LAG

The purpose of the Legal Action Group 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.

LAG
242 Pentonville Road
London N1 9UN
Telephone: 020 7833 2931
Fax: 020 7837 6094
E-mail: legalaction@lag.org.uk
Visit: www.lag.org.uk

Cover photograph: Red Green Blue New Media Ltd Gonta / Alamy

Published by LAG Education & Service Trust Ltd, a registered charity incorporated in England (1095065), 242 Pentonville Road, London N1 9UN

Designed by Mick Keates and Tom Keates-Miles
Typeset by Boldface Typesetters Ltd
Printed by Reflex Litho Ltd
ISSN 0306 7963

In wandering mazes lost ...

If legal practitioners are to influence the first major shake-up of the profession in this century, then they need to make a start now. The publication of the draft Legal Services Bill is the latest step in the process set in train by the Department for Constitutional Affairs' white paper, *The future of legal services: putting consumers first*. Though the bill's passage onto the statute book is still many months away, the current phase of pre-legislative scrutiny represents the best opportunity for the final version to reflect the experience and needs of practitioners and their clients. (See pages 4 and 8 of this issue.)

LAG believes that there is much to recommend in the bill, particularly in simplifying the maze of legal services regulation and complaints systems. However, we have a number of major concerns. The bill starts with a statement of the regulatory objectives, which include protecting and promoting consumers' interests, promoting competition, improving access to justice and promoting and maintaining adherence to the professional principles. LAG believes that the independence of the legal profession is crucial and should be included explicitly as a regulatory objective, rather than as merely one of the stated professional principles. For the same reason, we do not accept that the Secretary of State for Constitutional Affairs should appoint all members of the new Legal Services Board, as the bill proposes. LAG also has doubts about the objective of promoting competition. The Carter review's proposals to introduce 'managed competition' and competitive tendering are likely to have a damaging impact on legal aid services by driving down quality and reducing choice for clients.

However, it is the proposals for alternative business structures (ABS) that are the most problematic. The report of Sir David Clementi's review of the regulatory framework for legal services in England and Wales (from which the white paper and bill originate) sets out detailed criteria for safeguarding clients who are being advised by lawyers working in legal disciplinary partnerships (LDPs). The report also proposed that LDPs be the 'necessary first step' before permitting multi-disciplinary partnerships. However, the bill provides less protection for clients, while opening the way for a wide variety of ABS to provide legal services.

Sir David also recognised the need to ensure a high level of ethical standards within legal practices. He recommended a number of detailed provisions, including that an LDP must have a head of legal practice (HOLP) to ensure responsibility for compliance with regulatory rules, and a head of finance and administration (HOFA) to ensure proper accounting for both the legal practice and clients' money. Sir David examined the conduct of non-lawyer managers and suggested that they sign a code of practice which committed them to act in clients' best interests, and that lawyers should be in a majority on the management group. Where an LDP was owned by non-lawyers, he suggested safeguards against, for example, the risks of inappropriate owners and of unreasonable commercial pressures being placed on lawyers that could lead to conflicts of interest.

This degree of detailed protection of clients' interests is sadly missing from the bill's provisions. Although the bill proposes that ABS should have a HOLP and a HOFA and provides that a 'non-authorised person' who owns a material interest in an ABS should be a fit and proper person, it does not define what criteria will be applied in deciding the latter. Without the more detailed provisions set out in the Clementi report, LAG does not believe that the bill establishes the necessary degree of protection for clients.

We think it is inevitable that a commercial ABS will put pressure on the HOLP to take as much account of the business's interests as those of clients. It is not difficult to imagine that an ABS formed by a bank or insurance company might want to sell financial services to clients who receive damages or a financial settlement in legal proceedings. LAG, therefore, urges a closer consideration of the provisions to protect clients' interests before ABS become a reality.

LAG is also concerned at the impact that ABS may have on legal aid services. It seems unlikely that commercial organisations will want to take on criminal or social welfare cases but may cherry-pick the more profitable work that sometimes subsidises legal aid practices. As a result, it may prove increasingly difficult for legal aid firms to stay in business, that is assuming they have survived the ordeal of the preferred suppliers scheme, the Community Legal Service strategy and the effects of the Carter review.

For everyone working in legal aid, the bill presents yet another challenge to business planning. While the government aims to reduce the regulatory maze, legal aid practitioners are trapped in a maze of contradictory and conflicting initiatives, few of which offer hope of leading to a stable and sustainable future.

news feature

Draft Legal Services Bill under scrutiny by parliamentary committee

Throughout June, the new Joint Committee on the Draft Legal Services Bill held public hearings to listen to the views of various groups and individuals, including LAG, Law Centres Federation, Sir David Clementi, and the Lord Chief Justice, Lord Phillips, on all aspects of the proposed legislation. Alison Hannah, LAG's director, in her submission to the committee, made clear that LAG recognises the many improvements the bill sets out. However, LAG has concerns over some particular aspects of the bill.

Alison Hannah comments: 'We believe the independence of the legal profession is such an important principle that it should be specifically included as one of the regulatory objectives. We also believe that tighter safeguards are needed to protect clients who obtain legal services from Alternative Business Structures (ABS), in particular to prevent conflicts of interest arising.' (See pages 3 and 8 of this issue.)

The committee's remit is to consider the bill and report on it to parliament by 25 July. While the deadline for submitting written evidence passed in June, the committee expects to continue to hold public hearings in July. In particular, the committee welcomes evidence covering the following:

- Whether the draft bill's proposals are necessary, workable and sufficient; and whether the bill's proposed outcomes could be achieved by better means.
- Whether the regulatory objectives set out in clause 1 of the bill are appropriate.
- Whether proposals for the regulatory body are fit for purpose.
- The ability and desirability of the proposed new ABS in opening up the market for legal services and delivering consumer benefits.
- Potential conflicts of interest under the new structures.
- Whether the proposed Office for Legal Complaints is fit for purpose.

Details about the committee's work are available at: www.parliament.uk/parliamentary_committees/jcdlsb.cfm.

Justice Albie Sachs to deliver BIHR memorial lecture

ELLEN ELMENDORP

Justice Albie Sachs (left) of the Constitutional Court of South Africa will ask the question: 'Do wicked people have human rights?' at the British Institute of Human Rights' (BIHR) annual Paul Sieghart memorial lecture to be held in London on 25 July. Baroness Brenda Hale will provide a response to Justice Sachs' speech. The subject is of topical interest as the Human Rights Act (HRA) 1998 has come under attack from politicians and parts of the media lately. The BIHR is working hard to dissuade the government from amending the HRA and, indeed, from attacking it without recognising the positive benefits that the Act has brought to many people (see page 6 of this issue).

The memorial lecture will also see the launch of the new BIHR Lawyers' Network. Lawyers, advisers and judges can join BIHR as a 'Legal Friend'. As well as receiving all the benefits of being a BIHR Friend (the standard membership scheme), those who join the lawyers' network will work with BIHR to make human rights a reality for everyone in the UK. BIHR will offer a discounted joining fee to those who sign up as Legal Friends at the lecture.

For more information visit: www.bihr.org or telephone: 020 7848 1818.

'Tolerated trespassers' ruling approves new order

Robert Latham, a barrister at Doughty Street Chambers, London and author of 'Tolerated trespassers: the problem and the solution', May 2006 Legal Action *35, writes:*

The Court of Appeal has held that there is no requirement to specify a date for possession on the face of a possession order, and has formulated an appropriate template for such an order (*Bristol City Council v Hassan*; *Bristol City Council v Glastonbury* [2006] EWCA Civ 656, 23 May 2006 and see page 26 of this issue). The decision was promptly circulated on Felix, the judicial e-mail facility. Many judges have welcomed the new *Bristol* order and are now using it.

A joint Department for Constitutional Affairs/Department for Communities and Local Government working party, assisted by HHJ Platt and DJ Hickman, is recommending that the *Bristol* template be formalised as a new Form N28A which will apply to secure tenancies. This, together with a new Part IV to Practice Direction 55, dealing with the procedure for fixing a date for possession, is subject to approval by Dyson LJ as Deputy Head of Civil Justice. It is hoped that these changes will become effective in October 2006.

However, many issues remain to be resolved, including:

- Whether the concept of tolerated trespassers is applicable to assured tenancies.
- What is to happen to the secure tenants (probably in excess of 100,000) against whom suspended possession orders have been made since October 2001 using Form N28?
- How are landlords reacting to the new template?

Robert Latham will explore these issues in an article to be published in August 2006 *Legal Action*.

OBE for John Fitzpatrick

LAW CENTRES FEDERATION

John Fitzpatrick OBE

John Fitzpatrick, director of Kent Law Clinic, has been recommended by the Prime Minister, Tony Blair, for an OBE for 'services to the administration of justice' in HM The Queen's Birthday Honours List 2006. John Fitzpatrick, who is a member of both the Law Centres Federation's executive committee and the management committee of Hammersmith and Fulham

Community Law Centre®, said: 'If ever an award was for a collective achievement, this is it. I want to accept it on behalf of all those people that I have worked with in public legal services, especially in the Kent Law Clinic. It has been an honour working with such wonderful students and colleagues in the Kent Law School and such supportive solicitors and barristers in local practice.'

Legal Aid Lawyer of the Year Awards

Civil rights lawyer Gareth Peirce has won this year's Legal Aid Lawyer of the Year (LALY) award for outstanding achievement. The awards ceremony was held in London in June, and was hosted by solicitor and broadcaster John Howard. LALY 2006 winners in full are:

- Outstanding achievement: Gareth Peirce (Birnberg Peirce);
- Criminal defence: Andrew Keogh (Tuckers);
- Immigration and asylum: Amit Sachdev (Sheikh & Co);
- Social and welfare: Nathaniel Mathews (Hackney Community Law Centre®);
- Mental health: Saimo Chahal (Bindman & Partners) (pictured);
- Family: Jennifer Beck (TV Edwards);
- Team of the year: Paragon Law Legal Aid Team;
- Young legal aid solicitor: Laura Janes (Howard League for Penal Reform);
- Legal aid barrister: James Collins (Central Chambers); and
- Young legal aid barrister: Ruth Brander (Doughty Street Chambers).


Saimo Chahal

The LALY awards were launched in 2002 by the Legal Aid Practitioners Group and *Independent Lawyer* magazine to recognise excellence in the legal aid profession.

Tender process for first CLACs opens

The Legal Services Commission (LSC) has now opened the tender process for the first Community Legal Advice Centres (CLACs). The first CLACs will be established in Gateshead and Leicester and are part of a series of centres being established across England and Wales. The centres are joint funding initiatives between the LSC and Leicester and Gateshead local authorities.

Tenders are invited from organisations, or groups of organisations operating together, that can supply integrated general and specialist legal advice and representation in a wide range of legal disciplines.

The closing dates for applications are at noon on 18 August for Gateshead and at noon on 24 August for Leicester.

The local councils and the LSC will decide jointly on the successful bid in October 2006. The CLACs are expected to open in March 2007.

news feature

Access to Justice Alliance holds lobby and public meeting on 'continuing legal aid crisis'

A lobby of MPs to support legal aid advice and assistance for people with problems including housing, unemployment, mental health or community care issues was organised by the Access to Justice Alliance (AJA) in May. The lobby was followed by a well-attended public meeting on the 'continuing crisis in civil legal aid' in the Wilson Room at Portcullis House in London. The meeting was addressed by:

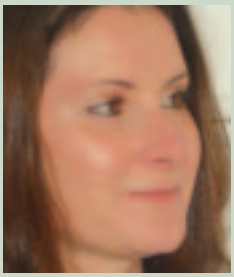
- Alison Hannah, LAG's director, who spoke about the vital role of legal aid in ensuring access to justice for some of the most vulnerable and discriminated against people in our society. 'Most legal aid spending is on criminal legal aid, with less and less available for the problems which cause people so much stress and hardship in their everyday life', she said.
- Vera Baird QC, MP, minister for legal aid at the Department for Constitutional Affairs, who described civil legal aid and the work done by AJA members as 'vital to the government's social inclusion programme'. She went on to speak about her commitment to early legal advice to prevent problems escalating and causing damage to people's health and safety.

