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LegalAction

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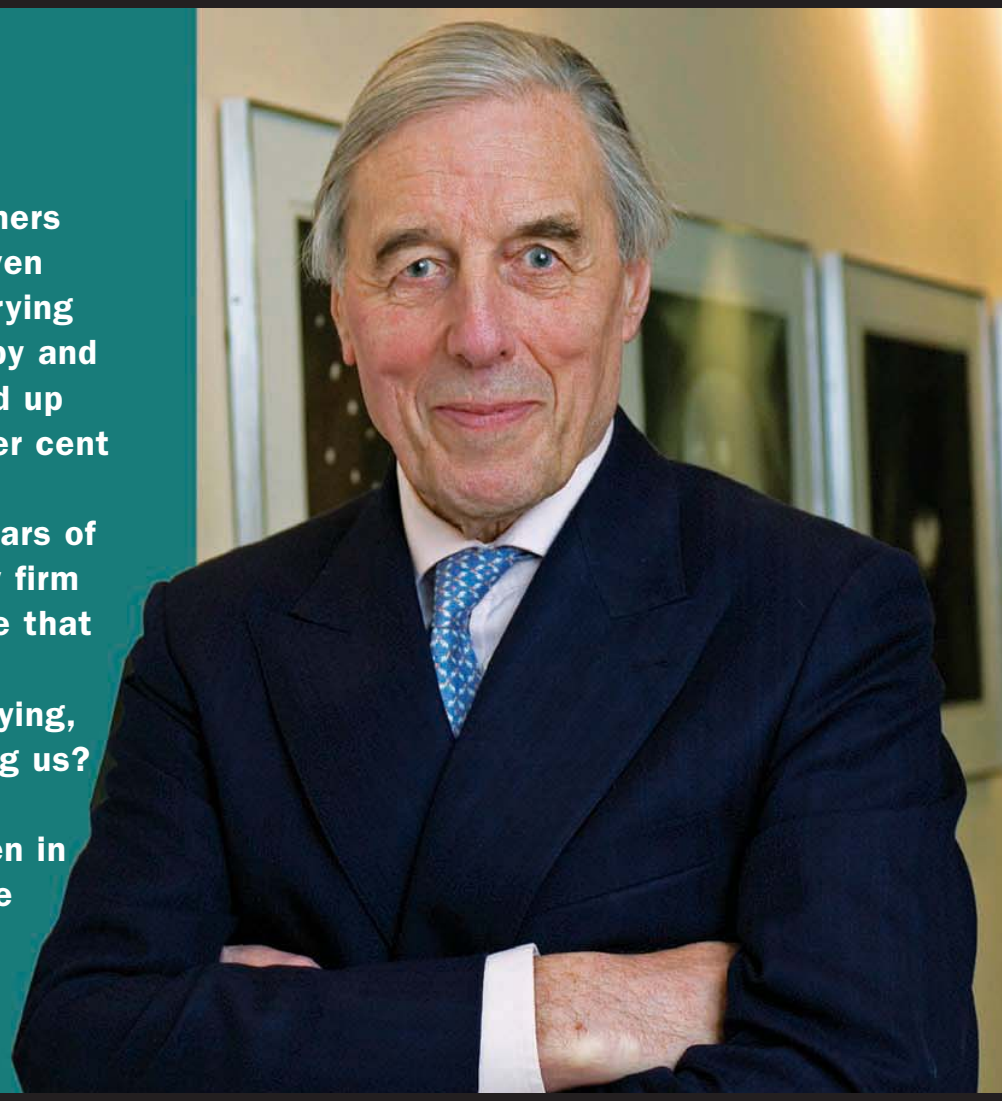
'... the reoffending or reconviction rate of prisoners coming out of prison is even more disgraceful and worrying than an escape because by and large escapees get picked up again. The fact that 67 per cent of all adult males ... are reconvicted within two years of release is a disgrace. Any firm that had a failure rate like that would be out of business. The public ought to be saying, why are you not protecting us? Why are so many people reconvicted who have been in your hands and could have been helped?'



WHAT PRICE IMPRISONMENT?

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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NFP legal aid agencies under threat

There are currently around 400 not for profit (NFP) Legal Services Commission (LSC) contract holders. These include citizens advice bureaux (CABx), Law Centres® and independent advice centres. The number of NFP contracts grew rapidly from 1998 when legal aid contracting was opened up to them after it had been piloted successfully in the sector under the Conservative Lord Chancellor Lord Mackay; however, the number of NFP contracted agencies has been falling recently mainly because of the implementation of fixed fees in October 2007. LAG is concerned that unless the sector can adapt, many more NFP agencies will drop out of legal aid work after the current contracts end in March 2010. This will be a loss to the many thousands of clients with whom the services are accessible and popular.

Legal aid minister Lord Bach has recognised the problems the sector is facing. On his initiative. the Ministry of Justice is currently undertaking a study of the sector (see January 2009 *Legal Action* 5). Until the implementation of fixed fees. the system seemed to work well, albeit with some gripes. However, over the last year it has not done so; at one extreme this has led to agencies being forced to close while many others have had to cut back what they do. The LSC would like to present this as a result of fixed fees leading to more efficient services, but LAG's view is that in the main fixed fees have forced all providers to reduce what they do for clients. Those agencies and firms making a success of fixed fees, or at least surviving, are pushing more cases through the system and looking to transfer cases on to legal aid certificates or alternative funding more rapidly. LAG wonders, for example, how much of the £33m extra government funding for debt work in CABx just over two years ago has in fact turned out to be a cross-subsidy for legal aid work?

LAG has highlighted the issue of exceptional cases on a number of occasions, most recently in December 2008 (see December 2008 *Legal Action* 50). Only 850 cases were claimed as exceptional for the first year of fixed fees. This begs the question, did clients' problems become simpler after October 2007 or are suppliers not claiming exceptional cases because of fears over cash flow? As NFP agencies tend not to do legal aid certificate work, they need in particular to make greater use of the exceptional cases procedure if they are going to survive and provide a decent standard of service to clients. Lord Bach's study is also an opportunity to consider reducing the limit at which exceptional case fees kick in to help them do this.

The results of Lord Bach's study will have to inform the bidding process for the renewal of civil contracts in April 2010. The LSC intends to commence the tendering process this summer. This gives firms and NFP agencies little time to prepare. LAG would suggest that NFP agencies should take particular notice of the consultation paper on the civil bid round published by the LSC in October 2008 (see December 2008 and January 2009 *Legal Action* 3 and 29) as it carries some pointers about the likely tender specification which the sector cannot afford to ignore.

Sole contracts for housing, debt and welfare benefits look set to end. Agencies will have to provide services in all three areas of work or provide housing with family work. According to the Advice Services Alliance, this means that over 80 per cent of NFP organisations will have to expand their services or enter into consortia in order to continue to undertake legal aid work. This move will also impact on some specialist housing law firms which do not offer family or other areas of social welfare law. In addition to requiring organisations to offer bundles of social welfare law work, in geographical areas in which the LSC decides there is likely to be a 'significant oversupply' (this is most likely to be urban areas) agencies that wish to bid for contracts in housing or community care law must be able to offer full legal representation. In practice this means that they will have to employ a solicitor or be in a consortium with one.

LAG agrees that to provide a comprehensive service in these areas of law, it is preferable that an agency is able to litigate and so needs a solicitor. Yet, this added to other likely criteria such as a supervisor to caseworker ratio of 1:4 and the requirement to reduce the cash owed to the LSC, leads us to question whether the proposed timetable for the tendering process will be fair, particularly if many urban areas are deemed to have an oversupply by the LSC. It would be better in these circumstances to delay the tendering process for a year so that agencies can make the necessary changes to compete. Not to do this would risk reducing drastically the number of legal aid providers in the NFP sector at a time when clients who are hard hit by the recession most need their services.

Inquest reforms are 'blow to civil liberties'

Controversial plans to hold 'secret' inquests resurfaced last month. It has been proposed that the press, families and juries could be kept out of inquests under the measures to be outlined by Jack Straw, the Justice Secretary.

The Coroners and Justice Bill, which promises to 'deliver more effective, transparent and responsive justice and coroner services for victims, witnesses, bereaved families and the wider public', was introduced in the House of Commons in January (see also page 52 of this issue). The legislation includes measures to reform the law on homicide (for example, wives subjected to domestic violence who kill their husbands will be able to claim a 'partial defence') and to establish a new Sentencing Council for England and Wales. It also proposes the creation of a national Coroner Service, led by a new chief coroner, as well as allowing the courts to pass indeterminate sentences for public protection for certain terrorist offences. A 'charter for the bereaved' has been announced as part of the bill.* At the moment, bereaved families must apply for judicial review of a coroner's decision if they take issue with the inquest verdict. According to the Ministry of Justice (MoJ), under the new proposals families will have a right of appeal to the chief coroner 'on a range of issues, including if they think there should be a post-mortem examination and if they are unhappy with the verdict of the inquest'.

According to the MoJ, the bill would 'aim to increase the amount of sensitive information made available for inquests - including information which currently cannot be disclosed publicly'. 'By holding a very small number of inquests partly in private, presided over by a High Court judge appointed by the Lord Chief Justice, more information will be available to enable a more accurate verdict to be recorded,' the MoJ says.

LAG, along with other organisations including Inquest, has been calling for the reform of the inquest system (see 'Modernising the coroner's court', July 2008 *Legal Action* 3). 'LAG welcomes much of the bill as it will modernise the coroner's court system, but we are concerned about the provision in the bill that allows for secret inquests in some cases involving an agent of the state. We believe that this could be used by the government to avoid political embarrassment. Relatives of service personnel killed in action, for example, could be denied a public hearing,' commented Steve Hynes, LAG's director. 'Inquests allow the government to be held to account for deaths at the hands of the state', David Howarth, Liberal Democrat shadow justice secretary, said. 'Holding them in secret, with coroners hand-picked by the government, would be another blow to our civil liberties.'

* *Charter for bereaved people who come into contact with a reformed coroner system*. *Revised draft charter and response to 2008 discussion paper* is available at: www.justice.gov.uk/docs/charter-bereaved.pdf.

Silk appointment system attacked

Solicitors have criticised the reformed Queen's Counsel (QC) appointment system in a new survey by the Law Society. It has been three years since lawyers decided to keep the controversial rank of QC, which aims to recognise excellence for advocacy in the higher courts despite concerns that it fails to acknowledge the diversity of the profession and wider society.

In the last year of operation under the old system, seven out of a total 1,244 QC were solicitor-advocates and 103 werre women. In the latest silk round announced in January last year, some 98 QCs were appointed, including 20 women (51 applied), four people from ethnic minorities (22 applied) and one solicitor (six applied).

Although lawyers decided to keep the QC title, the old system of appointment through the taking of 'secret soundings' was ditched three years ago. The Law Society's survey follows a review of the new system by Sir Duncan Nichol, who was commissioned to do so by the society and Bar Council. Sir Duncan Nichol's report was presented at the end of last year.

Of the 170 respondents to the survey, only three actually applied for QC status. The majority of respondents were concerned about the burden and cost of application and the length of time the selection exercises take to complete. Just over half of respondents wanted the QC rank to 'become a broader mark of excellence among lawyers'.

The Law Society is now a fifty per cent co-owner, alongside the Bar Council, of Queen's Counsel Appointments, the company responsible for the new process. Des Hudson, the Law Society's chief executive, said 'as a director' he was 'very confident [of achieving] our aims to bring about a transparent and objective process and to deal with those mischiefs about the old "tap on the shoulder" and that it all happens in smoke-filled rooms'. 'We have made very, very significant progress,' he added.

However, the Law Society, unsurprisingly, would like to see the QC rank acknowledge more fully the skills of its members as opposed to being largely about the Bar. 'If the QC is a mark of excellence, what sort of excellence should it represent?' Des Hudson asks. 'At the moment it recognises advocacy in the High Court. But the question then becomes "what is advocacy?"'

■ *Queen's Counsel appointments: results of an online survey conducted in November 2008* is available at: www.lawsociety.org.uk/documents/downloads/qc_survey_results.pdf.

LSC helpline to cover family law

The Legal Services Commission's (LSC's) telephone helpline will expand in July this year, covering family law advice and extending its opening hours. The LSC is to invest around £7 million over three years in the Community Legal Advice (formerly CLS Direct) family service to be rolled out from July.

A tender to run the new family advice service was launched last month. 'We are asking family legal advisers to tender for the Community Legal Advice family helpline contract because our research shows that debt, housing and family problems are so often experienced together,' explained Hugh Barrett, the LSC's executive director for commissioning. 'Debt, eviction or redundancy can put strain on relationships. Equally, splitting households can cause housing or debt problems.'

According to an evaluation of last year's pilot of the family law advice service, some 3,000 calls a month were received from people wanting such help. The LSC says that the advice line would encourage referrals to mediation, 'where appropriate, increasing the chance of less adversarial resolution of family disputes'.

■ The details of how to tender for this work are available at: www.legalservices.gov.uk/civil/tendering/9079.asp. The tender closing date is 27 February 2009.

Anne Owers, the chief inspector of prisons, has been awarded a damehood of the Order of the British Empire in the New Year Honours List 2009 for her services to the criminal justice system.

Conservative party calls for end to CLACs

Before being reshuffled last month, Nick Herbert, the then Conservative shadow justice secretary, tried to persuade the government to suspend the establishment of any further community legal advice centres (CLACS). He called on MPs to support Early Day Motion (EDM) 405 on the threat to the citizens advice bureaux (CABx) network posed by tenders for CLACs and community legal advice networks (CLANs).

CLACs are the government's and Legal Services Commission's flagship policy to join up civil legal services at a local level. However, CLACs have proved to be controversial, after leading to the closure of Leicester Law Centre® and threatening the continued existence of Hull CAB. EDMs are frequently used by MPs to draw attention to specific issues. EDMs are rarely debated, but if they are signed by large numbers of MPs, this can keep media interest alive in an issue and put political pressure on the government.

EDM 405 seems to be attracting all-party support: it has been signed by Liberal Democrat deputy chief whip, Adrian Sanders, Labour MPs Jim Dobbin and Marsha Singh along with prominent Conservative MPs such as Nicholas Soames. At the time of going to press, 48 MPs had signed the EDM.

On tabling the EDM jointly with Alan Duncan, the then Conservative shadow business secretary, Nick Herbert said, 'The effect of the tendering process on the voluntary sector needs to be reviewed and a new public interest test considered. The government should suspend tendering for legal advice services pending the outcome of their own review, and while the economy is in recession, so that we can be sure that more CABx will not be undermined.'

David Harker, chief executive of Citizens Advice, told LAG that he agrees with the Conservative party's initiative. 'We have never supported winner-takes-all competitive tendering for CLACs and CLANs and have on a number of occasions suggested that the roll-out be halted until the impact of the existing ones was evaluated.'

Lord Bach, the legal aid minister, told LAG that £80 million was spent last year on legal services in the not-for-profit sector and pointed out that CABx had been involved in three successful tenders out of the five CLACs established so far. In a sideswipe at the Conservative party, he said, 'The Conservatives are committed to cutting public spending. When in government. their record in this field was pathetic.'

■ Dominic Grieve is the new Conservative shadow justice secretary and shadow Attorney-General.
■ EDM 405 is available at: http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=37420&SESSION=899.

John Harrison 1954–2009

Steve Cragg and John Seargent, friends of John Harrison, write this tribute:
John Harrison, the author of LAG's book, *Police Misconduct: legal remedies*, has died, aged 54, from complications following a number of heart operations.

John was a pioneer of civil actions against the police in the 1980s. He began his career writing housing law guidance for the then National Association of Citizens Advice Bureaux Information Service. But in the early 1980s, his twin interests in writing fiction and becoming a lawyer grew. He moved to a delightful Parisian garret in the 6th arrondissement that it would not have been lawful to let to tenants in this country. However, John's muse never really turned up, and back in England he shifted his focus to the law.

John then worked at Paddington Law Centre® in west London. He secured a £26,000 grant from the then Greater London Council to fund the first edition of *Police Misconduct*. The book grouped together and explained in straightforward language, torts such as false imprisonment, malicious prosecution and misfeasance which had fallen largely into disuse over the years. The practical tone of *Police Misconduct* made it an important campaigning tool for more police accountability. When the book was deemed too controversial by the CAB movement, LAG published it and the rest is history. The current fourth edition of *Police Misconduct* is over 700 pages long and many human rights practices now boast dedicated police misconduct departments.

John moved away from police misconduct work. He worked for Southwark Council in south-east London, eventually as assistant director of law and administration, where he led groundbreaking work creating the pedestrianisation of the South Bank. Since 2001, John had been a partner at the leading firm Sharpe Pritchard.

However, John's involvement in human rights issues continued. As a gay man he was a passionate supporter of gay rights, a permanent marcher for Gay Pride, and a police station adviser for arrested marchers.

John was a fierce editor of the later editions of *Police Misconduct* and wrote the chapters about the constitutional and organisational position of the police. He was a loyal and trusted friend and will, of course, be greatly missed by all who had the pleasure of knowing and working with him.

news feature

Whatever happened to legal aid?

Jon Robins, LAG's communications and campaigns director, writes:

This year marks the 60th anniversary of the Legal Aid and Advice Act 1949. To mark this anniversary, in March LAG will publish a new book, *The Justice Gap: whatever happened to legal aid?*, part history of legal aid and part health check on an ailing public service. So, what do we mean by the justice gap? We define it as the legal aid vacuum occupied by an increasing section of society that is neither sufficiently impoverished to qualify for legal aid nor able to afford a lawyer.

Most LAG readers will not need to be reminded that the legal aid scheme was conceived originally as one of the key 'cornerstones' of the welfare state, even if legal aid has become a statistical irrelevance to clients. According to recent figures from the Ministry of Justice, less than one in three clients are now eligible for publicly-funded legal advice; if this particular cornerstone has not yet totally crumbled into dust, it is in a sorry state.

In legal aid's first 1949 incarnation, access to justice was seen as no less a fundamental right than that to a decent education or free health care. In the first years of the scheme, eight out of ten people were eligible for publicly-funded legal advice. 'Legal aid should be available in those types of case in which lawyers normally represented private individual clients,' argued Lord Rushcliffe in his 1945 report. 'Legal aid should not be limited to those people "normally classed as poor" but should include those of "small or moderate means".'

In 1997, New Labour came into power with a promise: a 'comprehensive' new Community Legal Service. At that point, just over half of all people could access publicly-funded legal help and so, using eligibility as a measure, New Labour has shockingly failed to deliver on that pledge. At the same time, the government spends £2 billion of taxpayers' money a year on publicly-funded legal advice. That sum represents, as successive legal aid ministers have been fond of pointing out, a greater spend per head on legal aid than anywhere else in the world. That amount of money is a significant investment, but it would not keep the NHS going for a fortnight. Unlike the health care or education budget, legal aid funding is set to be cut back in real terms over the next two years. The health care budget is set to grow at four per cent a year in real terms to £110 billion, while legal aid, ever the poor relation, will be expected to remain at the level of £2 billion.

It is wrong to suggest that legal aid is entering some new period of crisis, rather 'crisis' – as a result of a long-term absence of vision on the part of those that run legal aid together with an alienated supplier base – has became a way of life for the sector. A growing criminal budget will continue to squeeze the life out of the civil scheme.

Of course, events can change even the government's best-laid spending plans. Will the Labour government abandon its supporters and leave them in fear of losing their jobs and homes without legal redress?

'According to recent figures from the Ministry of Justice, less than one in three clients are now eligible for publicly-funded legal advice; if this particular cornerstone has not yet totally crumbled into dust, it is in a sorry state.'

■ LAG aims to represent the interests of clients not legal aid lawyers. Our remit is to campaign for equal access to justice for all, but chiefly for those who are socially, economically or otherwise disadvantaged. We want to talk to the users of legal services about their experiences of the justice system, legal aid and access to legal advice. Their voices have not been heard enough in the increasingly fraught debate over the future of legal aid that has been dominated by (understandable) practitioner self-interest and political intransigence. LAG wants to make sure that users' voices are heard. We welcome contact from firms and agencies which will help us do this. E-mail LAG at: lag@lag.org.uk or visit LAG's blog at: www.legalactiongroup news.blogspot.com/

Our research for *The Justice Gap* began in Dover Magistrates' Court one morning in mid-April 2008 on repossessions day. Courts like this see the victims of the so-called credit crunch at their most vulnerable. On the day that LAG visited, District Judge Parnell had 35 cases listed. In the waiting room, anxious homeowners struck deals with mortgage companies' agents to repay arrears or give up their homes. Many of those homeowners were 'traumatised', according to the debt adviser from the local citizen's advice bureau who was running the court desk. 'Homeowners arrive unsure of what is going on, totally ill-informed and prepared to lose their home because they think there is no alternative.' The reality is that in 21st century Britain, people can lose the roof over their head through a legal process, often unnecessarily, in ignorance of the law and after being misled about their rights, without having access to legal advice.

So, where does legal aid fit into this dismal picture? Many homeowners are barred from the legal aid scheme, which is only available to people who have less than £100,000 equity. The advice available in Dover Magistrates' Court was not subject to any means-test, but its provision was arbitrary. At that point, the Legal Services Commission funded 94 such services out of 230 county courts.

LAG argues that a critical test for the legal aid system is not just that homeowners who are fearful of losing their homes have a right to receive proper independent advice about their legal rights. People must understand that they have such a right, and there has to be an adequately-funded network of advisers who are well-placed to provide such advice, and those services must be clearly signposted.

It is LAG's contention that without a coherent set of principles, the modern system of legal aid flounders. *The Justice Gap* begins with a statement of principles that we believe should underpin a legal aid system for the 21st century.

■ *The Justice Gap: whatever happened to legal aid?*, Steve Hynes and Jon Robins, LAG, March 2009.

annual lecture

The 2008 LAG annual lecture was given by Lord Ramsbotham in London in November. This is an abridged version of the speech, which examines the failure of the prison system to cut rates of reoffending, and suggests an alternative approach. The full text is available at: www.lag.org.uk.

What price imprisonment?

My subject, 'What price imprisonment?', has a question mark attached to it very deliberately. I think that there is no subject in this country which is so imperfectly understood as imprisonment and yet about which so many people have extremely strong ideas, often for reasons that are very personal. Either they have been a victim or they just happen to feel that every criminal ought to be locked up. What I want to do is to explore the word 'cost' and then explore that question mark.

Why do I say a question mark? Well, first, nobody knows the financial cost of imprisonment. They know how much money is voted every year by the Treasury for the conduct of imprisonment, but they do not know how much it would actually cost to conduct imprisonment in the way that the government says that imprisonment ought to be conducted. So I want to explore what I think ought to be included in the cost of imprisonment.

The other question mark relates to the social cost that goes with imprisonment: the residual costs, the impact on the people who are affected by imprisonment, what happens to prisoners when they come out and the impact on society of those prisoners. Society must ask itself what imprisonment is meant to do in order to lessen that social cost.

As you know, there have been prisons in this country ever since society really formed itself and initially they were small, local prisons into which people were put to await trial and then sentence. As the sentence was either corporal or capital they did not have to wait very long. That system, more or less, survived until Tudor times. The next change was the repeal of the parish poor laws, resulting in every county being told to form a house of correction into which vandals and vagrants were sent, as opposed to being a burden on the parish.

Soon after that it began to be felt that there were people who did not deserve capital punishment but deserved something more than just a fine or being released. So transportation started to the American colonies at the end of the 16th century and continued until the American War of Independence. Then, luckily, Captain Cook discovered Australia, normal service was resumed and transportation went on until 1858 when Van Diemen's Land, or Tasmania, said 'no more'.

By that time there had been another look at the prison system in England. People were beginning to realise that, for some, a prison sentence was more appropriate than capital punishment. In 1843 the first convict prison in England, Pentonville, was built, influenced in particular by Jeremy Bentham's idea that work is an important part of resettlement.

In the mid-19th century, the idea arose to merge the local prisons and the convict prisons into one system, paid for out of the national budget. That came about in 1877 under the Prison Commission. I believe that our problems today start from that decision. That is because the local prisons housed short-term prisoners and those waiting for trial, close to their own communities. The convict prisons, of which more were built, housed the longer-term prisoner, whose needs are very different to those of the short-term prisoner.

As a result of the merger there are mixtures of different types of prisoner in most of the prisons in the country. I would like to see an adjustment, as in America or Canada, where there are state prisons and federal prisons. The shorter-term prisoners are in the hands of the state and the longer term in the federal prisons, so that each type of prisoner can receive better treatment according to the length of sentence.

The Prison Commission continued until 1962 when the prisons were brought under the control of the Home Office. That was the second date, I believe, from when we can trace our troubles. Civil servants are neither trained nor motivated to be operational heads of operational organisations, particularly ones where it is vital that the public is told about what is going on. Civil servants do not do that, it is not in their ethos, there is no reason why it should be.

When New Labour came into government in 1997 Mr Blair stated he wanted to be 'tough on crime and tough on the causes of crime'. I think this is about the most disastrous statement that has ever been made about imprisonment because it has resulted in what I can only describe as penal popularism, where each party has tried to be tougher than the other and they have cranked the whole thing up.

Instead of being tough on the causes, Blair became tough on the causers which is not the same thing at all. Being tough on the causes would have involved the whole of society in the conduct of imprisonment because all the causes of crime are actually in society: unemployment, lack of education, neglect, ill health, poverty, etc.

The New Labour government also looked at the criminal justice system: the courts, police, prisons and probation

service in particular. They realised that rather than being a system it was more like warring tribes competing against each other for ever diminishing resources. They decided to try and unify them by giving them one aim – to protect the public by preventing crime. Now I have no argument with that as an aim except, as lawyers and others know, it is not given to the right people because the criminal justice system does not click in until a crime has been committed. Police investigate, courts sentence, and then the prison and probation services administer the sentence.

Good idea, wrong people. A better aim for the criminal justice system would have been to protect the public by preventing reoffending because that does give a purpose, not necessarily to the police and the courts, but certainly to the prison and probation services. If you accept that the aim of the system is to prevent reoffending, then let us focus rather more on imprisonment.

What is imprisonment? What is it meant to be? What do people want from it? Well, I think there is no doubt that the first thing people think about imprisonment is that it is punishment. Yes, I agree with that but I prefer the words of Leon Brittan when Home Secretary who said 'prison is punishment, it is not for punishment'. The punishment is the sentence awarded by the courts, ie, the deprivation of liberty for a period of time following a sentence. It is the courts' job to punish – nobody else's. Once the word punishment is allowed to filter down, prison officers start thinking that punishment is part of the treatment they ought to mete out. I was extremely distressed when in 2001 I found that the National Probation Service had put punishment at the top of its five purposes, when for the previous 100 years its job had been rehabilitation. It seemed to me a very dangerous switch.

Of course, there are other views about imprisonment: that it should provide retribution, or be a deterrent. I do not think prison works as a deterrent. I do not think there is any evidence that people do not commit crimes for fear of going to prison. I have always thought that it is better to look at a more practical view of what prisons should do, and I found the solution was actually there staring at us in the statement of purpose given to the Prison Service:

It is our duty to keep securely those committed by the courts, to treat them with humanity, and to help them to live useful and law-abiding lives in prison and on release.

Lord Ramsbotham

The only argument I have with those words is that, as a soldier, I was taught that you should only have one aim, and there are three aims in that. So. I would suggest that it might be better to say:

It is our duty to help those committed by the courts to live useful and law-abiding lives in prison and on release, with the qualifications that they must not be allowed to escape and they must be treated with humanity.

I suggest that if the aim had been put in that way, security would have its proper place and not be considered the number one priority as opposed to doing things with and for prisoners which is what I believe prisons ought to do.

If you accept that you must ask yourself, how are they going to do this? Everything I am going to say now is actually happening somewhere, and one of my concerns is that it is not happening everywhere.

The first thing you have got to do when somebody is sent to you is to find out why they have come in, which includes assessing the risk that they represent to themselves, to the public or to other prisoners, and it includes the type of crime that they have committed. Should they be categorised as an armed robber or a sex offender? So you make that assessment and you realise that there are some things you can do to help them to be more law abiding.

Then you look at how to make them useful, and it is always seemed to me that there are five aspects to this. Education: it is terrifying how many prisoners have appalling educational records – the statistic I use most is that 65 per cent have a reading age of less than eight. But what worries me too is the scourge of the 21st century which is the inability to communicate with each other, and is why I have been championing the cause of speech and language therapist assessments which go into the whole business of why they cannot communicate. Building relationships is much better done with the mouth than the fist, and if you can communicate you can tell people something about yourself which they can then use as the basis for the programme to help you to improve. So, education in its widest sense.

Second, job skills. Appalling numbers of prisoners have no skills at all, and I would like to see an assessment that includes an aptitude test – as much as anything else to find out what potential skills people have got, and see if you can make something of them.

Then you come to the social skills side, by which I mean being able to look after yourself. I found a marvellous course running in Northern Ireland called 'Learning to live alone' which seemed to be very sensible and I thought it ought to be on the curriculum of every secondary school in the country as well. It included a little bit of cooking, painting and decorating, electrical work, and parenting skills. The whole question of the skills needed to live in society should be looked at.

Next is mental health, which is alarming. In 1998 the Office of National

Statistics disclosed that 70 per cent of all prisoners were suffering from some form of identifiable personality disorder. That does not mean to say that they are all sectionable under the Mental Health Act but it does mean there is something you can identify which impacts on their behaviour. If you can identify it you can do something about it. The one constant you hear is that the very worst thing to do for anyone with a personality disorder is to lock them up all day doing nothing because it makes them worse. So that seems to me to be barmy.

Then, of course, the physical health. There are all the problems of musculoskeletal disease, they cannot stand up, they do not know how to breathe. There are all the blood-transmitted viruses: Hepatitis C, HIV, and so on. There is a lot you can do, and encouraging all the Well Man and Well Woman clinics as a natural part of prison life seems again to be sensible.

Finally, of course, there is the substance abuse – both drugs and alcohol – and the figures again are terrible. I mean 80 per cent had been using some illegal substance at the time that they are brought in. I have never understood why the Prison Service does not automatically test everyone when they come in because it is the only way to know the size of the problem. Some prisons only test those people who admit to having a problem, some only test volunteers, one or two test all. Then the Prison Service has its own ridiculous test called the Mandatory Drug Test which it claims tells it what is going on. It is a test of five per cent of every prison every month. I once went into a cell and there on the wall were nine certificates and I said to the man 'what are they for?'. He said 'I do not use drugs, they test me every month and that is my certificate for being free and no doubt if you come next month there will be a tenth'. I think that ought to be stopped and there ought to be compulsory tests, and prisoners should be given treatment according to the result of the test.

So, they are the five things: education, work, social skills, mental and physical health, and substance abuse. What you then need to do is to look at each individual and decide what it is that individual needs to live a useful and law-abiding life. You should then prioritise what you are going to do with each one of them according to the time available, the length of sentence, and the severity of the need. After the assessment, that programme should be carried out.

Then comes the most important of all – the transition. Whatever you have started must be carried on somehow. Drug treatment: it is no good just saying they will automatically be clean when they go out, they will not. The first person they see coming out of prison is very often the drug dealer, taking the money from them which they have got as their leaving allowance from the prison, and then off you go and they are back again. The support must be there otherwise you are wasting all the time and effort that has been spent in prison. Education can be continued, and so on.

If you accept imprisonment could protect the public in this way by actively reducing the risk of reoffending, let us look at the organisation required to make that happen. Here again I ask myself some questions about the organisation of imprisonment in this country. At the moment there is nobody responsible and accountable for each type of prisoner in this country with the exception of high-security prisoners, and the Director of High Security Prisons was only put in place because escapes in 1994 embarrassed the then Home Secretary.

But I contend that the reoffending or reconviction rate of prisoners coming out of prison is even more disgraceful and worrying than an escape because by and large escapees get picked up again. The fact that 67 per cent of all adult males, over 70 per cent of all 18-year-olds, and 80 per cent of 15 to 18-year-olds are reconvicted within two years of release is a disgrace. Any firm that had a failure rate like that would be out of business. The public ought to be saying, why are you not protecting us? Why are so many people reconvicted who have been in your hands and could have been helped? Just to introduce finance to show I have not forgotten about it, reconviction is currently assessed at costing around £12 billion a year, which is not a good return for the £2 billion or more spent on imprisonment.

In 1990 there were riots in Strangeways and another 23 prisons, after which a marvellous report on the riots was written by Lord Justice Woolf – one of the great penal documents, I think, of all time.[1] In this he identified that the three things most likely to prevent reoffending were a home, a job and a stable relationship. All these are put at risk by imprisonment so you must try to mitigate that risk. The best way to do that is to keep prisoners as near to home as possible so that their family can visit them, and local employers could perhaps get involved in their job training so there was an opportunity for employment in their area when they came out.

Soon afterwards, the government published a white paper on imprisonment,[2] the only one to have been written in the last 60 years. The paper said that from now on we will work towards developing community clusters of prisons, as recommended by Lord Woolf. In other words, in each part of the country there will be enough prisons to house all the prisoners of each type from that part of the country, with the exception of high-security prisoners of whom there are not enough to justify a high security prison in each community.

