred him/her from taking the tenancy.

On discovering the misrepresentation, the tenant can elect to affirm or rescind the tenancy contract. Affirmation is any act which suggests an intention to proceed with the contract. Rescission means that the parties are restored back to the positions that they were in before the contract was made. So, in a housing case, the tenant who rescinds the tenancy will leave the property as it was found and all rent and other payments made to the landlord should be returned to the tenant.

The payment of further rent after the infestation has been discovered could affirm the tenancy, but each case will depend on its own facts. If a tenant does not rescind the tenancy, it will continue but the tenant will still have the right to claim damages from the landlord.

The tenant has to decide reasonably quickly whether to stay or go and cannot reconsider the decision once it has been communicated to the landlord: see *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 35. Delay can be conclusive evidence of affirmation. In infestation cases, the tenant must tell the landlord of a decision to rescind within a reasonable time, unless the landlord cannot be found, in which case s/he should still do something that makes it clear that the contract is over.

The right to rescind will be lost if it will affect detrimentally an innocent third party. For example, if by the time the tenant has discovered the infestation the landlord has sold the premises, the tenant's rights would lie in a claim for damages against the original landlord.

Section 2(2) of the Misrepresentation Act 1967 gives the court a right to award damages instead of rescission. In a housing case it is hoped that a court exercising this right would award damages equivalent to the rent for which the tenant would otherwise be liable.

■ Example 5: *Robert tells the landlord that he has a phobia about insects and that he needs an assurance that the flat being shown does not have a problem with infestations. The landlord assures him that this is the case. Robert signs a one-year tenancy and then learns from his neighbours that the whole building suffers from regular infestations of cockroaches and pharaoh ants. Robert moves out and sues the landlord for his deposit. The landlord counterclaims for a year's rent. Robert asks the court either to agree that the contract has been rescinded or to extinguish the landlord's rent claim by awarding Robert damages of 100 per cent of the rent for the year. Robert can then set off his claim for damages against the landlord's claim for rent.*

Fundamental breach

A breach of contract so fundamental that it goes to the root of the agreement will allow the tenant to repudiate (terminate performance of) the contract, in addition to entitling that tenant to sue for damages: see *Davidson v Gwynne* (1810) 12 East 381 at 389.

In the case of *Smith v Marrable* [1843] 11 M&W 5, Sir Thomas and Lady Marrable rented a furnished house in a fashionable part of Brighton for a five-week period, only to find out on moving in that 'all but one room was greatly infested with bed bugs'.[3] The landlord, Mr Smith, made efforts to eradicate the infestation, but after a few days Lady Marrable wrote to Mrs Smith telling her that they would move out as soon as they had found alternative accommodation. One week's rent was paid and the landlord sued for the remaining five weeks of rent. The court held that a large infestation by bed bugs rendered a property unfit, and entitled the tenant to repudiate the contract.

The right to repudiate is lost if the tenant waives the breach by treating the contract as if it is still in force: continuing to pay rent after discovering the infestation could be considered to be such a waiver. Other actions might also lose the tenant the right to leave the premises if it can be said that those actions unequivocally recognise that the tenancy is continuing, for example, seeking an injunction against the breach of covenant.

Caution

Misrepresentation and fundamental breach are complex concepts and this article can only outline the principles. Advisers must be very careful before advising a tenant who has signed a fixed-term agreement that it is safe to repudiate or rescind a tenancy. If a judge does not believe an allegation of misrepresentation or finds that the infestation was not serious enough to render the premises unfit, the tenant will be found liable for the remaining rent. These contractual principles can, however, be invaluable negotiating tools and are especially useful where the tenant has already vacated the premises without the benefit of advice and is being sued for rent.

DAMAGES

Arguably if premises are unfit as a result of a severe infestation, damages should be the equivalent of the full rent. However, judges are likely to find that there is always some residual rental value, especially where the tenant has not vacated the premises.

■ In *Clark v Wandsworth LBC* (1994) 21 April, Wandsworth County Court; June 1994 *Legal*

Action 15, an infestation was described as being 'worse than damp'. General damages of £3,500 were awarded for 18 months of cockroach infestation.[4] The court refused permission for the landlord to appeal to the Court of Appeal.

■ In *London & Quadrant Housing Trust v Riemy* (2008) 31 January, Mayors and City County Court; December 2008 *Legal Action* 31, damages of £300 per year were awarded for a minor mouse infestation caused by holes in the floorboards. The tenant had complained to his landlords and been told that he lived in an old house and mice were to be expected. Special damages were also awarded in relation to a carpet and laminate flooring bought in attempts to prevent the mice from gaining access through the holes in the boards.

■ In *Dadd v Christian Action (Enfield) HA* (1994) 28 September, Central London County Court; December 1994 *Legal Action* 18, the tenant was awarded £2,090 per year for a rat infestation with some other disrepair.

■ In *Abbas v Iqbal* (2009) 4 June, Bow County Court; August 2009 *Legal Action* 36, HHJ Redgrave awarded £2,000 per year for cockroach and rodent infestation. The contractual rent was £60 per week.

■ In *McGuigan v Southwark LBC* (1995) 15 September, Central London County Court; March 1996 *Legal Action* 14, the tenant suffered a severe ant infestation, especially in the kitchen.[5] There were ants in food packets, clothes, sheets and towels. The landlord eradicated the ants after about one year. Cockroaches also began to appear and two years later an extremely serious infestation existed. There were cockroaches in the fridge, the freezer and the oven; no food could be kept in the house; cockroaches were nesting in the furniture, crawling out of the television and the telephone; and bedding had to be checked every day. Mrs McGuigan used no heating for a period to try to deter the infestation, and had to abandon her possessions. Eventually she became profoundly suicidal. General damages of between £1,000 and £3,500 per year for the period were awarded, together with special damages, amounting to a total award of £28,650.

CONCLUSION

Courts are sympathetic to the plight of tenants living in infested premises and where a severe infestation can be linked to a breach of the landlord's legal obligations, the tenant may well be able to end the tenancy and, if not, can expect substantial damages.

1 See *Housing Law Casebook*, 4th edition, Nic Madge and Claire Sephton, LAG, 2008, T8.1.
2 See note 1, N3.17.
3 See note 1, P11.53.
4 See note 1, P7.19.
5 See note 1, P11.46.

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Community care law update – Part 3

In the final part of their three-part update, Karen Ashton and Simon Garlick consider the latest statutory guidance on safeguarding adults who are at risk, the Vetting and Barring Scheme (VBS), guidance on the deprivation of liberty provisions, the new regulatory system for social and health care and the Law Commission's consultation paper on law reform of adult social care provisions. The authors also examine the latest relevant case-law. For Parts 1 and 2 of this article, see March 2010 and April 2010 *Legal Action* 26 and 19 respectively.

POLICY AND LEGISLATION

Safeguarding adults at risk

Reviews of statutory guidance

On 17 July 2009, the Department of Health (DoH) published *Safeguarding adults: report on the consultation on the review of 'No secrets'*. On 19 January 2010, in a Written Ministerial Statement, the government gave its response to the report and outlined its plans:[1] to establish an inter-departmental ministerial group to determine policy, provide a strategic lead role and ensure a public and parliamentary profile for the issue; to introduce new legislation to 'strengthen the local governance of safeguarding by putting Safeguarding Adults Boards [which are not currently universal or a statutory requirement] on a statutory footing' (this is not, of course, the same as having a statutory vulnerable adult protection procedure); and to, by autumn 2010, produce new guidance and support materials.

The response also noted that the Association of Chief Police Officers has set up a working group to improve the response to financial crime against vulnerable adults.

In February 2010, the *Review of In safe hands. A review of the Welsh Assembly Government's guidance on the protection of vulnerable adults in Wales* was published.[2]

In safe hands is the Welsh-equivalent statutory guidance to *No secrets*. The review also recommended the creation of a new policy advisory group, the National Safeguarding Adults Group, local Safeguarding Adults Boards and new guidance. In addition, it recommends legislation so that safeguarding adults has 'the same legislative status and priority as protecting children' and further consultation on sanctions if bodies fail to follow guidance/ legislation and this failure leads to serious harm.

Vetting and Barring Scheme

On 12 October 2009, the VBS, which was established in England and Wales by the Safeguarding Vulnerable Groups Act (SVGA) 2006, entered its first phase of introduction. The basic idea is that anyone who wants to work with, or volunteers regularly to work with, children or vulnerable adults will be required by law to become registered with the Independent Safeguarding Authority (ISA), and employers will be legally required to check that new employees are registered.