The minister said that the government has taken steps to rebalance legal aid spending to protect the funds available for social welfare problems. She stressed the progress made in increasing the numbers of people helped by both face-to-face legal advice and the telephone service provided by Community Legal Service (CLS) Direct.

- Simon Hughes MP, the Liberal Democrats' Shadow Secretary of State for Constitutional Affairs, and Oliver Heald MP, the Conservative Shadow Secretary of State for Constitutional Affairs, who also stressed the key role legal aid plays in promoting civil justice. Simon Hughes looked forward to the establishment of a Ministry for Justice and set out the Liberal Democrats' commitment to supporting a sustainable future for legal aid services. Oliver Heald challenged the decisions of the Legal Services Commission (LSC) to move away from Community Legal Service partnerships and to withdraw the specialist support services. He questioned the value of moving to a new brand of Community Legal Advice Centres (CLACs) and expressed concern at the possibility that CLACs would not prevent the spread of advice deserts.
- Steve Hynes, director of the Law Centres Federation, who praised the expansion of CLS Direct, but also expressed concern at the LSC's plans to rebrand legal and advice centres as CLACs. Outlets for advice might be reduced rather than consolidated as a consequence of the CLS strategy. In conclusion, he called on the government to stand up to the tabloid press and say that legal aid is a fundamental part of democracy.

There were many questions and contributions from the floor of the meeting, covering a wide range of issues. Many speakers expressed concern at the changes that the CLS strategy may make by fragmenting advice and legal services, creating uncertainty and reducing outlets for people to find advice.

Further information about the AJA is available at: www.accesstojusticealliance.org.uk.



Faced with the horrors of extreme crime and terror, the Human Rights Act (HRA) 1998 has been an easy target for some politicians to attack. But as Anna Edmundson, deputy director of the British Institute of Human Rights (BIHR), explains, it is not accurate to say that those who have benefited most from the protection of the HRA have been criminals and terrorists.

In defence of the Human Rights Act

Introduction

The BIHR is a charity with a unique focus on human rights as they affect people in the UK in their everyday lives. This article tackles some of the myths about human rights and, from BIHR's experience of working with the voluntary and public sectors, highlights how the HRA has helped transform people's daily lives. These individuals' stories often go unreported by the mainstream media. However, they are important because these accounts show the HRA in a different light, not as an aid to criminals or terrorists but as a tool for social change that has breathed new life into long-held values like dignity, fairness and respect. Because of its experience, BIHR strongly opposes calls to scrap or weaken the HRA as this would mean that ordinary people would lose the important protection that human rights offer.

Why is the Human Rights Act in the news?

The HRA became headline news as a result of two different cases: a group of Afghan refugees who hijacked a plane and who were subsequently protected from return to Afghanistan (under article 3 of the European Convention on Human Rights ('the convention'), which prohibits return to a country where they would face a real risk of torture); and the murder of Naomi Bryant by convicted rapist Anthony Rice who had been released on life licence by the Parole Board. In the latter case, various allegations were made that a 'human rights culture' had been a key factor in the decision to release Anthony Rice. Sections of the press (and politicians) seized on these stories to characterise the HRA as a charter for criminals and terrorists and called for it to be axed.

Does the Human Rights Act prioritise individuals' rights over public safety or victims?

One of the myths about human rights is that the rights of individuals automatically override those of the wider community. But as human rights law is based on a set of values that seek to secure the respect and dignity of every individual, victims often have special protection under it. A string of cases have set out the importance of protecting the human rights of victims and stressed the importance of protecting them from physical or psychological harm, securing their privacy, and protecting them from intimidation in court. Most importantly, under human rights law, the government has an obligation to deter crimes, prosecute suspects and to carry out an effective investigation of crimes after the event. In certain circumstances, there is a special duty on the government to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v UK* 28 October 1998, App No 23452/94).

In the context of public safety, it is important to bear in mind that not all the rights under the convention contained in the HRA operate in the same way. While some rights are 'absolute' and should never be interfered with or opted out of (such as the article 3 prohibition of torture), others are 'limited' or 'qualified' in nature and contain an in-built mechanism to balance the rights of the individual with those of others or the public interest. Article 5 (right to liberty and security) is an example of a limited right where there are specific situations in which a person can be deprived of his/her liberty. Article 8 (right to respect for private and family life) is a qualified right. It contains a limitation clause which enables a range of 'public interest' aims to be given as justifications for interfering with an individual's rights, including 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

What options are the government considering?

The exact details are still unclear, but the Secretary of State for Constitutional Affairs, Lord Falconer, has stated that the government wants to ensure that 'public safety first' is the guiding principle when courts deal with cases that raise individual human rights issues. Lord Falconer has said that this would involve ensuring that officials were trained properly, but could, in time, require legislation to change the HRA. Also, the Prime Minister, Tony Blair, has asked the Home Secretary, John Reid, to 'look again at whether primary legislation is needed to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights'.

BIHR believes that amending the HRA

to put public safety first is unnecessary because the interests of the public are already at the heart of human rights law. The HRA contains an in-built mechanism to make sure that when officials make decisions based on human rights, they consider the rights of others routinely. What is needed is greater understanding and application of this existing aspect of human rights law – not a new law.

Politicians from across the political spectrum have called for the HRA to be scrapped or reformed. This would be a grave mistake. It would make no difference to cases such as that of Anthony Rice because poor decision-making and administrative failings led to his release – not the HRA; but scrapping or reforming the Act would undermine the protection that it offers to people in difficult situations.

How has the Human Rights Act been used to benefit ordinary people?

Although their stories rarely hit the headlines, BIHR's experience is that the HRA has been used successfully by individuals to challenge the injustices that they face in their everyday lives. Important cases in the courts include:

Mr and Mrs Gunter and their daughter Rachel

Rachel is severely disabled and requires constant nursing. After caring for Rachel for 24 hours a day for six years, her parents were no longer able to give her the physical support and mental stimulation that she required. Mr and Mrs Gunter approached the Primary Care Trust (PCT) for help.

The PCT, which was reluctant to provide care in the Gunters' home, hoped to put Rachel into a residential facility. However, Rachel's parents felt this would deprive their daughter of the mental stimulation that they could provide, and which had already increased her confidence and communication skills. On the ground that taking Rachel from her home would infringe her right to family life under article 8, the court ordered that the PCT reconsider its decision. (See *Rachel Gunter (by her litigation friend and father Edwin Gunter) v South Western Staffordshire Primary Care Trust* [2005] EWHC 1894 (Admin), 26 August 2005.)

Mr and Mrs Bernard and their family

Mrs Bernard is a severely disabled, wheelchair-bound woman. She, her husband and their six children were housed in inappropriate and inadequately adapted local authority accommodation. Mrs Bernard was only able to access the lounge. She could not use the stairs and, therefore, had no access to the first floor where the bathroom and bedrooms were situated. This was a particular problem as Mrs Bernard was incontinent. Although the Bernards' local social services department recommended that the family be provided with specially adapted accommodation, they heard nothing from the local authority for well over a year.

The High Court held that the local authority had positive obligations to enable the Bernards to lead as normal a family life as possible and to secure Mrs Bernard's physical integrity and human dignity. It had not met these obligations, in breach of the Bernards' article 8 right to respect for family life. (See *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin), 25 October 2002.)

Ms A and B

Ms A and B are two disabled sisters, who need assistance in order to move, living with their parents in a specially adapted house. The local authority's policy imposed a complete ban on all manual lifting of people, which meant that the sisters were unable to be moved or go outside their home. After the family challenged the blanket policy on manual lifting, the High Court concluded that a complete ban was unlikely to be lawful because it did not consider a person's individual circumstances. Inhuman or degrading treatment contrary to article 3 might occur if the women were either left in their own bodily waste or stuck on the lavatory for hours. The court ordered the local authority to revisit its policy to make sure that it struck a better balance between the sisters' human rights and the carers' rights to a safe working environment. (See *R ((1) A (2) B (by their litigation friend the Official Solicitor) (3) X (4) Y) v East Sussex County Council and the Disability Rights Commission (interested party)* [2003] EWHC 167 (Admin), 18 February 2003.)

There is also evidence that the HRA has had many benefits for people 'beyond the courtroom'. BIHR has gathered examples of how the HRA has been used by advocates, front-line workers and advisers to challenge poor practice – without the need to go to court. For example:

- A social worker from the domestic violence team at a local authority received training on the positive obligations placed on the council to protect the right to life (under article 2) and right to be free from inhuman and degrading treatment (under article 3). The social worker went on to use human rights arguments to secure new accommodation for a woman and her family who were at risk of serious harm from her violent ex-partner.
- A mentally-ill patient in hospital was placed in seclusion. He kept soiling himself and staff refused to clean up the mess or move him to another room. They argued that the same thing would happen again. Local volunteers argued that this position was a breach of article 3, which bans degrading treatment. As a result, the patient was moved to a new room.
- A care home for elderly people had a blanket policy of not providing residents with bedpans between lunchtime and teatime. This policy was challenged by a local support group as a breach of the residents' right to respect for their private life under article 8. As a result, the policy was changed.

Why do we need a 'human rights culture'?

The HRA is not just about legal cases. The broader and deeper aim behind the HRA was a democratic one: to build in every citizen a consciousness of shared ownership of the fundamental values of society, enforceable as a last resort through the legal process. This bid to create a 'human rights culture' has met with some criticism from those who see it as heralding a society based on rights rather than responsibilities. However, that is a misunderstanding; such a culture should rather be seen as a path to greater decency, respect and fairness for everyone.

All the evidence suggests that far from a 'human rights culture' which respects the rights of individuals taking hold, most people remain largely unaware of their rights and responsibilities under the HRA. So, for example, after years of marriage, elderly couples have faced separation from each other when one goes into care precisely because social workers and others have failed to think about their right to respect for private and family life under article 8. Where people do know about the HRA and how to claim their rights under it, BIHR believes that the evidence shows the Act leads to common-sense results. If the HRA is either scrapped or weakened, those individuals facing inequality or injustice will suffer most.

■ For more information visit: www.bihr.org.

The draft Legal Services Bill, which was published in May, sets out the government's proposals to reform the way that legal services are regulated and delivered.[1] Here, Andrew Slight, policy manager at the Law Society, describes the bill's main provisions and the Society's views on them.
See also pages 3 and 4 of this issue.

Draft Legal Services Bill reviewed by Law Society

At first glance, the bill merely enshrines the principles set out by Sir David Clementi in his 2004 report, *Review of the regulatory framework for legal services in England and Wales – final report*:[2]

- A Legal Services Board (LSB) to provide oversight of the front-line regulators such as the Society and Bar Council.
- An independent Office for Legal Complaints (OLC) to improve consumer confidence in the handling of complaints that cannot be resolved at solicitors' firm level.
- Legal Disciplinary Practices (LDPs) to enable firms to reward non-lawyers more effectively and secure outside investment if they want it.

The Society supports these ideas in principle. They would provide the basis for a sustainable regulatory system that is profession-led but with necessary input from the consumer and other sectors.

However, 172 pages, 159 clauses and 15 Schedules of bill later, the Society's support for these principles is outweighed by concerns about the detail in it. Put simply, the potential benefits for the profession, consumers and the wider public will be lost if the bill is implemented in its present form. Solicitors want a stable, fair and cost effective regulatory system that maintains their independence from government. Consumers want to trust solicitors as experts in their field, who are able to offer impartial and confidential advice. Also, we should all expect to live in a country where the rule of law and access to justice are the guiding principles of an independent legal profession. The bill threatens all of these assumptions.