Nothing has happened. Prisons are still organised in a haphazard grouping called an area, which is a clutch of prisons of different kinds under the charge of an area manager who is responsible for their budgets. That is the only direction that a governor of a prison gets. He is sent to govern a prison and he is told that he willl get his orders from his area manager and that is about budgets. I once went into Parkhurst and I asked the governor what the aim of his prison was and he said 'To save £500,000 by the end of the financial year'. That suggests to me that the focus of the Prison Service is entirely wrong. If prison governors are putting budgeting first they are not putting protection of the public first by the prevention of reoffending, as they should be.

There ought to be regional clusters of prisons. We have got government regions. We have got coterminus boundaries within them involving the courts and the police and health care and education, and the prisons can quite easily conform with that. Then a whole number of things could happen. For instance, chambers of commerce say they are more than happy to go into a prison, identify people who could fill potential skill shortages, and start training them in prison. They come out with a job to go to which has prospects.

Also, of course, if people are held more or less locally in a region it is easier to decide when and where they move. The problem with the present situation of overcrowding is that prisoners are sent all over the country according to where there is an empty bed, not because they ought to be going, for example, to do a course. Better planning could ensure that people move to where the courses are and do not leave until the course is completed. So you do not waste all the money that is currently wasted on courses that are either not filled or people have to leave

before they are completed. And, of course, you enable the prisoners to keep up with their families.

While I was thinking through all this Jack Straw kept on telling me when he was Home Secretary that he wanted me to league-table prisons. I said it is a pointless exercise. They are inspected every five years and what is the difference between a women's prison in Cumberland five years ago and a young offenders' establishment in Kent today? What is it going to tell you? Absolutely nothing. It is wasting your time, my time and I have no intention of doing it. What I will do though is tell you whether a prison is healthy or not based on my interpretation of what a prison should do.

There are four aspects of a healthy prison. The first is that everyone is and must feel safe, that is staff, prisoners, visitors, and people going in there for any purpose. The second is that everyone must be treated with respect. It is not just calling them 'Mr' but it is things like providing health care, and making certain that visitors are treated properly. Prisoners are fellow human beings, you have got a job to do with and for them during the time they are there.

The third is that they must be encouraged to improve themselves and given the opportunity to do so through access to work and education. The final thing is that they must be prepared for release and helped to maintain contact with their families. I add a rider to say that in preparing them for release I think that there is a job to be done of preparing the communities to receive them when they come back.

Well, that has been accepted and prisons have now been reported for the last nine years according to whether they are healthy or not. I am encouraged by that because the governors understand it. The governors have got clear ideas as to what they need to do to earn that healthy rating, if you like, because it is all practical. It is to do with prisoners, and what is happening to them, which brings us back to cost. But what worries me when I look at the cost of what is needed to do that programme, with and for every person, is that the cost assessment is only being carried out in the private sector prisons which are having to do these sums in order to compete for contracts. It seems to me that that is foolish because it is the public sector which ought to be assessing these costs.

I think that if they were required to produce a programme for each and every prisoner to have a full, purposeful and active day relating to the assessment of what is needed to protect the public by preventing crime, they would find a whole lot of things that they are currently doing are unaffordable and silly. The first thing I would do is get rid of the National Offender Management Service. It is an absolute nonsense: 1,647 civil servants and several tiers of management but nobody actually responsible or accountable for looking after different types of prisoners. There is no longer a Director General of the Prison Service. There is no longer a National Probation Service. There is no longer a Director of Probation. Well, this seems to be nonsense. They are operational services and they need operational heads.

Second, I would end the business of having national prison population management and delegate the responsibility out to the regions, saving millions. At the moment, the expense of putting people all over the place and arranging family visits and so on adds up to a completely unnecessary additional cost.

Third, there are all sorts of volunteers who would come in and help. For example, there is an admirable voluntary education scheme at Feltham where individuals come in and teach one to one. You could have that in every prison in the country and it would not cost you a thing. Or one of the best programmes going is called 'Toe by toe' where prisoners teach other prisoners to read.

There are all sorts of ways you could do this if you knew that you were being judged on producing this full, purposeful and active day with the aim of helping people to live useful and law-abiding lives. My contention is that the social cost of not doing this is the huge reoffending rate, and it also puts the public against anything that is done purposefully with and for prisoners because they see no result, all they see is the reoffending. When people say there will be a cost, yes, but for heaven's sake let us work it out because my contention is we cannot afford to pay the social cost of not doing it, and that is the question that I would put to government.

1 *Prison disturbances: April 1990*, Cm 1456, HMSO, 1991.
2 Home Office, *Custody, care and justice: the way ahead for the prison service in England and Wales*, Cm 1647, HMSO, 1991.

■ Lord David Ramsbotham was appointed a crossbench member of the House of Lords in May 2005, where he majors on penal reform. A former General, Lord Ramsbotham was appointed HM Chief Inspector of Prisons in 1995 until 2001, during which time he visited and/or inspected every prison in England, Wales and Northern Ireland, as well as prisons in Australia, Canada, Germany, the Caribbean Overseas Territories, Scotland and the USA.

Photograph by Robert Aberman

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LAG annual lecture

The citizens advice bureau (CAB) at the Royal Courts of Justice has seen a 30 per cent increase in inquiries over the last year, mainly due to the credit crunch. Jon Robins, LAG's communications and campaigns director, examines the work of the CAB, particularly its role in relation to litigants in person.

How the RCJ CAB helps unrepresented litigants

'It has been a traumatic experience,' says Kamal, a 42-year-old former civil servant (not his real name). 'In total, I have lost six or seven years of my life trying to seek justice.' Kamal's feelings of powerlessness and frustration chime with the experience of some litigants in person. His particular problems stem from what he alleges to have been a sustained period of bullying and harassment endured while working as an administrator in the civil service. He won an unfair dismissal case in 2004 on procedural grounds, but lost his claims for racial discrimination and damages relating to personal injury. The odds were stacked against him as less than one in five racial discrimination claims that make it to a hearing are successful. He was awarded £13,000, but walked away with under £1,000 in his pocket after the tribunal ruled that there would have been a high possibility that he could have been dismissed lawfully if the employer had adopted a fair procedure.

A separate personal injury action was dismissed in the Central London County Court in November last year, the week before LAG first met him at the Royal Courts of Justice's citizens advice bureau (RCJ CAB). Kamal, a regular visitor there, has made a claim for a back injury which he claims was caused as part of his line manager's campaign of harassment. He has also put in a claim for psychological damages.

Kamal blames the pressure of the litigation for the recent collapse of his marriage. 'The stress means you cannot give your family the time they deserve,' says Kamal, who has a young son. He faces a costs order of £25,000. Nonetheless, Kamal, who is unemployed, is determined to fight on. He is presently taking advice on how to apply for permission to appeal (which will cost another £250). 'I forgot to ask the judge when I was in court. I was in a state of shock and by myself,' he explains. He has been by himself apart from initial representation in the unfair discrimination case (from the then Commission for Racial Equality) and, of course, the backing of the RCJ CAB.

A lifeline, with limits

Over the course of 2006/07, the RCJ CAB dealt with 10,441 clients, up by 1,000 from the previous year. 'They are all either about to be involved in court proceedings, in which case they can be given traditional "citizens advice"-type advice, or else they are already involved in court proceedings,' explains Rebecca Scott, a senior solicitor at the CAB.

Kamal pays tribute to the support of the CAB ('… just fantastic, a real lifeline …'); however, there are limitations. As, he says: 'They cannot represent you. When it comes down to it, it is you on your own against the judge and the other side's barrister. Even though you have all the facts in front of you, the judge is going to be friendlier towards a legally qualified barrister than somebody who just says: "This is the law and this is the Human Rights Act".'

The CAB, which has its main office in the cramped warren of rooms in the RCJ's main building, introduced an appointment policy a few years ago. It no longer accepts drop-in clients unless there is an emergency (for example, an eviction is imminent). So, the old days when litigants would queue for help have gone. Each advice session is 45 minutes long.

The RCJ CAB which has a second site on High Holborn dealing with family cases, has a total of 21 staff with the equivalent of 13 full-time advisers plus 35 regular volunteers. Then there is the pro bono support of solicitors from some 60 City firms which provides advice to some 2,000 clients a year. The service receives a total of £850,000 funding, comprising £283,000 from the Legal Services Commission (LSC) for 'core' legal advice; another £260,000 from the Department for Business, Enterprise and Regulatory Reform through the financial inclusion fund to fund bankruptcy advice; approximately £120,000 from the Ministry of Justice for a miscarriage of justice support service; £85,000 from London councils for general advice on debt, welfare benefits and housing; plus in the region of £60,000 from donations from City firms and £50,000 from other grants.

So, how does the RCJ CAB go about meeting demand for its services? 'There is always more demand than we are fully able to meet for our services,' replies the CAB's director, James Banks. 'But one of our main challenges is in terms of space. Being physically located within the courts, there is a limit as to how many staff and volunteers we can fit into our offices and at the moment we are at capacity.'

Unrepresented litigants

There has been plenty of concern about, yet little research into, the plight of

TIM AYERS1/ALAMY

Debt is now the single biggest query at the Royal Courts of Justice CAB.

litigants in person. This is a point made in a 2005 study by Professor Richard Moorhead and Mark Sefton of Cardiff University.[1] This study revealed just how common it was to come across cases with one or more unrepresented parties. On the family side, 75 per cent of private adoption cases and 69 per cent of divorce cases involved at least one unrepresented party (as well as 49 per cent of Children Act cases and 48 per cent of injunction cases). Figures for civil cases were even higher, 85 per cent of individual defendants in county court cases were unrepresented at some stage during their case and over half of High Court defendants (52 per cent) were unrepresented. Obsessive or difficult litigants ('often taken to be the archetype for unrepresented litigants generally') represented 'a very small minority', the research found.

Why do so many people end up at this CAB? There is 'a definite trend' of solicitors being 'unwilling to take on cases on a publicly-funded basis in all the traditional areas' such as housing and family, Rebecca Scott reports. 'They are finding the bureaucracy of the LSC really difficult to deal with. They are also finding that it is affecting their profits. They are not making as much money as they could do through private clients.'

As for the reasons why parties went unrepresented, Richard Moorhead and Mark Sefton put forward three main reasons:

- inability to afford it (including 'unavailability of free or cheaper sources of help');
- a view that lawyers are 'not always perceived as necessary or best placed to advance the litigant's interests'; and
- 'the openness and supportiveness' of courts to unrepresented litigants.

'Cost, or the unavailability of legal aid, was usually a factor in their decision but often combined with other reasons: a belief that they could conduct the proceedings themselves without too much trouble; a feeling that solicitors provided little or no benefit ...; sometimes lawyers had been instructed but failed to attend because legal aid was expected but had not yet been granted or because of conflicting appointments.'

James Banks reports that the RCJ CAB is about 30 per cent up 'in terms of the number of inquiries compared to where we were at one year ago'. 'The credit crunch is a big part of that in terms of the profile of the inquiries we are handling.'

Unsurprisingly, given the parlous state of the economy, the biggest growth area for the CAB has been debt work. 'In the last 12 months, debt has been the single largest query that we have had. It is the first time in our history that that has been the case,' says Rebecca Scott. 'When it gets through to our office it tends to be at the chronic stage where court proceedings have been taken and been successful and the banks are trying to take possession.' In 2006/07 debt made up 27 per cent of the CAB's case load (legal was 26 per cent, housing 14 per cent and family 12 per cent) but over the last 12 months it is around 38 per cent.

Costs tend to be 'the biggest factor in terms of why people become litigants-in-person,' says James Banks. 'That is either because they are ineligible for legal aid or they cannot find a legal aid practitioner to take their case on.'

Most of the clients here are 'on a low income or on state benefits', reckons Rebecca Scott. Although many of the clients are 'theoretically eligible to get legal aid, the actual reality of finding legal aid and a solicitor to run your case is very different,' she says. 'We find that many of our clients say that they go to a solicitor who tells them they are too busy or else the case does not look like a sure-fire winner or there is not going to be much money in it for them.'

James Banks points out that there are a number of litigants who simply want to go it alone. 'There are those who feel that it would not be of benefit engaging a solicitor, for example, where there is a divorce where both parties are still quite amicable, have no children and it is more a form-filling exercise. So they are more willing to represent themselves.' Other litigants-in-person are 'incredibly knowledgeable at the law, their subject area and very able to conduct their cases effectively'. 'Perhaps they have had bad experiences with lawyers and do not have that trust and so want to represent themselves in order to feel that they have had a fair crack of the whip.'

Unexpected costs

The area where litigants-in-person are dangerously exposed is costs. 'It is so easy to go and issue a claim form but I do not think many have any concept of just how expensive litigation is,' says Rebecca Scott, 'and how once you have started a process you cannot finish it without having to pay someone money.'

'That seems to come as a complete surprise to our clients and it can ruin them,' Rebecca Scott continues. She cites the typical example of a neighbour dispute where the aggrieved litigant-in-person issues a claim. 'But the neighbour, of course, has money to pay for an expensive solicitor,' says Rebecca Scott. 'So they come to us and we explain that we do not think that they are going to win. They say: "OK, we will stop it now".' The advisers then inform them that they cannot actually stop without agreeing costs with the solicitor on the other side 'because he has racked up a bill'.

How do they advise someone like Kamal who has been in the system for so long and has such a massive costs order against him? 'We have to warn them as to their position on costs,' says duty solicitor Jacqui Brooks. She reckons Kamal 'will carry on to the bitter end. Some people are just so determined that they want to carry on.'

1 *Litigants in person: unrepresented litigants in first instance proceedings*, Department for Constitutional Affairs, March 2005, is available at: www.dca.gov.uk/research/2005/2_2005.pdf.

Recent developments in prison law – Part 1

Hamish Arnott, **Nancy Collins** and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. Part 1 of this update reviews legislative and policy changes relating to the Criminal Justice and Immigration Act (CJIA) 2008 and the Parole Board (Amendment) Rules ('the Amendment Rules') 2008, and developments in case-law concerning the Parole Board ('the Board'), temporary release, categorisation decisions and challenges to alleged breaches of the European Convention on Human Rights ('the convention').

POLICY AND LEGISLATION

Criminal Justice and Immigration Act 2008

Certain provisions of this Act have been introduced amending the release provisions specified under the Criminal Justice Act (CJA) 1991 and the CJA 2003.

On 9 June 2008 amendments to the CJA 1991 made by CJIA s26 entered into force. These amendments allow for the automatic release of long-term prisoners once they have served one half of their sentence. This does not apply to offenders serving sentences for one of the offences specified in CJA 2003 Sch 15 (specified violent offences and specified sexual offences).

On 14 July 2008 amendments were made to the CJA 2003 by CJIA ss13–18 to the circumstances in which the court can impose sentences of imprisonment for public protection (IPP) and extended sentences. On this date amendments were also introduced to the early release and recall provisions set out in the CJA 2003. These amendments are specified in detail in 'Recent developments in prison law', July 2008 *Legal Action* 13 and a summary of these amendments is listed below:

- Section 24 amends the minimum period of time which must be served before prisoners are eligible for early release on licence.
- Section 25 amends the release provisions for prisoners serving extended sentences.
- Section 29 amends the provisions on the re-release of prisoners after recall and the circumstances in which they will be considered for automatic release 28 days after their recall to prison.
- Section 30 amends the further review procedures for recalled prisoners and the timing of those reviews.
- Section 31 abolishes the requirement for the Board to make a recommendation for the recall of life sentenced prisoners.

Finally, on 14 July 2008, amendments were introduced under CJIA s32 to the provisions on the re-release of prisoners recalled under the CJA 1991. Further details are set out in 'Recent developments in prison law', July 2008 *Legal Action* 14.

On 3 November 2008 CJIA ss33 and 34 amended the CJA 1991 and 2003 respectively to remove the statutory exclusion of certain prisoners from the Early Removal Scheme (ERS), including extended sentence prisoners and those subject to the registration requirement under the Sexual Offences Act 2003. On the same date amendments were introduced by CJIA ss21–22 to the CJA 2003 to the calculation of period of time on remand.

Parole Board (Amendment) Rules 2008

The Amendment Rules, which came into force on 31 December 2008, amend the non-statutory Parole Board Rules 2004 ('the 2004 Rules'). It is disappointing that the Ministry of Justice did not seize this opportunity to introduce a completely new set of rules by way of statutory instrument, which would have allowed for a measure of parliamentary scrutiny of the rules and was envisaged in draft rules prepared in 2005.

The Amendment Rules provide for the following amendments to the 2004 Rules:

- Rule 3 is amended to remove the need for three-person paper panels and to allow oral panels to be formed of one or more members, rather than always being formed of three members. References to three-member panels elsewhere in the 2004 Rules have been amended accordingly. It is of concern that there is no guidance about when a single panel member will be inadequate. Where the Board grants an oral hearing in recognition of the complexity of the issues at stake it would seem appropriate that a full three-member expert panel composed of judicial and non-judicial members should be required.
- Rule 3 is also amended so that there is no longer a requirement for all oral panels to be chaired by a legally qualified member, and adds a requirement for all oral panels formed to hear the case of automatic lifers, mandatory lifers, discretionary lifers or Her Majesty's Pleasure lifers to be chaired by a sitting or retired judge. It is also of concern that this provision does not apply to prisoners serving IPP sentences. IPP sentences were introduced to replace the automatic life sentence and the custodial part of the IPP sentence must be served in precisely the same manner as any other life sentence. It therefore appears that there is no reasonable basis on which it could be argued that IPP sentenced prisoners should be afforded less favourable treatment under the Amendment Rules.
- Rule 8 is amended to allow members of the Board who have been accredited in accordance with the Board's intensive case management system to make directions before the appointment of a panel to consider the case.
- Rule 10 is amended to require the chairperson to dissolve any oral panel that is unable to reach a majority decision and form a new oral panel for that case.
- Rule 11 is amended to specify the two decisions a single-member panel can take: (a) decide that a case should receive further consideration by an oral panel; or (b) make a provisional decision that the prisoner is unsuitable for release.
- Rule 12 is amended so that where a single-member panel has made a provisional decision that a prisoner is unsuitable for release under r11(2)(b) of the 2004 Rules, on the provision of full written reasons the prisoner can request, but cannot require, an oral panel to consider his/her case. It is of concern that under the Amendment Rules indeterminate sentenced prisoners will not be given an oral hearing as of right thus ensuring compliance with article 5(4) of the convention and the common law requirements of fairness.
- Rule 20 is amended to increase the period of time within which the panel must notify the parties of its decision from seven to 14 days.

The Amendment Rules fail to make specific provisions for extended sentenced prisoners as well as determinate sentenced prisoners. It would assist with the administration and progression of oral hearings for such prisoners if the Board were to specify a timetable within which the case

should be considered as well as detailed provisions for such hearings. At present these hearings are conducted on the basis of a broad understanding between the parties that the 2004 Rules apply. However, we note that in fact this is not the case. The 2004 Rules refer to recall provisions under the Crime (Sentences) Act 1997 in relation to life sentenced prisoners and CJA 1991 ss39(4) or 44A(2) in relation to extended sentenced prisoners. The provisions under the CJA 1991 are no longer relevant as determinate and extended sentenced prisoners, whether the sentences fall to be administered under either the CJA 1991 or 2003, are now recalled under CJA 2003 ss254–255D, as amended. Accordingly, the 2004 Rules as amended will not apply to any determinate or extended sentence case, and there will therefore be a lack of clarity about the proper procedures for such prisoners.

CASE-LAW

Parole: determinate sentenced prisoners

■ Hopkins v Parole Board

[2008] EWHC 2312 (Admin), 3 October 2008

In this case a 19-year-old determinate sentenced prisoner challenged the Board's refusal to grant him an oral hearing and its refusal to grant his release on parole licence. Stadlen J held that the Board had acted unlawfully in failing to provide the claimant with an oral hearing, but rejected the challenge to the Board's decision not to grant his release.

The claimant had submitted detailed representations in support of his release on parole licence and had argued that he should be granted an oral hearing if the Board refused to release him on consideration of the papers. He was serving a six-year sentence for attempted murder and had committed the offence when he was 15. It was argued that an oral hearing was necessary to ensure compliance with article 5(4) of the convention and under the common law requirements of fairness. In finding that the Board had acted unlawfully by failing to provide the claimant with an oral hearing, Stadlen J considered that the claimant should have been granted an opportunity to persuade the panel that the probation officers' recommendations for his release were correct. There was a great deal of information that suggested he was suitable for release, and critically there was no up-to-date risk assessment. Moreover, the claimant disputed the accuracy of the security information to which the Board had specifically referred in its decision. Stadlen J referred in particular to a security information report which alleged that the claimant had made threats to the victim's family and which the claimant denied.

Stadlen J rejected the argument that the Board had failed properly to balance the risk presented by the claimant against the benefits to be gained by his release. Stadlen J noted the Board's decision referred to the 'external protective factors' identified in the probation officer's reports and considered that this made it clear that the panel had considered the benefits of release.

Finally, Stadlen J rejected the argument that the Board had not considered the risk of offending during the correct period of time (ie, the period of early release). Stadlen J noted that the panel's conclusion that the claimant's risk of reoffending was unpredictable and could occur at any time, including during the period of early release, was reasonable on the facts of the case.

Comment: This judgment advances the argument that determinate sentenced prisoners should be granted an oral hearing to determine their suitability for release and not only following a recall to custody. As with recall cases, whether or not an oral hearing should be granted will depend on all the facts of the case, including whether there are factual matters in dispute and whether the panel would benefit from the ability to assess the prisoner's personality and character through oral examination. The judgment also clarifies the need for detailed written representations addressing any factual disputes between the prisoner and the report writers; the fact that such matters were addressed in the claimant's representations and yet had not been referred to in the panel's decision influenced Stadlen J's finding in favour of an oral hearing.

The increased recognition by the courts of the importance of oral hearings for determinate sentenced prisoners in certain cases highlights the need for specific rules to govern those hearings, as argued above in the summary of the Amendment Rules.

■ R (Pilgrim) v Parole Board and Secretary of State for Justice

[2008] EWHC 1019 (Admin), 9 May 2008

The claimant, a determinate sentenced prisoner whose release on parole licence was governed by CJA 1991 s35, challenged the test applied by the Board to the release of determinate sentenced prisoners. The test applied by the Board is set out in the secretary of state's directions to the Board issued under CJA 2003 s239. It requires the Board to consider primarily the risk to the public of a further offence being committed at a time when the prisoner could otherwise be in prison and whether any such risk is acceptable.

The claimant had been refused parole on the basis that he needed to undertake further work on impulsive thinking and to be tested in open conditions. The Board considered that he 'perhaps' presented a medium risk of reoffending.

The claimant sought to argue that the Board should apply the test set out in the secretary of state's directions to the Board on the release and recall of life sentenced prisoners. Thus he argued that the Board should release a prisoner if s/he presents a minimal risk to life and limb rather than a risk of committing further offences of any kind.

Saunders J rejected the claimant's argument. He considered that CJA 1991 s35 gives the secretary of state and the Board an unfettered discretion when deciding whether or not to release prisoners on parole licence. Furthermore, CJA 2003 s239(6) requires the secretary of state to refer to 'the desirability of preventing the commission … of further offences' when issuing directions to the Board. The different tests for life sentenced prisoners and determinate sentenced prisoners is justified by the fact that lifers may be required to serve longer than commensurate sentences because of the danger they represent to the public and the need to release those prisoners only once they are no longer a danger.

Comment: The difference in the test for the release of determinate and indeterminate prisoners reflects the fact that a life sentence is imposed on the basis that the offender is considered to be dangerous; therefore on the expiry of a lifer's minimum term his/her detention can only be justified if it can be shown that s/he continues to pose a risk of dangerousness. Unless this can be established, the causal link between the original conviction and the subsequent detention will be broken and a lifer's detention will become unlawful. Determinate sentences are not imposed on this basis and therefore the wider test of the risk of further offences being committed is appropriate when considering the suitability of these prisoners for release.

■ R (S) v Halton BC and Parole Board

[2008] EWHC 1982 (Admin), 21 July 2008

The claimant received a six-year extended sentence comprising a three-year custodial term and a three-year extension period. He was refused release on licence because it was not felt that a robust enough release plan had been put in place to safely manage his risk in the community and he sought to

challenge both that decision and the failure of the local authority to put in place the release plan needed. The case had originally come before the Board with a release plan based around the family home but the Board adjourned the hearing and asked the local authority to provide a more detailed release plan. A specific request was made for the option of foster care to be explored. The local authority provided a further report indicating that the view of social services was that a family placement was more appropriate than foster care and that, in any event, it had been unable to obtain a placement with one of its partnership fostering agencies. It was argued on behalf of S that the social worker had fallen into error by comparing the merits of foster care and a family placement rather than foster care as against continued detention. The final decision of the Board was also challenged on the grounds that the hearing should have been adjourned when it became apparent that the Board's preferred release plan was not viable. For its part, the Board considered that the local authority had properly complied with its directions. It had asked for the option of foster care to be explored and not a placement in foster care to be obtained. When the hearing resumed, the panel dealing with the case still considered that it had all options open to it, including the prospect of a family placement.

The court did not consider that it was possible to impose an article 5 duty on the local authority in relation to the task given to it by the Board. The difficulty in separating out the various arms of the state was discussed but ultimately the body with the article 5 duty was considered to be the Board.

Nevertheless, the court was prepared to review the decision on normal domestic public law grounds. Taking these principles and the evidence of the Board into account, it was held that the local authority had complied with its public law duties as once it had been decided that foster care was not a suitable option, it could not be under a duty to make a place potentially available in case this was the preferred option of the Board.

Turning back to the Board's decision, the court noted that the written reports had all recommended release to the family home. However, it concluded that the high risk levels in the claimant made this an inappropriate release plan and so declined to order release. The claimant contended that the panel ought to have adjourned the hearing as it had already concluded that the risk of release to the family home was too high, this being the reason for the original adjournment. As no alternative release plan had been presented, the appropriate step was to take further time to explore alternatives. This argument was also rejected by the court. A great deal of store was placed on the fact that no adjournment had actually been sought by the claimant's legal representatives. A very similar argument seeking to suggest that the Board should adjourn even where no such application has been made had previously been rejected in the case of *R (Emirsoylu) v Parole Board* [2007] EWHC 2007 (Admin), 14 August 2007. The court on this occasion felt that it was appropriate to follow the reasoning in that case and affirmed that where a prisoner is legally represented at a parole hearing, it is difficult for that prisoner to complain about procedural failings if those complaints are not raised at the time.

Resettlement licence

■ R (Adelena) v (1) Governor of HMP Downview and (2) Secretary of State for Justice

High Court,
3 November 2008

This case involved a challenge to the provisions of Prison Service Order (PSO) 6300 relating to temporary release. Temporary release is the power to allow prisoners out of prison (either escorted or unescorted). Although it is a power vested in the secretary of state, in practice it has been almost entirely devolved to prison governors. The PSO contains a list of prisoners who are excluded from ever having temporary release, which includes those prisoners serving prison sentences who have received confiscation orders with default terms of imprisonment where the confiscation order has not been met. These prisoners can receive temporary release once the original prison term is over and the default term is being served, but not on the original sentence itself.

The claimant argued that this policy was being rigidly applied and as such offended against the general principle that all policies should be flexible and capable of admitting exceptions. By the time her case was heard, the defendants had agreed to consider the claimant's application outside the normal policy and had rejected it on the merits. However, the challenge proceeded as, although the secretary of state claimed to have a residual discretion to grant temporary release as an exception to the general rule, the policy document which was the basis for the decisions made by prison governors did not reflect the fact that any such discretion existed. Evidence was introduced in the case of another prisoner at the same prison who had a 12-year prison sentence and a seven-day confiscation order. She had been told she was ineligible for temporary release, even in the face of threatened legal action, and it was only when she commenced judicial review proceedings that her case was then considered as an exception. The court found that the PSO was defective for failing to allow for exceptional cases, even though the decision to refuse temporary release to this particular claimant was upheld.

Comment: The refusal of the secretary of state to amend the PSO voluntarily is difficult to understand. It is the PSO that explains the policy that must be applied by prison governors and the evidence made it very clear that prison governors were not aware of the residual discretion. There was also no evidence of this discretion having been exercised by the secretary of state except when faced with legal proceedings. It is to the credit of the court that this issue was considered important enough to be determined even though the merits of the actual case before it were not strong enough to overturn the general rule.

Categorisation

Category A decisions

■ R (H) v Secretary of State for Justice

[2008] EWHC 2590 (Admin),
9 September 2008

The claimant was a life sentenced prisoner whose minimum term had expired. He was also held in a protected witness unit (PWU) which meant that his access to offending behaviour work was even more restricted than for other category A prisoners. In two successive annual category A reviews the local advisory panels in two separate prisons had both recommended downgrading. On both occasions the Director of High Security Prisons at Prison Service Headquarters, who makes the final decision about whether a prisoner should remain category A, rejected the downgrading recommendation.

The prisoner sought a judicial review of these decisions on two bases. First, he contended that the decision was procedurally unfair as he had requested an oral hearing before the Director so that the competing views on whether he should be downgraded could be properly investigated. The Court of Appeal held in the case of *Williams v Secretary of State for the Home Department* [2002] EWCA Civ 498, 17 April 2002; [2002] 1 WLR 2264 that an oral hearing may be necessary in a category A case where there was a conflict between the assessments relevant to the categorisation decision made by the Board, and by the category A review body.

Second, the prisoner contended that the Director had failed to take into account the limited opportunities that he had for accessing offending behaviour work. Consistently with the requirement contained in r3 of the Prison Rules 1999 SI No 728 to

rehabilitate prisoners he argued that this matter had to be considered in the categorisation process.

The application was granted in relation to the oral hearing point. The judge accepted that fairness required an oral hearing, even if this needed to be by reference to an 'exceptional circumstances' test as suggested by *Williams*. The factors identified by the judge as relevant to this finding were:

- The prisoner was held as category A.
- His tariff had expired. These first two issues were significant because their combination meant that delay in moving from category A conditions was highly likely to delay his eventual release. Since the consequences of an adverse category A decision were so serious, these two factors pointed in the direction of a particularly high standard of procedural fairness.
- On two occasions the local prison had recommended that he should be recategorised. As a consequence, there was an inconsistency between, on the one hand, the approach of the local prison and, on the other hand, that of the Director of High Security Prisons. This inconsistency supported the case for an oral hearing to explore it in greater depth, despite the difference of opinion not involving the Board.
- The approach of the Director would benefit from the closer examination which an oral hearing could provide.
- The claimant was in a PWU which was relevant to various factors such as risk and his ability to undertake work which could have an impact on reducing that risk.

The judge however accepted that the Director had not failed to consider the prisoner's need for rehabilitation through undertaking offending behaviour work. He had instead held that that need was outweighed by the needs of security in the light of the risk that he had found the prisoner posed and so the decision was not flawed in that regard.

■ R (Lynch) v Secretary of State for Justice

[2008] EWHC 2697 (Admin), 7 November 2008

The claimant was also a life sentenced prisoner who was challenging successive annual decisions that he should remain category A. For a number of years the annual decisions confirming that he should remain category A repeated the assertion that there was a 'lack of cogent evidence ... through offence related work or otherwise that the risk of you reoffending in a similar way if unlawfully at large had significantly diminished ...'.

By the time of his review in 2008 the prisoner had in fact undertaken one to one work with his offender supervisor set for him by the lifer manager at the prison, which an OASys (Offender Assessment System) assessment suggested had helped him develop a 'good insight into ... his offending'. The 2008 decision made no reference to this work when again asserting that there was a lack of evidence of offence-related work to warrant downgrading. The decision also failed to make reference to or take into account a psychological report that had been prepared for the 2007 review. The prisoner challenged the decision on the basis that the Director had clearly failed to take into account relevant material in coming to the decision.

The prisoner also challenged the decision on the basis that it was irrational to refuse to downgrade on the basis that further offending behaviour work was necessary, if such offending behaviour work was not in fact being provided. The issue was that the prisoner was not suitable for the accredited offending behaviour courses most relevant to his offending.

The claim succeeded on the ground that the decision was unlawful for failing to take into account the offending behaviour work that had been carried out, and because the psychology report included in the earlier review had not been considered.

However the second part of the challenge failed. The judge noted that the 2008 decision did indicate ways in which the prisoner may be able to demonstrate progress in risk reduction short of participation in accredited courses, namely 'work with prison staff to find a way forward to clarify his account of his offending behaviour and why it differs from the official account'. The judge commented on the irony implicit in the fact that the prisoner had in fact carried out such work, but that this had been ignored in the decision.

Comment: Category A decisions remain very difficult to challenge due to the deference accorded by the courts to the Prison Service's decisions relating to matters of security. In recognising that fairness in the category A context could require an oral hearing, *Williams* seemed to be a ground-breaking case. In fact it is unclear whether since it was decided there have been any other circumstances in which an oral hearing has been held. The *H* case at least demonstrates that the principle in *Williams* cannot be restricted to its own facts. The Prison Service has however appealed the judgment and the case is to be heard by the Court of Appeal in January 2009.