There are circumstances in which an individual may be barred automatically from working with children and vulnerable adults. For certain specified offences, the ISA is

required to bar an individual without further assessment. Anyone convicted of specified, less serious offences will be allowed to make representations about why the bar should be removed. In these cases, the ISA will be required to place the individual on the relevant list, but will request representations from him/her. A full list of the relevant offences is contained in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 SI No 37.

The ISA has published detailed guidance on what is a fairly complex scheme, *The Vetting and Barring Scheme guidance* (March 2010).[3] The scheme is to be introduced in phases. From 12 October 2009, the initial changes introduced were as follows:

- It is now a criminal offence for individuals barred by the ISA to work or apply to work with children or vulnerable adults and for employers knowingly to employ a barred individual in the prescribed activities.
- The three former barred lists, ie:
  - the Protection of Children Act list;
  - the Protection of Vulnerable Adults list; and
  - List 99 are now in the process of being phased out.
- The three former barred lists are to be replaced by two new ISA-barred lists, ie:
  - the ISA Adults' Barred List; and
  - the ISA Children's Barred List.
  - Currently, the ISA is reviewing the three former lists and deciding whether or not individuals on those lists should be included on its new lists.
- The new duties on referrals came into operation. This means that certain persons have a duty to refer information about individuals to the ISA in specified circumstances where they consider such persons to have caused harm or to pose a risk of harm. On 19 January 2010, the ISA published guidance on referrals and a standard referral form, both of which can be found on the ISA's website.[4]

ISA registration for the VBS does not start for new workers or those moving jobs until July 2010. ISA registration does not become mandatory for these workers until November 2010. All other staff will be phased into the scheme from 2011.

Deprivation of liberty provisions

The DoH has developed guidance on significant case-law developments about the Mental Capacity Act (MCA) 2005 deprivation of liberty safeguards (DoLs).[5] On 2 February 2010, the department published its first briefing, which included recent case-law on the relationship between the MCA DoLs and the Mental Health Act 1983, in particular, the complex Court of Protection judgment in *GJ v (1) Foundation Trust (2) PCT (3) Secretary of State for Health* [2009] EWHC 2972 (Fam), 20 November 2009.

Regulation of health and social care providers

The new regulation system for health and social care is underway in England. Health and Social Care Act (HSCA) 2008 s10 makes it a criminal offence for any person to carry out regulated activities without being registered with the Care Quality Commission. The definition of prescribed activities is left to regulation (see HSCA s8). The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 SI No 781 (the Regulated Activities Regs) have introduced an initial definition of regulated activities for the purpose of the first phase of the introduction of the new system which required that, from 1 April 2010, NHS trusts must be registered with the commission. The activities which count as regulated activities are set out in Schedule 1 of the Regulated Activities Regs (with exceptions set out in Schedule 2); however, Regulated Activities Regs reg 3(3) provides that, until 1 October 2010, an activity will only be a regulated activity if provided by an NHS body. Regulated activities comprise the provision of all personal care and the provision of accommodation with nursing or personal care, including in the further education sector.

The Regulated Activities Regs also set out the requirements for quality and safety. In addition, Regulated Activities Regs reg 26 requires the registered person to have regard to guidance issued under HSCA s23 by the commission in relation to these requirements.

The Care Quality Commission (Registration) Regulations 2009 SI No 3112 set out the detail of the registration scheme. The commission has published guidance on compliance.[6] The current timetable for further implementation across all the sectors affected is as follows:[7]

- From April 2010, adult social care and independent health care providers apply for registration.
- From October 2010, adult social care and independent health care providers must be registered under the HSCA and the Care Standards Act 2000 will be repealed.
- Dental health practices and general practices will be required to be registered between April 2011 and April 2012, although exact dates are yet to be confirmed.

Law Commission consultation paper

The Law Commission has published the long-awaited consultation into the reform of the law governing adult social care (see 'Reforming adult social care: Law Commission consultation', March 2010 *Legal Action* 6).[8] The consultation closes on 1 July 2010 with a view to the Law Commission's report being published in summer 2011. Detailed commentary on the proposals will be published in a future issue of *Legal Action*.

CASE-LAW

Alternative remedies

In **R (F and others) v Wirral BC** [2009] EWHC 1626 (Admin), 9 July 2009, the claimants sought to establish that the local authority had failed to assess them, produce care plans and meet their needs. The allegations of failure to assess and to produce care plans were not pursued. The judge refused the applications on a number of grounds, including that these were not proper claims for adjudication on judicial review: 'While the Administrative Court is astute to correct any illegality of approach on a public authority's part, it is not the proper forum in which to probe into the adequacy of community care assessments' (para 75). Noting that the cases raised 'no true issue of law' (para 75), the judge continued: '... the courts have pointed out on many occasions that the remedy of judicial review will not be granted where there is an alternative remedy ... If there was real complaint about any individual assessment or care plan or any true deficiency in the provision of community care the complaints procedure was the forum to which it should have been brought' (paras 77 and 84 respectively).

In **R (S) v Hampshire CC** [2009] EWHC 2537 (Admin), 22 October 2009, the claimant's mother sought to establish that the local authority's core assessment of her ten-year-old son under the Children Act (CA) 1989, which had concluded that he did not require community care services in holiday periods (he had the benefit of a 38-week, residential school placement to meet his special educational needs), was discriminatory and irrational. The judge found no unlawfulness in the local authority's approach to the assessment. Apparently the claimant's mother had failed to take the opportunity either to comment informally on the assessment or to use the formal complaints procedure that she had used successfully on an earlier occasion. The judge was critical of the stance taken by the claimant's mother and advisers. He noted that the complaints procedure is a 'speedy, informal and cheap method of resolving disputes' (para 59). He added that if the claimant's mother wished to go 'straight to a dispute resolution process rather than canvass matters in correspondence, then the complaints procedure was the appropriate

route' (para 59).

Comment: Local authority legal departments have been quick to point to *R (F and others)* and *R (S)* in response to pre-action protocol letters. It is unfortunate that in both cases there were clear failures to comply with the pre-action protocol to Civil Procedure Rule Part 54 and, as the respective judges pointed out, inconsistency between the cases presented by the claimants during the hearings and those pleaded or indicated in the available pre-action correspondence.

R (F and others) and *R (S)* are another reminder to claimants' advisers that on judicial review the court will not adjudicate on the lawful exercise of the discretion of local authorities (see *R (FL (a child) by her litigation friend the Official Solicitor) v Lambeth LBC* [2010] EWHC 49 (Admin), 19 January 2010 below) and that judicial review is a remedy of last resort. Taken on their own, some of the statements in the judgments might be interpreted to limit further the ambit of judicial review. However, arguably, these two cases introduce no additional narrowing of the parameters of judicial review in the community care context and the remedy remains appropriate in cases of urgency and where there is a 'true issue of law', in particular, where an individual claimant's challenge is to the lawfulness of a local authority's policy or approach.

National Assistance Act 1948 s21: 'in need of care and attention'

In **R (Zarzour) v Hillingdon LBC** [2009] EWHC 1398 (Admin), 1 May 2009, the judge examined how the House of Lords' judgment in *R (M) v Slough BC* [2008] UKHL 52, 30 July 2008 should be applied to the claimant, a totally blind asylum-seeker who had been found by the local authority not to have a need for 'care and attention' for the purposes of National Assistance Act (NAA) 1948 s21. This conclusion was based on Hillingdon's assessment that its social services department could support the claimant under NAA s29 and Chronically Sick and Disabled Persons Act 1970 s2(1), in moving to new accommodation supplied by the National Asylum Support Service (NASS), for a limited, transitional period after which he would no longer require personal care. Hillingdon asserted therefore that he did not need '24-hour residential care or a full-time carer' (para 9). Granting judicial review, the judge rejected this narrow interpretation of 'looking after'.

On appeal, the Court of Appeal upheld the High Court's decision (see [2009] EWCA Civ 1529, 17 December 2009). It had been established since *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956; [2002] UKHL 38, 17 October 2002, that NASS support is intended to be residual. The question of whether or not a person was within NAA s21: ' ... has to be decided without regard to the putative availability of accommodation from NASS. A local authority can only consider the provision of services within section 29 and section 2 combined with NASS accommodation if they have first concluded that the asylum-seeker is outwith section 21(1)(a)' (para 18).

The Court of Appeal expressed the opinion that 'the extent to which the law has been modified by *M (R (M) v Slough BC* [2008] 1 WLR 1808) is ... very modest' (para 18).