The Legal Services Board

The Clementi review recommended that profession-led regulation should continue. The Society made the case for this strongly on the basis that it ensures:

- proper independence from government of the legal profession and its regulation;
- that regulation reflects the realities of practice and is, therefore, effective;
- the willing acceptance of regulation within the legal profession; and
- that regulation is cost effective.

Lord Falconer, Secretary of State for Constitutional Affairs, confirmed that the Society's position influenced Sir David's recommendations and the subsequent white paper, *The future of legal services: putting consumers first*.[3] As a result both saw the need for a single oversight body while the professional organisations, such as the Society, act as day-to-day regulators (subject to the approval of the LSB).

This is not the arrangement that the bill in its present form is likely to create. The LSB, of course, needs sufficient powers to be effective, but the proposals suggest that the new board will too easily be allowed to duplicate, second-guess and direct the work of the front-line regulators. This might be appropriate if there was no distinction between the professional bodies' representative and regulatory roles. However, in the context of regulatory changes already made by the Society they cannot readily be justified.

The Society's regulatory functions are now the responsibility of an independent Regulation Board; seven of its 16 members are laypersons and no member of the Society's Representation Board is eligible to serve on the Regulation Board. The Society's current governance arrangements for regulation meet modern consumer needs fully and reflect best practice. It is important that – having implemented these reforms – approved regulators are able to get on with their task, subject only to light-touch supervision.

How can the bill better reflect the need for a light-touch approach?

The proposed powers of the LSB should be streamlined. For example, the powers to set targets, to fine regulators and to intervene in regulatory functions are inappropriate, encouraging the LSB to micro-manage the approved regulators. The Society believes that powers to give directions to the front line regulators should arise only where the LSB concludes that the action or inaction of an approved regulator risks serious damage to the regulatory objectives, and where the matter cannot be resolved informally. In addition, the requirement to approve all rule changes is potentially burdensome. The approved regulators should be free to carry out their functions (after appropriate consultation) without advance approval from the LSB, except for significant changes to the governance arrangements and for major new rules.

Finally, *Financial analysis to support the draft Legal Services Bill*, a study by PricewaterhouseCoopers (PwC) into the costs of running the LSB sustains the fear that the new board will be heavy handed.[4] While the Council for Healthcare Regulatory Excellence – which oversees the front-line healthcare regulators such as the General Medical Council – has a staff of 12, PwC's report suggests that the LSB will need between 39 and 57 staff to perform its broadly comparable functions. Given that the profession has been told

that it will have to bear the entire cost of setting up and running the LSB, this is a major concern.

Maintenance of independence

Government ministers have acknowledged the importance of maintaining the legal profession's independence from government. While we welcome this commitment, there are aspects of the bill that do not reflect this pledge. For example, it gives the secretary of state the power to appoint LSB members. The Society has suggested that appointments should be made by the secretary of state and the Lord Chief Justice jointly to ensure confidence in the independence of the LSB. Recommendations by a demonstrably independent panel, chaired by a figure such as the Commissioner for Public Appointments and including a senior judge, would be another way to assuage concerns about a possible lack of independence. This model worked well in the appointment of members to the Judicial Appointments Commission.

The regulatory objectives in Part 1 of the bill should be ranked, rather than treated as of equal importance. In particular, the desirability of promoting competition should specifically be made subject to the need to support the rule of law, the need to protect the interests of consumers, and the need to maintain the independence of the legal profession from government.

Additionally, there are provisions throughout the bill under which the LSB would consult the secretary of state before exercising particular functions (such as an application to become, and giving directions to, an approved regulator). These provisions should be reconsidered. The secretary of state will need to have a role in matters where secondary legislation is needed to give effect to the LSB's decisions, but that should not stretch into a general consultative role on the board's activities.

Office for Legal Complaints

We welcome the principle of an OLC, which would be independent of the profession. Such independence is necessary to ensure consumer confidence in the complaints handling system, but to be effective it must have the trust of all stakeholders. This means that the OLC must be efficient and concentrate on dealing with redress rather than on misconduct issues.

There will, of course, be a need for the OLC to work closely with front-line regulators, for example by sharing information as and when the front-line regulators request it. However, some of the proposals for the OLC fail to provide the proper delineation between consumer redress and conduct issues. Front-line regulators will be required to investigate matters of the new office's choosing. The OLC can then report regulators to the LSB if it is dissatisfied with their investigation. This gives the OLC quasi-supervisory powers over the regulators and risks distorting their priorities, which is unacceptable. The bill also fails to ensure that the OLC will pass relevant information to the regulator promptly whenever it is requested.

Alternative Business Structures

The proposals for Alternative Business Structures (ABS) include both LDPs and Multi-Disciplinary Partnerships. Our members have told us for some time that they want more flexibility about the way they manage and run their businesses. The Society has, therefore, called for the introduction of LDPs for many years. As a potential regulator of ABS, the Society has relevant experience of allowing firms to run their businesses in different ways. In recent years, many firms have been looking to change their status, for example, to limited liability partnerships.

We are, therefore, particularly aware that the take up of ABS will depend to a large extent on the bill. The application process for front-line regulators to license new business arrangements must not be unnecessarily burdensome. In addition, firms will need to be clear that it will be possible to clear the regulatory and bureaucratic hurdles that the bill puts in place.

However, the bill proposes a totally separate licensing system for ABS. This could create different regulatory systems with different rules for ABS and for solicitors' firms. This, in turn, would create confusion for consumers. As they stand, the onerous requirements for front-line regulators and others in order to become a licensing body could create significant disincentives to seek these powers. We hope that during the passage of the bill, a system that builds on the existing powers for regulators is introduced. This will ensure there is no regulatory gap between the powers over existing legal services providers and those over ABS. The bill also indicates that the LSB may take on a direct regulatory role regarding ABS. This is totally contrary to the idea of an oversight regulator.

Greater public protection is also needed. The bill should cover requirements to show that non-solicitor partners are not only 'fit and proper' to be involved in a law firm, but also demonstrate an understanding of the conduct of business rules. A register of permitted non-solicitor partners and of persons who are disqualified from being partners should be set up by the bill. Also, rules concerning the ring-fencing of an externally owned law firm from any other part of the owner's business, along with stringent rules concerning 'fitness to own' need to be put in place.

Conclusion

Our concerns about the bill matter. If the government wants to achieve its aim of a more consumer-focused legal profession, solicitors, other legal professionals and new entrants must be enabled to meet this challenge. This means the introduction of a clear, fair and cost-effective regulatory and consumer complaints framework, and a licensing process for ABS which encourages rather than deters firms from taking advantage of these new opportunities. The obstacles outlined above could damage the intended impacts of the bill significantly.

So what happens next? At the time of writing, a joint committee of MPs and members of the House of Lords are debating the bill, and it will produce a report for the government to consider. The Society very much welcomes this pre-legislative scrutiny. The bill is expected to be introduced in the next session of parliament, which starts in November. The LSB, the OLC and the opportunity for ABS could follow 18 months to two years after the bill receives royal assent. This means that the substantive changes are unlikely before late 2008 at the earliest. In the meantime, the Society will be putting the case of its members to government, so that this disappointing draft bill becomes a bill that will truly benefit consumers and be workable for the profession.

1 The draft bill, explanatory notes and regulatory impact assessment document, are available at: www.official-documents.co.uk/document/cm68/6839/6839.pdf and from TSO, £27.
2 Available at: www.legal-services-review.org.uk/content/report/report-chap.pdf.
3 Available at: www.dca.gov.uk/legalsys/folwp.pdf and from TSO, £19.
4 The report was published in May 2006 and is available at: www.dca.gov.uk/legalsys/pwc_finanalysis_060524.pdf.

Environmental protection law update

In this annual review, Deborah Tripley looks at the changes and developments in the law concerning environmental protection. This article discusses the UK's energy policy. Readers are invited to contact the author with relevant case notes or information.

Introduction

In May 2006, the Prime Minister, Tony Blair, told businessmen at the Confederation of British Industry's (CBI's) annual dinner that a failure to press ahead with a new generation of atomic reactors would be a 'serious dereliction of our duty to the future of this country'.[1] Tony Blair was discussing the initial findings of a Department of Trade and Industry (DTI) review on the future supply of UK energy, which was launched in January 2006.[2]

The aim of that review, according to the DTI, was to look again at the strategies set out in a 2003 white paper entitled *Our energy future – creating a low carbon economy*.[3] The DTI said that the review was necessary because of three important changes since the publication of *Our energy future*. First, more evidence of the adverse impact of climate change had come about, second, the UK had become a net importer of gas sooner than expected and, third, energy prices had risen sharply.

But is anyone surprised to learn that the government wants more nuclear power? It appears that the DTI has been considering a new generation of UK nuclear power stations for a considerable time. As long ago as July 2002, the *New Scientist* published an article reporting the contents of a leaked internal DTI document that supposedly discussed ways in which to 'soften up' the public's opposition to nuclear power.[4]

Our energy future: the issues

Our energy future seems to have asked the same questions that the DTI's energy review has posed. The white paper acknowledges specifically that, by 2006, the UK will be a net importer of gas and that, by around 2010, it will also be a net importer of oil (para 1.13). It concludes that 'being an energy importer does not necessarily make it harder to achieve energy reliability'. *Our energy future* notes that the UK is one of just two of the world's leading industrial nations to be a net exporter of energy.

Addressing the issue of climate change specifically and looking as far into the future as 2020, *Our energy future* concludes that:

- much of our energy will be imported;
- most of our large power stations will be offshore marine plants, including wave, tidal and wind farms with smaller onshore wind farms also generating energy;
- local generation will play a larger part in the fuel economy, with locally grown biomass from locally generated waste, wind sources and possibly local wave and tidal generators;
- there will be more micro-generation from combined heat and power (CHP) plants, fuel cells in buildings or photovoltaics;
- there will be a reduction in new demand by improved energy efficiency;
- there will be better energy efficiency design in new build; and
- there will be more efficient boiler technologies to offset demand for gas and less coal fired generation, unless linked with CO2 capture and storage (p18).

As for nuclear power, *Our energy future* notes that it is an important carbon-free electricity, but rules this type of energy out of the equation because its current economics and the unresolved issues surrounding nuclear waste make it an unattractive option. The white paper concludes that 'Renewables and smaller-scale, distributed energy sources – eg micro-CHP and fuel cells – will help us avoid over-dependence on imports and can make us less vulnerable to security threats' (para 1.14).

Hurdles to new nuclear build

The Sustainable Development Commission (SDC), in its March 2006 review of the current case for more nuclear power entitled *The role of nuclear power in a low carbon economy*, considers that neither the economic nor waste arguments have changed dramatically since 2003.[5] While the SDC finds that emissions associated with nuclear power production are, in general, relatively low – estimating 4.4tC/GWh for nuclear power plants compared with 243tC/GWh for coal and 97tC/GWh for gas (para 2.1) – it considers that the nuclear contribution to a 2020 CO2 reduction target is likely to be limited. A doubling of existing capacity to 20GW could supply around 13.4MtC, which is equal to an eight per cent saving. However, the SDC points out that although this would deliver sizeable reductions in CO2 emissions, cuts of at least 50 per cent would still be needed from other measures to meet the 2050 (Kyoto) target (60 per cent reduction in emissions from 1990 levels by 2050).

The SDC also gives a gloomy view of the economics of nuclear power. It argues that the waste and decommissioning elements of the cost calculation are fraught with complications. The SDC points out that the liabilities associated with waste management and decommissioning have been significant hurdles for private investors in the past. In particular, it notes there is, as yet, no government policy on nuclear waste disposal and, therefore, no certain estimates of the total costs of this element for new build.

In fact, the government has been making some headway towards a future waste policy. It established the Committee on Radioactive Waste Management (CoRWM) to examine the options for long-term storage of radioactive waste.

In May 2006, CoRWM recommended that, for the long-term management of the inventory of radioactive wastes, geological disposal is the best available approach when compared with the risks associated with other methods of management.[6] However, CoRWM notes that the implementation of geological disposal is likely to take several decades and, therefore, it will be necessary for government to institute an interim period of storage as a contingency.