These two cases also both address the difficult issue of the availability of offending behaviour work in relation to category A decisions. The judgment in *Lynch* rejected the assertion that there is a duty on the Prison Service to provide courses so that a prisoner can demonstrate a reduction in risk. In doing so the analogy with the parole context (and in particular *Secretary of State for Justice v Walker and James* [2008] EWCA Civ 30, 1 February 2008; [2008] 1 WLR 1977) was resisted on the basis that the prisoner concerned was a long way from tariff expiry and because the categorisation process did not involve a decision on release. However in *H* the judge accepted that the ability to engage in offending behaviour work had to be a relevant consideration in the decision-making. Therefore a prisoner who can only undertake such work in a lower category environment may qualify for downgrading with a higher level of assessed risk than a prisoner for whom courses are available in category A.

Other security category decisions

■ R (Lowe) v Governor of HMP Liverpool

[2008] EWHC 2167 (Admin), 28 August 2008

The prisoner challenged the decision that he be recategorised from category C to category B. The challenge was broadly on two bases. First, the prisoner claimed that the decision was not based on any relevant change of circumstances since he had been given category C status. Second, the governor had wrongly taken into account an additional period that the prisoner had to serve due to non-payment of a confiscation order in deciding that he posed a greater risk of absconding.

On the first issue the court held that the Prison Service's policy on categorisation, contained in the National Security Framework and PSO 0900, did not indicate that decisions could be reversed because one governor disagreed with another. While it would clearly be lawful to correct an earlier decision vitiated by obvious error, there:

> *is an expectation of prisoners that they will be reviewed annually, or less than annually, if there is a significant change in their circumstances. There is an expectation that they will be dealt with consistently and not dependent upon the differing views of different governors.*

On the length of time to serve the governor had made several errors. First, the policies did not prescribe that there was any limit on the amount of time to serve for prisoners to qualify in principle for category C. Furthermore, although an increased sentence could clearly be a relevant factor to risk, the governor had irrationally concluded both that the failure to pay the confiscation order in itself indicated a propensity to escape, and that the prisoner's challenges to the security category decisions themselves supported

such a view. Finally the decision failed to take into account the fact that statutory changes to release dates introduced in June 2008 (see above) had actually reduced his time to serve.

Comment: This case is a very useful example of the need for prisons to avoid a mechanistic approach to categorisation, but to focus on the key issues of risk of escape and risk to the public on the facts of each individual case. The judge was also particularly scathing of the suggestion that a prisoner, in legally challenging a categorisation decision, is demonstrating an increased risk of escape. Perhaps inevitably such an approach was described as 'almost Kafkaesque'.

European Convention on Human Rights

Article 8: right to respect for private and family life

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

[2008] EWCA Civ 676, 2 May 2008

In this case a prisoner, Mr Davison, challenged the charging structure for prisoners' telephone calls under which a prisoner pays 10p for the first 55 seconds of any call to a UK landline and thereafter 1p for each 5.5 seconds. This charging structure differs to that in public phones outside prison where any call of 15 minutes costs a minimum of 30p and thereafter 10p for each 7.5-minute period. Mr Davison argued that the expense of phone calls from prison violated article 8 of the convention because the restrictions had not been imposed for a legitimate reason. He also argued that the different pricing regime imposed on prisoners' phone calls was discriminatory in violation of article 14. The Prison Service contended that any pricing structure raised issues about cross-subsidies and that the current pricing structure is necessary because there are positive benefits in charging a cheaper rate for short calls.

The Court of Appeal rejected Mr Davison's arguments. Mr Davison had conceded that the cost of phone calls from prison did not amount to a violation of his article 8 rights, but merely that article 8 was engaged. Buxton LJ noted that both Strasbourg and domestic case-law make it clear that unless there is an infringement of an individual's right to respect for private and family life under article 8(1) there is no obligation on a public authority to justify the issue that is alleged to engage article 8.

The Court of Appeal went on to find that there was no violation of article 14. It was not sufficient for Mr Davison to allege that article 8 was 'engaged'. The case of *AB v Netherlands* App No 37328/97, 29 April 2002; (2003) 37 EHRR 48, in which the European Court of Human Rights (ECtHR) held that article 8 does not guarantee prisoners the right to make telephone calls, suggested that in fact article 8 is not engaged at all. Furthermore, the court held that insufficient analogy could be drawn between the use of phones in prison and outside to allow Mr Davison to argue that he had suffered discrimination.

■ R (G) v Nottinghamshire Healthcare NHS Trust; R (N) v Secretary of State for Health; R (B) v Nottinghamshire Healthcare NHS Trust

[2008] EWHC 1096 (Admin), 20 May 2008

The claimants argued that the failure to provide designated smoking rooms for patients detained at Rampton Hospital amounted to an unlawful interference with their article 8 rights and a violation of article 14. The claimants are detained in secure conditions which do not allow them to leave the building in order to smoke.

The court rejected their arguments. It did not accept that preventing an individual from smoking has such an adverse effect on that individual's physical or moral integrity as to amount to an interference with the right to respect for private or home life within the meaning of article 8. Furthermore, the court stated that when considering whether the ban amounted to a violation of article 8 it was necessary to distinguish between a private home and an institution as well as different types of institution. Thus a high security psychiatric hospital calls for a different regime to that imposed on prisoners. It was also noted that the policy at Rampton allowed for exceptions to the ban; for example, terminally ill patients who are unable to go outside may be permitted to smoke in a designated room.

Nor did the court consider that the failure to provide smoking facilities fell within the ambit of article 8 so as to engage article 14; given that the claimants had failed to establish a substantive violation of article 8 it was not open to them to resort to the concepts of the scope or ambit of article 8 on which to base a claim for discrimination. In addition, the court did not consider that 'mental health' conferred a status on the claimants for the purposes of article 14.

The court also held that even if the claimants' article 8 rights had been violated, the prohibition on smoking was proportionate. It had been introduced to protect the health of the patients and the staff. The evidence suggested that the smoking ban had not had a detrimental impact on the claimants' mental or physical health. The ban on smoking outside was justified for security reasons.

Finally, the court rejected an argument that the Trust had applied its policy inflexibly, despite the fact that no exemptions on the ban have yet been granted at Rampton.

Comment: In both of these cases the courts rejected arguments that article 14 was engaged because the complaints fell within the ambit or scope of article 8. In the case of *RD* Buxton LJ commented:

> *At one time at least some courts in England and Wales were minded to take a very broad approach to what constituted the ambit of particular articles of the convention. But the House of Lords has more recently, and critically of earlier domestic jurisprudence, required a more limited approach based upon the distance of the conduct complained of from the core values that are said to be engaged* (para 18).

In *G* the court noted that article 8 is much less well defined than other articles (para 104). Both judgments imply that the courts will be reluctant to find that article 8 is engaged unless a claimant can demonstrate that s/he has suffered a violation of his/her article 8(1) rights.

Article 2: the right to life

■ Renolde v France

App No 5608/05, 16 October 2008

The applicant's brother, Joselito Renolde, committed suicide in prison and the applicant contended that the prison authorities had failed to protect his right to life. The ECtHR upheld this complaint. In so doing it noted that shortly before his death the applicant had attempted suicide by cutting his arms. He was diagnosed as having suffered an acute delirious episode and was prescribed antipsychotic medication. Joselito Renolde mentioned to staff that he had a history of psychiatric problems for which he had been hospitalised. Following his suicide attempt Joselito Renolde continued to behave strangely. He was monitored by the local psychology service. The court therefore concluded that the authorities knew that Joselito Renolde was suffering from psychotic disorders and presented a real risk of self-harm which required careful monitoring.

The court went on to hold that the authorities had not done all that could reasonably be expected of them to avoid that risk. It was noted that the authorities had taken some action to respond to his needs. Thus, Joselito Renolde was subject to half-hourly cell checks. He was seen regularly by medical staff following his suicide attempt and had seen a psychiatric nurse on the morning of his death. Furthermore, shortly before his death he had asked to see a

doctor and this request was immediately passed to the medical staff.

However, prison staff had failed to consider whether Joselito Renolde should be transferred to a psychiatric hospital following his suicide attempt. The staff did not request an expert assessment of his mental state and did not consider doing so until his lawyer requested this. Furthermore, staff did not supervise Joselito Renolde to ensure he took his medication which was provided to him twice a week. The toxicology report completed after his death revealed that he had not taken his medication for at least one to three days and expert reports completed after his death concluded that his failure to take his medication appropriately could have contributed to his suicide. In addition, three days after his suicide attempt Joselito Renolde had been punished with 45 days' segregation, the most serious punishment available. This meant that he was deprived of all visits and activities, which the court considered was likely to increase his risk of suicide. The combination of these factors led the court to conclude that the authorities had failed to comply with their positive obligation to protect Joselito Renolde's right to life in violation of article 2.

The court went on to conclude that Joselito Renolde's punishment amounted to inhuman and degrading treatment in violation of article 3. His punishment with 45 days' segregation was incompatible with the standard of treatment required for a detainee suffering from serious mental illness who is known to pose a suicide risk.

■ R (JL) v Secretary of State for Justice

[2008] UKHL 68,
26 November 2008

The House of Lords considered the nature of the investigation to be held into suicide attempts in custody which nearly succeed and leave the prisoner with serious injury. JL attempted suicide in 2002 and was left with serious brain damage. Following the Court of Appeal's decision the secretary of state accepted that an article 2 compliant investigation was necessary in JL's case and that this investigation must comply with the requirements identified in the case of *R (D) (by the Official Solicitor his litigation friend) v Secretary of State for the Home Department* [2006] EWCA Civ 143, 28 February 2006; [2006] 3 All ER 946. Accordingly, it was accepted that in JL's case the investigation must:

- be held in public;
- be capable of compelling the attendance of witnesses;
- allow the representative of the victim to attend the enquiry and question witnesses;
- allow the victim's representative to be given advance access to all relevant evidence; and
- provide adequate funding for the victim's representative ('a type D investigation').

However, the secretary of state sought to appeal the decision that such an investigation would be necessary in every case of attempted suicide which results in serious injury where it is not clear from an initial independent investigation that the state or its agents bore any responsibility for the suicide attempt. Instead, the secretary of state argued that a type D investigation would only be necessary where an initial investigation by the prison authorities determines that there is an arguable case that the authorities have breached their duty to protect life under article 2 and that the nature of that investigation would depend on the facts of the case. The secretary of state was particularly concerned about the resource implications of the Court of Appeal's decision.

Their lordships rejected the secretary of state's appeal and held that article 2 requires an independent investigation to be held into every attempted suicide which results in serious injury. Although their lordships did not define precisely the term 'serious injury', Lord Rodger suggested that independent investigations would only be required where the injury meant that the prisoner was mentally impaired and unable to hold the authorities to account for any of their actions which led to his/her injuries. By contrast, Lord Walker appears to suggest that an investigation would be necessary where the prisoner was a known suicide risk or where, for example, the attempt suggested a failure in the system of cell searches.

The lords considered that it is not possible to prescribe the exact form the initial investigation should take. However, it must be capable of leading to the identification and punishment of those responsible. It will be for the investigator to decide whether to conduct the enquiry in public. Whether or not a further investigation is necessary will depend on the nature of the initial investigation. For example, if the initial investigation is prompt and all witnesses give their evidence readily so that the circumstances surrounding the suicide attempt are clear and show no possible defects in the system for preventing suicide nor any shortcomings in staff operating that system, the initial investigation may be sufficient. However, the public interest may require a type D investigation or this may be required where, for example, witnesses refuse to give evidence or serious failures by the prison authorities become apparent.

Comment: The judgment merits careful reading as it sets out a detailed analysis of domestic and ECtHR case-law on the procedural requirements under article 2. The lords imply that an investigation by the Prisons and Probation Ombudsman (PPO) will usually be sufficient in cases of near suicide, and this was explicitly argued by the Equality and Human Rights Commission, which intervened in this case. However, the efficacy of such investigations is dependent on the co-operation of prison authorities; the PPO has no power to compel compliance with his investigation of witnesses and no power to compel the prison authorities to comply with any recommendations made following his investigation.

The Prison Service will be required to amend its policy on investigations in light of the judgment as PSO 1300 does not require an independent investigation in the case of a near-suicide that results in serious injury.

Article 3: prohibition on inhuman and degrading treatment

■ Rodić and others v Bosnia and Herzegovina

App No 22893/05,
1 December 2008

The ECtHR upheld the applicants' arguments that they had been subject to inhuman and degrading treatment in violation of article 3 as a result of their detention in mainstream prison accommodation despite them being of Serb and Croat origin and having been convicted of war crimes against Bosnians. During this period of their detention they had been subject to death threats and beatings as well as having their food spat in and water spilt on their beds. The applicants had not been provided with separate accommodation until ten months after their initial detention and only after they had suffered serious assault by other prisoners, threatened to go on hunger strike and their situation had received media attention. In finding that there had been a violation of article 3, the court had particular regard to the constant mental anxiety suffered by the applicants as a result of the threat and anticipation of physical violence.

The court rejected a claim by the applicants that the conditions of their detention in the prison hospital unit amounted to a violation of article 3.



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Gypsy and Traveller law update – Part 1

Chris Johnson, **Dr Angus Murdoch** and **Marc Willers** highlight the latest developments in policy and case-law that have occurred in this area of the law since their last articles were published in December 2007 *Legal Action* 13 and January 2008 *Legal Action* 15. Part 1 details changes in relation to possession proceedings in general, rented site provision, unauthorised encampments and homelessness. Part 2 will be published in March 2009 *Legal Action* and will consider changes relating to planning law and enforcement. The authors welcome any case notes or comments from readers.

LATEST GYPSY COUNT FIGURES

Rented Gypsy/Traveller sites

The Communities and Local Government (CLG) Gypsy count for July 2008 in England showed 6,553 caravans out of a total of 17,626 caravans on local authority and other registered social landlord sites (37 per cent).[1] The July 2008 Gypsy count for Wales showed 450 of the 798 caravans counted in Wales to be on public sites (56 per cent).[2]

Unauthorised encampments

The CLG Gypsy count for July 2008 in England showed 1,750 caravans out of a total of 17,626 caravans on unauthorised encampments (10 per cent). The July 2008 Gypsy count for Wales showed 131 of the 798 caravans to be sited on unauthorised encampments (16 per cent). This does not include caravans stationed on what are normally referred to as 'unauthorised developments' – ie, caravan sites on land owned by Gypsies and Travellers where no planning permission has yet been obtained.

POLICY AND LEGISLATION

Government guidance

The CLG *Designing Gypsy and Traveller sites: Good practice guide* was published in May 2008. It includes detailed recommendations with regard to fire safety on sites.[3]

The CLG *Guidance on the management of Gypsy and Traveller sites* is still awaited.

Police guidance

The Association of Chief Police Officers (ACPO) are finalising a policy on unauthorised encampments.[4]

Mobile Homes Act 1983

The Housing and Regeneration Act (HRA) 2008 received royal assent in July 2008. HRA s318 amends the Mobile Homes Act (MHA) 1983 to include local authority Gypsy and Traveller sites within the provisions of the Act. This amendment has been brought in by the government in order to comply with the European Court of Human Rights (ECtHR) judgment in *Connors v UK* App No 66746/01, 24 May 2004; (2005) 40 EHRR 9. However, the section has not yet been brought into force as the government is still considering the results of a consultation exercise which looked, in particular, at the issues of assignment, succession and written agreements.[5]

Housing benefit

There has long been a problem for residents of county council sites who are claiming housing benefit. Unlike residents of district or unitary authority sites, county council residents receive a rent allowance as opposed to a rent rebate. The general rule is that claims for rent allowances must be referred to a rent officer for a rent determination. Such a determination serves to fix the local reference rent which, in turn, fixes the amount of housing benefit that is paid. Almost inevitably, this leads to a large shortfall between the actual rent and the housing benefit that is paid.

The Housing Benefit and Council Tax Benefit (Amendment) (No 2) Regulations 2008 SI No 2824, in force from 6 April 2009, provide that housing benefit claims made by residents of county council-owned Gypsy and Traveller sites are exempt from the requirement for referral to the rent officer (so that they are treated in the same way as those made by the residents of registered housing association sites whose rents are also exempt from automatic referral to the rent officer, unless the local authority believes their rent to be unreasonably high). This should cure the problem and ensure that the only circumstance in which housing benefit will not meet the actual rent for a pitch on a county council site will be where the rent is held to be unreasonably high.[6]

CASE-LAW

Possession proceedings and article 8

■ McCann v UK

App No 19009/04, 13 May 2008

This case did not involve Gypsies or Travellers but has wide-reaching ramifications for Gypsies and Travellers living on rented sites and on unauthorised encampments. Mr and Mrs McCann were joint secure tenants. Mrs McCann was rehoused by the local authority on grounds of domestic violence and, at the local authority's instigation, she signed a notice to quit which brought the tenancy to an end. The local authority's possession claim was dismissed at first instance but allowed by the Court of Appeal. The House of Lords refused a petition for leave to appeal against that decision and Mr McCann was evicted. He complained to the ECtHR that his article 8 rights under the European Convention on Human Rights ('the convention') had been violated.

The ECtHR unanimously held that there had been a violation of Mr McCann's article 8 rights. In doing so the ECtHR held that:

a) the real issue was whether or not the eviction of the applicant was proportionate;

b) the earlier decision in *Connors* (see above) was not to be confined either:

i) to cases involving the eviction of Gypsies or Travellers; or

ii) to cases where the applicant sought to challenge the law itself rather than its application in his/her particular case;

c) the availability of judicial review was an insufficient procedural safeguard for the applicant's article 8 rights;

d)

The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under article 8 of the convention, notwithstanding that, under domestic law, his right of occupation has come to an end (para 50);

e) the determination of the proportionality of the interference, on its merits, should be left to the county court;
f) the applicant should have had the proportionality of the measure determined by an independent tribunal, although the ECtHR also emphasised, in accordance with the judgments of the minority in the House of Lords' decision in *Kay v Lambeth LBC*; *Leeds City Council v Price* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465, that 'it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings' (para 54).

■ **Doherty v Birmingham City Council**
[2008] UKHL 57,
30 July 2008

Mr Doherty is an Irish Traveller and has lived on a site owned and run by Birmingham City Council (BCC) for many years. BCC wished to carry out improvements to the site and then turn it into a transit site. Initially, BCC alleged that the presence of the Doherty family 'deterred' other Travellers from living on the site but ultimately BCC simply terminated Mr Doherty's licence and obtained a possession order without relying on any grounds to justify the proposed eviction. On appeal Mr Doherty argued that his case was indistinguishable from *Connors* (see above) but the Court of Appeal disagreed.

The Court of Appeal referred back to Lord Hope's speech in *Kay and Price* where he stated:

... I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out ... Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act [HRA] 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it to do so under section 3 [HRA], in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable ... (para 110).

The Court of Appeal divided Lord Hope's analysis into what were described as two 'gateways'. Gateway (a) required there to be a seriously arguable challenge under article 8 to the law under which the possession order was made. Gateway (b) required there to be a seriously arguable challenge under conventional judicial review grounds to the local authority's decision to recover possession (though the latter challenge was now to be taken in the county court). The court concluded that Mr Doherty's appeal could not get through either gateway.

Mr Doherty appealed to the House of Lords and his appeal was heard before the ECtHR had handed down its judgment in *McCann*. In the light of *McCann* the House of Lords permitted the parties in *Doherty* (which included the Secretary of State for Communities and Local Government as an intervener) to make further written submissions. On 30 July 2008 the House of Lords handed down its judgment.

The House of Lords decided not to issue a declaration of incompatibility – though the majority of their lordships accepted that the relevant legal framework was defective because Gypsies and Travellers living on local authority sites were excluded from the procedural protections afforded to other residents of mobile homes parks by the MHA – given the fact that the exclusion had recently been removed by HRA s318, which was given royal assent on 22 July 2008.

Though their lordships did not go so far as to accept that *Kay and Price* had been wrongly decided in the light of *McCann* (and considered that only a nine-judge panel of the Judicial Committee could come to such a decision since a seven-judge panel had given judgment in *Kay and Price*), it is clear from all the speeches that the approach to gateway (b) set out by Lord Hope in para 110 of his speech in *Kay and Price* (see above) needed some modification.

In *Doherty* Lord Hope gave a fuller explanation of the guidance he had given in *Kay and Price*:

... it would be unduly formalistic to confine the review strictly to traditional Wednesbury *grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the [local authority's] decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the appellant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority ... the test of reasonableness should be ... whether the decision to recover possession was one which no reasonable person would consider justifiable* (para 55).

Lord Scott said:

But public authorities, and in particular local authorities, are in a different position. Their decision making powers are subject to the constraints of Wednesbury *reasonableness, and they must not act in a way that is incompatible with convention rights* (para 69).

Lord Scott referred to the (minority) judgment of Lord Bingham in *Kay and Price* and noted that the difference between the majority and minority in that case was small, in that the minority gave 'to the occupier's personal circumstances a central importance that the majority opinions did not accept' (para 70).

However, within gateway (b), Lord Scott said that the occupier's personal circumstances:

might well be a factor to which, along with the other factors relevant to its decision, a responsible and reasonable local authority would need to have regard. The question for the court would be whether the local authority's decision to recover possession of the property in question was so unreasonable and ***disproportionate*** *as to be unlawful* (para 70, emphasis added).

Lord Walker had been in the minority in *Kay and Price* but accepted in *Doherty* that he was bound by the majority's decision in that case. He stated that, if a defence is raised, 'the judge will in effect be hearing an application for judicial review on traditional review grounds' (para 123).

Lord Mance stated:

The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with Human Rights Convention rights should not however be exaggerated and can be seen to

have narrowed, with 'the "Wednesbury" *test … moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests' …The common law has been increasingly ready to identify certain basic rights in respect of which 'the most anxious' scrutiny is appropriate …* (para 135).

Lord Rodger restricted himself to saying that he agreed with the reasoning of Lords Hope and Walker (para 89).

Comment: Thus it seems clear that the scope of judicial review by the county court in cases where the claimant has an apparently absolute right to possession has been extended as a result of the judgment in *Doherty*; at the very least so as to require the court to subject such decisions to anxious or heightened scrutiny, but perhaps further (in accordance with the ECtHR judgment in *McCann*) to involve consideration of whether a claim for possession would be proportionate in the circumstances of the case.

■ Hillingdon LBC v Collins and others and Secretary of State for Communities and Local Government (interested party)

[2008] EWHC 3016 (Admin), 5 December 2008

Following the judgment of the House of Lords in *Doherty* there has been much discussion about how possession claims brought against Gypsies and Travellers living on authorised sites will be determined in procedural terms.

In *Collins* HHJ Gilbart QC, sitting in the High Court, gave some important guidance on the procedure to be adopted by the courts faced with such claims. The case itself involved a possession claim against Irish Travellers living on a local authority site. HHJ Gilbart QC decided the case should be transferred to the county court. At the same time he directed that there should be an exchange of witness statements and standard disclosure as per Civil Procedure Rule (CPR) 31.5. Witnesses, he said, 'will inevitably be required'.

HHJ Gilbart QC also directed that the county court 'should approach the issue of the challenged decision by [Hillingdon] in accordance with paragraphs 44–55 of Lord Hope's speech in *Doherty* as interpreted in this judgment'. HHJ Gilbart QC's interpretation is as follows:

54. I consider that the effect of the speeches in Doherty *is to widen the scope of the enquiry that may be made into decision-making by an authority. I do not consider that the effect of the amendment of section 4 [of the Caravan Sites Act (CSA) 1968] in 2005 [which gave judges the discretionary power to suspend possession orders made against Gypsies and Travellers living on local authority sites] undercuts the points of principle which are established in* Doherty *but I do consider that, as per* Smith v Buckland *[[2007] EWCA Civ 1318, 12 December 2007; [2008] 1 WLR 661, a case involving the eviction of a Gypsy from a local authority site post the CSA 1968 s4 amendment], the fact that article 8 can operate at the stage of considering whether or not to evict, still gives it effect within the domestic law framework when taken as a whole … However I also consider that in the light of* Doherty *the observations in* Smith v Buckland *that the circumstances where such a defence can be made out as wholly exceptional have been overtaken by subsequent authority. They were justified on the basis of the previous* Kay *test, but not on the wider one which now encompasses a broader consideration of reasonableness.*

55. I also consider that the test is no longer whether the claim on public law grounds is 'seriously arguable'. It is now, as per Doherty*…, whether the decision was reasonable, in the sense of whether no reasonable person would think that recovering possession was justifiable.*

Unauthorised encampments

■ Secretary of State for the Environment, Food and Rural Affairs v Meier and others

[2008] EWCA Civ 903, 31 July 2008

It was previously the practice of many large landowners to obtain possession orders not only for the particular piece of land on which the Gypsies or Travellers were encamped without authorisation but also for other parcels of land within a wide radius of the encampment. In *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, 26 February 2004; [2004] 1 WLR 1906, the Court of Appeal made it clear that wide possession orders should only be granted in exceptional circumstances, stating: 'Although it would be foolish to be prescriptive about the nature of the necessary evidence, it seems safe to say that it will usually take the form either of an expression of intention to decamp to the other area or of a history of movement between the two areas from which a real danger of repetition can be inferred or … of such propinquity and similarity between the two areas as to command the inference of a real danger of decampment from one to the other' (para 21).

The case of *Meier*, which came before Mr Recorder Norman at Poole County Court on 3 August 2007, involved a group of New Travellers encamped on woodland owned by the Secretary of State for the Environment, Food and Rural Affairs (SSEFRA) and managed by the Forestry Commission (FC). Soon after the Travellers had camped on the woodland, they were visited by two FC officers. The FC officers maintained that one of the Travellers had told them that the Travellers were 'targeting' FC land, a claim denied by the Traveller concerned. SSEFRA took possession proceedings and sought not only possession of the piece of woodland on which the encampment had been established but also possession of a number of other parcels of woodland located in an area of Dorset which measured some 30 miles from east to west and 20 miles from north to south. SSEFRA also sought an injunction effectively banning the Travellers from all these pieces of woodland.

After a trial, Mr Recorder Norman concluded that the Traveller in question had not stated that she would 'target' FC land but rather that she had stated that it was difficult to avoid FC land given the lack of stopping places. He went on to say:

The concern that I have had is that the [FC] were asked by Dorset County Council before they issued proceedings to consider the effect of rapid and regular eviction … Although [the 2004 government guidance on unauthorised encampments] is addressed principally to local authorities and the police, it is guidance which the [FC] as a public authority can be expected to take into account … If [the FC] exercises its discretion in such a way as to result in repeated and rapid evictions without considering the acceptability of the site in question against the criteria spelt out in [the government guidance] it is leaving out of account a relevant consideration (para 27 of *Meier*).

Despite finding that the *Drury* criterion (see above) had been met, the Recorder restricted the possession order to the land on which the Travellers were encamped. He concluded that the making of a wider order would be likely to lead to regular and repeated evictions, and that he ought to exercise any discretion he had to refuse such an order or, in the alternative, to hold that such an order would be *Wednesbury* unreasonable. In addition the Recorder refused the application for an injunction on the grounds that it would be disproportionate. He stated that an 'injunction would have had the undesirable effect of criminalising these defendants'.

On appeal, the Court of Appeal concluded that a court has the power to grant a wide possession order and an injunction in respect of land which is not occupied by trespassers and it rejected the argument that the power

was inconsistent or incompatible with the Office of the Deputy Prime Minister's (ODPM's) *Guidance on managing unauthorised camping*, February 2004. All three judges accepted that, once the *Drury* criterion was satisfied, the court did have the discretion as to whether to grant the wide possession order. However, the court also severely limited the scope of any such discretion. Arden LJ commented:

If the court is concerned with any of the factors in the government guidance, the appropriate time for the court to consider them is when the court is considering the date for enforcement of the possession order. Accordingly, in my judgment, the recorder should have extended the possession order to the further sites and it is not a breach of his public law obligations for the secretary of state to apply for an extended possession order at this stage (para 47).

By a majority of two to one (Wilson LJ dissenting), the court also held that, if there were grounds for granting a wide possession order, then there would also be grounds for granting an injunction. In December 2008, two of the Travellers, Sharon Horie and Lesley Rand, lodged a petition for leave to appeal with the House of Lords. Among other grounds of appeal, they are reviving a ground rejected by the Court of Appeal in *Drury*, namely that CPR Part 55 simply does not allow for a possession order to be granted in respect of land that is not in actual fact being trespassed upon.

Homelessness

■ Lee v Rhondda Cynon Taf CBC

[2008] EWCA Civ 1013, 16 July 2008

The Gypsy appellant appealed against the suitability of an offer of a house largely on the grounds that she had a cultural aversion to bricks and mortar accommodation. Giving the leading judgment in the Court of Appeal, Longmore LJ stated:

Mr Knafler [for the appellant] submits that [the consideration by the local authority of the appellant's position as a Gypsy] was not lawful and adequate because RCT [Rhondda Cynon Taf] did not consider whether they should acquire an alternative site. That however seems to me to be, in the context of a homelessness application, wrong … Homelessness applications are expected to be determined within a short timeframe, ideally at least within 33 days of an acceptance of a requisite duty. If a new site is to be acquired for stationing a caravan for residential purposes, that will usually mean a new use which will typically require planning permission. That will require determination by the local authority planning committee, especially if it means a departure from the local development plan, which it may well, and any decision so made is liable to be appealed. After all that, land would have to be bought if it is not already owned by the local authority itself. All this is, in my judgment, inconsistent with the manner in which homelessness applications are expected to be dealt with by the housing department, and especially since they are expected to be dealt with with a degree of promptness. As, moreover, the recorder himself observed, that is really inconsistent with the law as laid down by Price *[[2003] EWHC 42 (Admin), 24 January 2003; March 2003* Legal Action *30] and* Codona *[[2004] EWCA Civ 925, 15 July 2004; [2005] HLR 1], to the effect that bricks and mortar accommodation is at any rate capable of being suitable accommodation even for a Gypsy.*

All that is not to say that there might not be unusual circumstances in which a local housing authority might be expected to do more than consider availability and sites within their own area. If, for example, there was a question of an applicant being at risk of suffering psychiatric harm, it might well be that the local authority should take that consideration into account, specifically in deciding what, or what further, enquiries they should make. In the present case, however, there is no risk of any such psychiatric harm … (paras 16 and 17).

Comment: The court's judgment in *Lee* is disappointing and Ms Lee is petitioning the House of Lords for leave to appeal. Those representing Gypsies and Travellers have been arguing for some time that there ought to be some correlation between the provision of homelessness accommodation for Gypsies and Travellers under the Housing Act (HA) 1996 and the mechanism for planned provision for Gypsy and Traveller sites laid down in government guidance (namely, ODPM Circular 01/2006 and Welsh Assembly Government Circular 30/2007 *Planning for Gypsy and Traveller caravan sites*). The fact is that it will take several years for local authorities to identify new sites to accommodate those Gypsies and Travellers who are currently homeless[7] and have an aversion to bricks and mortar. In the meantime we consider that the very same local authorities ought to be doing far more to locate sites for those Gypsies and Travellers who apply to them for accommodation as homeless persons, even if such sites provide no more than a temporary respite from the precarious nature of life on roadside encampments.

One other point can be taken from the decision in *Lee*. It is clear that it will be necessary for those representing Gypsies and Travellers in such homeless cases to obtain psychiatric evidence in order to satisfy a local housing authority or a court, on appeal, of the strength of their client's or clients' aversion to bricks and mortar accommodation.

1 See: www.communities.gov.uk/housing/housingmanagementcare/gypsiesandtravellers/gypsyandtravellersitedataandstat/.
2 See: http://cymru.gov.uk/docs/statistics/2008/20081128sdr2002008en.pdf.
3 Available at: www.communities.gov.uk/documents/housing/pdf/designinggypsysites.pdf.
4 For more information, contact ACPO at 1st Floor, 10 Victoria Street, London SW1H ONN (tel: 020 7084 8950).
5 See CLG, *Implementing the Mobile Homes Act 1983 on local authority Gypsy and Traveller sites*, September 2008, available at: www.communities.gov.uk/publications/housing/implementingmobilehomesact. The consultation period ended on 19 December 2008.
6 Thanks to Desmond Rutledge of Garden Court Chambers for his advice on this section.
7 This is in the context where a Gypsy or Traveller is homeless if there is no place where s/he is entitled or permitted to place his/her caravan or vehicle: see HA 1996 s175(2)(b).



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Recent developments in social security law – Part 1

Simon Osborne and **Sally Robertson** continue their six-monthly series. Part 1 of this article examines recent developments in case-law relating to claims and payments, overpayments, decisions and appeals, human rights and equal treatment and European Community law. Part 2 will be published in March 2009 *Legal Action* and will review case-law in means-tested and non-means-tested benefits as well as tax credits.

CLAIMS AND PAYMENTS

Whether secretary of state can reject Ombudsman's findings

■ **R (Bradley and others) v Secretary of State for Work and Pensions**

[2008] EWCA Civ 36, 7 February 2008

This decision looks at whether or not the secretary of state is bound by a finding of the Parliamentary Commissioner for Administration ('the Ombudsman'). Specifically, the Court of Appeal held that the secretary of state can reject a finding by the Ombudsman, but must act rationally.