Comment: This decision may be of assistance to advisers who, following the decision in *R (M)*, are faced with wholesale local authority reviews of NAA s21 support to, in particular, asylum-seekers and failed asylum-seekers. The Court of Appeal also approved the High Court's decision that a person's need for care and attention is to be assessed by reference to his/her current needs, not his/her likely future needs.

Service reorganisation

In **R (Watts) v Wolverhampton City Council** [2009] EWCA Civ 1168, 7 October 2009, the Court of Appeal (hearing an appeal against refusal of permission: first on the papers, and then on oral renewal) rejected the claimant's attempt to judicially review the local authority's decision to close (or implement the closure of) a care home in which she had lived for five years. It was said that a move might cause her (and other residents) harm and a greater risk of mortality. The Court of Appeal noted that the evidence of the consultant psychiatrist served on behalf of the claimant failed to disclose any reason why a properly managed move should do the claimant any appreciable harm. The court found clear evidence that the move was likely to be properly managed by the local authority, which had carried out a comprehensive impact assessment and had given the court, in the course of the proceedings, clear undertakings to assess and ameliorate risks to the residents.

In **R (B and others) v Worcestershire CC** [2009] EWHC 2915 (Admin), 3 April 2009, the claimants were successful in challenging the decision to close a day centre. The court found that the council's decision that the needs of three service users at the day centre in question could be met adequately at another day centre was based on a 'broad-brush approach', rather than any 'detailed analysis', in particular, in relation to whether or not there were sufficient staff at the new day centre to meet the needs of the individuals. Comparing this case with other similar cases in which challenges had failed on the ground that they were brought prematurely, ie, before assessments of the individuals affected by the proposed reorganisation had been carried out, the court distinguished this case. It found that '[t]he decision to close and the decision to move [the residents] ... were linked' (para 85).

Disability equality duties

Disability Discrimination Act (DDA) 1995 s49A requires public authorities to have 'due regard' to specified disability equality matters when exercising any of their functions. The duty has been used to challenge local authority decisions in the following cases.

In **R (Domb and others) v Hammersmith and Fulham LBC and Equality and Human Rights Commission (intervener)** [2009] EWCA Civ 941, 8 September 2009, the Court of Appeal considered a challenge to the local authority's decision to introduce charges for its domiciliary care services. The local authority, having decided to reduce council tax by three per cent, was faced with a choice of either raising eligibility criteria or introducing charges. As part of the local authority's impact assessment as required by the statutory equality duties, it consulted on the proposal to introduce charges.

The claimants complained that the local authority had failed to have due regard to its DDA s49A duties (as well as sex and race equality duties) and that the impact assessment, which had concluded that there would be positive benefits to maintaining eligibility criteria, was perverse as it was based on the false premise that the only two choices were either to raise eligibility criteria or introduce charges.

The Court of Appeal held that there was no evidence that the local authority had failed to consider its equality duties in substance as well as form; furthermore, it was too late to challenge the setting of the budget. Sedley LJ however encapsulated the court's unease in reaching the second decision: 'The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished ... there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court' (para 80).

Comment: Although in this case the Court of Appeal held that it was too late to challenge the budget set by the local authority, *R (Chavda and others) v Harrow LBC*

[2007] EWHC 3064 (Admin), 20 December 2007, a challenge under article 8 of the European Convention on Human Rights ('the convention') to Harrow raising its eligibility criteria, failed on the basis of prematurity as the challenged change in the local authority's eligibility criteria had not yet impacted on the claimants. It is likely that there will be an increasing number of challenges to local authorities' budgets and budget allocation as demand increases faster than budgets. Those advising claimants will need to think carefully about the timing of any challenge.

In **R (Boyejo and others) v Barnet LBC**; **R (Smith) v Portsmouth City Council** [2009] EWHC 3261 (Admin), 15 December 2009, the claimants challenged the local authorities' decisions to replace warden/ staffing of sheltered accommodation schemes with (less expensive) non-residential staff and other measures, on the basis that they had not had due regard to their DDA s49A equality duties. The court found that although residents who were likely to be affected by the changes had been consulted, Portsmouth's consultation was flawed and the impact assessments of both authorities were *Wednesbury* unreasonable. Acknowledging that the failure to make specific reference to s49A was not determinative in relation to whether or not the duty had been performed, the judge found that there had been a failure to bring the duty adequately to the attention of the decision-makers and it was not possible to demonstrate that due regard had been given to the prescribed matters.

Children Act 1989: the s17/s20 interface

In **R (G) v Southwark LBC** [2009] UKHL 26, 20 May 2009, the House of Lords again considered the relationship between the specific duty set out in CA 1989 s20 to provide accommodation to certain classes of children in need and the target duty contained in CA 1989 s17 to provide services to children in need, which includes a power (under s17(6)) to provide accommodation. The question was whether or not it was lawful for a social services authority, faced with a request for accommodation by a 16- or 17-year-old, to refer him/her to the housing authority for accommodation under the homelessness provisions under Housing Act 1996 Part VII. The Court of Appeal ([2008] EWCA Civ 877, 29 July 2008) had held by a majority that the local authority was entitled to conclude that G required only 'help with accommodation' under s17 and not accommodation under s20(1).

Baroness Hale expressed surprise that the issue had come before the court given the House of Lords' previous judgment in *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14, 27 February 2008, that 'the clear intention of the legislation is that these children need more than a roof over their heads and that local children's services authorities cannot avoid their responsibilities towards this challenging age group by passing them over to the local housing authorities' (para 5). Giving the leading judgment of a unanimous decision of the House of Lords, Baroness Hale said: 'Section 20 involves an evaluative judgment on some matters but not a discretion' (para 31). She approved the analysis of when the s20 duty is triggered set out in *R (A) v Croydon LBC* [2008] EWCA Civ 1445, 18 December 2008. Baroness Hale found that the claimant fell clearly within that group of children in need whom local authorities were obliged to accommodate under s20, a consequence of which was that, in due course, the local authority would owe G duties under the leaving care provisions.

In **R (FL (a child) by her litigation friend the Official Solicitor) v Lambeth LBC** [2010] EWHC 49 (Admin), 19 January 2010, the claimant aged 16 claimed to be entitled to accommodation under CA 1989 s20 on the basis that she was unable to return to her family home because of threats and danger in the area. It was also alleged that the local authority had acted unlawfully in failing: properly to assess the claimant; to carry out an inquiry under CA 1989 s47; to have proper regard for its welfare duties under CA 2004 s11; and in breaching various convention rights of the claimant.

The judge rejected the claims. He found as a matter of fact that the claimant was able to return to her family home, where her mother was able and willing to provide care to her. Therefore, for the purposes of s20, it could not be said that she required accommodation as a result of the person who had been providing care for her (ie, her mother) being prevented from providing her with suitable accommodation or care. The court also accepted the local authority's argument that it should not interfere with the council's decision-making unless that could be demonstrated to be *Wednesbury* unreasonable.

Resource allocation systems

In 'Community care law update – Part 1', March 2010 *Legal Action* 26, the authors described the draft revised *Fair access to care services* (FACS) guidance on the use of a resource allocation system (RAS). In **R (Savva) v Kensington and Chelsea RLBC** [2010] EWHC 414 (Admin), 11 March 2010, the claimant challenged the local authority's operation of its RAS. Initially, the claimant's assessed needs, converted into points and then into money, resulted in a weekly personal budget of £82.91, although funding was then 'adjusted' to the higher figure of £170.45. Following a further, functional assessment which found significantly greater needs (a 75 per cent increase in the points award), a new points score converted into money led to a basic figure of £112.21: ie, about £30 per week higher than the original figure. There was an adjustment to what was described as an 'indicative budget' of £142.02, which was then further adjusted to the same final figure of £170.45.

The judge rejected the claimant's argument that the RAS tool was per se unlawful because it imposed an unlawful cap on the budget. He found that the local authority had lawfully used the RAS using a 'relative and non-linear approach ... as a starting point' (para 32). He also rejected the claim that for the local authority to arrive at the same final figure when the later assessment arrived at a 75 per cent higher points score was irrational. The judge accepted the local authority's argument that 'arriving at the appropriate personal budget is ... an art rather than a science' (para 57). However, he quashed the local authority's decision on the basis that a local authority panel making a decision relating to a personal budget was required to give reasons for its decisions 'which are adequate to show that it is satisfied, reasonably, that the allocated budget is sufficient to meet the individual's assessed needs' (para 69), which had not been done in this case.