Previously, CoRWM pointed out to government that although technically waste from new atomic reactors could be accommodated within its findings, the committee's exercise had not been conducted with future waste from reactors in mind. If the government planned future nuclear reactors, it would be necessary, according to CoRWM, for more public engagement on the issue. CoRWM felt that such a decision raised separate ethical and political questions which were not considered as part of its own public engagement exercises.

The SDC also noted that if the UK abandons reprocessing as part of its waste management strategy (which seems likely), then the current stockpiles of spent fuel would have to be dealt with as part of the overall waste inventory. CoRWM, in its *Phase 2 report* (August 2005), providing an inventory of nuclear wastes, states that the total packaged volume is 476,460 cubic metres, of which intermediate level waste makes up

about 73 per cent and spent fuel makes up about 35 per cent of the radioactivity.

Public consultation

Significantly, *Our energy future* did not rule out the possibility of new nuclear build at some point in the future: 'Before any decision to proceed with the building of new nuclear power stations, there will need to be the fullest public consultation and the publication of a further white paper setting out our proposals' (para 1.24).[7] Did the Prime Minister forget the promise of a further white paper before making his speech to the CBI? If he did forget the promise, others remembered it, particularly certain environmental groups. The Prime Minister's speech was immediately criticised for pre-empting the outcome of the DTI's energy review. Friends of the Earth is reported to have sent an environmental information request to the DTI calling for sight of the document referred to by Tony Blair as the 'first cut' of the review during his speech to the CBI.[8]

New licensing regime

The complexities involved in licensing nuclear power stations are one of many legal and administrative hurdles facing proponents of nuclear power. The spectre of the Sizewell B public inquiry still haunts the industry and is a big disincentive to future investors.[9]

No doubt it is for this reason – at the same time as announcing its energy review – that the DTI requested that the Health and Safety Executive (HSE) provide it with advice on the potential role of pre-licensing assessments of candidate designs. In the light of this request, the HSE has since conducted a consultation into its strategy for regulating the design of new nuclear power stations, which closed in April and will report to the DTI in June 2006.[10]

The Nuclear Installations Inspectorate (NII) is employed by the HSE to regulate the safety of nuclear installations in the UK. The NII's functions are set out in the Nuclear Installations Act (NIA) 1965 as amended. The NIA ensures that no corporate body operates a nuclear installation without first having been granted a licence. The process adopted by the NII in making decisions on the granting of a licence requires the prospective licensee to make a safety case for assessment. In making its assessment, the NII has regard to its published safety assessment principles – which are also under review – and its thinking on radiological risk as set out in *The tolerability of risk from nuclear power stations*.[11] The operation of the nuclear site licensing regimes is underpinned by the Ionising Radiations Regulations 1999 SI No 3232.

The NII must also work within the international framework established by the Convention on Nuclear Safety – to which the UK is party – and agreed under the auspices of the International Atomic Energy Agency (IAEA). The nuclear safety convention is primarily concerned with the safety of nuclear installations. The UK is also party to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (the joint convention). The objectives of the joint convention are to achieve and maintain a high level of safety worldwide in spent fuel and radioactive waste management.

At the EU level, Council Directive 96/29/Euratom of 13 May 1996 (also known as the Basic Safety Standards (BSS) Directive) lays down basic safety standards for the protection of workers and the general public against the dangers arising from ionising radiation.[12] The government's regulations implementing the BSS Directive are contained in the Justification of Practices Involving Ionising Radiation Regulations 2004 SI No 1769.

The HSE's review of current licensing practice (see above) is concerned more with procedural than substantive changes to the present system. It suggests that:

Potential licensees may wish to reduce project and commercial risk, by seeking preliminary, or pre-licensing regulatory assessments of prospective reactor designs, before large-scale financial commitments are made.[13]

A phased approach to licensing is likely to have industry support. The idea has been similarly touted for regulatory approaches to the licensing of future nuclear waste sites.[14] Pre-licensing approaches are used already in the United States where a system of design certification is applied to new nuclear power reactors. Environmental organisations have criticised such changes.[15] They argue that a pre-licensing approach will remove all the major issues (such as the environment, security, safety and waste) from public scrutiny.

There have been moves already in this direction by the Office for Civil Nuclear Security (OCNS), which has issued guidance suggesting that the details of the function of any nuclear facilities should not be disclosed in planning applications.[16] The OCNS has suggested that safety cases, including details of the strengths and weaknesses of processes, structures and protection systems designed to contain, control or secure radioactive materials, may not be disclosed (p17).

Commenting on the need for public confidence, the SDC's report suggested that while any planning or consent process should be as efficient as possible, there would be concern if standard planning and licensing procedures were streamlined in such a way as to undermine the public's right to consultation and due process. Any such moves would seem entirely out of step with the procedural rights, such as the right to public participation, which are now well-embedded in environmental protection measures as a way to secure the public's right to a healthy environment.

Notable in this respect is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (also known as 'the Aarhus convention'). The Aarhus convention provides a right to access to information, public participation in decision-making and access to justice in environmental matters in order to protect citizens' rights to health and well-being. Article 6(1) of the Aarhus convention applies the public participation provisions to all activities listed in Annex 1, which includes nuclear power stations.

The public's right to participate in the environmental impact assessment (EIA) process is prescribed by the Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, EC Directive 85/337/EEC, as amended (also know as 'the EIA Directive'). The public's right was highlighted by Lord Hoffmann in *Berkeley v Secretary of State for the Environment and others* HL, 6 July 2000; [2000] 3 All ER 897, in which he stated:

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.

Directive 2003/35/EC, a new directive that implements the public participation provisions of the Aarhus convention, is now in force. Unfortunately, nuclear power is not one of the specified activities that allow public participation in plans and programmes, licensing or the permitting stage. This contrasts sharply with the amendments made by Directive 2003/35/EC to article 15 of the Council Directive 96/61/EC concerning integrated pollution prevention and control. The amendment states:

1. Member states shall ensure that the public concerned are given early and effective

opportunities to participate in the procedure for:
– issuing a permit for new installations,
– issuing a permit for any substantial change in the operation of an installation,
– updating of a permit or permit conditions for an installation … (article 4(3))

There seems no reason for this anomaly. Under the existing provisions of the EIA Directive, an EIA is a mandatory requirement before consent can be granted to a developer of a new nuclear power plant. The developer's environmental statement will need to provide all the information required under Annex IV of the EIA Directive, including a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases and a description of the main characteristics of the production processes, for instance, nature and quantity of materials used.

Most of the NII's pre-licensing considerations are likely to concern the safety aspects of the design, construction and operation of a new nuclear power plant, including ancillary operations such as the handling and transport of radioactive material and the disposal of waste. These are all matters of equal interest for an EIA statement. Thus, whether the DTI/HSE can speed up the regulatory process remains to be seen.

Case-law and the EIA Directive

A considerable body of case-law has now developed on the application of the EIA Directive at both national and European levels. In May 2006, the government was told by the European Court of Justice (ECJ) in *R (Diane Barker) v Bromley LBC* C-290/03, 4 May 2006, that it had wrongly interpreted the EIA Directive and it would have to ensure the Directive could be applied at both the granting of outline planning permission and the 'reserved matters' stages of a planning permission.

The principal legal instrument implementing the EIA Directive in the UK is the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations (TCP(EIA)(E&W) Regs) 1999 SI No 293, as amended, although *Barker* concerned the earlier Town and Country Planning (Assessment of Environmental Effects) Regulations (TCP(AEE) Regs) 1988 SI No 1199. Under TCP(AEE) Regs reg 4 outline planning permission constitutes 'planning permission', whereas the decision approving reserved matters does not.

In 1998, Bromley granted outline planning permission to London & Regional Properties Ltd (L&R) for the development of Crystal Palace Park ('the Crystal Palace development project'). Bromley concluded that no EIA was needed for the development. L&R applied for final determination of certain reserved matters in 1999. By then, the project had become a significant urban development including, among other things, 18 cinemas, a leisure and exhibition area, restaurants, cafes, and a car park with 950 spaces.

Diane Barker challenged Bromley's refusal to reconsider the need for an EIA. She lost the argument at both first instance and the Court of Appeal. However, the House of Lords had doubts about the compatibility of national law with the EIA Directive and referred several questions to the ECJ. (In separate infringement proceedings brought by the Commission of the European Communities and also concerning the Crystal Palace development project, the ECJ also considered whether an EIA should be considered at a 'reserved decisions stage' of a planning permission *(Commission of the European Communities v UK*, Case C-508/03, 4 May 2006; [2006] ECR I-0000)).

In *Barker*, first, the ECJ decided that the term 'development consent', for the purposes of the EIA Directive, remained a European concept. Thus, it was necessary for national law to interpret the term in a way that achieved constancy with the aims and purpose of the European legislation.

Second, the ECJ held that where national law provides a consent procedure which is staged so that there is both a principal and an implementing decision (as in the UK system), the effects of any project must be assessed at the time of the initial principal decision.

However, if all of the effects of a project are not identifiable at the initial outline planning stage, then the competent authority must conduct a further assessment of the significance of the development on the environment when making the implementing decision, here the 'reserved matters' decision.

The ECJ reached the same decision in *Commission v UK* (see above). This case was also concerned with the application of the EIA Directive to 'reserved matters', but was brought by way of infringement proceedings by the Commission against the UK government. The ECJ ruled that 'the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of article 1(2) of Directive 85/337, as amended'. In *Commission v UK*, the ECJ also relied on the earlier decision in *R (Delena Wells) v Secretary of State for Transport, Local Government and The Regions* C-201/02, 7 January 2004; [2004] ECR I-723, which had ruled in similar terms. The message from the ECJ seems clear. It is no longer possible for a member state to avoid its obligations under the EIA Directive by applying a restrictive meaning to the term 'project consent'. If there are a number of stages to the planning consent process, each of which is determinative of whether development can commence, an EIA must be considered at each of those stages.

These decisions reflect the approach taken at EC level towards achieving a high level of environmental protection. It now seems that the European Court of Human Rights (ECtHR) is adopting a similar stance to environmental and health protection. One example is the case of *Taşkin and others v Turkey* 10 November 2004, App No 46117/99; EHRLR 2005, 2. All the applicants in *Taşkin* lived in or owned property near to a gold mine. They had obtained orders from their domestic court requiring the cessation of activities at the mine due to risks associated with the use of cyanide in the extraction process, among other complaints.

Despite obtaining the relevant cessation orders, the gold mine's operations were allowed to continue. The failure by the member state to protect the applicants' rights was found by the ECtHR to be in breach of their article 8 rights under the European Convention on Human Rights ('the convention'). This was despite the fact that there was no evidence of any actual health problems.

The ECtHR considered that evidence of a close link between the activities and the risks posed, as demonstrated by the EIA, was sufficient. Commenting on the procedural aspects of the decision-making process, the court held that 'the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake' (para 119).

Similarly, in *Fadeyeva v Russia* 9 June 2005, App No 55723/00, the ECtHR held that the onus was on the state to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community. Mrs Fadeyeva and her family lived in the city of Cherepovets (to the northeast of Moscow) in a council flat within close proximity to a steel plant run by a private company. Mrs Fadeyeva claimed there was a breach of her article 8 convention rights because the state had failed to prevent or adequately regulate the environmental

pollution from the plant and this was having an adverse effect on her quality of life, making her vulnerable to disease.

The ECtHR noted that the Russian government was unable to explain how the interests of the population residing around the steel plant had been taken into account when conditions were attached to the permit. The state had failed also to give due weight to the interests of the community living in close proximity to the plant's premises when regulating its industrial activities (paras 129–131).