The case resulted from an investigation by the Ombudsman into the circumstances in which final-salary pension schemes had been wound up underfunded, and in particular with regard to official information provided by the Department for Work and Pensions (DWP) about the security that members of final-salary occupational pension schemes could expect from the minimum funding requirement under the Pensions Act 1995. The Ombudsman found that the information had been inaccurate sometimes, often incomplete and therefore potentially misleading, and that that constituted maladministration. Other related findings of maladministration were also made. The secretary of state rejected all of the findings, along with the Ombudsman's recommendation that the government consider awarding compensation.

The Court of Appeal held that there was nothing in the law which required the secretary of state to accept the Ombudsman's findings of maladministration. However, it was necessary that his decision to reject the findings was not irrational, having regard to the legislative intention of the Parliamentary Commissioner Act 1967. The test was not whether the secretary of state considered that there had been maladministration, but rather whether, in the circumstances, his rejection of the Ombudsman's finding that there had been maladministration was rational. In this case, it had been irrational for the secretary of state to reject the Ombudsman's finding that the official information had been so misleading as to constitute maladministration; however, his rejection of other findings of maladministration was not irrational.

Duty to disclose change of circumstances – fraud – where no entitlement to benefit

■ **R v Laku**

[2008] EWCA Crim 1745, 16 July 2008

Benefit rules provide for criminal penalties in certain cases, including dishonest failure to report a change in circumstances. In this case, the Court of Appeal held that where there was already no entitlement to benefit, subsequently the claimant could not commit the criminal offence of dishonestly failing to report a change of circumstances.

The claimant, when making his claim for benefits to his local authority and the DWP, failed to disclose that he had bank accounts containing capital in excess of the capital limits. For that failure, he was eventually convicted of making a false representation, contrary to Social Security Administration Act (SSAA) 1992 s111A. The court did not disturb that conviction.

However, it did quash other convictions under SSAA s111A(1A), for (subsequently) dishonestly failing to report a change of circumstances that could affect the claimant's entitlement. In quashing those convictions, the court said: 'This court has held in the case of *Mote*, that in such circumstances where there was originally no entitlement any subsequent documentation that comes into existence cannot bring a relevant change of circumstances sufficient to justify a count in the indictment such as those which were added in this case.'

Comment: The decision referred to by the court is *Mote v (1) Secretary of State for Work and Pensions (2) Chichester DC* [2007] EWCA Civ 1324, 14 December 2007, which was concerned mainly with a tribunal's refusal to adjourn pending a criminal trial.

OVERPAYMENTS

Inadequate decision notice regarding overpayment decision: effect on recovery powers

■ **C3/07-08 (IS)**

14 February 2008

The benefit authorities must give a claimant from whom they wish to recover an overpayment adequate notice of that decision. Although tribunals have a general power to rectify defects in decisions, certain outcomes may be so inadequate that they cannot be rectified. This decision of the Northern Ireland commissioners (such rulings are formally of persuasive rather than binding authority in GB) applied that principle in a case where the benefit authorities put the blame on their computer system.

The claimant was a lone parent who was entitled to income support (IS). She was investigated for alleged cohabitation, and eventually notified of an overpayment. Deputy Commissioner MacLynn held that the overpayment was not recoverable because the relevant provisions on decision-making and notification of decisions had not been complied with. For a recovery decision to be made, the decision awarding benefit had to be:

- revised or superseded;
- notified in writing; and
- the claimant informed of his/her rights to request reasons and of appeal.

The decisions in this case failed to meet those requirements, and the defects here were of sufficient substance not to be capable of correction by the tribunal. The Department for Social Development (DSD) argued that the problems were because the decisions had been taken on computer and had become confused, but taken together might be said to satisfy the requirements. The deputy commissioner rejected that assertion: the decision should be clear and unequivocal, and detail whether it is on a claim, revision or supersession, with the proper use of statutory language and relevant dates. The deputy commissioner stated furthermore that computers were servants of the DSD and could not be used in isolation.

Offsetting IS overpayment where entitlement was on another basis

■ **CIS/546/2008**

1 September 2008

Overpayments of IS may be 'offset', ie, reduced by entitlement that the claimant would have had on the basis of true entitlement under the claim; however, if entitlement is lost completely on the ground that the claimant was not in the IS eligibility group s/he claimed to be, for example, a lone parent, could there be an offset if s/he was also a member of another eligible group? This decision of Deputy Commissioner Sir Crispin Agnew QC holds that there can be such an offset.

In this case, the claimant was overpaid IS as a lone parent because she failed to disclose that she had begun living as husband and wife with someone. The tribunal was asked to reduce (offset) the amount of the overpayment with reference to the amount of IS the claimant would have been entitled to had she disclosed the change correctly and claimed as a couple. The tribunal refused to so do on the ground that the claim was made on the basis of IS entitlement as a lone parent, and that entitlement had completely ceased to exist.

The deputy commissioner held that the tribunal had erred in law, and that the claimant was entitled to an offset of the overpayment. The relevant rule was at regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 SI No 664. In particular, that regulation provides, at subparagraph (1)(b), that where there has been an overpayment, there shall be a deduction of, 'any additional amount of [IS] … which was not payable under the original, or any other, determination, but which should have been determined to be payable … on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination …' The deputy commissioner considered that the claimant was entitled to an offset because at the relevant time she had made a claim for IS.

It did not matter that the claim for IS was not made on the basis of being a member of a couple as had the claimant disclosed her change of circumstances at the time she could have elected to have made the claim as a couple under regulation 4(3) of the Social Security (Claims and Payments) Regulations (SS(CP) Regs) 1987 SI No 1968. The decision in *CIS/2291/2001*, 12 February 2002, relied on by the tribunal, was distinguishable as it concerned a situation in which the question was whether or not an overpayment of IS (where there was no entitlement) could be offset by notional entitlement to jobseeker's allowance where there had been no claim for it.

Overpayment: failure to disclose – no evidence of clear or specific instruction from DWP

■ **CIS/2095/2008**

10 September 2008

In this decision of Commissioner Williams, it was held that given the claimant's own diligent reporting of her circumstances and the DWP's inadequate instructions about what should be reported, an overpayment was not recoverable from the claimant on the alleged ground of failure to disclose a relevant fact. The claimant was on IS. When she was about to begin a two-year course as a full-time student, the claimant contacted the local Jobcentre and gave full details about it, including the various grants and loans that she was to receive over the forthcoming two years. Despite that, two years later she was summoned for an interview at the Jobcentre. Subsequently, the claimant was issued with a decision that she had been overpaid IS which was recoverable from her, in particular, because of her alleged failure to disclose her second-year grants and loans. The tribunal refused her appeal.

The commissioner held that any overpayment of IS between the relevant dates was not recoverable from the claimant. She had not failed to disclose any relevant income in that period. The commissioner found that the claimant had told the Jobcentre about the two-year course and her income in that period. The claimant had been assured that she did not need to tell it about her income again unless circumstances changed. She had kept the DWP fully informed and did not fail to disclose anything relevant. Although because of failings by the DWP and the tribunal it was not possible for the commissioner to establish the claimant's correct IS entitlement, he was satisfied that in the event of an overpayment it was not recoverable from her.

Also there was no evidence of any specific notification to the claimant that she was under any duty to report changes in her student financing to the Jobcentre. There were poor photocopies of the back pages of benefit books, but the claimant was not paid by orders in such a book. There was also a photocopy of the Jobcentre INF 4 income support information sheet. Apart from – in the commissioner's words – the 'hopelessly vague duty to "tell us if you … get any money" or "get more or less money", there is nothing relevant in that leaflet'. Therefore, the tribunal had failed to explain why it had found that the claimant had received the relevant notifications. Furthermore, the tribunal failed to identify whether or not the contended duty on the claimant to disclose was an obligation to provide specific evidence, or a more general duty under SS(CP) Regs reg 32 (*B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, 20 July 2005, reported as *R(IS) 9/06*, was cited).

DECISIONS AND APPEALS

Right of appeal against decision of legally qualified panel member: refusal to extend time for late appeal

■ **CHR/3855/2005; CDLA/948/2007; CIS/3746/2006**

4 July 2008

This decision of a Tribunal of Commissioners clarifies that there is no right of appeal against a tribunal decision refusing to allow a late appeal, even where the request was within the absolute 13-month time limit. The clarification was necessary following the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Morina and another* [2007] EWCA Civ 749, R(IS) 6/07, 23 July 2007; February 2008 *Legal Action* 25. There, the court held that there was no right of appeal against such decisions (and a similar 'interlocutory' decision not to reinstate an appeal was struck out for want of jurisdiction). However, doubt remained about what was restricted to those interlocutory decisions where there was in any case no right of appeal, for example, where the appeal was made outside the absolute 13-month time limit.

The Tribunal of Commissioners held that following *Morina*, there was no right of appeal against a decision not to admit a late appeal, irrespective of whether or not it was made within the absolute 13-month time limit. Regarding the (then) specific legislation on late appeals, regulation 32 of the Social Security and Child Support (Decisions and Appeals) Regulations (SSCS(DA) Regs) 1999 SI No 991, it was 'simply inconceivable that parliament intended that some decisions under regulation 32 should be appealable whilst others should not'.

The legal remedy for claimants aggrieved by refusal, as indicated in *Morina*, was judicial review. However, the commissioners cast doubt on whether claimants would regard that as an attractive alternative to an appeal to the commissioners. They noted that the Tribunals, Courts and Enforcement Act (TCEA) 2007 allowed the transfer of categories of judicial review case to the commissioners (or, to use their name under the TCEA, the Upper Tribunal) and recommended that as worthy of serious consideration.

Comment: Since this decision, the Tribunal Procedure (Upper Tribunal) Rules 2008 SI No 2698 have been published. The rules provide for a judicial review function of the Upper Tribunal, which by a Practice Direction from the Lord Chief Justice does indeed apply to tribunal decisions, such as the one at issue in this case, against which there is no appeal.[1]

Retirement pension calculation: decisions and rights of appeal

A couple of judgments have unpicked the various knots in a decision on retirement pension entitlement, so as to outline decision-making and appeal rights. The outcome is that decisions concerning contribution records are matters for HM Revenue & Customs (HMRC), with consequent appeals being tax appeals rather than social security appeals, whereas decisions concerning credits are matters for the DWP, with consequent appeals being social security appeals.

■ CP/4205/2006

5 March 2008

Commissioner Williams remarked of this case that it contained, 'the most complex set of personal circumstances of any state pension claim or appeal I have ever considered'. This was partly because the calculation crossed and recrossed jurisdictions between social security appeals and tax appeals. The social security tribunal held that the claimant's contribution record was not a matter for it, but was a matter for HMRC and it assumed that her contribution record was correct.

However, the commissioner held that that was the wrong approach: the appeal tribunal should have adjourned to get more information, and in particular to get decisions that were within the jurisdiction of HMRC and tax tribunals. As (on the facts of this case) there was good reason to doubt that the contribution record was correct, the tribunal should have adjourned and had the matter referred to HMRC under SSCS(DA) Regs reg 38A.

The question of the claimant's actual contribution record was a matter for a decision by HMRC with any appeal going to the tax tribunals. Any appeals about credits or credited earnings were, again, initially both for the Secretary of State for Work and Pensions and HMRC, with any appeal going to the social security tribunal. The question of entitlement to make voluntary contributions is a matter for HMRC, with an appeal to the tax tribunals. When all that was resolved, entitlement to basic pension could be calculated by the secretary of state with a right of appeal on that to the social security tribunal and ultimately the commissioner. The commissioner expressed the hope that the jurisdictional complexity of such cases will be eased by the creation of single-tier tribunals under the TCEA.

Comment: The commissioner got his wish: the subsequent First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 SI No 2684 directs that appeals concerning not only benefits but also earnings and contributions are dealt with by First-tier tribunals in the Social Entitlement Chamber. However, decision-making duties will continue to be split between HMRC and the DWP.

■ CP/1792/2007

22 July 2008

This decision took the same line as *CP/4205/2006* (above). The commissioner held that when the claimant appealed about his contribution record, the tribunal erred in simply declining jurisdiction. It should have adjourned and referred the matter to the Secretary of State for Work and Pensions for onward reference to HMRC. Also, decisions on credits were for the secretary of state and may be appealed to an appeal social security tribunal.

Evidence at tribunals: surveillance evidence and claimant's own evidence

Two decisions have looked at these particular types of evidence and how they should be dealt with by tribunals. Both reaffirm the long-held doctrine that social security tribunals do not have formal laws of evidence, and in essence should weigh whatever evidence is before them with regard to the facts of the case and the principle of fairness. There is nothing specific in the new Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules (TP(FtT)(SEC) Rules) 2008 SI No 2685 to alter such fundamentals, although it should be noted that tribunals now have the power to exclude evidence, albeit within the overall context of ensuring fairness.

■ CIS/1481/2006

24 April 2008

The claimant in this case had her IS terminated on the basis that she was not single as claimed but was living with a partner. The DWP had conducted video surveillance of people entering and leaving her house, including a male who was allegedly her live-in partner. The claimant was subject to a formal interview in which she was told that her 'human rights were suspended'. When she appealed, her representative requested that the video evidence and audio tape of the interview be made available, but the DWP refused. This evidence was not available at the appeal tribunal, and neither was the claimant provided with a set of appeal papers.

Commissioner Williams held that because the evidence was withheld from the appellant, the tribunal was 'fundamentally unfair before it even started'. The tribunal itself had added to that unfairness by failing to insist on seeing the evidence on which the DWP's case was based (including also failing to get evidence from the investigating officers), so relying on hearsay or secondary evidence when the primary evidence was readily available. It could not simply rely on statements provided by the presenting officer about the content of that material. The tribunal's findings of fact were unreliable. The claimant had been misled when being told that her human rights were 'suspended'. Apparently, the DWP had at the highest level (in a letter from the external relations and communications director of Jobcentre Plus, written on behalf of the chief executive) believed that what the letter referred to as the 'appeal board' did not conduct legal proceedings and was outside the scope of the Human Rights Act 1998: however, such belief was entirely wrong.

The commissioner also clarified that objections about the legality of the surveillance and the way in which it was conducted (the relevant provisions were in the Regulation of Investigatory Powers Act 2000) were essentially a matter for consideration by a separate tribunal, ie, the investigatory powers tribunal. A social security tribunal could not exclude or rule inadmissible evidence even from an illegal surveillance; however, it was under a duty to conduct hearings fairly with regard to access to evidence and to make proper findings of fact.

■ CIS/4022/2007

12 June 2008

In this decision, the then Deputy Commissioner Wikeley set out the framework to be adopted by tribunals in weighing the testimony of appellants in social security appeals. The claimant had her IS terminated on the ground that she was not single as claimed, but had been living with a partner for several years. That decision led to two others on several thousands of pounds of overpayments. The claimant's appeal was rejected by the tribunal. She appealed further on the ground that the tribunal had not given adequate reasons for its decision; in particular, it had failed to explain why in certain respects her and her partner's oral evidence were found not to be credible.

The deputy commissioner held that the tribunal had not erred in law. When dismissing the claimant's and her partner's oral evidence, the tribunal had pointed to a logical inconsistency in their testimony. In addition, the tribunal's reasoning made it plain enough, with regard to the wider context of all its findings of fact, that it found another

particular aspect of their testimony implausible. More widely, the deputy commissioner reviewed case-law authority on findings of credibility and the tribunal's duty to give reasons. In summary, he held that the fundamental principles are as follows:

- There is no formal requirement that a claimant's evidence is corroborated, but such evidence may well reinforce his/her evidence.
- A tribunal is not obliged simply to accept a claimant's evidence as credible.
- The decision on credibility is one for the tribunal to judge, weighing and taking into account all relevant considerations (for example, a claimant's reliability, the internal consistency of the account, its consistency with other evidence and inherent plausibility, etc, bearing in mind that a liar may appear consistent and an honest person's account may have gaps and discrepancies, not least because of forgetfulness or mental health problems).
- Subject to natural justice, a tribunal is not obliged to put a finding on credibility to a party for comment.
- In decisions, there is no universal obligation to explain assessments of credibility in every instance.
- There is however an obligation to give adequate reasons for a decision, this may, depending on the circumstances, include a brief explanation about why a particular piece of evidence has not been accepted.

The deputy commissioner noted that the tribunal chairperson might have required those giving evidence to be sworn in or to affirm. However, the deputy commissioner tended to the view that it may be inappropriate to require this in an appeal tribunal for the following reasons:

- It is inconsistent with the informal atmosphere that tribunals seek to adopt.
- It may in reality make little difference to the evidence given.
- The real issue is often the reliability of the evidence, which is a wider issue than the honesty of the person giving the testimony.

However, credibility might prove to be in question, and although an oath is a matter of judgment for the tribunal chairperson, it may be desirable as a matter of good practice simply to remind the parties that tribunal proceedings are judicial proceedings and that it is important to be truthful.

Comment: One change introduced by TP(FtT)(SEC) Rules r15 is the specific power for tribunals to require any witness to give evidence on oath.

HUMAN RIGHTS AND EQUAL TREATMENT

Disability premium for the homeless: non-contributory benefits as a 'possession'

■ R (RJM) v Secretary of State for Work and Pensions

[2008] UKHL 63,
22 October 2008

In this decision, the House of Lords held that the denial of the disability premium to homeless persons was lawful. To that extent, it is a confirmation of the conclusion of the earlier decision of the Court of Appeal ([2007] EWCA Civ 614, 28 June 2007) in this case. However, the Lords departed from the Court of Appeal in ways that may provide support in other challenges involving benefit entitlement under the European Convention on Human Rights ('the convention').

Unlike the Court of Appeal, the Lords confirmed, first, that for the purposes of article 1 of Protocol No 1 of the convention, the disability premium is, as part of the UK's social welfare system, a 'possession' (ie, a benefit does not have to be a contributory benefit for the protection afforded by the convention to apply). In so holding, the Lords specifically followed the finding of the Grand Chamber of the European Court of Human Rights in *Stec v UK* [2005] 41 EHRR SE295 that there was no justification in drawing a distinction in this context between contributory and non-contributory benefits.

Second, and contrary to the Court of Appeal's finding, homelessness could fairly be described as a 'personal characteristic' for the purpose of article 14 of the convention. That provision prohibits discrimination on a number of specific grounds, or 'other status'. It had been established in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, 13 December 2006, that that meant a 'personal characteristic' of the claimant. The Lords held that homelessness was an 'other status' for the purposes of article 14. However, the Lords held that the denial of the disability premium was, nevertheless, lawful because the discrimination involved was justified.

EUROPEAN COMMUNITY LAW

Claims for retirement pension by male-to-female transsexuals made after age 65: rights to pension as women

■ CP/1425/2007; CP/2862/2007; CSP/503/2007

13 March 2008

This decision of a Tribunal of Commissioners held that the claimants, male-to-female transsexuals, had rights to be treated in the same way as other female claimants of state retirement pension, as a result of EU Council Directive 79/7/EEC and the decision of the European Court of Justice in *Richards v Secretary of State for Work and Pensions* C–423/04, 27 April 2006 (reported as *R(P) 1/07*). However, that did not mean that the 12-month time limit for claiming retirement pension did not operate in these cases, and the fact that the claimants were now more than 12 months on from their 60th birthday meant that full backdating was not possible.

The Gender Recognition Act (GRA) 2004 did not prevent reliance by the claimants either on the Directive or *Richards* at any time, including before the GRA came into force, although the tests for entitlement on the basis of acquired gender, as set out in the GRA, were valid. The Directive and *Richards* meant that the claimants were entitled to retirement pension as women. However, the 12-month time limit for claiming retirement pension was not unlawful. It was not possible for the claimants, who were more than 12 months beyond the pensionable age for a woman of 60 and receiving pension claimed at the age of 65, to make a fresh or separate claim now. Yet they were entitled to have claims adjusted on the basis of deferment, ie, for any period between when they would have been entitled as women and the date the pension actually started.

1 See: www.hmcourts-service.gov.uk/cms/files/Direction-ClassesOfCasesSpecifiedUnderSection18(6).pdf.

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Recent developments in housing law

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

POLITICS AND LEGISLATION

Social housing allocation

In December 2008, Communities and Local Government (CLG) approved funding for another tranche of local housing authorities and housing association partners to work up proposals for regional or sub-regional choice-based lettings schemes. The schemes in this fourth round of grant-funding in some cases cover large areas incorporating most of, or the whole of, a county: CLG press release, 12 December 2008.[1]

Regulating social housing

The new regulator for England, the Tenant Services Authority (TSA), has published *Putting things right: what to do if you have a complaint about a registered social landlord*.[2] It also has a booklet explaining how a complaint can be made against the TSA itself: *Making a complaint about our services*, TSA, November 2008.[3]

Homelessness

Statistics for England for the third quarter of 2008 show that the number of households accepted as homeless and owed the main housing duty (Housing Act (HA) 1996 s193(2)) has fallen by 60 per cent since 2003. Only 14,340 households were accepted as owed the main duty – a 13 per cent reduction compared to the same quarter last year. The statistics also show a reduction in the number of homeless households in temporary accommodation – down 29 per cent since 2004: *Statutory homelessness, 3rd quarter 2008, England*, CLG, 11 December 2008.[4]

The latest government thinking on issues around homelessness prevention and temporary accommodation was set out by the junior housing minister, Iain Wright MP, when responding to a Commons debate about temporary accommodation: *Hansard,* HC Debates col 260WH, 26 November 2008.

In December 2008 the YMCA published *Breaking it down: developing whole-family approaches to youth homelessness*.[5] Based on interviews with parents of homeless young people, it found that 72 per cent of those interviewed believed that extra help could prevent the breakdown of family units causing young people to leave home.

Anti-social behaviour and housing

Several developments require consideration by housing advisers:

Family intervention tenancies: On 1 January 2009 it became possible for these new non-secure, non-assured tenancies to be granted by local housing authorities and registered social landlords. These tenancies of social housing are available to people undertaking behaviour support programmes designed to address their anti-social behaviour. Such tenancies can be ended by service of a notice to quit (NtQ). Before a local authority landlord gives a NtQ to a family intervention tenant, it must first serve a minded-to notice and offer the opportunity of a review. The Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008 SI No 3111 spell out the procedure to be followed on such a review.

Premises closure orders: Several of these new orders have already been made since the relevant provisions of the Criminal Justice and Immigration Act 2008 came into force on 1 December 2008. Although only the police or a local housing authority may apply for an order, the provisions are tenure-neutral. For example, Tower Hamlets LBC applied for and obtained an order in respect of a property let by Old Ford Housing Association: Home Office press release, 8 December 2008.[6]

Anti-social behaviour orders (ASBOs): In December 2008 the Sentencing Guidelines Counci (SGC) issued new guidance to the criminal courts when sentencing offenders for breach of ASBOs: *Breach of an anti-social behaviour order*, SGC, December 2008.[7]

Housing statistics for England

The latest annual volume of national housing statistics was published in December 2008: *Housing statistics 2008*, CLG.[8] The report covers all aspects of housing in England (and in some cases, tables also deal with the whole of the UK).

Disability and housing

In December 2008 the government announced that it would be making £157 million available to local authorities in England for the financial year 2009/10 through the Disabled Facilities Grant Programme (designed to help disabled and older people stay in their homes) and gave details of the authority-by-authority allocations: CLG press release, 10 December 2008.[9]

The December 2008 edition of *Housing Spotlight* (Issue 29), published by the Chartered Institute of Housing, focused entirely on the relationship between housing and disability.[10]

Help for owner-occupiers

Throughout December 2008, starting with a written ministerial statement on 8 December 2008, the government announced a portfolio of new measures intended to improve arrangements for the buying and selling of houses and flats and to assist homeowners in financial difficulties: *Hansard*, HC Debates col 25WS, 8 December 2008. These included:

- a comprehensive study by the Office of Fair Trading (OFT) of home buying and selling, looking at competition between service providers and how consumer interests are served;
- the strengthening of home information pack (HIP) requirements. A property information questionnaire (PIQ) will be needed in a HIP for all properties marketed for sale from 6 April 2009. The PIQ is designed to provide information sellers can supply without professional help: *Property information questionnaire (PIQ) – general version*, CLG, December 2008.[11] The requirement for a PIQ follows consideration of the responses to a consultation exercise: *Improving consumer information in the home information pack – summary of consultation responses*, CLG, December 2008;[12]
- further modifications to the HIP regime, some of which were brought into effect on 1 January 2009 and others which will be introduced on 6 April 2009, in each case by the Home Information Pack (Amendment) (No 3) Regulations 2008 SI No 3107;
- more than 130 developers agreeing to offer the HomeBuy Direct scheme which will help up to 18,000 first time buyers purchase a home at sites across England aided by an equity loan, part funded by the government and the developer. The equity loan, which will be free of charge for five years, can be used as a deposit and can cover up to 30 per cent

of the purchase price: CLG press release, 15 December 2008;

■ from 5 January 2009, changes to the welfare benefits system which have enabled help with mortgage interest payments to be made available earlier than previously. The changes reduce the waiting period for assistance with mortgage interest from 39 weeks to 13 weeks and increase the capital limit to £200,000: Department for Work and Pensions (DWP) press release, 19 December 2008; and

■ in response to complaints of misleading information being given to council tenants to encourage them to exercise the right to buy, the OFT has secured undertakings from three former directors of companies engaged in the marketing of credit agreements to such tenants: OFT press release, 19 December 2008.[13]

Despite these measures, the Council of Mortgage Lenders issued a statement predicting that by the end of 2009 there would be 75,000 mortgage repossessions and 500,000 households with more than three months' arrears: *CML market commentary*, 18 December 2008.[14]

Rent officers

On 5 January 2009 the rules for rent officer assessments in housing benefit and local housing allowance cases were changed to reverse the effect of the House of Lords decision in *R (Heffernan) v Rent Service* [2008] UKHL 58; [2008] 1 WLR 1702. Instead of considering rents in a 'locality', officers will now be looking at 'broad rental market areas': Rent Officers (Housing Benefit Functions) Amendment (No 2) Order 2008 SI No 3156.[15]

From 1 April 2009 ministerial responsibility for the rent officer service will switch from the DWP to Her Majesty's Revenue and Customs: Transfer of Functions (Administration of Rent Officer Service in England) Order 2008 SI No 3134.[16]

Housing and the elderly

In December 2008, CLG published *Delivering lifetime homes, lifetime neighbourhoods: a national strategy for housing in an ageing society*.[17] The document sets out the government's action plans for implementing a national strategy to address the housing needs of an ageing population.

HUMAN RIGHTS

Article 8

■ Hillingdon LBC v Collins

[2008] EWHC 3016 (Admin), 5 December 2008

The defendants occupied caravans on a site provided by Hillingdon. They did not have security of tenure. After allegations of serious anti-social behaviour, Hillingdon served notices to quit and began possession claims. The defendants filed defences relying on article 8 of the European Convention on Human Rights ('the convention'). Following *Birmingham City Council v Doherty* [2008] UKHL 57; [2008] 3 WLR 636, they contended that they were entitled to have Hillingdon's decision to bring proceedings scrutinised by the court. The claim was transferred to the High Court. They sought directions relating to the calling of evidence and disclosure.

After reviewing a number of authorities, HHJ Gilbart QC, sitting as a deputy high court judge, noted that:

■ the effect of *Doherty* is 'to widen the scope of the enquiry that may be made into decision making by an authority'. Observations in *Smith v Buckland* [2007] EWCA Civ 1318; [2008] 1 WLR 661 that 'the circumstances where [an article 8] defence can be made out as wholly exceptional have been overtaken by subsequent authority' (para 54);

■ 'the test is no longer whether the claim on public law grounds is "seriously arguable". It is now, as per *Doherty* at paragraph 55, whether the decision was reasonable, in the sense of whether no reasonable person would think that recovering possession was justifiable' (para 55);

■ while a judge 'must eschew simply substituting his own judgment for that of the local authority, [the court] must grapple with whether it had material before it, and whether the decision was reasonable' (para 56);

■ 'There is no better tribunal, nor one more experienced in dealing with disputes of this kind in housing cases, than an experienced circuit judge sitting in the county court' (para 57).

He concluded that at some stage the case would involve disputes of fact with witnesses being required. He remitted the case to Uxbridge County Court to be heard by a circuit judge. He gave directions for service of witness statements and disclosure.

■ Bedfordshire CC v Taylor

[2008] EWCA Civ 1316, 16 October 2008

Bedfordshire took possession proceedings against trespassers. They raised their rights under article 8 as a defence. HHJ Everall QC made a possession order. On an oral application for permission to appeal, the defendants argued that '*Doherty* adds a material gloss to *Kay*; … that contrary to the majority decision in *Kay*, it now enables the personal circumstances of the defendants to be taken into account in assessing the proportionality of a decision by a public authority to recover possession of property.'

Although the Court of Appeal did 'not hold out any encouragement to the appellants to expect success on the substantive hearing', it granted permission to appeal. Rimer LJ said that 'a permission application … is not the occasion on which to wrestle with the effects, if any, of [*Doherty*'s] 56 pages of speeches …'.

PUBLIC SECTOR TENANCIES

Possession claims: reasonableness

■ CDS Housing v Bellis

[2008] EWCA Civ 1315, 28 October 2008

Mr Bellis was a secure tenant. He was mentally unwell and suffered from delusions. He thought that there was electro-magnetic radiation emanating from the central heating or some other part of the electrical system of the flat. In trying to find out the source of the radiation he twice damaged the electrical and gas installations in the flat. This rendered his own flat and neighbouring properties unsafe. There was a risk of an explosion. HHJ Trigger found that the property was in a 'highly dangerous condition'. Mr Bellis left the property to stay with friends but did not take his belongings. CDS obtained an injunction that he remove them so that it could carry out repairs, but Mr Bellis did not comply with the order. CDS sought possession. At trial, a psychiatrist gave evidence that Mr Bellis continued 'to hold delusional ideas about the safety of his property'. He concluded 'I suspect that if Mr Bellis were to return to his property and if he were to be left alone … it would be only a matter of time before there were further damage caused to the property'. HHJ Trigger made an outright order. Mr Bellis appealed.

The Court of Appeal dismissed the appeal. It was common ground that HHJ Trigger should only have made an immediate order if there was no lesser alternative which would realistically make sense. Jacob LJ stated that this boiled down to a simple question, 'could the court be satisfied that there was no longer any real risk that the appellant would not do to the property that which he had done before?' He could see no fault in the judge's conclusion. 'The consequences of getting this one wrong could be catastrophic.' The judge had considered reasonableness and whether there should be suspension or postponement. 'The judge was absolutely right in his judgment.'

■ South Lanarkshire Council v Nugent

Sheriffdom of South Strathclyde Dumfries and Galloway, SD1706/07, 19 August 2008[18]

The parties entered into a contractual Scottish secure tenancy agreement in

February 2000. Subsequently, Mr Nugent pleaded guilty to supplying ecstasy and possessing amphetamines, at the property and elsewhere. It was accepted by the prosecution that he had only been concerned in the supply of drugs to his friends. He was ordered to serve 220 hours of community service. Although no complaints were received from neighbours, the council's policy 'in every case without exception' was to take positive action to evict tenants whenever misuse of drugs was established to have taken place. It sought possession against Mr Nugent under Housing (Scotland) Act 2001 Sch 2 paras 1 and 2 (which is very similar to the second limb of HA 1985 Sch 2 Ground 2). During the hearing of the possession claim, a detective constable gave evidence that ecstasy, amphetamine and cannabis resin found in the house had a value of between £1,860 and £1,891. He also referred to mixed banknotes totalling £845, a knife, a chopping board, cling film and scales found there. He said that on the day that these items were found, Mr Nugent was seen in a public house a mile from his house passing ecstasy to an unknown person. After stating that Mr Nugent had been 'warehousing large quantities of illegal [drugs] on the tenancy property to supply to others', the Sheriff found it reasonable to grant an order for recovery of possession. Mr Nugent appealed.

After considering a number of Scottish authorities dealing with the question of reasonableness, where tenants have been involved with drugs, the Sheriff Principal applied the four tests set out in *Glasgow City Council v Lockhart* 1997 Hous LR 99, namely: (i) the public interest; (ii) the fact that there was no doubt that Mr Nugent knew the consequences of his actions; (iii) the gravity of the offence (described as 'a very serious matter indeed' involving what was described as a 'substantial' quantity of drugs); and (iv) the consequences of removal ('no doubt material as far as [Mr Nugent was] concerned, but that is something which he might have applied his mind to before embarking on a course of criminal conduct'). The Sheriff Principal dismissed the appeal. The Sheriff was entitled to reach the decision which he did. The Sheriff Principal rejected the submission that the Sheriff's consideration of the defender's drug misuse was restricted to the terms of his plea of guilty. The possession claim was a civil action and the standard of proof was on the balance of probabilities. The Sheriff was entitled to take into account all the evidence which he heard from the housing officer, the detective constable and the anti-social investigation officer employed by the council.