1 Available at: www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_111286.
2 Available at: http://wales.gov.uk/docs/dhss/publications/100401insafehandsreviewen.pdf.
3 Available at: www.isa-gov.org.uk/PDF/VBS_guidance_ed1_2010.pdf.
4 *ISA referral guidance* and the ISA referral form are available at: www.isa-gov.org.uk/default.aspx?page=379.
5 Available at: www.dh.gov.uk/en/Healthcare/Mentalhealth/DH_111770.
6 Available at: www.cqc.org.uk/guidancefor professionals.cfm.
7 For further details visit: www.cqc.org.uk.
8 *Adult social care: a consultation paper*, is available at: www.lawcom.gov.uk/docs/cp192.pdf.

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Simon Garlick will be speaking at LAG's Community Care Conference: *Protecting Liberties* on 14 July 2010. Please see flyer inserted with this issue for more information.

Police station law and practice update – Part 2

Ed Cape continues his six-monthly series covering developments in policy, legislation and case-law affecting police station law and practice. Part 1 of this article appeared in April 2010 *Legal Action* 30 and covered relevant policy and legislation. The author welcomes both comments and information about practitioners' experiences of advising at police stations.

CASE-LAW

Stop and search

■ Michaels v Highbury Corner Magistrates' Court and Crown Prosecution Service (interested party)

[2009] EWHC 2928 (Admin), 3 November 2009

Police officers approached M in the street and saw him place something in his mouth. The officers questioned M and asked him to open his mouth under their powers of search, without arrest, under the Misuse of Drugs Act (MDA) 1971 s23. When he did so, they saw what they believed to be a wrap of drugs. One of the officers grabbed M by the throat and told him not to swallow. A struggle ensued, but no drugs were found by the officers. M was charged with obstructing the police in the execution of their duty contrary to MDA s23(4). At trial it was argued on his behalf that the officer was not acting in execution of his duty as the search was unlawful because the officer had not informed M of his name and the name of the police station to which he was attached before starting the search, as is required by Police and Criminal Evidence Act (PACE) 1984 s2. In convicting M, the judge decided that this failure was not material and was not sufficiently serious so as to render the search unlawful since the officer and M knew each other well from previous encounters.

On appeal it was held that the authorities are clear that 'however formalistic this requirement may appear to be', it is mandatory (para 7). As a result, the search was unlawful, and therefore M could not be guilty of the offence charged.

Comment: The facts of this case are similar to those in *R v Bristol* [2007] EWCA Crim 3214, 4 December 2007; April 2008 *Legal Action* 12, and with a similar result. As the court said in *Michaels*:

The failure to identify name and station renders the subsequent search unlawful. It means that the officers were not then acting in the execution of their duty and no offence was committed under section 23(4) (para 9).

Taken together with the decision in *B v Director of Public Prosecutions* [2008] EWHC 1655 (Admin), 3 July 2008; May 2009 *Legal Action* 11, it shows that the Divisional Court is prepared to apply the procedural requirements concerning stop and search strictly. As the author argued in relation to *B v Director of Public Prosecutions*: '... it is a reminder of the importance of investigating the circumstances surrounding an arrest, particularly where a person is charged with an offence arising from his/her conduct on arrest'.

Arrest

■ Cumberbatch v Crown Prosecution Service; Ali v Department of Public Prosecutions

[2009] EWHC 3353 (Admin), 24 November 2009

In the case of C, she had protested at the way in which her father had been arrested under the Mental Health Act 1983. She was restrained by one of several officers present at the scene, who were accompanying the officer arresting C's father, and was then arrested for assault on a police officer in the execution of her duty. The Crown Court did not find that the arrest of C's father was lawful, but found that the officer who arrested C was acting in the execution of her duty because C's conduct presented a risk of violence or a breach of the peace.

In the case of A, the Crown Court found that the first officer who arrested him, for resisting a police officer in the execution of his duty, was not acting in the course of his duty. However, the court found that the two officers who had assisted the first officer in arresting A were acting in the execution of their duty since they were under an obligation to assist a police officer who was effecting an arrest. Both C and A appealed by case stated to the Divisional Court.

In the case of C, the Divisional Court held that, assuming that the arrest of her father was unlawful, the arrest of C was unlawful. If she had assaulted an officer arresting her father, she would not have been guilty of assaulting him/her in the execution of his/her duty, and the position was the same in respect of any officer arresting her in order to prevent her protest or intervention. Any threatened or actual violence, or breach of the peace, was inextricably linked to her protest at the way in which her father was being arrested and thus did not provide a separate basis for a lawful arrest. In the case of A, since his arrest by the first officer was unlawful, he could not be guilty of resisting the other officers, who had come to the aid of the first officer, in the execution of their duty.

Comment: This decision makes logical, and good, sense. If a person is unlawfully arrested, the person being arrested is entitled to use reasonable force to resist that arrest and another person is entitled to use reasonable force to prevent what, given the illegality of the arrest, amounts to an assault. In neither circumstance is s/he guilty of resisting or assaulting an officer in the execution of his/her duty since the officer is not acting in the execution of his/her duty. It follows logically that it should make no difference if the resistance or assault relates to an officer who comes to the aid of the officer carrying out the unlawful arrest. As Lloyd Jones J said in relation to A:

... he could not possibly distinguish between the actual arresting officer and those officers who merely assisted in that arrest. In my judgment, he did not need to do so in the circumstances of this case. He was simply entitled to resist arrest. Were this not the case, the right of any citizen to resist an unlawful attempted arrest would be defeated (para 13).

However, if the person is charged with 'ordinary' assault on the officer, whether the officer effecting the initial arrest or an officer coming to his/her aid, the outcome will depend on the reasonableness of his/her actions.

■ Alexander, Bull, Farrelly and Fox

[2009] NIQB 20, 5 March 2009

Farrelly (F) and others challenged the legality of their arrests by way of judicial review. The essence of their challenge was that the arrests were not 'necessary', as required by Police and Criminal Evidence (Northern

Ireland) Order 1989 SI No 1341 article 26(4) and (5), as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007 SI No 288. This provides, in identical terms to that set out in PACE s24(4) and (5), that a constable may only use his/her power of summary arrest if s/he has reasonable grounds for believing that arrest is necessary for any of the statutory reasons.* In a key passage in his judgment Kerr LCJ stated:

We consider that where a police officer is called upon to make a decision as to the necessity for an arrest, the grounds on which that decision is based can only be considered reasonable if all obviously relevant circumstances are taken into account. In particular, it is necessary that he make some evaluation of the feasibility of achieving the object of the arrest by some alternative means, such as inviting the suspect to attend for interview. That is not to say that the police officer may only arrest when no conceivable alternative is possible. For reasons that we will discuss below, we do not consider that arrest need be in every instance a matter of last resort; that it can only be deemed necessary where there is no feasible alternative (para 16).

F had attended the police station voluntarily, waited for some time before the officer was ready to see him, and was co-operative at all times. He was then arrested, the officer explaining subsequently that 'it was inappropriate to bring an individual in for police inquiries "as a voluntary attender" where, if that person sought to leave before inquiries were completed, he would inevitably be arrested' (para 23). Applying the principles to those facts, the court held that it was clearly the officer's intention to arrest whatever the circumstances. This being the case, the arrest:

... cannot be said to have been based on reasonable grounds for believing that it was necessary. For the reasons that we have given above, we consider that some consideration of the feasibility of obtaining the same result by having the suspect questioned as a voluntary attender is a prerequisite to a tenable conclusion that it is necessary to arrest (para 24).

Comment: This is the first substantive decision on the necessity requirement, which was introduced in England and Wales in January 2006 by amendments to PACE s24 by the Serious Organised Crime and Police Act 2005 s110 and Sch 7. The challenge was made by judicial review. The court made clear that this was an inappropriate mechanism because of the 'nature of the disputed evidence' (para 22). The challenge should have been made either in criminal proceedings arising out of the arrests, or in ordinary civil proceedings. For that reason, all of the applications apart from that of F, where the evidence appears to have been unchallenged, were dismissed.

The court made it clear that in order for a police officer to believe arrest to be necessary, s/he does not have to be satisfied that 'there is no viable alternative', but rather that it is the 'practical and sensible' option (para 18). As feared by a number of commentators, including the author, this is a rather weak interpretation of a requirement that was used by the government to answer concerns that police powers of arrest were being extended to all offences.