Safety and proliferation

In general, the civil nuclear industry has a good record of safety but, as the SDC notes, 'experience at a UK military reactor (Windscale) and elsewhere (Chernobyl, Three Mile Island) show just how dangerous a major accident can be'. Moreover, the government has needed to introduce a raft of security measures (see the Anti-terrorism, Crime and Security Act 2001, the Civil Contingencies Act 2004, the Energy Act 2004 and the Nuclear Industries Security Regulations 2003 SI No 403) to deal with the risk of terrorist attack since 11 September 2001.

The SDC notes that shipments of spent fuel for reprocessing could be attacked en route from the station to the reprocessing plant, either with the intention to spread contamination over a wide area or to steal the material for future use in a nuclear weapon. It was also possible for reactor grade fuel to be used to make a 'dirty bomb'.

Equally, although major accidents are rare, current evidence from nuclear sites like Sellafield demonstrates that a number of small-scale releases result from human error and management lapses. Thorp, the reprocessing facility, still remains closed after leaks were discovered in April 2005.

The SDC also highlights the risks of proliferation associated with an expansion of nuclear power. The SDC considers that it is very difficult to protect against such developments and raises the following note of caution:

The UK therefore needs to be fully aware of the implications of developing new nuclear capacity, particularly in the context of international treaties such as the Framework Convention on Climate Change. If nuclear power is part of the UK's chosen solution to climate change, then it would be considered a suitable solution for all countries.

The SDC notes also that article 4.1c of the UN Framework Convention on Climate Change explicitly encourages 'the development, application and diffusion, including transfer of technologies, practices and processes that control, reduce or prevent anthropogenic emission of greenhouse gases'.

1 See Patrick Wintour and David Adam, 'Blair presses the nuclear button', *Guardian*, 17 May 2006. A copy of the speech is available at: www.number10.gov.uk/output/Page9470.asp.
2 *Our energy challenge. Securing clean, affordable energy for the long-term*, available at: www.dti.gov.uk/files/file25079.pdf. The consultation period for the energy review closed on 14 April 2006.
3 Available at: www.dti.gov.uk/files/file10719.pdf and from TSO, £18.60.
4 See Rob Edwards 'Secret plan to revive UK nuclear power industry', *New Scientist*, 6 July 2002.
5 Available at: www.sd-commission.org.uk/publications/downloads/SDC-NuclearPosition-2006.pdf.
6 *CoRWN's draft recommendations* are available at: www.corwm.org.uk.
7 These comments are repeated in the energy review's executive summary which states 'The government is clear that, in making important decisions about energy policy including nuclear power, there should be the fullest public consultation. This consultation paper is part of that process. The government is not at this stage bringing forward policy proposals.'
8 See John Vidal, 'Campaigners call for Blair to publish briefing', *Guardian*, 18 May 2006.
9 The Sizewell B inquiry's timeline commenced in January 1981 with an application for a nuclear site licence. The public inquiry ran from January 1983 to March 1985. The inspector's report was published in January 1987. The facility did not become fully operational until February 1995.
10 Available at: www.hse.gov.uk/consult/condocs/energyreview/discussion.htm.
11 Available at: www.hse.gov.uk/nuclear/tolerability.pdf.
12 The regulatory framework for radioactive licensing and authorisation concerns the HSE, the Environment Agency (EA) and the Scottish Environment Protection Agency (SEPA). The HSE regulates site design, construction, licensing and the accumulation of wastes while the EA and SEPA issue discharge authorisations under the Radioactive Substances Act 1993.

In a review of the regulation of nuclear safety and the management of radioactive materials and radioactive waste by the Nuclear Safety Advisory Committee and the Radioactive Waste Management Advisory Committee, the report found that: 'It is not immediately obvious therefore, especially to a non-expert reader, how the two systems relate to each other from existing documentation. Notably, such understanding would be particularly difficult for an interested member of the public to obtain.' (para 34) The review is available at: www.defra.gov.uk/rwmac/reports/regcivil/rwmac-hse_regcivil.pdf.
13 See note 10.
14 See *Discussion paper on the implementability of radioactive waste management options. A briefing paper for CoRWM specialist workshops*, Ian Jackson, Jackson Consulting (UK) Limited, 3 June 2005, available at: www.corwm.org.uk/pdf/Criteria%207_Implementability.pdf.
15 See Greenpeace, Friends of the Earth and WWF, *Energy review update*, Issue 2, 3 April 2006, at: www.greenpeace.org.uk/MultimediaFiles/Live/FullReport/7693.pdf.
16 *Finding a balance: guidance on the sensitivity of nuclear and related information and its disclosure*, Office for Civil Nuclear Security, Department of Trade and Industry, Issue No 2, April 2005, available at: www.dti.gov.uk/files/file23308.pdf.

Deborah Tripley is a barrister at Fenners Chambers, Cambridge. E-mail: deborah.tripley@fennerschambers.co.uk.

Recent developments in prison law – Part 1

Hamish Arnott and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This series will appear in January and February, and in July and August. Part 1 of this update reviews the recent developments in case-law regarding life sentences, lifers' parole hearings, determinate licences and recall and offenders 'unlawfully at large'. Part 2 will be published in August and will review recent developments in case-law in a number of areas, including compensation claims, deaths in custody and misfeasance in a public office.

Life sentences: sentencing issues

■ R v Lang and others

[2005] EWCA Crim 2864, 3 November 2005

The Court of Appeal examined the circumstances in which the new mandatory sentence of imprisonment for public protection (IPP) (Criminal Justice Act (CJA) 2003 ss224–229) should be imposed on dangerous offenders and the relationship of the new sentence to the range of protective sentences available for offences committed before 4 April 2005 (discretionary and automatic life sentences, extended sentences and longer than commensurate sentences). The sentence of IPP can be imposed in the following circumstances:

■ following a conviction for a specified serious offence, which is punishable with ten years or more imprisonment, if the court is satisfied that the offender poses a significant risk of causing serious harm by committing further specified offences;

■ following a conviction for an offence for which life imprisonment can be imposed and the offence or others associated with it justify life imprisonment; and

■ where an offender aged over 18 has a previous conviction for a specified offence and is convicted of a new serious offence, the court will assume dangerousness unless this would be unreasonable in light of the circumstances of the offence or any pattern or behaviour of which the offence forms part.

The court noted that the sentence of IPP was virtually indistinguishable from the old discretionary and automatic life sentences. As with discretionary life sentences, IPP must be imposed where there is a risk of future dangerousness. Rose LJ explained that the new statutory test must be interpreted so as to replicate the pre-existing test for imposing a discretionary life sentence. Furthermore, as with the automatic life sentence, there is a presumption that the sentence will be imposed following a second serious conviction, although this presumption can be rebutted by the defendant. Therefore, the only difference between the old and new sentences is that the court cannot decline to set a minimum term after imposing IPP (ie, there are no circumstances where a whole life term might be appropriate) and that, unlike the life sentence, there is a power to cancel the life licence altogether ten years after release has taken place.

The key issue is the manner in which the sentencing court assesses risk and the Court of Appeal gave detailed guidance on factors relevant to the assessment (at para 17):

■ the risk must be significant, which is higher than a mere possibility;

■ risk assessment must include the nature and circumstances of the offence itself, the history of the offender, including all types of previous offending and any pattern of offending, and social and economic factors relating to the offender such as employment history, alcoholism, substance abuse, relationships and housing. This assessment will therefore require detailed evidence from pre-sentence probation reports and medical reports if appropriate;

■ the risk of serious harm cannot simply be assumed by the fact that the conviction is for a serious offence and proper consideration must be given to the factors set out above;

■ the range of offences specified in CJA 2003 Sch 15 is so large that the sentencer must bear in mind that if the concerns are of future offending which is not serious, this will not be sufficient to qualify as a 'significant risk of serious harm' and IPP should not be imposed;

■ despite the assumption that a second conviction indicates future dangerousness, the court must be mindful that it remains a discretionary sentence and judges must exercise that discretion in each case;

■ sentencing for juveniles (defined as those who are under 18 on the day of conviction) requires consideration of the offender's age and his/her susceptibility to change;

■ reasons should normally be given for decisions; and

■ parliament cannot have intended indeterminate sentences to be imposed for relatively minor offences.

Rose LJ went on to explain that the risk being assessed is the risk that is posed to 'members of the public' (para 19). He considered that this is wider than the risk that might be posed to 'others' in that it does not exclude any group, including the offender. Prison officers and staff at secure units must be included as must cases where particular members of the public are at a higher risk than others, such as future partners or children.

Comment: The judgment is important for those advising prisoners both in terms of how risk is assessed at the time the sentence is imposed but also in providing definitions of risk which might be applied in the parole process. The clarification given to the definition of the risk that might be posed to the public is slightly wider than that currently used in the parole process. For example, a risk of suicide would not usually be seen as a reason for refusing release on life licence, unless the action would place others in danger. This now appears to be at odds with the test applied when imposing a sentence of IPP and the appropriate test for parole purposes may need to be clarified in the future, especially in the context of recalls.

The examination of how the risk of harm was assessed in individual cases is also highly relevant to the parole review process. For example, in *Lang*, it was considered that the use of lethal weapons, such as knives or guns, to commit robberies, would usually be sufficient to justify the imposition of the indeterminate sentence, particularly where there is a history of such offending. In contrast, the case of *Abdi* concerned a street robber who did not use weapons; he had two previous robbery convictions and was assessed in a pre-sentence report as posing a high risk of both reoffending and of harming the public, although the report did not address whether the risk was of causing serious harm. In his case, the sentence of IPP was quashed and one of four years imposed in its place. The Court of Appeal noted that the victim had not suffered serious physical or psychological harm and the

seriousness of the offending was diminishing not increasing (para 47). It is difficult to see the Parole Board (the Board) taking such a robust approach when required to conduct a similar assessment on suitability for release, but it is arguable that the two processes should not be conducted to standards which are significantly different.

■ R v Jones and others

[2005] EWCA Crim 3115, 30 November 2005

The Court of Appeal also looked at some of the developing issues in setting minimum terms for murder under the CJA 2003, following the judgments in *R v Sullivan and others* [2004] EWCA Crim 1762, 8 July 2004 and *R v Peters and others* [2005] EWCA Crim 605, 10 March 2005. The court looked at a number of joined appeals and made the following observations:

- pleas of guilty must be taken into account even when the starting point is a whole life term, but it will be rare that, in such a case, the decision is sufficiently borderline for a plea to justify a reduction from the whole life term;
- in cases involving death caused by a firearm, the correct starting point for adults will always be 30 years. However, a lack of intention to kill and youth are important factors and, on the facts of one case before the court on this occasion, justified a reduction to 20 years rather than to 27 years as had been made by the trial judge. In another case involving a deliberate shooting, a reduction of five years to 25 years on account of the offender's young age was considered to be adequate;
- a reduction of eight years from the starting point of 30 years was appropriate for a relatively young man who had not intended to kill but who had committed arson which resulted in death.

Comment: These guidelines from the Court of Appeal relate to cases where the sentence has been imposed under the mandatory guidance contained in CJA 2003 Sch 21, for offences where the conviction occurred after 18 December 2003. These guidelines do have relevance, however, for those lifers who fall in the transitional categories and are having their minimum terms reset by the High Court in respect of offences committed before that date (CJA 2003 Sch 22). Virtually all of the High Court's decisions on minimum terms are being made on a consideration of the papers alone and there appear to be increasing inconsistencies between different judges. In a number of cases, the decisions appear to indicate that as the term set under the new Act would be significantly higher than the old executive tariffs, no alteration will be made to the original tariff unless some major error can be identified. These decisions appear to proceed without proper consideration of what the actual term would be under the new legislation, simply referring to the starting points. As the room for varying the starting points is considerable and the discretion of the sentencing court has once again been emphasised, a crude approach to the equivalent new sentence as a basis for evaluating the old tariff will be difficult to sustain.