Housing benefit: discretionary payments

■ R (Gargett) v Lambeth LBC

[2008] EWCA Civ 1450, 18 December 2008

Ms Gargett was a housing association tenant who was entitled to full housing benefit. Her weekly rent was increased, but neither she nor her landlord notified Lambeth. As a result, Lambeth did not increase the amount of housing benefit, and rent arrears accrued. The housing association began a possession claim, which was stayed on terms. Ms Gargett asked Lambeth for a discretionary housing payment on the basis that, in addition to her entitlement to housing benefit, she required further financial assistance to meet 'housing costs' in the form of rent arrears. Lambeth refused, stating that, in view of Discretionary Financial Assistance Regulations (DFA Regs) 2001 SI No 1167 para 2(3)(b), it had no discretion to make a discretionary housing payment, because Ms Gargett was now in receipt of full housing benefit and there was not a continuing shortfall. Ms Gargett's application for judicial review was refused.

The Court of Appeal allowed her appeal. The DFA Regs did not expressly place a limit on Lambeth's discretion. It was not possible to construe paras 2 and 4 to impose the limit which Lambeth sought. Lambeth had misconstrued the DFA Regs by giving the fact that she was already in receipt of full housing benefit as the reason why it had no discretion to grant the application for a discretionary housing payment. Lambeth's decision was quashed.

Suspended possession orders

■ Knowsley Housing Trust v White
■ Islington LBC v Honeygan-Green
■ Porter v Shepherds Bush Housing Association

[2008] UKHL 70, 10 December 2008

In these three appeals, heard together, the House of Lords considered important questions relating to suspended possession orders.

Mrs White was initially a secure tenant of Knowsley MBC but, as a result of a large-scale stock transfer, she became an assured tenant of Knowsley Housing Trust (HT). She fell into rent arrears. A 'suspended possession order' was made on 8 June 2004 in Form N28 which provided: 'The defendant give the claimant possession [of the property] on or before 6 July 2004 … This order is not to be enforced so long as the defendant pays the claimant the rent arrears and the amount for use and occupation and costs, totalling £2,262.52 by the payments set out below in addition to the current rent.' Largely owing to housing benefit difficulties, Mrs White breached the terms of the order. Later, she sought to exercise her preserved right to buy, but Knowsley HT informed her that she was not entitled to exercise that right because her tenancy had come to an end on the breach of the 'suspended possession order'. It asserted that she occupied the property as a tolerated trespasser. She sought a declaration that she was still an assured tenant and entitled to exercise the right to buy. HHJ Mackay dismissed her claim. The Court of Appeal dismissed her appeal: [2007] EWCA Civ 404; [2007] 1 WLR 2897.

The House of Lords allowed Mrs White's further appeal. Mrs White was entitled to a declaration that she was, and had been, an assured tenant, notwithstanding that there was an effective suspended order for possession against her and that she had been in breach of the terms of suspension.

Ms Honeygan-Green was a secure tenant. In May 2000, she made an application to buy the property under the right to buy scheme. That application was admitted by Islington, her landlord. In July 2002, Islington began a possession claim based on arrears of rent. In the meantime, completion of the right to buy application was delayed because another tenant had encroached on Ms Honeygan-Green's garden and a wall had collapsed. She served notices of delay under HA 1985 s153A. In October 2002, Islington obtained a suspended possession order in Form N28. It provided that the order was not to be enforced so long as Ms Honeygan-Green paid current rent and £50 per week. She failed to comply with the order. Islington wrote to Ms Honeygan-Green stating that she had become a tolerated trespasser. Ms Honeygan-Green then applied to set aside the possession order. By July 2003, she had paid all arrears and the possession order was discharged. In 2005, further arrears accrued. Islington again began a possession claim and Ms Honeygan-Green counterclaimed for a mandatory injunction ordering the council to convey the property to her. HHJ Marr-Johnson granted that order on the discharge of all arrears. Nelson J allowed Islington's appeal: [2007] EWHC 1270 (QB); [2007] 4 All ER 818. The Court of Appeal allowed Ms Honeygan-Green's further appeal: [2008] EWCA Civ 363; [2008] 1 WLR 1350.

The House of Lords dismissed Islington's appeal. Ms Honeygan-Green's right to buy was revived retrospectively and with immediate effect when the order for possession was discharged.

Mr Porter was the secure tenant of a flat. He fell into arrears of rent and a suspended possession order was made against him in 1997, when the arrears were £2,338. He did not comply with the terms and his tenancy

came to an end. He was allowed to remain in occupation as a tolerated trespasser. In April 2004, when the arrears stood at about £1,400, he issued a claim for damages for disrepair. Shepherds Bush Housing Association, his landlord, defended that claim on the basis that he was a tolerated trespasser. Before the hearing of that claim, he cleared the arrears. He then made an application to revive his former secure tenancy under HA 1985 s85(2) or, alternatively, to rescind the 1997 order for possession under s85(4). Following *Swindon BC v Aston* [2002] EWCA Civ 1850; [2003] HLR 42 and *Marshall v Bradford MDC* [2001] EWCA Civ 594; [2002] HLR 22, District Judge Nicholson dismissed the application. HHJ Simpson dismissed an appeal. The Court of Appeal dismissed a second appeal: [2008] EWCA Civ 196; [2008] HLR 35.

The House of Lords allowed Mr Porter's further appeal. Mr Porter's application for discharge of the suspended possession order was remitted to the county court.

The three appeals gave rise to the following principal issues:
(a) *When a suspended order for possession has been made against an assured tenant under the HA 1988, when does the tenancy come to an end?* On a fair and practical reading, the HA 1988 leads to the conclusion that an assured tenancy subject to a possession order does not end until possession is delivered up – ie, the position of an assured tenant is the same as that of a regulated tenant under the Rent Act 1977 (para 76). Lord Neuberger described the status of a tolerated trespasser as 'conceptually peculiar, even oxymoronic' (para 79) but said that the House of Lords should not reconsider the view expressed in *Burrows v Brent LBC* [1996] 1 WLR 1448 that *Thompson v Elmbridge BC* [1987] 1 WLR 1425 was rightly decided so far as secure tenancies are concerned (para 92). (At present, therefore, secure tenancies come to an end on breach of the terms of a suspended possession order, but the position will change when Housing and Regeneration Act 2008 s299 and Sch 11 are brought into force.)
(b) (i) *Can the court, when making a suspended possession order under the HA 1985, proleptically direct that the order be discharged once the terms have been complied with?* Yes. Section 85 permits a proleptic (ie, anticipatory) discharge provision, not least because the court can always revisit the provision, effectively at the suit of the landlord, if the terms of the suspension are not complied with. Section 85 should be construed, as far as permissible, to confer as much flexibility as possible on the court, and in such a way as to minimise future uncertainty and the need for further applications (para 96).
(ii) *If so, can the court proleptically direct that the order be discharged even if the terms of the suspension have not been strictly complied with?* Yes. The terms on which a possession order for non-payment of rent is suspended should, almost as a matter of course, include precise dates on which any payment should be made. However, it does not follow that proleptic discharge should only be available if payment is made strictly on those dates (para 105). Nevertheless, the terms of a suspended order are to be literally applied and precisely complied with. If a tenant fails to comply strictly with any of the terms of suspension, the landlord can apply for a warrant (para 110). The decisions in *Marshall* and *Swindon* were wrong on this issue (para 112).
(c) *In the case of a suspended order under the HA 1985, without a proleptic discharge provision, can a tenant who has not complied with the terms of suspension, but has paid off the arrears and costs, seek a discharge or variation of the order?* Yes. There is nothing in s85(2), or elsewhere in the Act, which expressly or impliedly prevents a tenant, who has paid off all the arrears and costs, making an application to the court to exercise its powers under s85(2) (para 113).
(d) *If a tenant who has served notice exercising the right to buy is then made subject to a suspended possession order, does the right to buy pursuant to the notice revive if and when the order is discharged?* Yes. The right to buy, pursuant to a notice already served under s122, is not permanently lost once the tenant is obliged to deliver up possession (para 119). The language of HA 1985 s121(2)(d) does not permanently remove the right to buy. It merely suspends it (para 118). Lord Neuberger said that the well-established rule that discharge of a suspended possession order revives the secure tenancy retrospectively logically carries with it the consequence that the tenant must be retrospectively treated as having had a secure tenancy throughout the period when s/he was contemporaneously 'obliged to give up possession … in pursuance of an order of the court' (para 121).

ANTI-SOCIAL BEHAVIOUR

Anti-social behaviour orders

■ Fairweather v Commissioner of Police for the Metropolis

[2008] EWHC 3073 (Admin), 2 December 2008

Ms Fairweather was convicted of 68 offences over a period of 13 years. She also breached a number of ASBOs. The police applied for a further ASBO under Crime and Disorder Act 1998 s1(1)(b), after complaints that, when drunk, she had attended both (i) a residential home for the elderly where she was abusive; and (ii) a police station where she had assaulted police officers and members of the public. In the magistrates' court, a district judge made a further ASBO, despite a report from an educational psychologist which referred to her limited intelligence and learning difficulties. She appealed.

The Divisional Court dismissed the appeal. An individual who suffers from a personality disorder may be liable to disobey an order, but that is not sufficient reason for holding that an order, which is otherwise necessary to protect the public from anti-social behaviour, is not necessary for that purpose, or that the court should not exercise its discretion to make an order. The district judge was entitled to hold that the evidence fell short of showing that Ms Fairweather did not understand simple instructions, as the report did not properly focus on the issue of whether she was capable of complying with an order.

Local Government Act 1972 s222

■ Bristol City Council v Ahmed

Bristol County Court, 5 December 2008[19]

In October 2007 Bristol City Council was granted an injunction for one year under Local Government Act 1972 s222 preventing the defendant from begging contrary to the Vagrancy Act 1824 anywhere in the City of Bristol or from remaining on Bristol's highways for the purposes of begging. The injunction was later amended to exclude the defendant from Bristol city centre. The defendant breached the injunction in October and November 2007. In February 2008, he received a 21-day prison sentence, suspended for the remaining term of the injunction. Further breaches were proved in new committal proceedings in July 2008 and the 21-day prison sentence was activated with no further penalty.

At a further hearing, Recorder Derbyshire accepted that the injunction had been sought not just to prevent a breach of the criminal law but also to address a public nuisance and could be distinguished from *Stoke on Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. He rejected the council's submission that the criminal law had inadequate sanctions to deal with begging. He also held that the council could have sought an ASBO to regulate the defendant's behaviour and, although it related to future criminal behaviour, *R v Boness* [2005] EWCA Crim 2395; [2006] 1 Cr App R (S) 120 would not prevent the making of such an order.

However, following *Birmingham City*

Council v Shafi [2008] EWCA Civ 1186; December 2008 *Legal Action* 24, he held that there were no exceptional circumstances to justify the injunction or the continuation of it. The injunction was discharged.

LONG LEASES

Service charges

■ **Morshead Mansions Ltd v Di Marco**

[2008] EWCA Civ 1371, 10 December 2008

Morshead was a private limited company which was the freehold owner of a block of 104 flats let on long leases. It had been established to undertake the management and administration of the block. Each lessee held one share in the company. The Articles of Association of the company permitted it to establish and maintain capital reserves, management funds and any form of sinking fund and to require the shareholders to contribute towards such reserves or funds in such manner as the members might approve by resolution in a general meeting. At the AGM in 2006, a motion was passed approving the establishment of a 'recovery fund', to raise £400,000 from the shareholders to redecorate the exterior and finance the provision of normal services such as the building insurance and cleaning. Each shareholder was to pay two instalments of £2,000. Although the interim service charge for 2007 would be £400,000, and each lessee would receive a service charge demand, payment of the instalments for the recovery fund would entitle the payer to an equivalent credit against his/her respective service charge account. Mr Di Marco was a lessee of one of the flats and a shareholder. He did not pay either instalment to the recovery fund. Morshead sued him as a shareholder for £4,000 plus interest. He defended, claiming that the recovery fund was a service charge as defined by Landlord and Tenant Act 1985 s18. In the county court, Recorder Mitchell QC accepted that the recovery charge was a service charge and dismissed the claim. Morshead appealed.

The Court of Appeal allowed the appeal, finding that there was a distinction between the liability of a tenant to a landlord under a lease containing service charge provisions, and the liability of a member of a company to the company under separate contracts made under its Articles of Association. The two kinds of legal relationship can co-exist between the same parties, but they are different relationships, incurred in different capacities and they give rise to different enforceable obligations. In this case, the claim related only to the right to recover moneys owed by the defendant as a member of the company.

HOUSING AND CHILDREN

■ **R (A) v Croydon LBC**

■ **R (M) v Lambeth LBC**

[2008] EWCA Civ 1445, 18 December 2008

The claimants were young asylum-seekers. If they were adults, the National Asylum Support Service would have been responsible for accommodating them. If they were 'children in need', the local authorities would have to accommodate them under Children Act (CA) 1989 s20. In each case, the councils decided that the claimants were over 18. Their claims for judicial review of those decisions were dismissed (August 2008 *Legal Action* 44).

The Court of Appeal dismissed their appeals. Questions of the age of prospective 'children in need' were not questions of precedent fact falling for determination by the High Court if a dispute arose but questions reserved by parliament to the authority by means of the CA 1989. Judicial review was available in the normal way. Provision for initial decision-making by the authority subject to scrutiny by way of judicial review sufficiently discharged the state's obligations under article 6 of the convention.

HOMELESSNESS

Eligibility

■ **Barry v Southwark LBC**

[2008] EWCA Civ 1440, 19 December 2008

The claimant was a Dutch national and an EU citizen. Although unemployed and incapacitated by an accident, he claimed to be eligible for homelessness assistance because he was a 'worker' for the purposes of Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 reg 6(2)(a) under the extended definition of that phrase given by Immigration (European Economic Area) Regulations 2006 SI No 1003 reg 6(2)(b)(ii) which embraces former workers who have not been continuously unemployed for more than six months before an incapacitating injury. Within the six months before his accident, the claimant had been employed for a fortnight as a steward at a tennis tournament while also receiving jobseeker's allowance. Southwark decided that that engagement did not count as 'work' and that because he had had no other work for that six months he was not eligible. The decision was upheld on review and an appeal was dismissed by HHJ Welchman.

The Court of Appeal allowed a second appeal. It decided that a wide and flexible interpretation of 'worker' was required by EU law and by the jurisprudence of the Court of Justice at Luxembourg. In settled EU law, 'work' need not be of indefinite duration, can be part-time or casual and need not be remunerated at the minimum wage. The true question was whether the services provided to the employer were real and actual and not merely marginal or subsidiary. Applying that approach, the applicant was in 'work' during the two weeks. Deductions were made from his pay on a PAYE basis, the work done was of economic value and it was not ancillary to any other relationship between the claimant and the employer. The reviewing officer could not properly come to any other conclusion than that he had been in work for those two weeks. By a respondent's notice, Southwark sought to uphold its decision by reliance on the fact of receipt of jobseeker's allowance for the relevant two weeks. The Court of Appeal held that even wrongful receipt of benefits could not deprive actual work of having the effect of rendering the claimant eligible as a 'worker' for the purposes of HA 1996 s185.

Priority need

■ **Mangion v Lewisham LBC**

B5/08/0018(A), B5/08/0018, 11 December 2008

Ms Mangion had moderate depression, back problems and a condition of alcohol dependency. A medical adviser, when assessing her for disability benefits purposes, had described her as having 'severe disability'. On her application for homelessness assistance, Lewisham decided, on a review, that she was not 'vulnerable': HA 1996 s189(1)(c). HHJ Knight QC dismissed an appeal against that decision.

Following the grant of permission to appeal on a renewed application (see January 2009 *Legal Action* 27), the Court of Appeal dismissed Ms Mangion's further appeal. The council's reviewing officer was addressing a different issue from those officials responsible for assessing incapacity for welfare benefits purposes. The reviewing officer had correctly addressed and applied the test in s189(1)(c).

Intentional homelessness

■ **Gaskin v Norwich City Council**

[2008] EWCA Civ 1490, 10 July 2008

In December 2003 the claimant was evicted from her privately rented home for non-payment of rent. On her homelessness application, Norwich initially decided that she did not have priority need. That decision was subsequently withdrawn and, in October 2004,

a new decision was made that although homeless, eligible and in priority need, she had become homeless intentionally: HA 1996 s191. In January 2005 that decision was confirmed on review. HHJ Barham dismissed an appeal against it and in October 2007 Chadwick LJ refused permission for a second appeal (see January 2008 *Legal Action* 38). Meanwhile, the claimant had made a second homelessness application. Norwich again decided that she had become homeless intentionally and that decision was upheld on review in August 2006. HHJ Darroch dismissed an appeal against that second review decision in September 2007. The claimant sought permission to bring a second appeal.

Stanley Burnton LJ refused a renewed application for permission. The grounds relied on to show that the appeal raised an important point of principle or practice (Civil Procedure Rule 52.13) were: that not all the relevant documents in the case had been before the second reviewing officer. Stanley Burnton LJ held that that was a matter confined entirely to the facts and raised no point of principle; and that the second reviewing officer had referred to and relied on the reasons of the first reviewing officer. Stanley Burnton LJ held that that was explicable because exactly the same factual issues had been raised before, and determined by, the first reviewing officer and the second reviewing officer agreed with the reasons given and came to the same conclusions himself.

■ Hassan v Brent LBC

[2008] EWCA Civ 1385, 20 October 2008

The claimant lost her last settled home at a time when she was still a child. Brent decided that she had become homeless intentionally: HA 1996 s191. That decision was upheld on review and HHJ Powles QC dismissed an appeal.

The claimant sought permission to bring a second appeal on the grounds that the judge had erred in law in finding that the reviewing officer had taken into account the fact that the claimant had been a child when she became homeless and in relating her age to the questions of: (i) whether she had acted deliberately; and (ii) whether it would have been reasonable for her to have continued in occupation.

Etherton LJ refused permission. The reviewing officer's decision had specifically referred to the claimant's age and her difficulties with undertaking her homework. In those circumstances there was no real prospect of success.

Reviews

■ Banks v Kingston-upon-Thames RLBC

[2008] EWCA Civ 1443, 17 December 2008

Mr Banks applied for homelessness assistance. Kingston decided that he was not homeless. He sought a review but, before it was concluded, he was given notice to quit by his private landlord. The reviewing officer decided that the original decision could not stand because Mr Banks was now homeless but that no duty was owed because he did not have a priority need.

HHJ Crawford Lindsay QC dismissed an appeal against that decision.

The Court of Appeal allowed a second appeal. Although on a literal construction of the words of Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2) there had been no 'deficiency or irregularity' in the original decision when made, a broad reading of the regulation required a reviewing officer to give an applicant an opportunity to address him/her (orally or in writing) before making an adverse decision on wholly different grounds. That embraced a situation where an original decision had become 'deficient' simply because it did not deal with a matter raised by a changed factual situation since it was promulgated. Such a strained interpretation of the regulation would not have been necessary had the claimant taken the expedient course of making a fresh application when his factual circumstances changed rather than pursuing his review of a decision overtaken by events.

Main housing duty

■ Muse v Brent LBC

[2008] EWCA Civ 1447, 19 December 2008

Brent owed Ms Muse the main housing duty under HA 1996 s193(2) and provided her under that duty with temporary accommodation on an assured shorthold tenancy with a housing association. As her family grew, the accommodation became overcrowded and she applied for a transfer to alternative accommodation. Brent decided that her present accommodation had become unsuitable and told her that it had instructed the housing association to recover possession. It offered other suitable accommodation but Ms Muse declined to move. The council decided that its duty had been discharged. HHJ Powles QC allowed an appeal but the Court of Appeal allowed a second appeal.

The Court of Appeal acknowledged two possible variants of the application of the statutory scheme to the facts. It could be said that the s193(2) duty had been completely performed by the offer and acceptance of the temporary housing association premises but that a fresh s193(2) duty had arisen later when that accommodation became unsuitable. Alternatively, it could be said that a continuing s193(2) duty had at all times been owed. However, the effect of the offer and refusal of the new suitable accommodation had been the same on either view: namely to work a discharge of the duty by operation of HA 1996 s193(5): refusal of an offer of suitable accommodation. There had been no unfairness to Ms Muse in not warning her that an application to transfer to alternative temporary accommodation might, in some circumstances, lead to the duty being discharged. But the council had been wrong to make the misleading statement that it would 'instruct' the housing association to recover possession. Whether the association wished to seek possession was a matter for its consideration and not the proper subject of instruction from a local housing authority.

1 Available at: www.communities.gov.uk/news/housing/1097330.
2 Available at: www.tenantservicesauthority.org/upload/pdf/Putting_things_right.pdf.
3 Available at: www.tenantservicesauthority.org/upload/pdf/Making_a_complaint_about_our_services.pdf.
4 Available at: www.communities.gov.uk/documents/statistics/pdf/1095044.pdf.
5 Available at: www.ymca.org.uk/SITE/UPLOAD/DOCUMENT/Breaking_it_Down.pdf.
6 Available at: nds.coi.gov.uk/content/Detail.asp?ReleaseID=386765&NewsAreaID=2&print=true. See also: www.insidehousing.co.uk/story.aspx?storycode=6502434.
7 Available at: www.sentencing-guidelines.gov.uk.
8 Available at: www.communities.gov.uk/documents/statistics/pdf/1095351.pdf.
9 Available at: www.communities.gov.uk/news/housing/1094670.
10 Available at: www.cih.org/spotlight.
11 Available at: www.communities.gov.uk/publications/housing/propertyinformationquestionnaire.
12 Available at: www.communities.gov.uk/corporate/publications/consultations.
13 Available at: www.oft.gov.uk/news/press/2008/148-08.
14 Available at: www.cml.org.uk/cml/publications/marketcommentary/archive.
15 Available at: www.opsi.gov.uk.
16 Available at: www.opsi.gov.uk.
17 Available at: www.communities.gov.uk/documents/housing/pdf/deliveringlifetimehomes.pdf.
18 Available at: www.scotcourts.gov.uk/opinions/SD1706.html.
19 Frances Barratt, solicitor, Bristol; Michael Paget, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at www.nicmadge.co.uk and www. gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm.

Tolerated trespassers: the long goodbye

Robert Latham considers the House of Lords' judgment in the conjoined appeals in *Knowsley Housing Trust v White*; *Honeygan-Green v Islington LBC*; *Porter v Shepherds Bush Housing Association* [2008] UKHL 70, 10 December 2008, and the amendments which are to be introduced by the Housing and Regeneration Act 2008.[1]

'Nothing says goodbye like a bullet' observed detective Philip Marlowe in Robert Altman's film 'The Long Goodbye'. Unfortunately, neither the government nor their lordships have heeded this advice.

The Housing and Regeneration Act (H&RA) 2008 received royal assent on 22 July 2008. The relevant provisions (s299 and Sch 11) are likely to come into force on 6 April. Part 1 of Schedule 11 amends for the future the legislation in respect of secure, introductory, demoted and assured tenancies. It could, and should, have been implemented immediately. While the amendments to the Housing Act (HA) 1988 are no longer strictly necessary in respect of assured tenancies as a result of the judgment in *Knowsley*, the amendments will achieve symmetry in the wording between the different statutory codes.

The transitional provisions in Part 2 of Schedule 11 are far from satisfactory for reasons which are discussed below. The sound advice to both social landlords and tenants is to apply under HA 1985 s85 to revive all tenancies before the commencement date and thereby avoid the problems created by the 'replacement' tenancies. For tenants, this is the only means of securing their full basket of rights. For landlords, this will avoid the problems arising from the unfortunate manner in which the legislation has been drafted.

The House of Lords' decision in the conjoined appeal was unanimous. Lord Neuberger, who had been counsel for Ms Burrows 12 years previously, gave the lead opinion. Had he had the courage of his convictions, he would have revisited whether *Thompson v Elmbridge BC* [1987] 1 WLR 1425, 14 July 1987, had been correctly decided. In the light of the position taken by the experienced counsel instructed in the appeal, he declined to do so (see paras 91–93). The problem therefore subsists for secure, and the related introductory and demoted, tenancies.

The approach adopted in *Burrows v Brent* [1996] 1 WLR 1448, 31 October 1996, has been affirmed. However, their lordships have reined back many of the excesses of the Court of Appeal over the past 12 years which has nurtured this subclass of 'tolerated trespasser'. Lord Neuberger (at para 79) described this concept as 'oxymoronic', namely two contradictory terms being used in conjunction. The size of this subclass is made the more uncertain.

ISSUES RESOLVED BY THE HOUSE OF LORDS

The appeal in *Knowsley* was allowed. The regime of tolerated trespassers has no relevance to assured tenancies which continue for so long as the tenant remains in occupation of the dwelling. Their lordships (at para 89) also reversed *Artesian Residential Developments Ltd v Beck* [2000] QB 541, 19 March 1999, which related to an outright possession order, as opposed to the conditional order in *Knowsley*.

Islington's appeal in *Honeygan-Green* was dismissed. The tenant's right to rely on her notice of 23 May 2000, exercising the right to buy, was suspended on about 1 November 2002, when the possession order took effect. However, her right was revived retrospectively and with immediate effect no later than 8 July 2003 when the order for possession was discharged. Lord Neuberger (at para 134) tended to the view that the right revived somewhat earlier when the arrears were cleared by virtue of para 6 of the possession order ('upon payment of the arrears in full, claim do stand dismissed') which had been added to the template in Form N28 (2001).

The appeal in *Porter* was allowed, by consent. Mr Porter's application to discharge his suspended possession order was remitted to the county court. The Court of Appeal decisions in *Marshall v Bradford MDC* [2001] EWCA Civ 594, 27 April 2001; [2002] HLR 22, and *Swindon BC v Aston* [2002] EWCA Civ 1850, 19 December 2002; [2003] HLR 42, were overruled on three points:

- The absurd concept of the 'entrenched tolerated trespasser' is now dead. The mere fact that the tenant has paid off the arrears so that the landlord can no longer enforce the order, cannot prevent the tenant from going back to the court under HA 1985 s85 (paras 112–113).
- A court may exercise its discretion under s85(4) to discharge an order where the arrears have been cleared, even where the tenant has not strictly complied with the terms of suspension (paras 112–114). This is to be contrasted with HA 1985 s85(2) which requires strict compliance (para 109).
- When making a conditional possession order under HA 1985 s85(2), a court may proleptically (in anticipation) direct that the order be discharged once the arrears are cleared (paras 94 and 97). However, an order which merely provides that 'when you have paid the total amount mentioned, the claimant will not be able to take any steps to evict you' (as in Form N28 (1993)) will not of itself discharge the order.

Lord Mance dissented from the second and third of these propositions (see paras 17–18). He suggested that compliance, or substantial compliance, was required before a court could discharge an order under HA 1985 s85(4). However, this was a minority position.

Full argument on these points would have been called for had the appeal in *Porter* not been compromised on the first day of the hearing, when counsel withdrew from the appeal. The House of Lords had also granted permission to appeal in *London and Quadrant Housing Trust v Ansell* [2007] EWCA Civ 326, 19 April 2007; [2007] HLR 37, but this appeal was also compromised before the hearing, presumably on terms favourable to the tenant.

Lord Neuberger referred to the drafting of the Rent Acts (RA), on which HA 1985 s85 and HA 1988 s9 are based, as 'opaque', citing MacKinnon LJ's reference in *Winchester Court Ltd v Miller* [1944] KB 734 to 'that chaos of verbal darkness'. He drew the following conclusions (at para 88):

- the phrase 'mesne profits' in RA 1977 s100 and HA 1988 s9 are unnecessary as protected and assured tenants will never occupy their dwellings as trespassers;
- 'stay' and 'suspend' in RA 1977 s100(2), HA 1985 s85(2) and HA 1988 s9(2) are synonymous with one another;
- 'discharge' and 'rescind' in RA 1977

s100(4), HA 1985 s85(4) and HA 1988 s9(4) are also synonymous.

OUTSTANDING ISSUES

Lord Neuberger noted the cardinal importance of housing law being 'substantively and procedurally clear and simple' (at para 68). He referred to *Baker v Turner* [1950] AC 401 in which Lord Porter had observed that '"the rules of formal logic must not be applied … with too great strictness" to legislation conferring security of tenure on residential tenants' (at p417). Lord Porter had added that the RAs 'must be viewed in the light of their aim and object'. In *Feyereisel v Turnidge* [1952] 2 QB 29, 4 March 1952, Denning LJ (at p37) had said that 'the guiding light through the darkness of the Rent Acts was to remember that they confer personal security of tenure on the tenant in respect of his home'.

Burrows related to an outright order for possession. In the earlier decision of *Greenwich LBC v Regan* (1996) 28 HLR 469, 31 January 1996, the Court of Appeal had considered the position of a conditional possession order (Form N28 (1982)). Millett LJ concluded that when a tenant breached the terms of such an order, the landlord had an election. It could treat the tenant as a trespasser and apply for a warrant of possession. Alternatively, it could waive the breach in which case the tenancy would continue. On any further breach, a fresh right of election would arise. Had this approach been followed, the problem of the tolerated trespasser would largely have been restricted to outright possession orders.

In *Marshall v Bradford*, Chadwick LJ (at paras 26–31) held that the decision in *Regan* was inconsistent with *Burrows*. A tenancy would only revive if either the landlord or the tenant made a formal application under s85(2). This decision was later affirmed in *Lambeth LBC v O'Kane*; *Helena Housing Ltd v Pinder* [2005] EWCA Civ 1010, 28 July 2005; [2006] HLR 2.

It is difficult to reconcile this approach with the speeches in *Knowsley*. Lord Walker (at para 4) expressly stated that *Regan* had been approved by the House of Lords in *Burrows*. However, although Lord Neuberger overruled *Marshall v Bradford* on three points, he did not specifically address the issue of waiver. It remains to be seen whether the Court of Appeal will be willing to reconsider this issue or whether this is unfinished business for the House of Lords.

A tolerated trespasser cannot sue under a covenant to repair since no contractual tenancy subsists. While it is open for a tolerated trespasser to bring a claim in nuisance (see *Pemberton v Southwark LBC* [2000] 1 WLR 1672, 13 April 2000), it had been thought that no action could lie under Defective Premises Act 1972 s4 as this depends on the landlord being under 'an obligation to the tenant for the maintenance or repair of the premises'. Lord Neuberger (at para 83) inclined to the view that such an action could be brought, relying on *Brikom Investments Ltd v Seaford* [1981] 1 WLR 863, 5 March 1981. In *Brikom*, the landlord was held to be estopped from contending that the normal implied repairing covenants did not apply where a fair rent had been fixed on the basis that they did. Similarly, where the landlord demands payment of mesne profits comparable to the rental payable by a tenant with the benefit of the normal repairing covenants, the landlord should be estopped from denying its obligation to repair. If a third party is able to establish such an estoppel, it is difficult to see why a tolerated trespasser should not also be able to do so. At the least, the House of Lords has given a green light to any tenants applying to revive their tenancy under HA 1985 s85(2) to enable them retrospectively to revive their tenancy in order to maintain an action for disrepair.

Lord Neuberger (at para 82) highlighted the 'difficulties and uncertainties' relating to the status of the tolerated trespasser highlighted by Brooke LJ (at para 34) in *Bristol City Council v Hassan* EWCA Civ 656, 23 May 2006; [2006] 1 WLR 2582. A particular problem is that the statutory procedure for increasing the rent payable by a secure tenant does not apply to a tolerated trespasser. It is arguable that a landlord is only able lawfully to increase the mesne profits payable by either securing the consent of the tolerated trespasser or applying to the county court to amend the possession order.

IDENTIFYING TOLERATED TRESPASSERS

The problem of tolerated trespassers is now largely historical. Since 3 July 2006, most courts have been making postponed possession orders using Form N28A (2006). The problem, as noted by Wilson LJ in *Jones v Merton LBC* [2008] EWCA Civ 660, 16 June 2008 (at para 9), is that most landlords are unable to distinguish between their tenants and their tolerated trespassers.

The Housing Law Practitioners Association (HLPA) had estimated that there are 500,000–750,000 tolerated trespassers, namely some 10–20 per cent of tenants, occupying social housing. This estimate was confirmed by a survey published by *Inside Housing* on 25 January 2008. This figure is now reduced by some 33 per cent as a result of the *Knowsley* decision in respect of assured tenancies.

As Lord Neuberger noted (at para 83), conditional possession orders which appear to have an identical effect to one another turn out not to do so. The issue is whether a conditional order 'postpones the date of possession' (HA 1985 s85(2)(b)) or 'suspends the execution of the order' (s85(2)(a)).

Form N28 (2001)

Some 150,000–200,000 tolerated trespassers have been created by the use of Form N28 (2001). This template was introduced on 15 October 2001. It is understood that few judges have used it since the 'interim possession order' and Form N28A (2006) were introduced respectively on 17 March and 3 July 2006. However, no statistics are available. Form N28 (2001) suspends the execution of the order (see *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; [2006] 1 WLR 2116). All tenants became tolerated trespassers regardless of whether or not they complied with the specified conditions.

Form N28 (1993)

Up to 150,000 tolerated trespassers have been created by Form N28 (1993). This was introduced on 1 November 1993 and was used for the subsequent eight years. The critical elements of the order are the date to which possession has been postponed in para 1 (normally 28 days) and the conditions specified in para 3. If the tenant fails to comply with the conditions specified in para 3 for the period specified in para 1, the occupant will become a tolerated trespasser. The courts have not construed the effect of this order where there has been compliance for this limited period of postponement. In many cases, judges have granted some indulgence as to when the first payment is required, requiring only two or three payments of rent during the requisite period of 28 days. After the initial period of postponement has passed, it is arguable that the landlord on a later breach must apply for a further date to be fixed. Should the landlord fail to do so, the tenancy subsists.