However, it does at least mean that an officer must be able to show that s/he gave some consideration to why arrest was necessary rather than simply, as in the case of F, following a policy of arrest without consideration of the circumstances. It is disappointing that the court did not consider the necessity requirement in relation to the principle of proportionality. It is unclear from the judgment what F was arrested for, but since the summary power of arrest is now available in respect of any offence, however minor, the necessity requirement provides the only basis for ensuring that people are not arrested needlessly for minor offences. PACE Code of Practice G para 1.3 does provide that arrests must be exercised in a 'proportionate manner' but there is no guidance, for the benefit of police officers and those arrested, as to what this might mean in practice.

Search and seizure

■ Syed v Director of Public Prosecutions

[2010] EWHC 81 (Admin), 13 January 2010

Police officers went to S's house following reports from a neighbour that there had been sounds of a disturbance from that address. When the officers arrived there were no signs of a disturbance. S answered the police officers' knock on the door and he explained that there had been an argument with his brother; however, neither he nor the other two people who came to the door made any complaint or showed any signs of injury. The police stated that they had a right to enter under PACE s17. S said that they had no right to enter, and spat in the face of one of the officers and headbutted the other. He was convicted subsequently of assaulting a police officer in the execution of his duty contrary to the Police Act (PA) 1996 s89.

He appealed by case stated, and the question asked of the Divisional Court was whether or not the court could properly conclude that the officers had been acting in the execution of their duty when, under PACE s17, they used force to enter premises in circumstances where they had received reports of a disturbance but found no evidence of such, or of any injury or damage, on visiting the address. In convicting S the justices had based their view that the police were acting in the execution of their duty on the basis that concern for the welfare of people in the property was sufficient. In answering the question in the negative, the Divisional Court stated that concern for the welfare of someone in the premises is not sufficient to justify an entry to premises under PACE s17(1)(e), which permits entry and search of premises for the purpose of 'saving life or limb or preventing serious damage to property'. The court held that the use of the word 'serious' in relation to damage indicated that saving life and limb required apprehension that serious bodily injuries had been, or would be, caused.

■ Thomas v Director of Public Prosecutions

[2009] All ER (D) 245 (Oct), (2009) 23 October

PACE s17(1)(b) permits a constable to enter and search premises for the purpose of arresting a person for an indictable offence, provided that the officer has reasonable grounds for believing that the person s/he is seeking is on the premises (s17(2)(a)). Where the premises consist of two or more separate dwellings, the powers of entry and search are limited to parts of the premises that the occupiers use in common, and any such dwelling within the premises that the officer has reasonable grounds for believing that the person s/he is seeking may be (s17(2)(b)).

In the instant case the dwelling was a house used by the local authority for housing homeless persons. It contained three bedrooms, each of which had its own lock, and homeless persons were permitted to remain in one of the bedrooms for a day, with use of the communal parts. The police were seeking to arrest H, but entered the bedroom occupied by T. He became aggressive and was restrained. He sought subsequently to enter H's room which was then being searched. An officer blocked his entry and T resisted, resulting in a violent struggle. T was convicted subsequently of wilfully obstructing a police officer in the execution of his duty contrary to PA 1996 s89(2). At first instance it was held that the three bedrooms comprised a single dwelling and that, therefore, the officers had power to enter each of the bedrooms.

It was held on appeal by case stated that there was no test to establish whether or not rooms in a dwelling occupied individually constitute a separate dwelling, but on the facts each of the bedrooms in these premises did constitute a separate dwelling. Therefore, the officer was a trespasser when he entered T's bedroom, and as a result was not acting in the execution of his duty. However, T had no right to enter H's bedroom, and in attempting to stop him the officers were acting in the execution of their duty.

Comment: As well as providing useful interpretations of police powers of entry and search under different subsections of PACE s17, these two cases are further examples of the importance of examining closely the circumstances surrounding an arrest where the charge arises from those circumstances. The effect in *Syed* is that he cannot be guilty of assaulting an officer in the execution of his duty, although the result could well have been different if he had been charged with 'ordinary' assault.

■ (1) Bhatti (2) Sadiq (3) Akhtar (4) Middlesex College Ltd v (1) Croydon Magistrates' Court (2) Commissioner of Police of the Metropolis (3) Secretary of State for the Home Department

[2010] EWHC 522 (Admin), 3 February 2010

This was a challenge, by way of judicial review, to a number of search warrants and the manner in which they had been executed. The first defendant had granted the second defendant three 'all premises' search warrants under PACE s8, giving the latter the right to search properties relating to or occupied by each of the claimants. In executing the warrants the police supplied the occupiers with copies of them, but those copies did not include the address in question. Attached to each copy was a separate page which included an empty box in respect of the premises stating 'to be completed by the officer ... '. The boxes were completed by hand by the officers at the time of the search. The claimants argued that the failure of the copy warrants to show on their face the address to which they related amounted to a breach of PACE s16(5), and that this rendered the entry, search and seizure unlawful under s15(1), with the result that the property seized must be returned.

It was held that the schedule including the address of the premises to be searched was an integral part of the warrant. The authenticity of a warrant could not simply depend on the word of the police. A copy of a search warrant issued under PACE s8 had, on its face, to record the address being searched so that when the occupier was served with the copy s/he would know for certain that the warrant as issued did indeed cover his/her premises. The practice of the police to complete the address by hand as a warrant was executed was in breach of s16(5) and rendered any entry, search and seizure illegal under s15(1), thereby entitling an occupier to the return of any seized property.

Comment: The case-law on search warrants shows that the courts are generally particular about the need to comply with the procedural requirements, and are ready to strike them down if they are not complied with fully. See, for example, *Bates and Bates v Chief Constable of Avon and Somerset Police and Bristol Magistrates' Court* [2009] EWHC 942 (Admin), 8 May 2009; October 2009 *Legal Action* 11 and *R v Faisaltex Ltd v Preston Crown Court* [2008] EWHC 2832 (Admin), 21 November 2008; May 2009 *Legal Action* 14.

■ (1) Scopelight Ltd (2) Vickerman (3) Vickerman v (1) Chief of Police for Northumbria (2) Federation Against Copyright Theft Ltd

[2009] EWCA Civ 1156, 5 November 2009

This Court of Appeal decision overturns the Divisional Court decision ([2009] EWHC 958 (QB), 7 May 2009; October 2009 *Legal Action* 11). The effect is that the police are not prevented, by PACE s22, from retaining, for the purposes of a private prosecution, material seized on execution of a search warrant even though the Crown Prosecution Service has decided not to prosecute.

Inferences from silence

■ R v Abbas and another

[2010] All ER (D) 79 (Jan), 14 January 2010

A was arrested on the basis of DNA evidence found on the knickers of V who, while having absconded from care, had sex with a number of men and had been controlled for the purposes of prostitution by the second defendant. A made no comment in interview. The police warned him under PACE Code C that DNA had been found on V's underwear and informed him that failure to account for its presence on the underwear could lead to adverse inferences at trial. A was charged with engaging in sexual activity with a child under 16. V had no recollection of a sexual encounter with A. At trial, A's submission of no case to answer was rejected. The judge directed the jury that it was open to it to draw adverse inferences from A's failure to account for the presence of the DNA. He was convicted.

On appeal, it was held that it was clear that the judge had purported to give a direction to the jury under Criminal Justice and Public Order Act (CJPOA) 1994 s36. However, s36 had no application in the circumstances since the semen stain did not come within any of the circumstances set out in s36(1)(i)–(iv). Inferences could not be drawn under s34 since A had not relied on any fact in his defence at trial which he could reasonably have been expected to mention on being questioned under caution. In fact the judge should have positively directed the jury that it should not hold A's failure to answer police questions against him. Therefore, the conviction was unsafe.

Comment: Reported cases on CJPOA s36 are relatively rare. The essence of s36 is that inferences may be drawn where an accused fails or refuses to account for an object, substance or mark on his/her person, in or on his/her clothing or footwear, otherwise in his/her possession, or in any place where s/he was at the time of the arrest.

Although the available report of the case is brief, it is clear that the semen stain was on an item of V's clothing that had not been in A's possession nor in the place where he was arrested. Thus s36 simply did not apply to the circumstances, a fact misunderstood not only by the police but, it would seem, by the trial judge as well. As the court indicated, inferences might have been possible under s34, but the conditions for inferences under that section were not satisfied.