■ R v Cadman

[2006] EWHC 586 (Admin), 23 March 2006

This was the first resetting of a minimum term for a life-sentenced prisoner following an oral hearing in the High Court (under the transitional arrangements in CJA 2003 Sch 22), whose tariff had been set previously by the executive. The oral hearing was ordered to allow the court to examine the relevance of exceptional progress after conviction to the length of the sentence.

The facts of the original conviction were severe, the defendant having been convicted of three murders of vulnerable elderly people during burglaries. The mitigation, however, was substantial, including, inter alia, the facts that the defendant admitted the burglaries and the killings having offered a plea to manslaughter, that he was very young at the time and that no weapons had been used. The trial judge had recommended 15 years, the Lord Chief Justice had recommended 18 years, but the tariff was set initially at 30 years. The Home Secretary had subsequently reviewed his decision and reset the tariff at 25 years. The case was due for further consideration by the Home Secretary on the basis of the defendant's exceptional progress when the CJA 2003 was passed and the power to set the minimum term was judicalised. By the time the case came to be considered by the High Court, it was accepted on the part of the Crown that exceptional progress had been made, not least because the defendant had progressed to open prison conditions eight years ahead of tariff expiry (such a step only being allowed in truly exceptional cases: *R (Payne) v Home Secretary* [2004] EWHC 581 (Admin), 1 March 2004).

The court was faced with two tasks. The first was to assess the appropriate length of the new minimum term, and the second was to then decide what the appropriate reduction should be for the exceptional progress that had been made. In relation to the first task, Stanley Burnton J considered that the legislation required him to perform an impossible task of taking into account a judicial recommendation for 18 years, an executive term of 25 years and the current sentence which would be whole life. Given that it is not possible to reconcile the different terms, he decided that the appropriate option was to give most weight to the recommendation of the Lord Chief Justice, preferring this to the Home Secretary's view. He felt that, contrary to the views of a Home Office representative, this would be likely to promote more consistency but would also give greater vindication to the spirit of article 6 of the European Convention on Human Rights ('the convention'):

> *20. There is in my judgment a further reason to give greater weight to the judicial recommendations. The determination of the applicant's tariff by the executive arm of government infringed his rights under article 6 of the European Convention on Human Rights. This country's obligations under the convention required his tariff to be determined by the independent judiciary. If it had been, there can be little doubt that it would have been no more than 18 years.*

Stanley Burnton J went on to caution against placing too much store by subsequent increases in sentencing. Although he did not consider that article 7 of the convention required the minimum term to be no longer than the period recommended contemporaneously by the judiciary, he did suggest that 'fairness points against giving substantial weight to subsequent increases in such periods' (para 21).

Turning to the second issue of exceptional progress, it was pointed out that the Home Secretary had tended not to allow for a reduction of more than one or two years on this ground. In addition, progress after conviction could not diminish the seriousness of the offence itself. The conclusion was, therefore, that the CJA 2003 did not authorise any more substantial reductions on this ground than previously allowed and two years should generally be the maximum reduction.

Comment: The decision does not provide the authoritative answer to the vexed question of how the High Court should deal with those cases where there are very wide discrepancies between the views of the judiciary and the executive tariff or the current statutory guidelines. However, the decision does demonstrate the benefit of an oral hearing in allowing the issue to be considered properly and contains a much more rigorous and principled approach to this problem than many of the decisions made on the papers alone. The indication that, in

cases where there is a wide discrepancy, the views of the Lord Chief Justice are likely to be preferred is helpful.

In this case, the 'exceptional progress' application was probably one of the strongest that will come before the courts based on individual change and development as opposed to an application based on a particularly meritorious or courageous act. It is now fairly clear that two years will be the maximum reduction on these grounds. The one irony in the case is that after the helpful statements of principle and the careful consideration given to the particular facts, it is difficult to discern how the final decision was made. The minimum term was set at 19 years, allowing for the correct term to have been 21 years with a two-year reduction for progress. That starting point is roughly in the middle of the Lord Chief Justice's recommendation and the Home Secretary's tariff, despite the comment (set out above) that the former should be preferred over the latter.

Lifers' parole hearings

■ R (Hall) v First Secretary of State

[2005] EWHC 3165 (Admin), 16 November 2005

■ R (Faulkner) v Home Secretary

[2006] EWHC 563 (Admin), 8 February 2006

In these two cases, the duty imposed on the secretary of state to disclose fresh material and advice, which has not been considered by the Board but which he has relied on, was considered.

In the case of *Hall*, the claimant sought to challenge a refusal by the secretary of state to accept a recommendation made by the Board that he should be transferred to an open prison. He is serving a mandatory life sentence for a sexually motivated murder and has previous convictions for sexual offences. At the parole hearing, the Board had received evidence from a Prison Service psychologist and an independent psychologist. The former considered that the claimant still posed a high risk of offending and needed to complete the Sex Offenders Treatment Programme (SOTP). The latter believed that the risk had reduced and the claimant could safely be managed in open conditions. The Board accepted the independent expert's evidence but the secretary of state rejected its recommendation. He relied, in part, on a security report which had not been before the Board nor fully disclosed to the claimant. Following the grant of permission, the report was disclosed and the claimant invited to submit representations and he duly did so. These were rejected and the initial decision upheld.

The claimant complained that the Board should have been consulted before the second decision was made. The court held that there was no general policy requiring such consultation and that fairness did not require such a consultation in this case, not least because the claimant had not asked for his case to be referred back to the Board. The challenge that the decision was irrational on its merits was also dismissed; the court deciding that the secretary of state was entitled to reach a different conclusion from the Board on the evidence.

In *Faulkner*, the claimant, who is serving an automatic life sentence, had also been recommended for a move to open conditions following an oral parole hearing. The Board considered that his work in a therapeutic community was sufficient to reduce risk without any further formal offending behaviour work being undertaken. The Home Secretary was not minded to accept the advice and issued a provisional notification setting out his reasons and inviting further representations before a final decision was reached. The claimant sent a letter before claim. In it he argued that an interval of more than one year before the next parole review would violate article 5(4) of the convention, further arguing that the Home Secretary's reliance on a psychologist's report, which had not been disclosed previously, was procedurally unfair. In response to that letter, the Home Secretary did disclose the report but argued that he had no duty to disclose material that he considered amounted to internal advice. Before the claimant could submit representations, the provisional decision was made final.

The argument that the Home Secretary should not fix a period of greater than 12 months between reviews was dismissed, the court being persuaded that there was no general requirement for reviews to take place annually and that the Home Secretary had, on the particular facts of the case, made out his position that a review after two years was appropriate.

On the procedural fairness issue, the court held that the view of the psychologist did not constitute fresh material but was internal advice. Accordingly, the *Carltona* principle applied and, notwithstanding the fact that the report had been disclosed, there was no obligation on the secretary of state to take such a course of action. The consequence was that there was no obligation on the Home Secretary to refer the case back to the Board for fresh advice in light of the contents of that report (following similar decisions about procedural fairness in earlier parole cases such as *R (Burgess) v Home Secretary*, 3 November 2000, unreported).

Comment: These cases demonstrate that the requirements of fairness are very fluid and that it will always be essential to identify what procedural steps should be taken at the outset. While it is clear that the secretary of state is required to disclose all of the material on which he intends to rely – subject to the exemptions contained in the Parole Board Rules (PBR) 2004 – it will only be necessary to refer cases back to the Board where the prisoner can identify why this step is necessary to ensure fairness. In *Hall*, the fatal mistake seems to have been the failure of the prisoner's solicitors to ask for such a step. The court's comment was that a further referral would not benefit the prisoner as the material was adverse to him. The prisoner was obviously seeking an opportunity to have his representations on the material considered by the Board.

The question of what constitutes advice and what is fresh material remains very unclear in this context. The secretary of state will often seek advice from his internal Offending Behaviour Unit following parole reviews, especially in cases involving disputes about the SOTP. The general position, as outlined in *Faulkner*, seems to be that these reports have the status of internal advice. However, context is everything and there may be circumstances where the secretary of state is required to either disclose the report and/or refer it back to the Board. Examples might include cases where the internal advice differs from the view expressed by the secretary of state at the hearing or where it takes a different view from the prison psychologist's opinion. A number of cases seeking disclosure and re-referral have recently settled at the permission stage when the prison was able to demonstrate that the material differed from that considered by the Board.

■ R (Gardner) v Parole Board

[2005] EWHC 2981 (Admin), 21 December 2005

The requirements of procedural fairness at parole hearings came under scrutiny in this challenge. The claimant was a life-sentenced prisoner who was recalled from life licence after his partner made allegations that he had been violent to her. The Board panel which heard the case decided to receive the partner's evidence without the claimant being permitted to remain in the room, although his counsel was allowed to remain and cross-examine her. The panel upheld the recall decision, relying, in part, on a finding that he posed a serious risk of harming his partner.

The evidence in the case shows that the witness had initially been assured she would

not have to be present in the same room as the claimant. However, despite this assurance, the panel had explored all possible options to enable him to remain in the same room, including the use of screens. It was the witness who was insistent that she would not give any evidence if he remained in the room. In the face of this problem, the judge chairing the panel relied on PBR 2004 r19(6), which permits the prisoner to be excluded from a hearing as his presence would adversely affect the health and safety of his wife.

In his judgment, Munby J found that the Board was acting within the remit of the PBR 2004. Furthermore, the panel did have the general power to regulate its procedure in this manner (as per *Roberts v Parole Board* [2005] UKHL 45, 7 July 2005). In relation to the general compatibility of the decision with the convention, Munby J referred to the long line of article 6 cases which emphasise the degree of flexibility in criminal proceedings, providing the overall result is fair, these cases having been approved domestically. The panel's decision to permit the claimant's counsel to remain to cross-examine was decisive, corresponding closely to a decision made by the European Court of Human Rights (ECtHR) in a criminal trial (*Doorson v Netherlands* 26 March 1996, App No 20524/92; (1996) 22 EHRR 330). Finally, Munby J held that the decision achieved the proper balancing act between the prisoner's rights under article 5(4) and the witness's rights under article 8.

Comment: In light of the *Roberts* decision, it is not surprising that the judgment in this case permitted the evidence to be heard in the absence of the prisoner. It is possible that the determining factor was that the claimant had been unable to indicate how the procedure had prejudiced him given that his counsel had conducted a thorough cross-examination of the witness (unlike in *Roberts* where the starting point was the acceptance that the procedure followed was prejudicial).

There are two aspects of the decision which are more controversial: the finding that a promise made to the witness was a relevant consideration and the fact that the court felt it necessary to balance the article 8 rights of the witness against the right to a fair hearing. Munby J did accept that it was unwise for the assurance to have been given to the witness before the panel itself had the chance to examine the issue with her. He commented that, in future, it might be preferable for a video link to be used. However, overall, he did not consider that this had resulted in an infringement of article 5(4). His decision that article 8 rights were engaged on the part of the witness is the first time this right has been articulated in the parole context in domestic law. Given that the right fell short of articles 2 and 3 – the witness rights engaged in *Roberts* – it is worrying that a qualified right of this nature could be capable of overriding the objective requirements of article 5(4). An appeal is due to be heard by the Court of Appeal in July 2006.

■ R (Wyles) v Parole Board and Home Secretary

[2006] EWHC 493 (Admin), 30 January 2006

The claimant was a mandatory lifer recalled to prison having been charged with an offence of causing grievous bodily harm. He challenged the Board's decision to uphold his recall. He had been acquitted of the further criminal charge, but the Board considered that his behaviour, notwithstanding that it made no finding that he had committed any assault, was sufficient to warrant recall. The claimant had been drinking, was involved in an incident in a bar which resulted in another person requiring 20 stitches to the face and, rather than reporting the matter, 'went to ground'.

The court accepted the Board's submission that there was a sufficient causal link between the claimant's conduct and the original sentence for murder to warrant recall. In other words, it was entitled to conclude that there was a substantial risk of further offences against 'life and limb' being committed if the claimant was at liberty. The judge also held that in a judicial review of the Board's decision in such cases, the court should not decide the case on the merits. Instead, the court is limited to examining whether the Board, within its 'area of discretion', had come to an irrational conclusion.