Form N28 (1982)

Up to 100,000 tolerated trespassers have been created by Form N28 (1982) which was used for ten years. This was construed in *Thompson v Elmbridge*, above. The occupant will become a tolerated trespasser on breaching the specified conditions. Strict compliance is required. The interim possession order introduced in March 2006 was modelled on this template.

Not all judges have used the recommended templates. Many have adapted them, as in *Honeygan-Green*, above. The effect of these orders, namely whether they postpone the date of possession or suspend the execution of the order, is often uncertain.

Both Form N28 (1993) and Form N28 (1982) are 'postponed possession orders'. It is now again arguable that it is open to the landlord to waive any breach, thereby preserving the secure tenancy. Given that none of these orders have been used since October 2001, there is a cogent argument that any breach has been waived. If this argument is correct, this would dramatically reduce the underclass of tolerated trespassers (by at least 50 per cent). 'Friendly litigation' could resolve this issue.

HOUSING AND REGENERATION ACT 2008

Part 1 of Schedule 11 to the H&RA reverses *Thompson v Elmbridge* by amending the relevant legislation to provide that, in future, a tenancy only ends when a possession order is executed:

- Secure tenancies: HA 1985 s82 is amended by para 2;
- Assured tenancies: HA 1988 s5 is amended by para 6;
- Assured shorthold tenancies: HA 1988 s21 is amended by para 9;
- Introductory tenancies: HA 1996 s127 is amended by para 11;
- Demoted tenancies: HA 1996 s143D is amended by para 13.

The transitional provisions in Part 2 of Schedule 11 are less satisfactory. Communities and Local Government (CLG) rejected the simple solution of reviving the tenancies of all existing tolerated trespassers. This had been recommended by both HLPA and Shelter. On 22 January 2008 they sought unsuccessfully to promote an amendment to the bill to achieve this.

The H&RA rather proposes that a new replacement tenancy will arise on the commencement date provided that three conditions are met:

- 'The home condition': both at the commencement date and at all material times during the termination period, the ex-tenant has occupied the dwelling as his/her only or principal home. In the case of joint tenants, this condition must be satisfied by at least one of them.
- The ex-landlord is still entitled to let the dwelling (ie, there has been no stock transfer from a local housing authority to a registered social landlord or local government reorganisation).
- The ex-landlord and ex-tenant have not entered into a new tenancy in the interim.

The first problem is that social landlords are unable to identify their tolerated trespassers from their tenants. They will therefore have difficulty in identifying who are subject to these new replacement tenancies. While the original and the new tenancies are to be treated as the same and continuous for certain purposes (ie, succession rights, right to buy and Ground 8 claims: see para 21), this does not extend to claims for disrepair. The tenant must rather apply to the county court for an order to this effect. There seems to be no reason why the tenant could not also make an application under s85(2) to revive the original tenancy.

Second, there is a drafting problem. Schedule 11 para 18(2) provides that '[t]he terms and conditions of the new tenancy are to be treated as modified so as to reflect, so far as applicable, **any changes made during the termination period** to the level of payments for the ex-tenant's occupation of the dwelling-house **or to the other terms and conditions of the occupation**' (emphasis added). This is intended to deal with any changes in the conditions of tenancy which were made while the occupant was a tolerated trespasser. However, such changes could never have governed the conditions under which the tolerated trespasser occupied the premises. Had they done so, a new tenancy would have been created. The replacement tenancy will therefore be governed by the conditions of tenancy which applied when the occupier became a tolerated trespasser. It will be necessary for the landlord to go through the HA 1985 s102/103 consultation procedure to amend the tenancy conditions in line with its current conditions of tenancy.

Third, the H&RA currently makes no express provision for 'successor landlords', albeit that the national authorities in England and Wales are authorised to do so by secondary legislation. On 25 September 2008, CLG issued a consultation paper proposing similar treatment where there has been a change of landlord, namely the creation of a replacement tenancy.[2] Responses were sought by 19 December 2008. It is understood that there has been a poor response from social landlords, whose morale is low at present as a result of the current financial crisis.

HLPA calls for CLG to introduce Part 1 of Schedule 11 at the earliest opportunity.[3] However, Part 2 should not be implemented. Rather, CLG should promote primary legislation to revive retrospectively the tenancies of all tolerated trespassers who remain in occupation of their dwellings.

CLG's current intention is to work towards a common commencement date in April 2009 implementing Schedule 11 in full together with secondary legislation making similar provision in respect of successor landlords. The wording of the 'successor landlord order' will be critical. The danger is that CLG will perpetuate 'that chaos of verbal darkness'.

As a result of these changes, judges will revisit whether possession orders should be made using the templates of Form N28 (2001) (the 'suspended' order) or Form N28A (the 'postponed' order). In future, the tenancy will subsist until the order is executed, whichever template is used. There are cogent reasons for both social landlords and tenants to continue to use Form N28A. These will be discussed in a future article.

1 See also 'House of Lords verdict on tolerated trespassers', Robert Latham, *Inside Housing*, 15 December 2008, available at: www.insidehousing.co.uk/story.aspx?storycode=6502290.
2 *Tolerated trespassers: successor landlord cases. A consultation paper* is available at: www.communities.gov.uk/publications/housing/toleratedtrespassersconsultation.
3 HLPA's response to the consultation is available at: www.hlpa.org.uk/ uploads/TTs-SuccessorLandlords-HLPAn221208n.doc.

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Recent developments in immigration law – Part 3

This series of articles by barristers in Tooks Chambers' immigration team aims to keep practitioners up to date with significant developments in immigration case-law. See 'Recent developments in immigration law – Part 1', December 2008 *Legal Action* 40 for the latest politics and legislation in this area. Part 2 of this article, which also covered case-law developments, was published in January 2009 *Legal Action* 12.

CASE-LAW

Prison conditions

■ SH (prison conditions) Bangladesh CG

[2008] UKAIT 00076, 13 October 2008

The appellant, a member of the Bangladesh National Party (BNP), was convicted and sentenced to seven years' imprisonment in his absence. Despite accepting that prisons in Bangladesh were severely overcrowded, the tribunal held that without evidence of other exacerbating features, prison conditions for ordinary prisoners did not in general violate article 3 of the European Convention on Human Rights ('the convention'). However, the tribunal left open the possibility for other prison cases to reach the article 3 threshold depending on the particular circumstances of detention in each case. The tribunal's comments suggest that this would require evidence of additional exacerbating factors, including the length of detention and the effect of detention on the individual's health. *AA (Bihari-Camp) Bangladesh CG* [2002] UKIAT 01995, 17 June 2002, *H (Fair Trial) Bangladesh CG* [2002] UKIAT 05410 and *GA (Risk-Bihari) Bangladesh CG* [2002] UKIAT 05810, 20 December 2002, are no longer country guidance cases for Bangladesh.

Duties of immigration judge

■ AW (Duties of Immigration Judge) Pakistan

[2008] UKAIT 00072, 6 August 2008

This case provides authority, should it be needed, for the proposition that immigration judges (IJs) have a duty to act fairly in relation to both parties to an appeal and to reach a decision on the evidence before them. Judges should not reach conclusions about evidence which is not before them (in this case, the respondent's bundle), or evidence which has not been made available to all parties. Judicial notice was also given to the frequent failure by entry clearance officers to comply with Asylum and Immigration Tribunal (AIT) directions on disclosure.

Delay in application for indefinite leave to remain

■ Obienna v Secretary of State for the Home Department

[2008] EWHC 1476 (Admin), 27 June 2008

The claimant alleged that the Secretary of State for the Home Department had disappointed a legitimate expectation that his application for indefinite leave to remain on the basis of long residence would be considered within a finite time scale. There had been a delay of almost three-and-a-half years since the application was made in February 2005. An acknowledgment letter had indicated that the defendant aimed to decide his claim in between three and 13 weeks.

In affidavit evidence the defendant explained that there was a backlog of some 30,400 cases caused by a lack of resources. In December 2007, it was decided to concentrate the majority of casework resources to deal with the backlog in chronological order, starting with the oldest first.

Simon J accepted that the defendant had received a very large number of such applications and that such claims were recognised as being complex; it should have been recognised as unrealistic to indicate that a decision would be made within a matter of weeks. Furthermore, despite the claimant's solicitors having written four letters to clarify the position, they did not receive a response and there was still no evidence (even now) about when the claimant's application would be dealt with; this showed either a high degree of inefficiency, a deliberate policy of not replying to such enquiries or recognition that the backlog was so bad that any information would either be so vague or otherwise unsatisfactory that it was better to say nothing.

However, on analysis of the wording of the letter it did not convey a legitimate expectation that claims would be determined within a finite period. There was nothing in the letter which would render it 'conspicuously unfair' to the claimant if the claim were dealt with after 13 weeks. Adopting the observations of the court in *R (FH and others) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), 5 July 2007, Simon J was of the view that since resources available to the government are finite, the court should not make decisions which might implicitly require the deployment of further resources to deal with a particular problem, unless it was satisfied that the delays in a particular system were so excessive as to be unlawful.

Before May 2007, there appeared to have been no system for dealing with an accumulating backlog of applications. The lack of any system was unlawful. The system put in place until December 2007 operated in a way which was conspicuously unfair; the backlog was ignored in favour of targeting the new intake and expedited cases, and old cases were not dealt with at all. Since December 2007, however, there had been a system for dealing with the backlog in chronological order. Provided that it was sufficiently resourced so as to avoid excessive delays, the present system was not unlawful. Simon J declined to make an order in relation to a system and policies of priority now superseded, but highlighted that:

- the 'continual failure of the Home Office to respond to or even acknowledge receipt of correspondence' was a serious failure in public administration (para 35);
- a proper system of dealing with a backlog would include a means by which applicants could be informed how long they may have to wait for a decision, a fortiori, when applicants pay an application fee;
- '[C]laims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable', but if the application of the policy now in place could not provide any indication about when an application may be dealt with, it may be open to question whether the policy is being applied fairly and consistently (para 37).

Statelessness

■ MT (Palestinian Territories) v Secretary of State for the Home Department

[2008] EWCA Civ 1149, 22 October 2008

■ SH (Palestinian Territories) v Secretary of State for the Home Department

[2008] EWCA Civ 1150, 22 October 2008

These two cases involved claims by stateless Palestinians that they would be persecuted by the denial of return to the Israeli-occupied territory of the West Bank on grounds of their race as Palestinian Arabs. In both cases the appellants had the truth of their historical accounts of persecution in the West Bank and Israel rejected by the AIT. The AIT, followed by the Court of Appeal, found that neither of them wished to return to their former habitual residence. The issue was therefore: Could a stateless person be persecuted by discriminatory denial of return to their place of former habitual residence if such denial was based on a convention reason?

The appellants in both appeals sought to distinguish the case of *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304, 9 April 2008 and the Court of Appeal found that all three cases were indistinguishable on their facts, finding in the case of *MT* that:

■ stateless Palestinians from the West Bank fall somewhere between persons with rights of citizenship at one end of a spectrum and stateless habitual residents of a territory with no rights at the other (para 20);

■ the case of *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809, 31 July 2007, was distinguishable from *MT* because *EB* was a citizen with rights of which she would be de facto deprived. Habitual residence was a state of affairs rather than something that conferred rights. Refusal of re-entry was refusal of a right the appellant never had (para 50).

In both *SH* and *MT* the court applied its earlier decision in *MA*. *MA* held that denial of return to stateless persons to their country of former habitual residence does not of itself give rise to recognition as a refugee. That decision was binding and there was nothing to distinguish it for the same reasons as those given in *MT* (para 52).

■ Even if *MA* was not binding, refusal to allow re-entry to the West Bank as a stateless Palestinian would not cross the persecution threshold in regulation 5 of the Refugee or Person in Need of International Protection (Qualification) 2006 Regulations SI No 2525 (para 52).

The appellants in *SH* and *MT* submitted petitions to the House of Lords on 7 November 2008 to be considered alongside the petition of the appellant in *MA* and leave to appeal was declined by the House of Lords in all three cases in December.

Bias

■ Helow v Secretary of State for the Home Department and another (Scotland)

[2008] UKHL 62, 22 October 2008

This is an interesting case originating in Scotland in which the House of Lords considered the issue of bias in the context of the relevance of the Lord Ordinary's membership of the International Association of Jewish Lawyers and Jurists and her hearing of the appeal of a Palestinian refugee. In particular it was argued on appeal to the Court of Session on the ground that a fair-minded and informed observer would have concluded that there was a real possibility that the Lord Ordinary was biased by reason of her membership of an association actively antipathetic to the interests with which the petitioner was identified.

Somewhat surprisingly considering the strong views expressed by the association, the lords held that membership of an association did not necessarily connote approval or endorsement of all material that was published in its publications. The Lords did comment, however, that circumstances might arise where an association's publications were so extreme that members might be expected to become aware of them and dissociate themselves by resignation if they did not wish to be thought to approve of them.

Comment: Lord Hope's discussion about the 'fair-minded and informed observer' at paragraphs 1–6, confirming his earlier judgment on the issue in *Porter v Magill* [2001] UKHL 67, 13 December 2001; [2002] 2 AC 357, is worth a read, especially for those of us who may have doubts about the meaning of this concept.

Violation of article 3

■ NA v UK

App No 25904/07, 17 July 2008

The government had rejected the asylum claim of a Sri Lankan Tamil. His claim was founded on a fear of targeting by the Tamil Tigers and the Sri Lankan army.

The applicant was born in 1975 and claimed asylum in 1999. He claimed to have been arrested and detained, and released without charge, by the army six times between 1990 and 1997 on suspicion of involvement with the Tamil Tigers. During one detention he was ill-treated and his legs had scars from being beaten with batons. During the 1997 detention he was photographed and fingerprinted. His father had signed papers to secure his release. He feared the Tamil Tigers because his father had collaborated with the army. The Tamil Tigers had tried to recruit him in 1997 and 1998.

Following unsuccessful appeals and judicial review challenges to rejection of fresh claims for asylum, he applied to the European Court of Human Rights (ECtHR) as a result of removal directions issued for 25 June 2007. The President of the competent chamber of the ECtHR applied r39 of the Rules of Court (interim measures), indicating to the UK government that the applicant should not be expelled until further notice.

In the course of 2007, the ECtHR received an increasing number of requests for interim measures from Tamils who were being returned to Sri Lanka from the UK and other contracting states. Interim measures were granted in respect of 342 Tamil applicants in the UK.

In response to a letter from the competent Section Registrar in October 2007, the Agent of the UK government stated that since the government did not consider that the current situation in Sri Lanka warranted the suspension of removals of all Tamils who claimed that their return would expose them to a risk of ill-treatment, the government was not in a position to assist the court by refraining from issuing removal directions in all such cases on a voluntary basis. It was suggested that the difficulties posed by the increasing numbers of requests for interim measures by Tamils could best be addressed through the adoption of a lead judgment by the court.

The court held that a complaint under article 2 could be dealt with in the context of its examination of the related complaint under article 3.

The court observed as a preliminary matter that the government proposed to remove the applicant to Colombo, thus it was not necessary to examine the risk to Tamils from the Tigers in parts of the country outside Colombo. It was accepted by all parties that there had been a deterioration in the security situation in Sri Lanka. This did not create a general risk to all Tamils returning to Sri Lanka and assessment could only be done on a case by case basis.

It was legitimate, when assessing the individual risk to returnees, to rely on the list of 'risk factors' which the UK authorities had created from objective information and expert evidence. The assessment of a 'real risk' had to be made on the basis of all relevant factors which might increase the risk

of ill-treatment. Individual factors considered separately which did not constitute a 'real risk' might do so when taken cumulatively against the background of general violence and heightened security.

The information before the court pointed to the systematic torture and ill-treatment by the Sri Lankan authorities of Tamils who would be of interest to them in their efforts to combat the Tamil Tigers. In respect of returns through Colombo, there was a greater risk of detention and interrogation at the airport than in Colombo city.

Whether a returnee was at real risk of ill-treatment might turn on whether that person would be likely to be detained and interrogated at Colombo airport as someone of interest to the authorities. At Colombo airport, the court considered that, at the very least, the Sri Lankan authorities had the technological means and procedures in place to identify failed asylum-seekers and those who were wanted by the authorities.

In the applicant's case, the court found:

- No risk to him from the Tamil Tigers in Colombo. Only Tamils with a high profile as opposition activists, or those seen as renegades or traitors, would be in danger.
- In relation to the Sri Lankan authorities, the strength of the claim resulted from an accumulation of the risk factors identified by the domestic authorities. However, compared with the last factual assessment made by the national authorities, the court did so in the light of more recent developments and in particular having due regard to the deterioration of the security situation in Sri Lanka and the corresponding increase in general violence and heightened security.
- Taking a cumulative approach, a previous criminal record and/or arrest warrant could be relied on by the applicant as a risk factor, having been found credible on this point by the UK authorities.
- The applicant's father had signed a document to secure his son's release. Although the precise nature of this document was not known, the logical inference was that it would have been retained by the Sri Lankan authorities at the time.
- The court considered that where there was a sufficient risk that an applicant would be detained, interrogated and searched, the presence of scarring, with all the significance that the Sri Lankan authorities were then likely to attach to it, had to be taken as greatly increasing the cumulative risk of ill-treatment to that applicant.
- Although it had been over ten years since the last detention, the passage of time could not be conclusive in assessing the risk faced without a corresponding assessment of the current general policies of the Sri Lankan authorities. Their interest in particular categories of returnees was likely to change over time in response to domestic developments and might increase as well as decrease.
- The court also examined the additional relevant factors: the age, gender and origin of a returnee; a previous record as a suspected or actual Tamil Tiger member; return from London; having made an asylum claim abroad; and having relatives in the Tamil Tigers. Where present, these additional factors contributed to the risk of identification, questioning, search and detention at the airport and, to a lesser extent, in Colombo. With the exception of having relatives in the Tamil Tigers, the court considered that the remaining factors were all capable of being relied on by the applicant and, on the facts of his case, their cumulative effect was to increase further the risk to him, which was already present due to the probable existence of a record of his last arrest and detention.

The court concluded that there were substantial grounds for finding that the applicant would be of interest to the Sri Lankan authorities in their efforts to combat the Tamil Tigers and at the present time there would be a violation of article 3 if the applicant were to be returned.

Violation of articles 3, 5(1)(f) and (4), and 13

■ Soldatenko v Ukraine

App No 2440/07,
23 October 2008

The applicant, who claimed to be stateless, was the subject of extradition proceedings to face trial in Turkmenistan and was detained by the Ukrainian authorities. The Ukrainian authorities contended that he was a Turkmen national.

In July 1999 an indictment was issued against the applicant in Turkmenistan on charges of inflicting light and grievous bodily harm and his arrest was ordered. In October 1999, he fled to Ukraine. In January 2007, he was arrested by the Ukrainian police in accordance with an international search warrant and under an extradition request by Turkmenistan.

He applied to the ECtHR complaining that, if extradited, he would face a risk of torture and inhuman or degrading treatment by the Turkmen law-enforcement authorities. He relied on articles 3 (prohibition of inhuman or degrading treatment); 13 (right to an effective remedy); 5 (right to liberty and security) and 6 (right to a fair trial).

The court's decision was as follows:

Article 3

The court noted the existence of numerous and consistent credible reports of torture, routine beatings and use of force against criminal suspects by the Turkmen law-enforcement authorities. There were reports of beatings of those who required medical help and denial of medical assistance. According to the report of the UN Secretary-General, torture was also used as a punishment for persons who had already confessed. Reports equally noted very poor prison conditions, including overcrowding, poor nutrition and untreated diseases. It appeared from different reports that allegations of torture and ill-treatment were not investigated by the competent Turkmen authorities.

On the other hand, there was no evidence in the available materials that the criminal suspects of non-Turkmen origin were treated differently from the ethnic Turkmens. Nevertheless it was clear from the available materials that any criminal suspect held in custody ran a serious risk of being subjected to torture or inhuman or degrading treatment. Despite the fact that the applicant was wanted for a relatively minor offence which was not politically motivated, the mere fact of being detained as a criminal suspect in such a situation provided sufficient grounds to fear that he would be at serious risk of being subjected to treatment contrary to article 3 of the convention.

With regard to the assurances given, the court found that it was not established that the officials concerned had been empowered to make such undertakings on behalf of the state. Furthermore, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances were respected. Finally, the international human rights reports had also showed serious problems as regards the international co-operation of the Turkmen authorities in the field of human rights and categorical denials of human rights violations despite the consistent information from both intergovernmental and non-governmental sources. In the light of these different considerations, taken together, the court was satisfied that the applicant's extradition to Turkmenistan would be in violation of article 3.

Article 13

The court concluded that the applicant had not had an effective domestic remedy by which he could challenge his extradition on the ground of the risk of ill-treatment on return, in violation of article 13.

Article 5(1)(f)

The court also found that Ukrainian legislation did not provide for a procedure that was

sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition. There had accordingly been a violation of article 5(1)(f).

Article 5(4)

The court referred to its findings under article 5(1) about the lack of legal provisions governing the procedure for detention in Ukraine pending extradition. These findings were equally pertinent to the applicant's complaint under article 5(4), as the government had failed to demonstrate that the applicant had at his disposal any procedure through which the lawfulness of his detention could have been examined by a court. The court accordingly concluded that there had also been a violation of article 5(4).

Article 6

Having no reasons to doubt that the respondent government would comply with the present judgment, it considered that it was not necessary to decide the hypothetical question whether, in the event of extradition to Turkmenistan, there would also be a violation of article 6.

Qualification Directive article 15(c)

■ AM and AM (armed conflict: risk categories) Somalia CG

[2008] UKAIT 00091,
1 December 2008

The tribunal revisited the earlier country guidance case of *HH and others (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 00022, 28 January 2008, and concluded:

■ Central and southern Somalia and Mogadishu, not just in and around Mogadishu, was an internal conflict zone within the meaning of article 15(c) of the Refugee Qualification Directive and within the meaning of international humanitarian law.*

■ In the context of article 15(c) the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause.

■ The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu.

■ Assessment of the extent to which internally displaced persons (IDPs) face greater or lesser hardships, at least outside Mogadishu (where security considerations are particularly grave), will vary significantly depending on a number of factors.

■ Those whose home area was not Mogadishu would not in general be able to show a real risk of persecution or serious harm or ill-treatment simply on the basis that they are a civilian or even a civilian IDP and from a certain home area. Much would depend on the background evidence relating to their home area at the date of decision or hearing.

■ Whether those from Mogadishu (or central and southern Somalia) would be able to relocate in safety and without undue hardship depended on the objective conditions in central and southern Somalia and the applicant's personal circumstances. The degree of likelihood of relocating for a substantial period in an IDP camp was an important but not necessarily a decisive factor.

■ The current conflict between the TFG/Ethiopians and the insurgents meant that the Sheikhal clan (including Sheikhal Logobe) was less able to secure protection for its members than previously, due to hostility from the Al Shabab. The risk of serious harm and protection depended on the individual case.

■ Where a particular route and method of return is implicit in an immigration decision it was a justiciable issue for the tribunal to deal with en route safety on return: see *AG and others v Secretary of State for the Home Department* [2006] EWCA Civ 1342, 17 October 2006. The current situation in Somali appeals was such that the method of return is far too uncertain and so any opinion the tribunal expressed could only be given on an obiter basis.

Comment: This case is helpful for Somalis who originate from Mogadishu or other parts of central and southern Somalia since there is no need to show a differential impact from the effects of civil war (as per *Adan v Secretary of State for the Home Department* [1999] 1 AC 293). Thus it is not necessary to come from one of the minority clans in order to qualify for humanitarian protection while the current crisis in Mogadishu persists. However it is important to bear in mind when representing majority clan members that they will have to demonstrate that they cannot access protection from their clan network outside Mogadishu and as such will be forced into IDP camps for a substantial period.

Zimbabwe

■ RN (returnees) Zimbabwe CG

[2008] UKAIT 00083,
19 November 2008

This is a significant and far reaching new country guidance case for Zimbabwe, which reviews existing country guidance and identifies additional categories of Zimbabweans that would be at risk on return to Zimbabwe.

Having examined voluminous up-to-date country evidence the AIT concluded that the current evidence showed a serious deterioration in the human rights situation in Zimbabwe since 2007 which in turn impacted on a wider category of people than had hitherto been identified in its earlier country guidance.

Considering the most recent political developments in the country the AIT found that the agreement signed on 15 September 2008 in Harare had not resulted in the Mugabe regime transferring any real power to the Movement for Democratic Change (MDC) but rather that the evidence showed that the Mugabe regime had intensified its resolve to suppress dissent and preserve its control. To this end the regime now sought to target not only those identified as opposition supporters but entire communities within which such people might reasonably be expected to be found (para 212). The attempt by the regime to identify and suppress its opponents was identified by the AIT as having 'moved from the individual to the collective'.

Importantly, the AIT found that those at risk on return to Zimbabwe on account of imputed political opinion could no longer be restricted to perceived members or supporters of the MDC, but now included anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF (para 225). Accordingly, to this extent the country guidance in *HS (returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094, 29 November 2007, is no longer to be followed (para 258), though the AIT reaffirmed the guidance in *HS* in so far as it concerned the assessment of who would be identified as being of sufficient interest on return to Harare airport (para 240).

Furthermore, the fact of being a teacher or having been a teacher in the past is identified as a factor capable of giving rise to an enhanced risk (para 261), as is the fact of having lived in the UK for a significant period of time and of having made an unsuccessful asylum claim (paras 231–234).

Finally, in relation to the general dire living conditions faced by Zimbabweans, the AIT found that country conditions had continued to deteriorate and, for some, may have deteriorated sufficiently (when taking relevant factors cumulatively) to give rise to a successful claim under article 3 of the convention. The AIT acknowledged that the evidence before it identified the state as 'responsible for the displacement of large numbers of people' and for the deprivation of basic necessities by way of a 'deliberate policy decision of the state acting through its chosen

agents'. However, the AIT stressed that any claim on this basis would have to be assessed on its individual facts and that there will be 'many appellants who will be unable to make out such a case' (paras 255–256).

The headnote, from this detailed and lengthy determination running to 275 paragraphs, helpfully summarises the key findings as follows:

1. Those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the country guidance in HS is no longer to be followed. But a bare assertion that such is the case will not suffice, especially in the case of an appellant who has been found not credible in his account of experiences in Zimbabwe.
2. There is clear evidence that teachers in Zimbabwe have, once again, become targets for persecution. As many teachers have fled to avoid retribution, the fact of being a teacher or having been a teacher in the past again is capable of raising an enhanced risk, whether or not a person was a polling officer, because when encountered it will not be known what a particular teacher did or did not do in another area.
3. It is the CIO, and not the undisciplined militias, that remain responsible for monitoring returns to Harare airport. In respect of those returning to the airport there is no evidence that the state authorities have abandoned any attempt to distinguish between those actively involved in support of the MDC or otherwise of adverse interest and those who simply have not demonstrated positive support for or loyalty to Zanu-PF. There is no reason to depart from the assessment made in HS *of those who would be identified at the airport of being of sufficient interest to merit further interrogation and so to be at real risk of harm such as to infringe either convention.*
4. Although a power-sharing agreement has been signed between Mr Mugabe on behalf of Zanu-PF and Mr Tsvangirai on behalf of the MDC, the evidence presented does not demonstrate that the agreement as such has removed the real risk of serious harm we have identified for anyone now returned to Zimbabwe who is not able to demonstrate allegiance to or association with the Zimbabwean regime.
5. General country conditions and living conditions for many Zimbabwean nationals have continued to deteriorate since the summer of 2007. Some may be subjected to a complete deprivation of the basic necessities of life, for example access to food aid, shelter and safe water, the cumulative effect of which is capable of enabling a claim to succeed under article 3 of the ECHR. But that will not always be the case and each claim must be determined upon its own facts.

Comment: This determination gives renewed hope to many Zimbabwean asylum-seekers and particularly failed asylum-seekers who have for many years been left in a chronic state of limbo, having neither been granted any form of immigration status nor been capable of removal. While this country guidance does not hold that all Zimbabweans will be at risk on return, failed asylum-seekers may now benefit from making a fresh claim to the Home Office in the light of this welcome determination. It will, however, still be for each applicant to establish on his/her individual facts that s/he is a person who cannot demonstrate loyalty to or support for the regime and/or in reliance of the enhanced risk factors identified in the determination.

Immigration detention

■ Abdi and others v Secretary of State for the Home Department

[2008] EWHC 3166 (Admin), 19 December 2008

In this case Davis J considered an unpublished policy which provided that all foreign national prisoners should be held following the completion of their sentence until a deportation decision was made. The judgment makes the following points among others:

■ Any policy regarding detention cannot be a blanket policy that provides for no exceptions (para 102). The policy regarding foreign national prisoners did not operate in this manner (para 109).
■ A policy containing a presumption in favour of detention is not lawful (para 110). The policy regarding foreign national prisoners violated this principle.
■ The policy was also unlawful because it was not sufficiently accessible (para 120).
■ Detention is not unlawful if the secretary of state can prove on balance of probabilities that a detainee would have been detained in any event despite the unlawful policy (para 152).

The issues raised in this case will be considered by the Court of Appeal as at least one case in the Court of Appeal has been stayed to await the judgment of Davis J.

Article 8

■ VW (Uganda) and AB (Somalia) v Secretary of State for the Home Department

[2009] EWCA Civ 5, 16 January 2009

Following on from the House of Lords decisions on article 8 in June 2008, and in particular Lord Bingham's comment at para 12 of *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, 25 June 2008; [2008] 3 WLR 178, the appellants in this case persuaded the Court of Appeal to take the important step of putting an end to the misapplication of the so-called 'insurmountable obstacles' test derived from the judgment of Lord Philips in *R (Mahmood (Amjad)) v Secretary of State for the Home Department* [2001] 1 WLR 840. Giving judgment Sedley LJ set out the correct approach to the assessment of proportionality under article 8(2), holding at para 24 as follows:

EB (Kosovo) *now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant. It is to be hoped that reliance on what was a misreading of* Mahmood, *as this court had already explained in* LM *(DRC) [2008] EWCA Civ 325 (and as Collins J had previously done in* Bakir *[2002] UKIAT 01176, § 9), will now cease.*

* Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Article 15 provides for the qualification for protection subsidiary to recognition as a refugee. Article 15(c) provides: 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

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Family and children's law review

Nigel Humphreys and **Simon Osborn** keep readers up to date with legislation, practice matters and case-law relating to family and children's law in their twice-yearly series.

POLICY AND LEGISLATION

Forced Marriage (Civil Protection) Act 2007

In 2000 a government-commissioned working group published a report, *A choice by right*, dealing with the problem of forced marriages.[1] The report distinguished between forced and arranged marriages, the key difference being that a forced marriage is one which has taken place without the valid consent of one or both of the parties. An arranged marriage is one where both parties freely consent, even if they have been brought together by their wider family or friends. One of the important conclusions of the report was that no religion condones or approves forced marriages.

Following the report of the working group, the Forced Marriage Unit (FMU) was established in 2005, and is now part of the Foreign and Commonwealth Office.[2] According to its website the unit deals with around 400 cases a year. Its staff provide free advice and assistance to those who are at risk of being forced into marriage, or are worried about friends or relatives who are at risk. Through British Embassy staff it can assist victims abroad.

Following its consultation paper, *Forced marriage, a wrong not a right*, published in September 2005, the government decided not to introduce any legislation, but instead to increase the level of training for professionals working in the field, and to help them to engage more effectively with affected communities, working within existing legislation such as the criminal law of kidnap, false imprisonment or rape.[3]

However, a private members' bill, now the Forced Marriage (Civil Protection) Act (FM(CP)A) 2007, was introduced by Lord Lester in November 2006, and with government support came into effect on 25 November 2008.

The FM(CP)A inserts a new Part 4A into the Family Law Act 1996. Section 63A(4) provides that: 'For the purposes of this Part a person ('A') is forced into a marriage if another person ('B') forces A to enter into a marriage (whether with B or another person) without A's free and full consent.'

The Act empowers courts to make 'forced marriage protection orders' (s63A(1)) containing terms designed to protect any person from being forced into a marriage, or who has been forced into a marriage. Section 63(B) defines the terms which may be contained in an order very widely, but these could, for example, include:

- requiring the whereabouts of the person to be disclosed;
- preventing someone from being taken abroad;
- requiring passports to be handed over;
- prohibiting a marriage ceremony;
- prohibiting intimidation or violence.

In deciding whether to make an order, the court must under s63A(2): ' ... have regard to all the circumstances, including the need to secure the health, safety and well-being of the person to be protected'.

Under s63A(3) the court must: ' ... in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding'.

Forced marriage protection orders may be obtained ex parte (s63D), and may contain a power of arrest (s63H). Breach of an order is punishable as contempt of court, the court's powers including imposing a term of imprisonment for up to two years (s630).[4]

The person who is to be protected by the order, or third parties to be specified by statutory instrument (currently only local authorities), may make application without leave of the court for a forced marriage protection order (s63C(2)). Any other person may apply with leave of the court (s63C(3)).