■ Charles v Crown Prosecution Service

[2009] EWHC 3521 (Admin), 26 November 2009

C was found slumped, asleep, over the steering wheel of a car with the parking lights on and keys in the ignition. He was arrested for being in charge of a motor vehicle while under the influence of drink or drugs. At the police station he tested positive and was informed that he would be charged. However, following that he was interviewed with a view to ascertaining whether he had driven the vehicle, which he admitted. He was not told in that interview that the police were inquiring into the offence of driving while under the influence of alcohol. At the beginning of the interview, C was given the caution in the form set out in PACE Code C para 10.5, indicating that inferences could be drawn from 'silence', rather than the caution set out in para 16.5. At trial the prosecutor conceded that the only evidence that C had been driving was his confession. C sought exclusion of his confession to driving under PACE s78. The magistrates did not exclude the evidence since, they said, C knew he was over the limit before he was interviewed, but went on to admit to driving knowing that it was likely that he would be charged with driving with excess alcohol. C was convicted

of driving with excess alcohol.

On appeal by case stated, the Divisional Court said that it was not clear to the court how C would have known of those consequences given that he had not been told the purpose of the interview. While not every breach of PACE will lead to exclusion of evidence so obtained, the significance of the breach must be taken into account. While the breaches were not made in bad faith, the police showed scant regard for the clear requirements of PACE and the Codes. Those breaches, said the court, 'had the unfortunate result that [C] cannot have been aware that the switch in questioning half-way through the interview would lead to far more serious consequences' (para 12). Therefore, the magistrates should have excluded evidence of the interview.

Comment: Inferences under CJPOA s34 can only be drawn in respect of failure to mention relevant facts on being questioned under caution before charge or, under s34(1)(b), 'on being charged with the offence or officially informed that he might be prosecuted for it'. In consequence, Code C para 16.5 provides that if a person is questioned about an offence after s/he has been charged with it or informed that s/he may be prosecuted for it (which is only permitted for limited purposes), s/he must be cautioned in the form set out in that paragraph, which makes no reference to the consequences of 'silence'.

It is not completely clear that there was a breach of para 16.5 since C was not questioned about the offence in respect of which he was told that be might be prosecuted (in charge of a vehicle while under the influence of alcohol), but in respect of another offence (driving while under the influence). However, they arise from the same facts, and the court may have simply taken a pragmatic, rather than a legalistic, view of whether C was being questioned about the same offence. In any event, if they were to be treated as two separate offences for these purposes, arguably C should have been arrested for the offence of driving while under the influence as a result of PACE s30 and at the very least, as the court indicated, should have been informed at the beginning of the interview that the police were investigating this offence. A breach of PACE or the Codes does not lead automatically to exclusion of evidence under s78. However, the court clearly regarded the breaches as significant:

These provisions are not a mere rigmarole to be recited like a mantra and then ignored. The provisions of the Police and Criminal Evidence Act and the Code relating to caution, are designed to protect a detainee. They are important protections. They impose significant disciplines upon the police as to how they are to behave. If they can secure a serious conviction in breach of those provisions that is an important matter which undermines the protection of a detainee in the police station (para 10).

The courts have not always taken such a robust attitude to the caution requirements (see, for example, 'Police station law and practice update', October 2006 *Legal Action* 12) and it is refreshing to see such a clear confirmation of the protective significance of the provisions.

Evidence

■ Morris v Director of Public Prosecutions

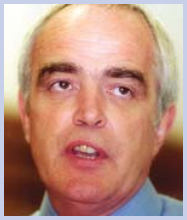
[2008] EWHC 2788 (Admin), 14 November 2008

At trial for the offence of driving with excess alcohol, M disputed the statutory procedure, and submitted that there had been an abuse of process because the prosecution had failed to provide CCTV evidence from the custody suite. M's conviction was confirmed in the Crown Court, and he appealed by case stated.

The Divisional Court held that there was no automatic requirement on the prosecution to retain CCTV evidence where potentially it recorded the statutory drink-driving procedure, and the Crown Court was right to observe that the prosecution had not been put on notice and it was not apparent that the statutory procedure would be challenged.

Comment: This decision is not that recent, but it is included here as a reminder to defence lawyers specifically to request the preservation of custody suite CCTV footage or data if it may become relevant at a later date.

* For an explanation of the arrest provisions see Ed Cape, 'Arresting developments: increased police powers of arrest', January 2006 *Legal Action* 24.



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Police misconduct and the law – Part 2

Stephen Cragg, **Tony Murphy** and **Heather Williams QC** continue their six-monthly review of important developments in the law relating to police misconduct. This article examines relevant case-law relating to articles 2, 3 and 8 of the European Convention on Human Rights ('the convention'). See April 2010 *Legal Action* 32 for Part 1 of this article, which considered case-law covering, among other things, malicious prosecution, compensation for wrongful convictions and informational privacy.

CASE-LAW

Human rights

Article 3

■ **Morrison v Independent Police Complaints Commission and Commissioner of Police for the Metropolis (interested party) and Secretary of State for the Home Department (intervener)**

[2009] EWHC 2589 (Admin), 26 October 2009, March 2010 Legal Action 37

The claimant had been pulled from his car, tasered on a number of occasions and otherwise handled roughly causing injury by police officers who believed that he was in possession of firearms. He made a complaint against the officers concerned. The Independent Police Complaints Commission (IPCC) decided that the complaint should be investigated locally by the Metropolitan Police Service, rather than there being an independent or managed investigation by the IPCC. The claimant challenged the decision on the basis that his treatment amounted to an arguable breach of article 3 of the convention and for there to be an effective, official investigation to meet the investigative duty in article 3 (see *Assenov v Bulgaria* App No 24760/94, 28 October 1998; (1999) 28 EHRR 652), a local investigation would not suffice.

Initially, the IPCC accepted that a local investigation would not satisfy article 3 but argued that article 3 was not engaged in any event as the treatment of the claimant did not meet a minimum level of severity. However, by the time of the hearing the IPCC's approach had changed. The IPPC conceded that article 3 was engaged, but argued that it was not necessary for the complaints investigation itself to meet all the criteria of an independent inquiry: the police complaints appeal process, a possible civil action and likely criminal proceedings could contribute to or meet the investigative obligation.

Nicol J agreed with the IPCC. Other than finding that a possible civil action should not be taken into account when looking at whether or not the state had met its obligations under article 3, the judge held that both the statutory appeals process and a possible criminal trial of police officers could meet the duty. As the appeals process had not been invoked (the complaints investigation not having been completed) and a decision on criminal proceedings not having been made, the judge decided that it was premature to conclude whether or not there had been a breach of article 3. The application was dismissed.

Comment: The claimant has been granted permission to appeal. In an opinion dated 12 March 2009, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, highlighted his view that police complaints involving arguable breaches of article 3 should be investigated independently of the police.* In *Morrison*, a decision has now been made that there will be no criminal prosecution of police officers. The major difficulty for the IPCC is a lack of resources to investigate many complaints independently. Waiting to the end of the complaints process to argue that there is a lack of independence has its own difficulties: see *R (Fox) v Independent Police Complaints Commission and Metropolitan Police Commissioner (interested party)* [2009] EWHC 1654 (Admin), 22 May 2009, where permission was refused on the ground of delay.

Article 8

■ **Gillan and Quinton v UK**

App No 4158/05, 12 January 2010

The European Court of Human Rights (ECtHR) found in favour of the applicants in this case, a PhD student and a freelance journalist who had been searched, seemingly at random, on their way to campaign against the arms trade, that they had been unlawfully treated. Previously, the House of Lords had held that the applicants stop and search under the Terrorism Act (TA) 2000 s44, which allows the police and the Home Secretary to authorise searches in an area where it is considered 'expedient' for the prevention of acts of terrorism, was not a breach of article 8 of the convention, essentially because of what was perceived to be the minor interference, caused by a superficial search, with the right to respect to private life (see [2006] UKHL 12, 8 March 2006). However, the ECtHR was of the view that searches under the TA, especially in public, amounted to an interference with article 8(1). Furthermore, the wide discretion conferred on the police under the TA, both in terms of the authorisation of the power to stop and search and its application in practice, had not been curbed by adequate legal safeguards so as to offer the individual adequate protection against arbitrary interference. Thus the searches were not 'in accordance with the law' for the purposes of article 8(2) and in any event were not necessary or proportionate. The ECtHR was concerned especially with the effect on black and ethnic minority groups essentially subject to arbitrary stop-and-search powers.

Comment: This is a further example of the Strasbourg court finding that there has been an interference with article 8(1) rights (following *S and Marper v UK* App Nos 30562/04 and 30566/04, 4 December 2008 and retention of DNA samples) where the domestic courts have been anxious to play down the impact of intrusive measures by the state.