Comment: The claimant argued that by analogy with *Secretary of State for the Home Department ex p Daly* [2001] UKHL 26, 23 May 2001, as this was a case where the judicial review court was examining a potential breach of convention rights (in this case article 5), the court should make a primary judgment about whether the facts alleged were sufficient to justify recall. The judgment does not contain much analysis about why this argument was rejected. It must be assumed that as the court was examining the decision of the Board, the 'court-like' body constituted by statute to consider whether article 5 is breached when a lifer is recalled to custody, it was considered appropriate to defer to the Board as the primary decision-maker.

Determinate licences and recall

■ Brett Roberts v Home Secretary

[2005] EWCA Civ 1663, 29 November 2005

The claimant was serving an 18-month term of imprisonment. He was released automatically on licence at the half-way point and recalled. Following his re-release on licence, he was again recalled for failing to attend two appointments with his probation officer. Before he was redetained following the revocation of his licence, the claimant provided his probation officer with information confirming that he had good reason for missing the two appointments and the officer forwarded this information to the Home Office with a request that the recall decision should be rescinded.

After his redetention, the claimant made representations to the Board, which recommended his re-release on licence. He was in custody for six days between his return to prison and release. The claimant sought compensation on the basis that this detention was unlawful as it was arbitrary and, therefore, in breach of his rights under article 5 of the convention.

The Court of Appeal, in upholding the decision of the lower court to strike out the claim, held that the detention was not arbitrary; it was settled law that detention during the currency of a fixed-term sentence imposed as punishment, even where the offender was released on licence and recalled, was authorised for the purposes of article 5(1) by the sentence of the trial court (see, for example, *R v Parole Board ex p Smith; R v Parole Board ex p West* [2005] UKHL 1, 27 January 2005).

Furthermore, the statutory process (in CJA 1991 s39) applicable at the time of the claimant's case was not arbitrary. First, it set up a process by which recall was referred to the Board, which had the primary duty to consider whether further detention was justified. Second, the process was capable of permitting representations about recall to be made before the offender's return to custody. This was because the statute made a distinction between 'recall to prison', which triggered the right to make representations, and 'return to prison', which triggered a distinct right to be informed of the reasons for recall and to make representations. Accordingly, a recalled offender had the right to make representations at any stage of the recall process which would have to be referred to the Board for consideration (even though, if not returned to prison, made by an offender who is technically unlawfully at large).

The judge also considered, in deciding that the statutory framework did not necessitate

arbitrary detention, that the Home Secretary (through officials in the Release and Recall Section (RRS)) also had the power to rescind a revocation without referral to the Board, in exceptional circumstances.

On the facts, the judge did not consider that the claimant's redetention was arbitrary notwithstanding the fact that the supervising probation officer had requested that the licence revocation be rescinded before the claimant returned to custody. This was not one of the cases where the Home Secretary would have been under a duty to rescind the revocation without referral to the Board. Although the probation officer had written to the RRS, the claimant had, in fact, made no representations and had not returned to custody. In all the circumstances, it was correct for the matter to be referred to the Board to take all the circumstances into account in deciding whether to re-release the claimant. Moreover, once the referral had taken place there was no undue delay in consideration of the case by the Board.

Comment: Although the power to recall in this case (CJA 1991 s39) no longer exists, the wording of the power to recall lifers (Crime (Sentences) Act 1997 s32) and the new power to recall determinate sentenced prisoners (CJA 2003 s254) make the same distinction between 'recall' and 'return' to prison, with the right to make representations arising with the former. This will only be relevant in exceptional circumstances because, as the court noted, an offender is unlawfully at large once a licence is revoked. However, in some instances, where there is a gross error (for example, as to the offender's identity), it may be appropriate to make representations that the revocation should be rescinded by the Home Secretary or referred urgently to the Board while the offender remains in the community.

■ R v McGuigan

[2005] EWCA Crim 2861,
20 October 2005

The appellant had been convicted of an offence which was committed before the coming into force of the CJA 1991, but was sentenced to ten years' imprisonment afterwards. After his release, he committed a further offence before the expiry of the totality of the ten-year sentence. The court, as well as imposing a sentence for the new offence, ordered him to be returned to prison for a period of 690 days. The order to return is a sentencing power created by the CJA 1991 (distinct from the power to recall an offender for breach of licence conditions), available where the original sentence had been imposed after the coming into force of the Act, notwithstanding the date of commission of the offence. Where a new offence is committed before the expiry of the first sentence, an order to return to prison can be made when sentencing in respect of the fresh offence, the maximum term of which is the length of time between the date of commission of the new offence and the date of expiry of the first sentence.

The appellant contended the imposition of the order to return in his case was unlawful, and that it breached article 7 of the convention, the prohibition on the retrospective imposition of criminal penalties. The Court of Appeal rejected these arguments, notwithstanding the fact that the power to order the return to prison was not available at the date of commission of the offence leading to the original sentence. In relation to the article 7 argument, the House of Lords, in *R v Secretary of State for the Home Department ex p Uttley* [2004] UKHL 38, 22 July 2004, had decided that the article only prohibited a retrospective increase in the maximum available sentence and, in this case, there could be no breach as the maximum sentence available for the first offence was life. Furthermore, there were no grounds for interfering with the order to return as there was nothing to suggest that the availability of the further sanction had not been considered by the court that sentenced the appellant for the original offence as a practice statement had been issued at the time alerting sentencers to the impact of the new arrangements.

Comment: This claimant has lodged an application with the ECtHR on the basis that there are grounds for distinguishing retrospective changes to the amount of time an offender will be subject to a licence within the length of sentence imposed by the court (as was the case in *Uttley*) and the situation here, which involved liability to the imposition of a fresh punitive term of imprisonment by the sentencing court.

■ Buddington v Home Secretary

[2006] EWCA Civ 280,
27 March 2006

The Court of Appeal affirmed the Divisional Court's decision (January 2006 *Legal Action* 23) that prisoners who were released on licence under the provisions of the CJA 1991, before the enactment of the relevant provisions of the CJA 2003 in April 2005, could be recalled to custody under the 2003 Act. The confusion had arisen because the original commencement order was ambiguous in its wording: it appeared only to authorise the recall of such prisoners if the request for recall had been made before 4 April 2005. The appeal accepted that this interpretation operated to the advantage of the prisoner but relied on the principle that the courts should not 'legislate' to fill a void left by parliament, particularly when to do so would restrict the liberty of the subject.

The Court of Appeal rejected the appeal. The principal rationale for its decision was that the overall intention of the legislation was to ensure a uniform system of recall for all prisoners on licence. In those circumstances, it considered that it was both lawful and appropriate to interpret the legislation so as to ensure that it preserves the power to recall the prisoner.

Comment: The decision seems to be, on one level, part of a worrying trend by the courts to read parliamentary intention into legislation to fill holes left by poor parliamentary drafting, even when this operates to deprive liberty (in another context see, for example, *Haw v Home Secretary and another* [2006] EWCA Civ 532, 8 May 2006). However, on the facts of this particular case, even the appellant accepted his interpretation would provide him with an unexpected benefit, effectively freeing him from his licence conditions. Bearing in mind this aspect of the case, the slightly tortuous route taken by the Court of Appeal to ensure the continuity of the licence is perhaps less surprising.

■ R (Stellato) v Home Secretary

[2006] EWHC 608 (Admin),
31 March 2006

A similar problem with the poorly drafted transitional arrangements for the CJA 2003 was examined in this case. The claimant was sentenced under a regime put in place by the CJA 1991, which meant that his licence could not extend beyond the three-quarters point of his sentence. This regime was altered for newly convicted prisoners by the Crime and Disorder Act (CDA) 1998, but this Act stated specifically that it did not operate retrospectively so that the claimant's position remained unaltered. However, under the CJA 2003, once a CJA 1991 prisoner has been recalled, detention can continue until the very end of the sentence (the sentence expiry date (SED)). The claimant pointed to the commencement order addressed in *Buddington*, which appeared specifically to exclude pre-existing licence conditions from the new regime. On this basis, he contended that following his release on his original licence expiry date (LED) at the three-quarters point of his sentence, his licence had expired and the CJA 2003 had specifically not been applied to prisoners in his position.

The Home Secretary's interpretation of the legislation was that it intended to provide a new and uniform regime for all prisoners recalled from their licences after 4 April

2005. Consequently, following a lawful recall, the new statutory regime required all re-releases to be on licence. He contended that the commencement order did not seek to disapply the new legislation in relation to licence conditions, but was concerned with operation of licences where no recall had taken place.

The Divisional Court adopted the approach in *Buddington* and held that the intention of the legislation was to provide a single regime for the control of licences. Thus, even though the commencement order appeared to state specifically that the provisions of CJA 2003 s249 – relating to the duration of licences – do not apply, this was overridden by the impact of the recall decision which brought the prisoner within the control of ss254 and 256, which provide for any future release to be on licence until the SED.

Comment: Although the case appears to follow the *Buddington* judgment, there is very little analysis of the law and the implications are potentially more worrying. First, the commencement order appears, on first sight, to produce the opposite effect to the interpretation given to it by the court. Second, the effect it is given operates to the detriment of the prisoner by extending his licence from LED to SED. It is not at all clear how this intention can be derived from the statutory regime, in contrast to the *Buddington* view which simply preserved the pre-existing situation. Leave to appeal was given by the Divisional Court and an appeal hearing is due in October 2006.

Offenders 'unlawfully at large'

■ R (Lunn) v Governor of HMP Moorland

[2006] EWCA Civ 700, 25 May 2006

The appellant challenged the Divisional Court's finding (see February 2006 *Legal Action* 23) that he had been unlawfully at large (UAL), within the meaning of Prison Act 1952 s49, at a time when he was on licence in the community after being released early because of a mistake by the sentencing court in drawing up the order for imprisonment.

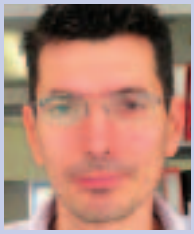
On conviction for burglary, L was given a sentence of two-and-a-half years' imprisonment, together with an order to return to prison for 813 days, which had to be served consecutively. In the order for imprisonment, the court wrongly identified the two terms as having been ordered to run concurrently. The appellant was then released on licence and was in the community for 65 days before he was returned to prison after a valid amendment to the order.

In judicial review proceedings, the appellant sought to establish that the days spent on licence in the community should count towards his sentence, on the basis that he was not UAL within the meaning of s49. The Divisional Court refused the claim. It held that the licence was effectively ultra vires, as the court's mistake could not alter the statutory release dates calculated by reference to the sentence of the court.

The Court of Appeal allowed the appeal primarily on the basis that '… the statutory provisions governing the early release of prisoners are concerned with the administration of criminal justice in general; it is the order of the court which provides authority for the detention and imprisonment of the person named in it, not the statutory provisions as such, although they are engaged once such an order has been made and dictate the manner in which the order is carried into effect' (Moore-Bick LJ at paragraph 15). The governor was, therefore, right to release the appellant on licence if this was how the early release provisions applied to the order of the court. Conversely, where a governor detains a prisoner in accordance with the court order then this will be a defence to false imprisonment until such time as the order is set aside (see *Olotu v Home Office* [1997] 1 WLR 328, which can be contrasted with *R v Governor of Brockhill Prison ex p Evans (No 2)* [2001] 2 AC 19, where the valid order of the court was misinterpreted by the governor where, although the error was in good faith, such a cause of action did lie).

Accordingly, the appellant was not UAL within the meaning of s49 when he was released. However, this changed once the order of the court was corrected, as this superseded the licence issued by the governor. As there were three days between the correction of the order and the return of the appellant to custody, only for this period could he be considered UAL. The court rejected the governor's submission that the corrected order operated retrospectively in this context, first, as the case involved the liberty of the subject, but second, and more importantly, because the wording of s49 states that it is only if the offender is currently liable to be detained by reference to the order of the court that s/he can be UAL.