Comment: The FM(CP)A is to be welcomed for providing a clear framework for the protection of victims or potential victims of forced marriage. However, there is no provision for financial compensation for victims, who may be defying those on whom they rely for financial support in seeking the protection of the court.

Allocation and transfer of family proceedings: the drive down to the magistrates' court

The Allocation and Transfer of Proceedings Order 2008 SI No 2836 came into force on 25 November 2008. A Practice Direction (PD) issued by the President of the Family Division on 3 November 2008 (*Practice Direction – allocation and transfer of proceedings*) also came into effect on the same date.[5]

In paragraph 1.2 of the PD it is made clear that the objective is to: '... ensure that the criteria for the transfer of proceedings are applied in such a way that proceedings are heard at the appropriate level of court, that the capacity of magistrates' courts is properly utilised and that proceedings are only dealt with in the High Court if the relevant criteria are met'.

Article 15 of the Order sets out the criteria for transfer of proceedings from the magistrates' court to the county court. A transfer may be ordered if:

- the transfer will significantly accelerate the determination of the proceedings;
- there is a real possibility of difficulty in resolving conflicts in the evidence of the witnesses;
- there is a real possibility of a conflict in the evidence of two or more experts;
- there is a novel or difficult point of law;
- there are proceedings concerning the child in another jurisdiction or there are international law issues;
- there is a real possibility that enforcement proceedings may be necessary and the method of enforcement or the likely penalty is beyond the powers of a magistrates' court;
- there is a real possibility that a guardian ad litem will be appointed under rule 9.5 of the Family Proceedings Rules 1991 SI No 1247;
- there is a real possibility that a party to proceedings is a person lacking capacity within the meaning of the Mental Capacity Act 2005;
- there is another good reason for the proceedings to be transferred.

The PD requires the magistrates (see paras 8.1 and 8.2) to consider whether transfer to another magistrates' court will meet the requirements of the case. In particular, enquiries must be made with other magistrates' courts to ascertain whether the hearing can be dealt with equally or more speedily there than in the county court.

Paragraph 3.1 of the PD requires the court to keep the question under continuous review.

So, if proceedings have been transferred to a county court under one of the article 15 criteria, they should in principle be transferred back again if the reason for transfer falls away.

Suitability criteria for cases to be dealt with in the High Court are covered in paragraphs 5.2 and 5.3 of the PD.

Comment: The Magistrates' Association Family Courts Committee has welcomed these directions, pointing out that in recent times family magistrates have seen the percentage of work they deal with roughly halved.[6] Both the government and the President of the Family Division have recognised that there is spare capacity among magistrates' court family panels nationally.

Many practitioners however prefer the frequently more robust or incisive approach taken by district and circuit judges. Professional judges are able to reach speedy and reasoned conclusions, often cutting short the length of evidence or submissions by actively managing the case and directing the parties to the relevant issues. Magistrates will nearly always need to retire at some length to consider their decisions together, and will usually require the parties to prepare draft findings of fact and reasons for them. In legally-aided cases, where fixed fees either already apply or are to be introduced, practitioners will bear the loss of longer hearing and waiting times in the magistrates' courts.

Enforcement of contact orders

From 8 December 2008, courts have new powers of enforcement in children cases. The powers, brought in by the Children and Adoption Act (CAA) 2006, are intended principally to address the complaints of non-resident parents that the courts have been unable effectively to enforce contact orders where they have been regularly breached. Judges have been reluctant to commit the parent with care to prison for obvious reasons, including the potential harm this would cause to the children themselves.

An application for Children Act (CA) 1989 s8 orders (residence, contact, specific issue or prohibited steps orders) should now be made on Form C100.

New powers are given to the court by amendment to the CA 1989. A new CA 1989 s11A allows the court to make 'contact activity directions' when it is considering whether to make, vary or discharge a contact order. This power is available at any stage in the proceedings before the making of a final order for contact. The activities have to be for the purpose of promoting contact with the child and may particularly be with the aim of assisting a person in establishing, maintaining or improving contact or, by addressing a person's violent behaviour, enabling or facilitating contact with a child. Examples would be mediation information and assessment meetings, domestic violence perpetrator programmes or parenting classes, guidance or counselling. It would not include medical or psychiatric treatment. It appears that there is no national provider programme and the availability of activities will depend on local resources.

A new CA 1989 s11C gives the court power to impose a 'contact activity condition' when making or varying a contact order. This requires an individual to take part in an activity which promotes contact. This condition can be applied to either the parent with whom the child resides or the parent with whom the child is to have contact. The condition has to be precise in that it has to specify the activity and the person providing it. Before making the order the court must be satisfied that the activity is appropriate, that the person to provide the activity is suitable and that the place where the contact is to take place is reasonable. The court must have regard to the effect of the condition on the person on whom it is imposed, taking into account in particular the effect on the person's religious beliefs and the time when s/he has to attend work or an educational establishment. The Children and Family Court Advisory Support Service (CAFCASS) can be asked by the court to provide information on these matters.

Section 11G provides that the court may ask a CAFCASS office to monitor compliance with contact activity directions or conditions and report to the court on any failure to comply.

Section 11H provides that a CAFCASS officer may be required to monitor compliance with a contact order and report to the court on such matters relating to compliance as the court may specify. This would include compliance with CA 1989 s11(7) conditions imposed in a contact order. The court must specify the period over which monitoring takes place, which shall not exceed 12 months.

Section 11I provides that whenever a court makes or varies a contact order after 8 December 2008, it must attach a notice warning of the consequences of failing to comply with a contact order.

In order to seek to use the powers of enforcement in the CAA for an order made before 8 December 2008, an application has to be made for a warning notice to be attached. This is in new Form C78. However, if an order made before 8 December 2008 comes before the court after that date and a further contact order is made then the court has to attach a warning notice under s11I without further application.

The new enforcement provisions set out in new s11J provide for the court to make an enforcement order if it is satisfied 'beyond reasonable doubt' that a person has failed to comply with a contact order. The standard of proof is the criminal standard of proof. The court may not make an enforcement order if the person concerned satisfies it on the balance of probabilities that s/he had a reasonable excuse for not complying with the order.

An enforcement order requires the person against whom it is made to carry out unpaid work. Applications for an enforcement order are made on the new Form C79. The court can suspend an enforcement order or make more than one order at the same time.

An application can be made by the person with whom the child lives, the person with whom the order provides the child shall have contact, an individual subject to a CA 1989 s11(7)(b) condition or contact activity condition or, with permission of the court, the child concerned. The power to make an enforcement order is in addition to the court's existing power to punish non-compliance with an order by fine or imprisonment.

Section 11L provides that before making the enforcement order the court must be satisfied that the order is proportionate given the seriousness of the breach and that it is necessary to secure compliance. Before making the order the court must also obtain and consider information about the person on whom it is considering imposing the order and the likely effect on him/her, particularly with regards to any conflict with his/her religious beliefs or work or education arrangements. It must also be satisfied that the facilities are available locally. CAFCASS may be requested to provide this information.

Section 11M provides that the enforcement orders will be monitored by CAFCASS, which will report non-compliance or the unsuitability of the person to perform the work.

Section 11N provides that a notice must be attached to the enforcement order warning of the consequences of breaching the order.

A new Schedule A1 is inserted into the CA 1989 before Schedule 1 which provides, among other things, for power for the court to amend or revoke an enforcement order and also deals with failure to comply with an enforcement order.

The court can revoke an order of its own volition, or on application in Form C79 by the person subject to the order, if it appears that in the circumstances no enforcement order should be made; if in the light of circumstances which have arisen since the order was made, the enforcement order should be revoked; or having regard to the person's satisfactory compliance with the enforcement order it is appropriate

for the order to be revoked.

If a person changes address to another area the enforcement order can be varied to the new area either by the court's own volition or on application in Form C79. It is anticipated that the court will deal with such an application without a hearing. The court can reduce the number of hours of unpaid work to a minimum of 40 and extend the period for completion of the unpaid work beyond 12 months of its own volition or on application in Form C79.

If there is a breach of the enforcement order the court may amend the order to make the provisions more onerous or make a second order either to replace or be in addition to the first order. It can extend the hours of unpaid work up to the maximum of 200 and retains its powers to fine or imprison. The person concerned must be given a warning, describing the circumstances of the failure, stating that it is not acceptable and warning that if there is a further breach within 12 months the breach will be reported.

New CA 1989 ss11O and 11P provide for the court to require a person who has caused financial loss by reason of breach of a contact order or a condition to a contact order to pay compensation up to the amount of that loss. The application is made on Form C79. The court must take into account the person's financial circumstances and the welfare of the child. The court may not make an order if it is satisfied that the person had reasonable excuse, on the balance of probabilities, for not complying with the contact order. The sum ordered is recoverable as a civil debt.

Other changes include the amendment of CA 1989 s16 to make the use of family assistance orders more common. The requirement for the circumstances to be exceptional is removed and the period during which the officer is to give advice and assistance in establishing, improving and maintaining contact is extended from six to 12 months.

Section 16A of the CA 1989 requires that a CAFCASS officer who is carrying out any function connected with a court order must carry out a risk assessment if s/he has cause to suspect that the child concerned is at risk of suffering harm.

No new fees have been prescribed and it is not clear whether an application on Form C79 will be treated as a fresh application (£175), or an application within existing proceedings (£40 without notice, £80 on notice). Local practice may vary.

Comment: The changes brought about by the CAA can be categorised as encouragement, monitoring and enforcement. No one can argue with the principle that children should enjoy good quality safe contact with both parents and there are significant opportunities provided by the CAA for the provision of contact support services if the resources to provide these are made available. However, once the court finds itself in the role of enforcer of contact, it once again faces the problem that enforcing contact inevitably places greater strain on already tense family relations, in the middle of which are children, for whom the contact is intended to be a benefit.

CASE-LAW

Financial provision for children

■ N v D

[2008] 1 FLR 1829,
12 December 2007

This first instance case was decided by District Judge Harper in the Principal Registry of the Family Division. It has nevertheless found its way into the law reports, and been the subject of some interest and comment, due to the absence of authorities dealing with modest or everyday claims for financial provision for children under CA 1989 Sch 1.[7]

The leading case of *Re P (child: Financial Provision)* [2003] EWCA Civ 837, 24 June 2003, decided in the Court of Appeal, involved a father who described himself as 'fabulously rich' – so wealthy that his counsel told the court he could ' ... without financial embarrassment raise and pay any sum which the court may order ... '. The order eventually made on appeal provided for him to settle a £1m house for the benefit of his three-year-old daughter, to make a lump sum payment to the mother of £150,000, and to pay child maintenance of £70,000 per year.

Although Lord Justice Thorpe set out a number of general principles in *Re P*, they are of limited application in the more ordinary cases which practitioners deal with on a day-to-day basis.

Forty-four per cent of children in the UK are now born to unmarried partners, and one would therefore expect applications for financial provision under Schedule 1 to be common – but they remain surprisingly rare.[8]

Under CA 1989 Sch 1 para 1(2) the court can make the following orders for the benefit of a child:

- periodical payments;
- secured periodical payments;
- a lump sum order;
- a property settlement order;
- a property transfer order.

However, Child Support Act (CSA) 1991 s8 excludes the jurisdiction of the court to make periodical payment orders for a child in any case where the Child Support Agency (now the Child Maintenance and Enforcement Commission) has power to make an assessment. So in practice Schedule 1 applications may often be limited to claims for a property settlement or transfer, or for lump sum provision. The court was able to make a periodical payments order in *Re P* because the father's income exceeded the income cap under CSA 1991 s8(6).

One of the principles *Re P* did establish clearly was that the provision of a home for a child under Schedule 1 should generally be ordered by way of settlement of property rather than a property transfer order, so that the property reverts to the settlor (usually the father) once the child has reached majority.

In the case of *N v D*, the unmarried parents had lived together for 17 years, and had a daughter aged 14 at the time of the hearing. Following separation they agreed a settlement of the family home under which the father retained a 20 per cent deferred interest, payable when the child reached the age of 18.

Although the parties were in a financially comfortable position, the facts of the case were closer to everyday practice than those of *Re P*. The father's net income was in the region of £180,000 a year. He owned a yacht, a Porsche and several cars. He was resident abroad, so giving the court jurisdiction to make a periodical payments order. The mother sought £4,400 per month by way of periodical payments, in addition to payment of school fees, while the father offered £2,000 per month. The mother also sought a lump sum to cover the cost of refurbishment of the property, replacement of certain items in it, and the cost of a new car.

District Judge Harper ordered the father to pay £4,000 per month maintenance, index-linked, to be secured against his 20 per cent interest in the family home, together with a lump sum of £45,000.

Under CA 1989 Sch 1 para 4(1), the court in deciding such applications must have regard to 'all the circumstances', including specifically:

- the income, earning capacity, property and other financial resources of the parties, whether now or in the foreseeable future;
- their financial needs, obligations and responsibilities, whether now or in the foreseeable future;
- the financial needs of the child;
- the income, earning capacity (if any), property and other financial resources of the child;
- any physical or mental disability of the child;
- the manner in which the child was being, or was expected to be, educated or trained.

The district judge held that among 'all the circumstances' that he was entitled to take into account was the length of the parties'

relationship. Although not specifically mentioned in the Act, this was relevant to the manner in which the child had been brought up and the lifestyle she was accustomed to. She had always been independently educated, and had enjoyed a comfortable standard of living during her parents' lengthy cohabitation.

Comment: This case illustrates that the court will be ready to make a non-returnable lump sum award to provide for items such as a car, white goods and refurbishment of the home.

The judge also confirmed that while the court must guard against unreasonable claims made with the disguised intention of providing for the mother's benefit, rather than for the child, the caring parent's financial needs can and should be taken into account. So the mother's need for income to eat, clothe herself, maintain car expenses, and to meet her medical costs were all allowable within the court's power to make a maintenance order for the benefit of the child.

However, periodical payments under Schedule 1 can only be ordered until the child's 18th birthday, unless the child is continuing to undergo training for a trade, profession or vocation or other special circumstances apply (Sch 1 para 3(1) and (2)). So the provision for maintenance must be time-limited. Furthermore, had the court been asked to make a settlement of property order, the whole property (not just 20 per cent) would have reverted to the father on the child's majority.

This contrasts starkly with the position of a married mother in the same circumstances, who could have expected much more substantial provision for herself under the Matrimonial Causes Act 1973, including continuing spousal maintenance, property and pension provision.

The case therefore illustrates the continuing disparity between the rights of married and unmarried partners. The Law Commission's recommendations for reform in *Cohabitation; the financial consequences of relationship breakdown*,[9] published on 31 July 2007, have not been taken up by the government, the Cohabitation Bill had its first reading in the Lords on 11 December 2008.

1 Available at: www.fco.gov.uk/resources/en/pdf/a-choice-by-right.
2 See: www.fco.gov.uk/en/fco-in-action/nationals/forced-marriage-unit/.
3 See: http://press.homeoffice.gov.uk/press-releases/combat-forced-marriage.
4 Contempt of Court Act 1981 s14(1).
5 Available at: www.judiciary.gov.uk/docs/judgments_guidance/pd/practice-direction-on-allocation-final.pdf.
6 Margaret Wilson, chairperson of Magistrates' Association Family Courts Committee, writing in November 2008 *Family Law*.
7 See, for example, 'Schedule 1 and the need for reform: *N v D*', August 2008 *Family Law* 751.
8 Available at: www.statistics.gov.uk/downloads/theme_population/Table_1_Summary_Table.xls.
9 Available at: www.lawcom.gov.uk/cohabitation.htm.


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Public law, but not as we know it – Part 1

In the first article in a two-part series, John Halford discusses the basis of the public sector ombudsmen's jurisdiction and how complaints are investigated. The second article, which will be published in March 2009 *Legal Action*, will look at challenging ombudsmen's decisions and the remedies that ombudsmen can recommend when maladministration has been identified.[1]

Maladministration comes in many guises, and while there is a substantial element of overlap between maladministration and unlawful conduct ... they are not synonymous (*R v Local Commissioner for Local Government for North and North East England ex p Liverpool City Council* [2000] EWCA Civ 54, 24 February 2000; [2001] 1 All ER 462, per Henry LJ at para 17).

This article overviews the principles deployed by the main public sector ombudsmen – those concerned primarily with central government, the NHS and local government bodies – when they investigate, adjudicate on and recommend redress for wrongs that might otherwise be challenged by judicial review. The ombudsmen only began publishing information about them comparatively recently and the development is welcome: lawyers can find themselves in an invidious position when advising on whether or not an ombudsman complaint should be made. If one is, the time to bring a prompt judicial review claim will almost certainly pass; there will be far less control over the pace and scope of an ombudsman investigation than there would be with a legal claim; and worst of all, the client must be told that even if his/her complaint is upheld, the body investigated may reject any remedy recommended. Similarly, once a specific issue has been the subject of a judicial review claim the ombudsmen may legitimately refuse to investigate it (see *R (PH) v Commissioner for Local Administration* [1999] EWCA Civ 916, 8 March 1999, unreported).

Notwithstanding these difficulties, far more complaints are made to the ombudsmen each year than claims are put to the Administrative Court. In many ways the ombudsmen have a freer hand to devise remedies that address the ongoing effects of past injustice experienced by individuals and groups. Ombudsmen will rarely limit themselves to asking a public body to reconsider its position. In recent years the Local Government Ombudsman (LGO) has recommended a financial redress package exceeding £100,000 to address a council's failure to provide adequate services to a child with learning disabilities (*Complaint 05/C/11921 against Trafford MBC*, 26 July 2007) and compensation of £75,000 for three siblings who experienced institutional racism and abuse while in foster care many years ago. Ann Abraham, the Health Service Commissioner (HSC), has recommended a framework for the return of money unlawfully charged for community care services[2] and that £25,000 should be paid to a GP who had suffered psychiatric illness as a result of the

mishandling of a complaint against her.[3] Last, but certainly not least, the Parliamentary Commissioner for Administration (PCA), an office also currently held by Ann Abraham, has recommended financial redress for over 130,000 members of final salary occupational pension schemes who were maladministratively misled into thinking their pensions were secure, whatever the fortunes of the sponsoring company.[4] She has also recommended that the government should establish a compensation scheme to address the effects of Equitable Life being inadequately regulated.[5]

It is unlikely that any of these outcomes could have been achieved through any form of litigation, much less judicial review (though, as discussed below, the pension scheme members had to resort to the Administrative Court to ensure the PCA's key findings in their favour were accepted).

Jurisdiction

There are many basic similarities between the jurisdiction of the Administrative Court and that of the public sector ombudsmen. At base, both are concerned with administrative acts and failures (see Parliamentary Commissioner Act (PC Act) 1967 s5, Health Service Commissioners Act (HSCA) 1993 s3 and Local Government Act (LGA) 1974 s26) but intervene as a matter of discretion: there is no 'right' to an ombudsman investigation any more than there is a right to judicial review. Issues which have become academic are of little interest to the ombudsmen or the court.

Like a judicial review claim, an ombudsman investigation can be brought to an end at an early stage (the Court of Appeal concluded in *R (Maxhuni) v Commissioner for Local Administration for England* [2002] EWCA Civ 973, 12 July 2002, unreported, that the LGO may legitimately conclude an investigation by means of a reasoned 'local settlement' without needing to produce a full report). The ombudsmen expect concerns to be raised with them (or, in PCA cases, the complainant's MP: PC Act 1967 s5(1)) reasonably expeditiously, that is within a year of the complainant becoming aware of the maladministration, though they have discretion to entertain those brought to their attention later for good reason (see PC Act 1967 s6(3), HSCA s9(4) and LGA 1974 s26B(3)).

As with the judicial review pre-action protocol, the usual expectation is that public bodies will have had the opportunity to respond to a complainant's concerns before resort is had to the ombudsmen. However, this will usually entail a reasonable attempt to exhaust an authority's internal complaints procedure, something that would not be expected in an urgent judicial review or where a complaint could not realistically resolve the issues in dispute. The ombudsmen are expressly prohibited from investigating where a complainant can seek a legal remedy (see PC Act 1967 s5(2), HSCA s4(1) and LGA 1974 s26(6)), subject to the important caveat that it must be reasonable to expect it to be sought bearing in mind, among other things, the complainant's resources: see *Liverpool City Council*, per Chadwick LJ at para 40:

... if the commissioner reaches the conclusion that there is a remedy by way of proceedings in a court of law, then he must go on to consider whether, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort (or to have resorted) to such proceedings. That does involve an exercise of discretion. It is for the commissioner to decide whether or not he is satisfied that it is not reasonable to expect the person aggrieved to pursue the alternative remedy.

Occasionally, this means that successful ombudsman complaints are made by people in a similar position to those who have unsuccessfully pursued civil litigation against public authorities. Last, the granting (by way of recommendations) and nature of ombudsman remedies is discretionary.

However, the extent of these similarities should not be exaggerated. There have, however, been some recent changes in the jurisdiction to allow joint investigations involving more than one ombudsman (see Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007 SI No 1889) and for the LGO to investigate 'apparent' maladministration and service failure that impacts on third parties (ie, non-complainants) of their own initiative (see LGA 1974 s26D, as amended). The ombudsmen are limited by their parent statutes in what they can investigate (see, for example, LGA 1974 Sch 5). They can do nothing when it emerges there is no maladministration or, in the case of the HSC and LGO, no service failure. The courts, not the ombudsmen, are the guardians of the rule of law and have stressed repeatedly that only they can rule on the legality of actions and failures (including whether there has been a breach of the Human Rights Act 1998): see *R v Commissioner for Local Administration ex p Croydon LBC* [1989] 1 All ER 1033, per Woolf LJ: '[i]ssues whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an inquiry are more appropriate for resolution by the High Court than by a commissioner, however eminent'. See also *Liverpool City Council*, per Chadwick LJ at para 47:

The commissioner's power is to investigate and report on maladministration; not to determine whether conduct has been unlawful. So there is no reason why, when exercising the power to investigate and report, (which has been conferred on him by the 1974 Act) he should, necessarily, be constrained by the legal principles which would be applicable if he were carrying out the different task (for which he has no mandate) of determining whether conduct has been unlawful.

Procedurally too there are considerable differences. Ombudsman investigations, and sometimes their reports, are not public. 'Hearings', though technically possible, are almost unknown. In LGO cases there may be no clear determination of the dispute, given the discretion to end an investigation with a local settlement exercised in the vast majority of cases, even where the complainant is reluctant. Ombudsman investigations generally progress far slower than judicial review claims and there is no power to grant interim remedies (a special effort to investigate expeditiously may be made by the LGO where there is a risk of irreversible prejudice, for instance in education admission cases). When their investigations are concluded, the ombudsmen have no power to compel public authorities to do anything, save to co-operate with their investigation and, in the case of the LGO, to publish reports. Though most recommendations are accepted, there are occasional and significant aberrations.

Yet to some extent these limitations are mitigated by the extensive information-gathering and fact-finding powers of the ombudsmen. Ombudsmen have been specially equipped by parliament to enable them to root out facts which may show maladministration leading to injustice in a way that a court could not (see *In the matter of a Subpoena issued at the request of the Commissioner for Local Administration*, 2 April 1996, unreported). Thus in *Liverpool City Council*, the Court of Appeal acknowledged at para 28 that the ombudsmen are uniquely: 'in a position to get to the bottom of a prima facie case of maladministration ... and can reach facts which might not emerge under the judicial review process'.

As discussed below, most investigations will involve a thorough examination of the public authority's files, including material that would not usually be disclosed under the duty of candour to which judicial review defendants are subject and some material, such as legal

advice, that would never be disclosable. This may be particularly helpful in cases where the natural inclination of the Administrative Court would be to accept the defendant's view of events where there is a conflict (see, for example, *R v Camden LBC ex p Cran* [1996] 94 LGR 8, 12).

Bases of challenge: service failure, maladministration and public law wrongs compared

The courts have made three main statements of principle about what is meant by 'maladministration'. First, the concept of maladministration is an evolving, rather than a fixed, one and it is for the ombudsmen themselves, rather than the courts, to decide whether a given set of facts amount to it. As Lord Denning MR observed in *R v Local Commissioner for Administration for the North and North East Area of England ex p Bradford MCC* [1979] 1 QB 287, 311:

Parliament did not define 'maladministration'. It deliberately left it to the ombudsman himself to interpret the word as best he could: and do it by building up a body of case-law on the subject.

The ombudsmen themselves have recognised that this is not without its advantages. The PCA has stated, for example:

To define maladministration is to limit it. Such a limitation would work to the disadvantage of individual complainants with justified grievances which did not fit within a given definition (see Sir William Reid, *Annual report*, 1993, 16 March 1994).

Interestingly, the courts have been willing to allow the ombudsmen themselves to develop and interpret the concept. As Sedley J noted in *R v Parliamentary Commissioner for Administration ex p Balchin No 1* [1996] EWHC Admin 152, 25 October 1996; [1997] JPL 917, at para 14:

... so far as a court of judicial review is concerned the question is not how maladministration should be defined but only whether the commissioner's decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question whether any given set of facts amounts to maladministration – or by parity of reasoning, to injustice – is for the commissioner alone.

See also *R (Doy) v Commissioner for Local Administration* [2001] EWHC Admin 361, 27 April 2001, per Morison J at para 16: 'the ombudsman and not the court is the arbiter of what constitutes maladministration'.

Second, as with public law wrongs, 'maladministration' is primarily concerned with process, rather than merits. In *ex p Bradford MCC* at 311H, Lord Denning MR adopted a passage from the fourth edition of *Wade on Administrative Law*:

It 'would be a long and interesting list', clearly open-ended, covering the manner in which a decision is reached or discretion is exercised; but excluding the merits of the decision itself or of the discretion itself. It follows that 'discretionary decision, properly exercised which the complainant dislikes but cannot fault the manner in which it was taken, is excluded': see Hansard, *734 HC Deb, col 51.*

In other words, if there is no maladministration, the ombudsman may not question any decision taken by the authorities. He must not go into the merits of it or intimate any view as to whether it was right or wrong. This is explicitly declared in section 34(3) of the Act of 1974. He can inquire whether there was maladministration or not. If he finds none, he must go no further. If he finds it, he can go on and inquire whether any person has suffered injustice thereby.

Third, while there is an overlap with public law principles, maladministration is undoubtedly broader than any failure to discharge a legal duty or obligation, or to act unfairly in a sense that would give rise to grounds based on procedural unfairness or abuse of power (see further below). All of this could well make it difficult, at least on the face of things, to make any reliable prediction on whether an ombudsman will investigate any individual complaint and ultimately find that maladministration has occurred.

Besides the ombudsman reports on past cases, there are now three sources of helpful guidance. The first is the expanded 'Crossman catalogue'. The catalogue is the list of examples given to parliament by the sponsoring minister of the Parliamentary Commissioner Bill 1966, Richard Crossman MP, specifically: 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on'. This open-ended definition was judicially endorsed by Lord Denning LJ in *Bradford MCC*. In his 1993 *Annual report* the then PCA, Sir William Reid, took the opportunity to add:

... rudeness (though that is a matter of degree); unwillingness to treat the complainant as a person with rights; refusal to answer reasonable questions; neglecting to inform a complainant on request of his or her rights or entitlement; knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler; offering no redress or manifestly disproportionate redress; showing bias whether because of colour, sex, or any other grounds; omission to notify those who thereby lose a right of appeal; refusal to inform adequately of the right of appeal; faulty procedures; failure by management to monitor compliance with adequate procedures; cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service; partiality; and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.

This Crossman catalogue has been fleshed out further by two important publications: the PCA's and HSC's *Principles of good administration* (March 2007)[6] and the LGO's updated guidance to local authorities on *Good administrative practice. Guidance on good practice 2* (May 2001).[7] Ten common principles emerge when all three are read together:

- It is maladministrative to fail to follow a code, policy or procedure to the detriment of an individual or class of people (for example, see *R v Commissioner for Local Administration ex p Blakey* (1994) COD 345 and *Liverpool City Council*). Plainly, this is analogous to procedural impropriety, though the origins of the procedure – statutory or by way of guidance – will be far less significant to an ombudsman and limitations placed by the courts on the concept of legitimate expectation are not generally applied.
- Delay in discharging a legal duty or honouring a commitment that causes a detriment (including a lost opportunity or mere uncertainty) will generally be maladministrative. Again, there are analogous public law principles, in that the courts have held that the exercise of statutory powers must not be delayed to the extent that the purpose for which they are conferred is unlawfully or irrationally frustrated (see, for example, *R v Tower Hamlets LBC ex p Khalique* (1994) 26 HLR 517 at 522).

A public body will also act irrationally where it has no demonstrably rational means of prioritising competing demands on its resources and taking into account relevant considerations in any prioritisation exercise (see *North West Lancashire Health Authority v A, D and G* [1999] EWCA Civ 2022, 29 July 1999; [2000] 1 WLR 977 at p991D and *R v Secretary of State for the Home Department ex p Mersin* [2000] EWHC Admin 348, 25 May 2000; [2000] INLR 511). However, there is much in the ombudsmen reports to

suggest that delay falling short of irrationality will nevertheless amount to maladministration, especially where a public authority fails to adhere to its own published standards.

■ Failing to provide adequate information, or actively providing misleading information, will amount to maladministration. This has no obvious public law corollary outside the specific contexts of consultation and fair hearings. It may be negligent for public bodies to give misleading information, but for a cause of action to arise the hurdles of a duty of care and proximity will need to be overcome. If an ombudsman concludes that they are required to demonstrate that maladministration has caused or contributed to an injustice, the ombudsmen must show a link (see *R (Bradley and others) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration (interested party) and HM Attorney General on behalf of the Speaker of the House of Commons (intervener)* [2008] EWCA Civ 36, 7 February 2008, per Sir John Chadwick at paras 108–110. See also *R v Commissioner for Local Administration ex p S* (1999) 1 LGLR 633), but not necessarily to the same standards that would apply in tort.

■ An unreasoned decision or one which is made for reasons that are unclear to those affected or to an objective reviewer will often be maladministrative. There is an obvious similarity to public law principles of fairness here, though the ombudsmen appear to take the approach that almost all administrative decisions call for reasons, not merely those where a procedure, or fairness, imposes a duty to give them.

■ A decision that is made without adequate information having been gathered will often be maladministrative. This is closely analogous to the public law principles of due inquiry and taking account of relevant considerations.

■ Unlawfully discriminatory decisions will also be maladministrative. This has some resonance in the common law as well as the statutory torts. It is not entirely clear how an emphatic finding could be made by an ombudsman, given that they have no jurisdiction to determine whether torts have been committed. In practice, the ombudsmen seem to take a reviewing role when discrimination is alleged and check whether authorities have been proactive in minimising the risk that might occur and responding to concerns in line with their own procedures.

■ When a decision is infected by conflicts of interest or personal bias, it will almost certainly be maladministrative. The test is closely analogous, but not identical, to the common law one (see *Liverpool City Council*).

■ A decision made without regard to the consequences of an inflexible application of discretion, or which is otherwise arbitrary or disproportionate, may well be maladministrative. This has some resonance with the prohibition on fettering, but once again is a broader concept. The expanded Crossman catalogue refers to 'failure to mitigate the effects of rigid adherence to the letter of the law', and so following a procedure insensitively (but wholly lawfully) when the consequences for the affected individual will be unduly harsh is caught.[8] There will also be some exercises of discretion, such as the establishment of an inflexible ex gratia compensation scheme using common law or prerogative powers, that are not subject to the prohibition on fettering (see *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, 10 October 2006; [2006] 1 WLR 3213). The PCA has shown no hesitation to examine these critically.

■ It is maladministrative to fail to be self-critical, especially where processes exist to facilitate this (such as statutory complaints procedures) but are not followed. This will encompass failure to provide adequate redress, or an apology. Again, there is no obvious public law corollary with this principle although the failure to giver proper weight to the outcome of a statutory complaints procedure (see *R v Islington LBC ex p Rixon* (1998) 1 CCLR 119) or factual findings of an independent tribunal may be unlawful (see *R v Warwickshire CC ex p Powergen plc* [1997] EWCA Civ 2280, 31 July 1997, at p6 (Simon Brown LJ) and *R v Secretary of State for the Home Department ex p Danaei* [1997] EWCA Civ 2704, 12 November 1997, at p8 per Simon Brown LJ and p9 per Judge LJ).

■ It is important to note that maladministration takes different forms, some of which tend to attract severe criticism. The LGO, for example, has been particularly damning about maladministration which manifests itself in a failure to deliver a service (or in delivering a manifestly inadequate service) which either:

■ is required as a result of a statutory duty owed to the individual service user; or

■ may be driven by a desire to avoid expenditure, notwithstanding such a duty; or

■ is needed because a service user is particularly vulnerable (whether by reasons of age, disability or illness) and thus particularly reliant on the help of the state; or

■ is repeated, persistent or systemic, rather than simply an aberration.

Similarly, the PCA has voiced grave concerns about conduct which flies in the face of basic notions of 'fair dealing' as between the individual and the state, for example where the government has taken it upon itself to regulate a particular area of public life but, in doing so, has acted maladministratively.