Article 2

■ **R (Lewis) v HM Coroner for the Mid and North Division of the County of Shropshire and Secretary of State for the Home Department (interested party)**

[2009] EWCA Civ 1403, 21 December 2009, [2010] 107 (2) LSG 17

This case considered whether or not a coroner has a duty, as opposed to a power, in an article 2 inquest to leave issues to the jury which were possibly but not probably causative of death. Mr Lewis was found

hanging in his cell by a prison officer who had received no suicide prevention or first aid training and was not equipped with a fish knife (a tool in common use in prisons, which is designed to enable suicides to be cut down promptly without further injuring them) to cut the ligature. The officer did not enter the cell and used an incorrect radio code to summon assistance, which meant help took longer to arrive. These issues, which it was accepted were possibly but not probably causative of death, were not included in the narrative verdict questionnaire left to the jury or in the coroner's Rule 43 report. Mr Lewis's father was unsuccessful in judicially reviewing the omission of these issues from the jury's questionnaire in the Administrative Court ([2009] EWHC 661 (Admin), 3 April 2009). He appealed, also unsuccessfully, to the Court of Appeal, which found that a coroner owed only a duty to leave issues to a jury that were probably causative of death.

Comment: The Court of Appeal was clearly influenced by the fact that the House of Lords in *R v HM Coroner for the Western District of Somerset and another ex p Middleton* [2004] UKHL 10, 11 March 2004, had not included possible causative factors within its definition of 'how ... and in what circumstances' a deceased's death was caused. The court also placed considerable emphasis on the power of a coroner to make Rule 43 recommendations in relation to factors which were possibly causative of death, and formed the view that this power may become a duty where the facts are disputed or uncertain.

Sedley LJ opined that a jury could be asked to find facts relevant to the exercise of a coroner's powers under Rule 43, which could include possible causative factors. Accordingly, this judgment could be said to impose a duty on the coroner to leave possible causative factors to the jury where a finding of fact is necessary for the purpose of the coroner's Rule 43 report, remembering that a coroner is not empowered to make findings of facts. However, this will be circumscribed by the limits of Rule 43, which provides for a report only where the coroner believes that action should be taken to prevent the recurrence of similar fatalities. The court also appeared to express some sympathy with the claimant's contention that the definition of 'in what circumstances' should, as a matter of common sense, include possibly causative factors.

■ R (Butler) v HM Coroner for the Black Country District

[2010] EWHC 43 (Admin), 21 January 2010

This case concerned the scope of a coroner's powers and the requirements of procedural fairness in a non-article 2 inquest. The deceased died in an accident at work and it was agreed that there should be a non-article 2 inquest. The owners of the workplace sought judicial review of the coroner's proposal to hear evidence of previous systemic failings in relation to health and safety at the workplace. They also challenged the coroner's refusal to provide disclosure and grant an adjournment.

Beatson J found against the coroner on the facts and identified the following principles:

- The function of all inquests is to seek out and record as many of the facts concerning the death as the public interest requires. It is the coroner's duty in all inquests to ensure that the relevant facts are fully, fairly and fearlessly investigated.
- 'How' the deceased's death was caused in a non-article 2 inquest is defined as 'by what means'. However, the remit of the inquest's investigation will often be wider than what is strictly required for the purpose of a verdict.
- An inquest is not limited to inquiring into the last link in the chain of causation. It is for the coroner to decide on the facts at what point the chain of causation becomes too remote to form part of the inquiry.
- A non-article 2 inquest can permit the investigation of systemic failings depending on the facts; however, care should be exercised in the use of expert evidence so that it does not appear to decide civil or criminal liability.
- Rule 43 does not enable a coroner to admit evidence s/he cannot properly admit under the Coroners Rules and/or common law. However, in assessing the scope of the inquest, a coroner is entitled to take into account the possibility of the need to make a Rule 43 recommendation or report.

Comment: Although the court was careful to find that *Middleton* (above) does not apply to non-article 2 inquests, it acknowledged the judicial debate which has been ongoing on that point since the House of Lords' majority decision in *R (Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13, 28 March 2007; [2007] 2 AC 189. The progressive tone of this judgment suggests that the gap between article 2 and non-article 2 inquests is narrowing. This is also a useful judgment on the requirements of procedural fairness in inquest proceedings.

■ Opuz v Turkey

App No 33401/02, 9 September 2009

The applicant claimed that the state authorities had failed to protect her and her mother from domestic violence at the hands of male family members, which resulted in her mother's death and her own ill-treatment. The ECtHR found that the government breached the applicant's mother's article 2 rights; the applicant's article 3 rights; and their article 14 rights on the basis of the following:

- The legislative framework in place at the time fell short of the state's positive duty to establish an effective system to punish all forms of domestic violence.
- Police reluctance and judicial passivity in enforcing criminal law provisions further undermined the deterrent effect of those provisions.
- Police failed to take operational measures in response to a real and immediate risk to the applicant's mother's life that they knew or ought to have known about and which might have been expected to avoid that risk.
- The impunity enjoyed by perpetrators of gender-based violence against women.

Comment: This judgment provides a powerful condemnation of state failure to counteract gender-based violence and a relatively rare finding of an article 14 violation. It also showcases the various strands of substantive duties which articles 2 and 3 impose on public authorities. Readers should note also the causation test applied by the court, ie, a 'real prospect of altering the outcome or mitigating the harm' (para 136). This test is taken from *E and others v UK* App No 33218/96, 15 January 2003 (an article 3 case), and chimes with the test identified by the High Court and the House of Lords respectively in *(1) Van Colle (Administrator of the estate of Giles Van Colle deceased) (2) Van Colle v Chief Constable of Hertfordshire Police* [2006] EWHC 360 (QB), 10 March 2006 at para 105; October 2006 *Legal Action* 18, and in *Chief Constable of the Hertfordshire Police v Van Colle (Administrator of the estate of GC (deceased)) and another*; *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, 30 July 2008 at para 138; October 2008 *Legal Action* 13. Arguably, it is a much more flexible test than the common law 'but for' test.

■ Rabone (in his own right and as personal representative of the estate of Melanie Rabone) and Rabone (in her own right) v Pennine Care NHS Trust

[2009] EWHC 1827 (QB), 23 July 2009

The claimants' daughter ('the deceased') was a voluntary patient on a mental health ward who committed suicide after being allowed out on home leave. The defendant admitted that it had acted negligently in granting the deceased home leave. The claimants settled the Law Reform (Miscellaneous Provisions) Act (LR(MP)A) 1934 aspect of their claim, while reserving their right to continue with their claim under article 2 of the convention. The article 2 claim was rejected by Simon J for reasons which included the following:

- The deceased was not compulsorily

detained. Therefore, the defendant did not owe her a substantive duty under article 2 other than to have proper systems in place for her care. A member of staff's failure to comply with these systems did not engage the operational duty under article 2 where a patient is not detained.

■ The claimants were not the victims for the purpose of the substantive duty under article 2 as they had successfully settled the LR(MP)A aspect of their claim.

■ The claimants were victims for the purpose of the investigative obligation under article 2; however, that obligation had been discharged by the following, ie:

– the availability of the inquest;
– the present proceedings; and
– an internal investigation by the defendant.

An independent investigation (for example, by the Prisons and Probation Ombudsman (PPO)) was not necessary in view of the fact that the deceased was not a detained patient.

Comment: This was a valiant attempt to extend to non-detained patients the operational protection afforded by article 2 to detained patients in the House of Lords' decision in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, 10 December 2008; March 2009 *Legal Action* 10. The distinction between these two groups of patients has traditionally been drawn on the basis that voluntary patients can leave hospital when they wish to and input into their treatment. In reality, this distinction is often blurred by the fact that many voluntary patients are under threat of compulsory detention if they seek to leave the hospital. It is therefore likely that this issue will resurface before the courts.

The denial of victim status to the claimants for the purpose of the substantive duty under article 2 is part of a worrying trend. It is important to note that Simon J did not deny the claimants' victim status on the basis that they were so called 'indirect' victims (according to Lord Scott's obiter comment in *Savage*) but rather on the basis that the claimants had already settled the non-Human Rights Act 1998 aspect of their claim.