That said, the ombudsmen have been cautious to avoid distinguishing between forms of maladministration dependent on their seriousness. It is easy to understand why. Depending on the circumstances of individual cases, superficially similar maladministration could result in very different degrees of injustice.

The other main limb of the HSC and LGO's jurisdiction, 'service failure', has been the subject of judicial comment only very recently in *R (Atwood) v Health Service Commissioner* [2008] EWHC 2315 (Admin), 6 October 2008. Burnett J noted at paras 27 and 29:

... 'failure in a service' does not necessarily import culpability in the sense required in an action for damages founded in negligence. There is any number of areas in which the public deals as consumer where a 'failure in the service' provided, is quite unconnected with culpability. Sometimes redress of some sort is available (for example, in air travel) and sometimes not. As a matter of principle, it is for the ombudsman to decide and explain what standard she applies before making a finding of a failure in a service. That standard as defined will not be interfered with by a reviewing court unless it reflects an unreasonable approach...

In my judgment, the ombudsman would be entitled to approach the question of failure in service, even in the context of clinical judgment, from a point of view that is different from the approach of the courts in negligence actions. It would, for example, be open to the ombudsman to explain that whilst she recognised that a finding of negligence could not be made, she would be disposed to make a finding of a failure in service if the clinical care fell below best practice within the NHS.

Injustice

In the debate on the Parliamentary Commissioner Bill 1966, Richard Crossman MP said:

We have not tried to define injustice by using such terms as 'loss or damage'. These may have legal overtones which could be held to exclude one thing which I am particularly anxious shall remain – the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss. We intend that the outraged citizen shall have the right to an investigation, even where he has suffered no loss or damage in the legal sense of those terms, but is simply a good citizen who has nothing to lose and wishes to clear up a

sense of outrage and indignation at what he believes to be maladministration.

Notwithstanding this parliamentary intention to create a second, open-ended concept it is perhaps surprising that the courts have had very little to say on the meaning of 'injustice'. To date the only indications are that it plainly does include outrage (see *R v Parliamentary Commissioner for Administration ex p Balchin No 2* [1999] EWHC Admin 484, 24 May 1999; (2000) 79 P&CR 157) and loss of an opportunity (see *ex p S*) is inherently a far broader concept than 'damage' for the purposes of tort (see *ex p S*), does not depend on strict causation (see *ex p Balchin No 1*) and, much like maladministration, is primarily a matter for the ombudsmen to define for themselves (see *ex p Balchin No 1*).

The clearest indication of the LGO's own approach is in its internal *Investigator's handbook*.[9] It describes injustice as taking two main forms:

In considering the effect of actions or inactions on a complainant, the commission therefore takes a broad view of injustice to include both objective loss or damage and subjective feelings.

Examples of objective injustices are:

- *Financial loss*
- *Loss of a service*
- *Damage to property or amenity*
- *Loss of an opportunity*

Examples of subjective injustices are:

- *Distress*
- *Hurt feelings*
- *Outrage*

We should consider both aspects in coming to a view about whether to pursue a complaint and whether to seek a remedy for a complainant.

The *Handbook* then goes on to distinguish between the kind of injustice that might merit an investigation (assuming there is prima facie maladministration) and that which will not such as trivial matters or technical breaches of a procedure. The PCA takes a very similar approach, explained in these terms at p334 of *Equitable Life: a decade of regulatory failure*:[10]

In the more than 40 years since my Office was established, ombudsmen have found that the concept of injustice is capable of covering:

(i) financial loss caused by official acts or omissions;

(ii) damage deriving from other causes but which has been exacerbated or prolonged by official acts or omissions;

(iii) the loss of opportunities to take remedial action or to pursue a course of action that might benefit a citizen or protect his or her position;

(iv) the frustration of such courses of action embarked upon by a citizen which prevent those courses of action from achieving the desired or another reasonable outcome;

(v) inconvenience or distress;

(vi) a sense of outrage;

(vii) the frustration of legitimate expectations; and

(viii) the expenditure of unnecessary effort or money in the pursuit of an appropriate outcome.

The investigation process

There are ten normal stages to an ombudsman investigation, with an eleventh applying uniquely in the NHS context. These are service failure complaints with a clinical element 'where the action or decision complained of relates directly to the patient's treatment or care and can properly be taken only by a professional trained in the appropriate discipline and possessing recognised qualifications and experience' (*A guide to the work of the Health Service Commissioner*, Office of the Health Service Commissioner, April 1996, para 53).

The stages are:[11]

- Initial screening. At this stage the relevant ombudsman considers jurisdictional questions and, critically, if the maladministration is proven and whether this has led to an injustice. See, for example, the first ombudsman Sir Edmund Compton, in his talk 'The Parliamentary Commissioner for Administration', published in the *Journal of the Society of Public Teachers of Law* (1968–9, 101–113). At p104, it was said that:

I begin with the statement of complaint by the aggrieved person. Note that he does not have to prove maladministration. The Act says he has to claim to have sustained injustice in consequence of maladministration in order to start me on my investigation. Now in my experience a complainant is usually specific about the injustice he has sustained but less so about maladministration which caused injustice. So the complaint, as I get it, usually starts with the injustice of which the complainant is naturally most aware and says little about the maladministration. My investigation on the other hand, follows the sequence laid down by the Act which puts the injustice not at the beginning but at the end of the causal chain.

- Preparation of internal statement or summary of the complaint. This statement will be prepared by the ombudsman's staff on the basis of the information received and effectively functions as the terms of reference of the investigation. A supplementary statement may be issued if necessary. The facts set out are not considered undisputed: they are merely the complainant's version of events.
- Providing an initial opportunity for the body complained of to respond in writing.

The statement will be sent to the practice or body that is the subject of the complaint along with an invitation to respond. If a complainant's letter or note is sufficiently comprehensive, the ombudsman may simply forward this. Some LGO investigators will follow matters up with a telephone call in cases which are urgent and there is prima facie maladministration.

- Consideration of whether the investigation should proceed or be determined at a preliminary stage.
- Request for internal records. In most cases, the relevant ombudsman will proceed by requesting access to all the documents necessary for the investigation, ranging from medical and complaints records to internal guidance and protocols. In this respect the ombudsmen's powers are identical to those of a court and they can certify an obstruction as a contempt of court. The fact that parliament conferred such powers on the ombudsmen is a clear indication of the importance it attaches to them having the fullest possible access to the relevant records even in sensitive areas (see In the matter of a Subpoena and Liverpool City Council). A dim view is taken of inadvertent loss or destruction of records once an investigation is underway and even if there is no evidence of bad faith, this will often lead to a finding of maladministration.
- An interview of the complainant, by telephone or in person, will often follow consideration of the documents requested.
- Further information will normally then be sought from those whose decisions are the subject of the complaint. Occasionally this will be done by means of a written questionnaire, or over the telephone, though face to face interviews are more common in LGO cases. The PCA's general approach is to consider interviewing if officers suggest this themselves or where conclusions could not be easily drawn from the written evidence (if any exists). Those interviewed are permitted to have a 'friend' in attendance. It is not normally envisaged that this will be a solicitor or barrister. The investigating officer will normally read back his/her notes to check their accuracy. Again, those who the ombudsman wishes to interview can be required to co-operate. The ombudsmen

Suggested structure of an adviser's letter/note of complaint

(1) 'The complaint in a nutshell'/introduction
As with judicial review grounds, it is always helpful to set the scene with a pithy paragraph or two from which the essence of the complaint will be clear.

(2) Supporting documents
Despite their evidence-gathering powers, ombudsman investigators invariably find it helpful to be presented with the key materials needed for a decision on whether to commence an investigation. It is also helpful to organise these by category and/or chronologically:

(3) Legal and policy framework
A short summary (perhaps a page or two) of the relevant legislative provisions and policy guidance.

(4) Background
This should take the investigator through the documents, highlighting the actions and failures complained of (particularly where a pattern emerges) and their impact on the complainant.

(5) The maladministration leading to unremedied injustice
Set out what specific form or forms of maladministration arise in more detail and the ongoing, unremedied injustice that has resulted.

(6) Remedy (or remedies) sought
Identify these clearly, drawing on precedents from the relevant ombudsman's own guidance and reported investigations.

(7) Whether, and if so on what basis, reimbursement of legal costs is sought

could, in theory at least, use their powers to convene a hearing.

■ In HSC cases, advice is then sought from clinical assessors. The ombudsman has appointed a number of health care professionals to advise her on issues of clinical judgment. Normally at least two will be involved in an investigation of this kind. They may, themselves, become involved in interviewing the person who is the subject of the complaint. They have traditionally advised on whether 'the actions complained of were based on a reasonable and responsible exercise of clinical judgment of a standard which the patient could be reasonably entitled to expect in the circumstances in question' (*A guide to the work of the Health Service Commissioner* at para 54). In *Atwood*, Burnett J reviewed the HSC's policies and concluded that this was 'indistinguishable' from the test in *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582,* which is used in clinical negligence cases.

■ The evidence gathered will then be considered.

■ A provisional view may then be reached that the investigation should not proceed further (in which case this will be notified to the complainant so that s/he can comment). In the case of the LGO, a local settlement may be brokered if the local authority is amenable to this. As the LGO's *Remedies guidance on good practice 6* (2005) explains on p1:

Local settlements occur where, during the course of our consideration of a complaint, the authority concerned takes action which provides what we regard as a satisfactory outcome to the complaint. Commonly local settlements account for some 95 per cent of the complaints where a remedy is involved.[12]

Failing that, a draft report (normally confined to factual findings) will be produced and sent to both the complainant and body complained of for comment.

■ A final report will then be produced and issued. No particular form is prescribed.

The ombudsmen are normally willing to reconsider provisional decisions and draft reports in an open-minded way when representations are made to them. If a final decision is made not to continue with an investigation, it is also possible to ask for this to be reconsidered at a senior level. As Simon Brown LJ observed in *R v Parliamentary Commissioner for Administration ex p Dyer* [1993] EWHC Admin 3, 19 October 1993; [1994] 1 WLR 621 at 626, challenging the exercise of an ombudsman's discretion and conclusions by means of judicial review will always be inherently difficult. These issues are discussed in the second part of this article, which also examines in detail the remedies the ombudsmen can recommend when maladministration has been identified.

1 A version of this article will appear in a forthcoming issue of *Judicial Review*.
2 *See Retrospective continuing care funding and redress*, third report of session 2006–2007, HC 386, HSC/PCA, 2007, available at: www.official-documents.gov.uk/document/hc0607/hc03/0386/0386.pdf.
3 See 'Complaint against Medway Primary Care Trust (Medway) and West Kent Primary Care Trust (West Kent)', *Remedy in the NHS. Summaries of recent cases*, HC 632, HSC, 2008, p15, available at: www.ombudsman.org.uk/pdfs/NHS_Remedies_200806.pdf.
4 See *Trusting in the pensions promise: government bodies and the security of final salary occupational pensions*, sixth report of session 2005–2006, HC 984, PCA, 2006, available at: www.ombudsman.org.uk/pdfs/pensions_report_06.pdf.
5 See *Equitable Life: a decade of regulatory failure*, fourth report of session 2007–2008, HC 815–1, PCA, 2008, available at: www.ombudsman.org.uk/pdfs/equitable_life_part_1_main_report.pdf.
6 Available at: www.ombudsman.org.uk/pdfs/pga.pdf.
7 Available at: www.lgo.org.uk/pdf/good_practice_2.pdf.
8 See, for example, note 3 above.
9 This can be obtained under the Freedom of Information Act 2000.
10 See note 5 above.
11 This draws on *A guide to the work of the Health Service Commissioner*, the PCA's explanation of her internal procedures in the skeleton argument filed in *Bradley* and the LGO's *Investigator's handbook*.
12 Available at: www.lgo.org.uk/pdf/remedies.pdf.

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Recent developments in practice management

Vicky Ling examines the way in which funding initiatives by both the Legal Services Commission (LSC) and the Big Lottery Fund (BLF) are encouraging practitioners in the not-for-profit (NFP) and private practice sectors to work together in improving services to clients.* Many of these initiatives are focusing rightly on improving access and referrals for clients; however, there are other aspects of management where the sectors can learn from each other.

Managing finances

Many NFP agencies have pretty sophisticated approaches to financial planning and management. Funding in the voluntary sector is both uncertain and complicated, coming from a variety of trusts and statutory sources, with ever-changing priorities.

A manager of a citizens advice bureau turning over in excess of £1 million a year, told me that funding comes from eight different sources, each with its own application and reporting requirements. The funding cycles tend to be lengthy and there is little chance of generating income quickly, so managers have to know the break-even figure for every activity and monitor budgets like hawks. Regular written reports to trustees' meetings provide a useful discipline. By contrast, partners in some private practices concentrate so hard on the legal aspects of the work that they lose sight of the bottom line.

Improving accountability

Accountability is another feature of the voluntary sector which encourages good planning. Voluntary organisations exist to serve the community, so they need to demonstrate how well they are doing and work out how to do things better. Charitable limited company status (essential to protect trustees from personal liability) means that the accounts have to be published and are subject to external scrutiny at the AGM.

Defining job and person specifications

In relation to managing people, some private practices could benefit from adopting the kind of detailed person specifications and job descriptions which are prevalent in the NFP sector. Defining a person specification helps to focus on the skills and experience the job requires rather than being distracted by the applicant with the most attractive personality. Similarly, a detailed job description makes it clear what will be required on a day-to-day basis. Partners sometimes tell me that it is obvious what a new solicitor will be asked to do; however, there are differences between firms, for example, one will use a costs drafter and another will expect solicitors to do their own bills. In addition, jobs are changing as people are developing new working methods to cope with the demands of fixed-fee regimes. Setting things out clearly can avoid misunderstandings, and if they should arise, helps to resolve them quickly.

The importance of supervision

I have been impressed by the conscientious way in which supervision is undertaken by some NFP agencies. It is recognised as an essential part of ensuring that clients receive a good quality of service and that staff are provided with the training and development opportunities they need to do their best. If there are problems with an individual's performance, a consistent approach is needed to enable these to be overcome. NFPs tend to have a regular programme of meetings. Private practice tends to take a less formal approach, which can be effective; however, pressure of work can sometimes mean that supervision is neglected.

Changes in case management

Although the NFP sector has been improving case management procedures, I think that private practice still has some lessons to teach when it comes to processing cases. Effective legal work relies on good administration. This used to be provided to each fee earner by a personal legal secretary, but this model has changed. Private practice is embracing information and communication technology and is seeing the benefits.

In addition, busy, successful firms have become expert in segmenting a case into individual tasks and getting someone at the right level to do it. In many firms, secretaries are responsible for ensuring that case administration runs smoothly. This could range from registering a new matter quickly onto the computer system, to managing the relationships with other agencies involved in a transaction or case so that things and people are in the right place at the right time. Some practices have administrators who specialise in various tasks, for example, one practice I know has an administrator responsible for booking all counsel, and many have an in-house billing department.

The precise division of labour will depend on the work of the practice, but the aim is to allow fee earners to concentrate on chargeable legal work, which is after all what they are trained to do. By contrast, the NFP sector tends to be poorly equipped and short on administrators. I will never forget the NFP solicitor who was hunched over an ancient photocopier, praying that it would do her court bundles for the following day before she had to call the engineer (again). It is hard to find funding for infrastructure, but trustees need to acknowledge that if NFP agencies are going to do legal work in the 21st century, they have to have the tools to do so.

Learning from each other

If an NFP agency is not fortunate enough to be part of a project which is funded to improve partnership working, there are still things it can do to share expertise for mutual benefit. Private practice solicitors could become trustees of NFP agencies, and gain first-hand experience of their planning and monitoring systems. NFP managers could perhaps offer some welfare-benefits awareness training in return for a placement in a local legal aid practice to observe their case-management techniques.

Developments in LSC funding are bound to increase contact between the sectors. These could be community legal advice centres or networks, or bidding requirements for the 2010 contracts. These expect family solicitors to have referral arrangements with 'family support services', and social welfare law providers to have debt, welfare benefits and housing contracts, the latter including a solicitor. Establishing better links will improve cross-referral, which is good for clients – and the bottom line.

* Round two of the BLF's Advice Plus programme allocated £20 million between November 2007 and April 2008 to third sector legal services that collaborated with other advice services in their local area. See: www.biglotteryfund.org.uk/prog_advice_plus?fromsearch=-uk.

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updater

Legislation

ADMINISTRATION OF JUSTICE

Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008 SI No 3240

These regulations come into force on 6 April 2009 and amend the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI No 1861 (as amended by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 SI No 2351, the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2005 SI No 435, the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No 2) Regulations 2005 SI No 1865 and the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 SI No 2683 ('the main regulations')).

These regulations make:

■ procedural changes to tribunal practice, including in relation to default judgments, electronic communications, withdrawal of proceedings, and Stage 1 equal value hearings;

■ consequential amendments to the main regulations arising out of the Employment Act (EA) 2008, which repeals the statutory dispute resolution procedures (contained in EA 2002 ss29 to 33 and Schs 2 to 4); and

■ changes to conciliation by the Advisory, Conciliation and Arbitration Service (Acas) under Employment Tribunals Act 1996 ss18 and 19.

These regulations also make minor clarifications to and correct drafting errors in the main regulations as follows:

■ Amend reg 4 of the main regulations to provide that when the Lord President or Lord Chief Justice appoints someone to discharge the functions of President where that person is unable to act or during any vacancy, the Senior President of Tribunals must be consulted beforehand.

■ Provide that reference to 'Secretary of State' is replaced by 'Lord Chancellor' in regs 8 and 9 of the main regulations.

■ Amend Sch 1 r8 of the main regulations to remove an employment judge's discretion not to issue a default judgment in certain circumstances.

■ Amend r15 to provide that where electronic communications are used in public hearings and oral evidence is given, the public must be able to see and hear all parties to the communication, and where the hearing is to be held in private and oral evidence is given, the tribunal or employment judge must be able to see and hear all parties to the communication.

■ Amend r25, and add a new r25A, to provide for the automatic dismissal of proceedings where the parties to a settlement have confirmed in writing their understanding that the proceedings covered by the settlement will be dismissed and the claimant has withdrawn the claim in keeping with Sch 1 r25(2) to the main regulations.

■ Provide that a preliminary consideration of an application under r33 to review a default judgment can take place without a hearing, and that the parties may consent in writing to the review of the application taking place without a hearing.

■ Amend Sch 6 r4 of the main regulations to enable an employment judge sitting alone to hear Stage 1 equal value claims.

These regulations also provide for transitional arrangements as follows:

■ The transitional arrangements for the amendments arising out of the repeal of EA 2002 ss29 to 33 and Schs 2 to 4 (the statutory dispute resolution procedures) mirror those of the repeal of those sections as provided for in the Employment Act 2008 (Commencement No 1 Transitional Provisions and Savings) Order 2008 SI No 3232 (see below).

■ Provide for transitional arrangements in relation to the changes to the issue of default judgments, the automatic dismissal of proceedings following withdrawal of a claim (or part of a claim) where an Acas settlement has been reached, the power of an employment judge to review a default judgment on his/her own initiative, and the changes to Stage 1 equal value hearings respectively.

Criminal Procedure (Amendment No 2) Rules 2008 SI No 3269

These rules add the following new provisions to the Criminal Procedure Rules (CPR) 2005 SI No 384:

■ A new Part 21 (initial details of prosecution case), in substitution for the existing Part 21 (advance information in magistrates' courts) which revises and simplifies the rules about the early provision of details of the prosecution case. The new Part 21 applies unless the court directs otherwise, to allow for the gradual introduction of the arrangements with which it deals, into all magistrates' courts and all categories of case. If the court disapplies the new rules, the rules in the old Part 21 will continue to apply.

■ A new Part 37 (trial and sentence in a magistrates' court), in substitution for the existing Part 37 (summary trial) and Part 38 (trial of children and young persons) which consolidates, revises and simplifies the rules about procedure at trial in magistrates' courts, including youth courts.

■ A new Part 44 (breach, revocation and amendment of community and other orders in a magistrates' court), in substitution for the existing Part 44 (sentencing children and young persons). The rules about trial and sentence procedure in magistrates' courts now are all contained in the new Part 37. The new Part 44 rules therefore deal only with the procedures relating to community and other orders to which some of the old Part 38 and Part 44 rules applied.

■ New rules in Part 2 (understanding and applying the rules) make transitional provision and explain when the new rules in Part 21, Part 37 and Part 44 will apply.

In addition, the following amendments are made:

■ Part 2 is amended to define the expression 'justices' legal adviser', which is used in the new Part 37 rules.

■ Part 19 (bail in magistrates' courts and the Crown Court) is amended to introduce into magistrates' courts a requirement for advance notice to be given of an application to vary the conditions of subsisting bail, including change of address, which is a requirement that applies already in the Crown Court. A new r19.25 is added, to introduce into magistrates' courts and the Crown Court a requirement for the defendant to give notice of the address at which s/he would reside if the court granted bail with a condition of residence, so as to help the court assess the suitability of the address proposed.

■ The Arrangement of Rules is amended to accommodate the changes to Part titles made in this and previous amendments of the CPR 2005. In force 6 April 2009.

Civil Procedure (Amendment No 3) Rules 2008 SI No 3327

These rules amend the Civil Procedure Rules 1998 SI No 3132 as follows:

■ Amend r7.4(3) as a consequence of amendments being made to two Practice Directions supplementing Part 7.

■ Amend r16.3 as a consequence of the increase in the financial limit of the fast track procedure from £15,000 to £25,000 for claims issued on or after 6 April 2009.

■ Amend r26.6 to increase the financial limit of the fast track procedure for claims issued on or after 6 April 2009 from £15,000 to £25,000;

■ Insert new rr44.18 to 44.20 to provide for applications for costs-capping orders.

■ Amend r46.2 as a consequence of the increase in the financial limit of the fast track procedure from £15,000 to £25,000 for claims issued on or after 6 April 2009. For claims issued after this date that are worth more than £15,000, the amount of fast track trial costs which the court may award is £1,650.

■ Amend r55.10 to extend the period of notice about a possession claim that must be given by the claimant to an occupier of the relevant property.

■ Amend r70.5 to clarify the procedure for the enforcement of sums payable under compromises following the amendment of the Employment Tribunal Act 1996 by Tribunals, Courts and Enforcement Act 2007 s142.

■ Amend r75.5 and insert a new r75.5A to enable requests for a review of a court officer's decision to be decided without an oral hearing unless the person making the request asks for a hearing or the court orders a hearing;

■ Amend r75.7 to enable an authority to request the reissue of a warrant during its 12-month validity period where the respondent's address has changed since the warrant was originally issued.

■ In relation to the new Practice Direction on Pre-Action Conduct, make minor

amendments to rr3.1(4), 14.1A(2) and 44.3(5) concerning parties' compliance with this new Practice Direction.

■ In relation to regionalisation of the Administrative Court, insert a parenthesis or 'signpost' below r30.6 to alert the reader to the existence of a new Practice Direction concerning where hearings in the Administrative Court may be held, and make minor amendments to RSC Order 115, rr16(1) and 32(1).

■ Amend CCR Order 26 r17(2) following amendments to the Housing Acts of 1985, 1988 and 1996 by Housing and Regeneration Act 2008 s299 and Sch 11 paras 1 to 26. In force 6 April 2009.

EMPLOYMENT

Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008 SI No 3232

This Order brings into force the provisions of the Employment Act (EA) 2008 set out in article 2. Those provisions come into force on 6 April 2009. EA 2008 ss1 to 7 make certain changes to the law relating to dispute resolution in the workplace. In particular:

■ Section 1 repeals the existing statutory dispute resolution procedures (EA 2002 ss29 to 33 and Schs 2 to 4) removing the statutory procedures in their entirety.

■ Section 2 repeals a related provision about procedural unfairness in dismissal cases (Employment Rights Act (ERA) 1996 s98A).

■ Section 3 confers on employment tribunals (ET) discretionary powers to vary awards if parties have failed to comply with a relevant code of practice.

■ Section 4 amends ET procedure for determinations without a hearing.

■ Sections 5 and 6 make changes to the law relating to conciliation by Acas.

■ Section 7 allows tribunals to award compensation for consequential financial loss in certain types of monetary claim. Part 1 of the Schedule to the EA 2008 contains repeals relating to ss1 to 7 of that Act.

For claims where the action on which the grievance is based begins on or before 5 April and continues beyond that date, the existing procedures are preserved where the employee presents a complaint to an ET or complies with EA 2002 Sch 2 paras 6 or 9 within the relevant specified date of either 4 July 2009 or 4 October 2009. Paragraph 5 of the Schedule to this Order provides that EA 2008 s7, which amends ERA ss24 and 163 (compensation for financial loss), does not take effect where a complaint has been presented before the coming into force on 6 April 2009 of s7. This Order also contains transitional provisions, detailed in the Schedule to the Order.

MENTAL HEALTH

Mental Health Act 1983 (Independent Mental Health Advocates) (England) Regulations 2008 SI No 3166

Section 130A of the Mental Health Act (MHA) 1983 provides that the secretary of state shall make arrangements to enable Independent Mental Health Advocates (IMHAs) to be available to help qualifying patients. These regulations contain provisions about the arrangements for the appointment of IMHAs and about who can be appointed to act as an IMHA as follows:

■ Direct that, where relevant, a commissioning body or provider of advocacy services must ensure that an individual who is appointed to act as an IMHA satisfies the conditions in reg 6. Commissioning bodies are also directed to take reasonable steps to ensure that the different needs and circumstances of qualifying patients, in respect of whom they may exercise the functions under MHA s130A ('s130A functions') are taken into consideration.

■ Amend NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 SI No 617 reg 5(b) to include s130A functions in the definition of 'functions of NHS bodies'.

■ Amend the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations (NHS(Functions)(E) Regs) 2002 SI No 2375 so that s130A functions are exercisable by a commissioning body, ie:

– strategic health authorities, for performance management purposes; and

– primary care trusts (PCTs).

Regulation 3 of the NHS(Functions)(E) Regs is amended to provide for circumstances where a PCT must exercise s130A functions for the benefit of qualifying patients who are not otherwise within its area or the area of another PCT and who are:

– resident in Scotland, Wales or Northern Ireland but are present in its area; and

– present in Wales, but liable to be detained under the MHA in a hospital or registered establishment in its area.

A further amendment is made to NHS(Functions)(E) Regs reg 10 preventing PCTs exercising s130A functions jointly with NHS trusts.

■ Provides that a person can only act as an IMHA if s/he has satisfied certain requirements concerning experience, training, good character and independence. Also provides that in deciding whether or not to appoint a person to act has an IMHA, regard is to be had to guidance issued from time to time by the secretary of state.

■ Specifies those who are not to be treated as concerned in the patient's treatment (a status that would otherwise prevent them from acting as an IMHA). In force 1 April 2009.

Parliament

BILLS

Coroners and Justice Bill
HC 1st Reading, 14 January
HC 2nd Reading, 26 January

Disabled Persons (Independent Living) Bill
HL 1st Reading, 9 December

Equal Pay and Flexible Working Bill
HL 1st Reading, 8 December
HL 2nd Reading, 23 January

Policing and Crime Bill
HC 1st Reading, 18 December
HC 2nd Reading, 19 January

Welfare Reform Bill
HC 1st Reading, 14 January
HC 2nd Reading, 27 January

Consultations

Identity Cards Act secondary legislation: a consultation

This paper sets out for consultation proposals for secondary legislation under the Identity Cards Act (ICA) 2006 and covers the regulations, orders and a code of practice that will need to be put in place before the first identity cards can be issued under the ICA. The paper is available at: www.ips.gov.uk/identity/downloads/NIS_Legislation.pdf. The consultation closes on 13 February 2009.

The national minimum wage: service charges, tips, gratuities, and cover charges: a consultation

This is a consultation to review the current ways for which tips are used in payment of the national minimum wage (NMW). It is intended to invite comments from employers, workers and consumers, to form a picture of the current arrangement to assist the government in establishing the precise nature of any regulatory change relating to the treatment of mandatory and non-mandatory service charges, tips, gratuities and cover charges in payment of the NMW. The paper is available at: www.berr.gov.uk/files/file48899.pdf. The consultation closes on 16 February 2009.

The future of Very High Cost Cases: a consultation paper

The current Very High Cost Cases scheme is due to expire on 13 July 2009. This consultation sets out the detail of how the Legal Services Commission (LSC) plans to deliver a replacement scheme. The paper is available at: https://consult.legalservices.gov.uk/inovem/consult.ti/VHCCProject08/listdocuments. The consultation closes on 18 February 2009.

Civil court fees 2008

A consultation on proposals to make changes to civil court fees, particularly in enforcement processes and to make changes to the magistrates' court fees order. It sets out for consultation proposals: to increase civil and family fees, particularly those for enforcement processes, in order to maintain full-cost recovery for civil business and keep the relevant family fees aligned with the civil equivalents; and to simplify the magistrates' court fees order and increase cost-recovery levels from around 55 per cent to 100 per cent.

The paper is available at: www.justice.gov.uk/docs/civil-court-fees-2008-consultation-paper-cp31-08.pdf. The consultation closes on 4 March 2009.

Family legal aid funding from 2010: a consultation. Representation, advocacy and experts' fees

A consultation seeking views on the fee structures and funding changes that form the second phase of family reform. The LSC is consulting on proposals covering advocacy, private family law representation and experts' fees. The paper is available at: https://consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/listdocument. The consultation closes on 18 March 2009.

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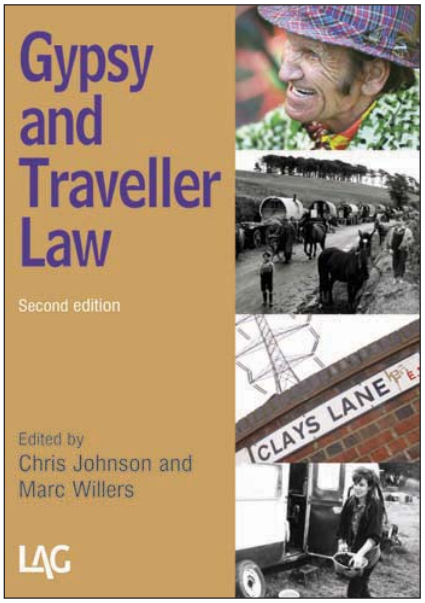

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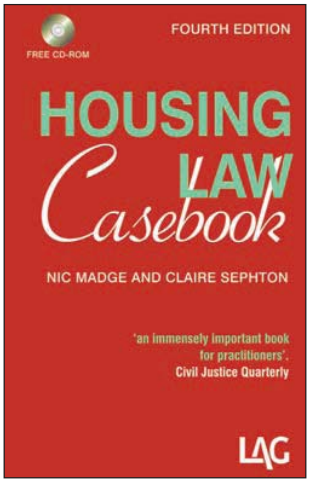

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13 March

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This course provides a comprehensive review of developments in Gypsy and Traveller law. It is designed for legal aid practitioners, Gypsy and Traveller advice and liaison workers and voluntary sector workers with a basic knowledge of Traveller issues. Local government housing, planning and education departments responsible for Gypsy and Traveller matters will also find this course particularly useful.

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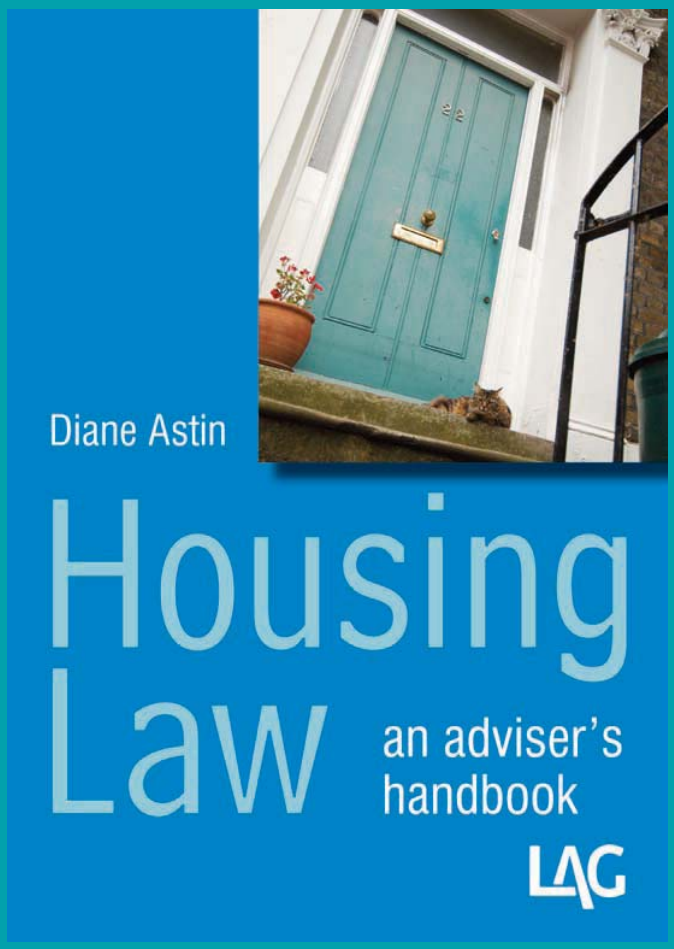

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