In relation to the indirect victim point, Lord Scott's comments in *Savage* were strict obiter as no argument was heard on that issue in that case and they were not endorsed by any other members of the Judicial Committee. The answer to Lord Scott's concerns (and those of the Court of Appeal in *(1) Van Colle (Administrator of the estate of Giles Van Colle deceased) (2) Van Colle v Chief Constable of Hertfordshire Police* [2007] EWCA Civ 325, 24 April 2007 at para 114; [2007] 1 WLR 1821) is provided by Strasbourg case-law, where so-called indirect victims have been awarded just satisfaction in their own right (see, for example, *Kontrová v Slovakia* App No 7510/04, 31 May 2007). Domestic courts continue to need persuasion on this point, possibly because they have not been referred to *Kontrová* (see, for example, *Hanaghan v Chief Constable of Greater Manchester* (2009) 8 June, unreported).

■ R ('JL') (by his litigation friend the Official Solicitor) v Secretary of State for Justice

[2009] EWHC 2416 (Admin),
7 October 2009,
March 2010 Legal Action 37

The claimant was found hanging in Feltham Young Offender Institution. He suffered severe and continuing brain damage. Protracted litigation ensued, which concluded in the House of Lords regarding the circumstances that trigger an article 2 inquiry into a near death in custody and the form that inquiry should take once triggered (see [2007] EWCA Civ 767, 24 July 2007; October 2007 *Legal Action* 17 and [2008] UKHL 68, 26 November 2008; April 2009 *Legal Action* 34).

In these proceedings, the claimant sought judicial review of the investigation which eventually took place after the House of Lords' decision, including on the basis that:

■ the person carrying out the investigation (the former head of Prison Service Psychology, now an academic) was not sufficiently independent; and

■ the claimant has not been allowed actively to participate in the investigation.

The claim failed. Laws LJ distinguished *'SP' v Secretary of State for Justice* [2009] EWHC 13 (Admin), 19 January 2009; August 2009 *Legal Action* 22, in relation to whether or not the investigator was sufficiently independent, and he blamed the claimant's solicitor's approach in part for the claimant's lack of involvement in the investigation.

Comment: This judgment provides a very useful history of how the article 2 investigative obligation has evolved in relation to near deaths in custody, which of course differ from the investigation of deaths in custody because of the non-availability of an inquest. Laws LJ identified the following principles from the House of Lords' earlier decision in this case (see above):

■ The article 2 investigative obligation is triggered by any death or near death in custody, which causes lasting, serious injury.

■ This obligation requires the state, in all such cases, to initiate an investigation by an independent person, which must be reasonably prompt, involve the next of kin and provide for a sufficient element of public scrutiny (that might be satisfied depending on the facts by the publication of the investigator's findings). It is possible, depending on the facts, that this investigation is sufficient in itself to comply with article 2. This was described by the court as an 'enhanced investigation'.

■ There may be circumstances (for example, egregious failings, unco-operative witnesses, etc) where it is clear to the authority convening the investigation at the outset or to the investigator during the investigation, that it is necessary to have a second level of investigation. This might include some form of public hearing where the next of kin would be entitled to be present, make appropriate submissions (but not directly cross-examine witnesses) and receive adequate funding so to do. This was described by the court as a 'D-type' public inquiry (according to *R (D) (by the Official Solicitor his litigation friend) v Secretary of State for the Home Department* [2006] EWCA Civ 143, 28 February 2006).

It is clear that the form an investigation into a near death will take is fact-sensitive. It is, however, welcome that Laws LJ rejected the suggestion that a defect in the independence of an early stage of an investigation could be cured at a later stage (contrary to Nicol J in *Morrison* (above)). It is surprising that no system appears to have yet been established to provide for independent investigation of deaths of detained patients given there are an estimated 100 such deaths a year, and their investigation does not come within the remit of the PPO.

* See Graham Smith, 'Police complaints: European Commissioner's *Opinion* published', April 2009 *Legal Action* 38.

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Recent developments in practice management

Vicky Ling provides useful guidance on dealing with the Legal Services Commission's (LSC's) updated contract compliance audit (CCA) regime.

Changes to CCA regime

The LSC has been heavily criticised by the National Audit Office, the Public Accounts Committee and in Sir Ian Magee's recent report for exercising insufficient control over payments to its suppliers. It is no wonder then that the LSC has dusted off and updated its CCA regime. These are audits of 20 closed controlled work files, conducted at the LSC's offices. Any organisation with an LSC contract needs to get a strong grip on its Legal Help billing in order to avoid, at best, time-consuming appeals and, at worst, the repayment of considerable sums.

In 2008, fixed fee CCAs were confined to those issues which decided whether or not the LSC could pay for the work at all, for example, scope, client signature on the form and evidence of means. Files either passed in full or were 'nil assessed', and considerable non-compliance had to be identified before penalties were applied.

However, this began to change during 2009. The LSC noticed that fundamental non-compliances were not the only issues on Legal Help files. Some organisations had claimed higher fees than they should have done but the CCA process did not penalise them for this, which seemed unreasonable. So, it added a new process to the CCA, which enabled it to count overclaimed files towards the overall result of the audit. For example, claiming a full fixed fee for a debt case (£200) instead of a tolerance fee (£123) would mean that £77 had been overclaimed. This would be treated as 38.5 per cent of a nil-assessed file: 77 divided by 200 and then multiplied by 100.

In addition to the financial penalties, poor audit results are almost certain to result in contract warning notices. Repeated breaches can result in contract termination, so it is absolutely crucial to ensure that Legal Help files comply with all the relevant rules.

Current CCA outcomes[1]

- Category A1 (0–2 files nil assessed): recoupment of fees on those files.
- Category A2 (2.01–6.99 files nil assessed): recoupment of fees on those files audited, contract notice for misclaiming, followed by second CCA six to nine months later; or the LSC has an option to extend the sample and extrapolate the result.
- Category A3 (7+ files nil assessed): further files required for extended audit.

If a second sample is required, the LSC will select a larger number, so that the result is statistically significant. The consequences of a second sample audit are:

- Category B1 (0–10% nil assessed): result extrapolated across the value of the contract schedule and recoupment of the corresponding sum.
- Category B2 (10%+ -20% nil assessed): result extrapolated across the value of the contract schedule and recoupment of the corresponding sum as well as a contract notice for misclaiming.
- Category B3 (20%+ nil assessed): consequences similar to above.

Audit failures

A surprising number of Legal Help forms fail the audit because they are incomplete, ie, Part A and/or Part B is left blank when it should be completed in full, for example, when the client is not receiving a passporting benefit or where a partner's means should be taken into account. Sometimes the original Legal Help form is not on the file, or has not been signed by the client.

Eligibility and evidence of means (EOM) are areas where caseworkers commonly make mistakes. Some still think that they will be allowed two hours' worth of costs even without EOM; however, this rule was changed significantly in the Unified Contract (Civil), and now only applies to cases claimed at hourly rates, for example, those that exceed the exceptional case threshold (see *Unified Contract civil specification* r2.5(c)).

The evidence must relate to the 'computation period', that is, the calendar month before the date the form is signed.[2] Where family members are supporting the client, a signed and dated letter confirming the level of support must be retained on file.

The *Unified Contract civil specification* r2.4 says that evidence of a client's means must be obtained 'before' starting work. However, as long as evidence of the client's means is obtained before closing the file, experience to date suggests that penalties will not be applied.

The LSC *Manual*, volume 2, part F, para 12.2 allows the acceptance of written evidence of benefits which does not refer directly to the calendar month before signing the form, where it seems reasonable to do so. This might be where the client produces a letter from the Department for Work and Pensions confirming his/her award or updating of benefit dated up to six months previously.

The LSC even states that the caseworker may telephone the relevant agency (with the client in attendance) to confirm details of type and amount of benefit or tax credit, and current entitlement (see the LSC *Manual*, volume 2, part F, para 12.4). A note of that conversation including the relevant details, along with any unique reference number and the name of the person spoken to, will be acceptable evidence on audit. However, the LSC auditors are being pretty literal in insisting that all the points listed in the guidance (for example, reference number and name of the person spoken to) are recorded on an attendance note. Written confirmation of current entitlement is the best evidence as far as the LSC is concerned and should be obtained if at all possible. In order to justify disbursements, a letter of instruction and invoice(s) must be retained on the file.

How to get it right

Checking Legal Help forms should be included in supervision and file reviews. In addition, a final check of the file is a good idea as part of the file-closing procedure.

1 *Planned changes to CCA recoupment sanctions*, available at: www.legalservices.gov.uk/docs/civil_contracting/091127_Changes_to_CCA_Recoupment_Sanctions.pdf.
2 *Volume 2F (Financial Eligibility) of LSC manual*, available at: http://calculator.communitylegaladvice.org.uk/ecalc/guidace.asp.

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