Comment: The Court of Appeal's focus on the actual order of imprisonment, as issued by the court, as the authority for detention is consistent with an approach which puts good administration of the criminal justice system at its heart. However, it does mean that the intention of the sentencing court can be frustrated by administrative error.



Hamish Arnott and Simon Creighton are solicitors at Bhatt Murphy solicitors, London.

Gypsy and Traveller law update

Chris Johnson, Dr Angus Murdoch and **Marc Willers** continue their series of articles on the law as it relates to Gypsy and Traveller communities. The last update appeared in September 2005 *Legal Action* 18. This is Part 1 in a series of three articles on developments in this area of law, and will concentrate on the new planning regime and government guidance on the provision of sites for Gypsies and Travellers published in February 2006.[1] Part 2 will be published in August 2006 and will conclude the developments in planning law as it affects Gypsies and Travellers with special emphasis on recent court decisions. It will also look at developments affecting official sites. Part 3 will be published in September 2006 and will look at developments in the law affecting evictions from unauthorised encampments and homelessness. The authors welcome case notes and comments from readers.

INTRODUCTION

Gypsies and Travellers continue to face high levels of discrimination in the UK and experience particular difficulty when trying to obtain planning permission for caravan sites to meet their accommodation needs. These difficulties were highlighted in *Gypsies and Travellers: Britain's forgotten minority* [2005] EHRLR 335, an article written by Sarah Spencer, one of the Commissioners for Racial Equality:

In 1997, 90 per cent of planning applications from Gypsies and Travellers were rejected, compared to a success rate of 80 per cent for all other applications … 18 per cent of Gypsies and Travellers were homeless in 2003 compared to 0.6 per cent of the population … Lacking sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted … Overt discrimination remains a common experience … There is a constant struggle to secure the bare necessities, exacerbated by the inability of many adults to read and write, by the reluctance of local officials to visit sites, and by the isolation of these communities from the support of local residents … But we know that these are communities experiencing severe disadvantage. Infant mortality is twice the national average and life expectancy at least 10 years less than that of others in their generation.[2]

Nevertheless there have been some radical changes in the law and policy relating to the provision of Gypsy caravan sites in the past year, and it may be that those developments will help improve the lives of Gypsies and Travellers in the future.

PLANNING

Probably the most significant changes have come as a result of new planning legislation and the recent publication of government policy on the provision of caravan sites for Gypsies and Travellers.

Planning and Compulsory Purchase Act 2004

Statutory changes to the planning system were introduced by the Planning and Compulsory Purchase Act 2004 and those provisions are now in force and being implemented. The Act provides that the old two-tier system of structure and local plans will be replaced with:

- 'regional spatial strategies' (RSSs), which must set out the secretary of state's policies in relation to the development and use of land within the region; and
- 'local development frameworks', which are effectively a folder of local development documents, which provide the framework for delivering the spatial planning strategy for the area.

We examine how the system should work with respect to the provision of Gypsy and Traveller sites later in this article.

Planning applications for Gypsy sites

Generally, changes to the use of land – such as stationing a caravan for residential purposes – require planning permission. Gypsies and Travellers must therefore apply to their local planning authority (LPA) for planning permission if they wish to live on their land in caravans or mobile homes: *Restormel BC v Secretary of State for the Environment* [1982] JPL 785.

However, the vast majority of planning applications made by Gypsies and Travellers are refused by LPAs, despite government advice in Department of the Environment Circular 1/94, *Gypsy sites and planning*, which encouraged them to make their own provision.

If planning permission is refused by a LPA, a Gypsy or Traveller has the right to appeal against the decision. Appeals are usually decided by a planning inspector following a planning inquiry but are sometimes 'called in' for determination by the Secretary of State for Communities and Local Government.

Changes in government policy: Circular 01/06

On 2 February 2006, the government issued Office of the Deputy Prime Minister (ODPM) Circular 01/06, *Planning for Gypsy and Traveller caravan sites*, which replaced Circular 1/94.[3] The government decided that it was necessary to issue new planning advice because the evidence showed that Circular 1/94 had failed to provide adequate sites for Gypsies and Travellers in many areas of England over the past 12 years.

The new national policy will have to be taken into account by all those deciding applications for planning permission for Gypsy sites and is also material in cases where a local planning authority seeks to enforce planning control.

In Circular 01/06 paragraph 5, the government refers to the poor health and low level of educational attainment among Gypsies and Travellers and expresses the view that the Circular should enhance their health and education outcomes.

In paragraph 12, the government indicates that it is intended that Circular 01/06 will, inter alia:

- create and support sustainable, respectful and inclusive communities where Gypsies and Travellers have fair access to suitable accommodation, education, and health and welfare provision;
- reduce the number of unauthorised encampments and developments;

■ increase significantly the number of Gypsy and Traveller sites in appropriate locations with planning permission in order to address under-provision over the next three to five years;
■ recognise, protect and facilitate the traditional travelling way of life of Gypsies and Travellers, while respecting the interests of the settled community;
■ underline the importance of assessing needs at regional and sub-regional level and for local authorities to develop strategies to ensure that needs are dealt with fairly and effectively;
■ identify and make provision for the resultant land and accommodation requirements;
■ promote more private Gypsy and Traveller site provision in appropriate locations through the planning system, while recognising that there will always be those who cannot provide their own sites;
■ help avoid Gypsies and Travellers becoming homeless through eviction from unauthorised sites without an alternative to move to.

Circular 01/06 explains how the new planning system will work in the context of the provision of Gypsy sites. It makes it clear that local authorities should begin by assessing the accommodation needs of Gypsies and Travellers and produce Gypsy and Traveller Accommodation Assessments (GTAAs).

At the same time as publishing Circular 01/06, the ODPM also published *Gypsy and Traveller accommodation assessments: draft practice guidance*.[4] This guidance will be finalised once the definition of 'Gypsy' for the purposes of GTAAs under the Housing Act 2004 has been resolved. The ODPM's suggested definition was published at the same time and is:

Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, and all other persons with a cultural tradition of nomadism and/or caravan dwelling.

The intention of the definition is to include ethnic Gypsies and Travellers who are currently living in housing within GTAAs (the consultation period has now ended and the finalised definition is awaited).[5]

The information from GTAAs will be fed to Regional Planning Bodies (RPBs), which will then be responsible for preparing RSSs which will identify the number of pitches required (but not their location) for each LPA.

It is then for individual LPAs to produce their own Development Plan Documents (DPDs), which set out site-specific allocations for the number of pitches that the RSSs have specified they need to accommodate within their areas. LPAs will need to demonstrate that sites are suitable and that there is a realistic likelihood that specific sites allocated in DPDs will be made available for that purpose. DPDs will also need to explain how the land required will be made available for a Gypsy site and the timescales for such provision.

All DPDs are subject to independent examination by an inspector whose conclusions will be binding. Where a LPA fails to allocate sufficient sites for the needs of Gypsies and Travellers, which have been identified by the RSS, the inspector can recommend that a DPD is altered to include additional sites. The secretary of state also has default powers.

On top of site-specific allocations, Circular 01/06 para 31 requires LPAs to formulate a criteria-based policy for Gypsy and Traveller sites that will be used to guide the allocation of sites in the DPD and to judge 'windfall' applications that were not foreseen in the DPD process – such as applications from Gypsies who move into the area after the DPD has been produced. Paragraph 32 states that criteria-based policies must be 'fair, reasonable, realistic and effective in delivering sites'. They cannot be used as an alternative to site allocations in DPDs in areas where there is an identified need for pitches.

Transitional arrangements

Clearly, it will take some time for LPAs to complete GTAAs; for RPBs to produce RSS which accurately identify the number of pitches that individual LPAs should be required to provide, and for LPAs to then adopt site-specific DPDs. Paragraph 43 of Circular 01/06 states that where there is a clear and unmet need for additional site provision, LPAs should bring forward DPDs containing site allocations in advance of the regional consideration of pitch numbers and completion of their GTAAs.

Temporary planning permission

Circular 01/06 para 45 refers to the advice in paragraph 110 of Circular 11/95, *The use of conditions in planning permission* – that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of temporary permission – and indicates that where there is unmet need, but no available alternative Gypsy and Traveller site provision in an area, and there is a reasonable expectation that new sites are likely to become available at the end of that period which will meet that need, LPAs should give consideration to granting temporary planning permission.

Paragraph 46 states that, in such circumstances, LPAs 'are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified'. There have already been a number of cases where planning inspectors have granted temporary planning permission for a period that corresponds with the time that it is anticipated it will take for LPAs to prepare their site-specific DPDs.

Gypsy status

The issue of who qualifies as a Gypsy or Traveller is also dealt with in Circular 01/06. Romani Gypsies are recognised as members of an ethnic group to whom the provisions of the Race Relations Act (RRA) 1976 apply: see *Commission for Racial Equality v Dutton* [1989] 2 WLR 17. Irish Travellers have also been recognised as members of a separate ethnic group that ought to be protected from discrimination by the RRA: see *O'Leary v Allied Domecq*, (2000) 29 August, unreported, Central London County Court.

However, in order to benefit from the positive planning advice in Circular 1/94, it was not enough for a person to show that s/he was an ethnic Romani Gypsy or Irish Traveller. A person seeking planning permission for a Gypsy caravan site had to show that s/he came within the statutory definition of the word 'Gypsy' under Caravan Sites and Control of Development Act 1960 s24, as amended by Criminal Justice and Public Order Act 1994 s80: '… "Gypsies" means persons of nomadic habit of life, whatever their race or origin …'.

In *R v South Hams DC ex p Gibb* [1994] 4 All ER 1012, the Court of Appeal indicated that the term 'nomadic' within the statutory definition should be read in such a way that a person claiming 'Gypsy status' must travel for an economic purpose. References to 'Gypsies' in Circular 1/94 were references to those people who fell within the statutory definition.

For many years, the issue of 'Gypsy status' has been hotly contested at both planning appeals and in the courts. The absurdity of the position faced by those seeking planning permission for Gypsy sites was exemplified by the Court of Appeal's judgment in *Wrexham CBC v (1) National Assembly for Wales (2) Michael Berry (3) Florence Berry* [2003] EWCA Civ 835, 19 June 2003, when it quashed a decision made by a planning inspector that a person who was born a Gypsy, but who was no longer nomadic because of poor health and infirmity,

remained within the statutory definition. The Court of Appeal held that where Gypsies and Travellers 'have retired permanently from travelling for whatever reason, ill health, age or simply because they no longer wish to follow that way of life, they no longer have a "nomadic habit of life"'.

Thankfully, the government has now tackled this anomaly by defining 'Gypsies and Travellers' for the purposes of Circular 01/06 as:

Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such.

Location of sites

In Circular 01/06 paragraph 47, the government recognises that Gypsies and Travellers in rural areas often face difficulties in securing an adequate supply of affordable land for their needs, while in paragraph 54 the government indicates that:

Rural settings, where not subject to special planning constraints, are acceptable in principle. In assessing the suitability of such sites, local authorities should be realistic about the availability, or likely availability, of alternatives to the car in accessing local services. Sites should respect the scale of, and not dominate, the nearest settled community. They should also avoid placing an undue pressure on the local infrastructure.

It should also be noted that important advice on sustainability can be found in paragraphs 64–65 and that advice on highway safety considerations can be found in paragraph 66.

Green belts

Paragraph 3 of *Planning policy guidance 2: green belts* (PPG 2) states that there is a general presumption against inappropriate development within the green belt and paragraph 3.2 states that inappropriate development is, by definition, harmful to the green belt and should not be approved, except in 'very special circumstances'. It is for the applicant to justify inappropriate development and 'very special circumstances' will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

Gypsy and Traveller sites are not categorised as 'appropriate development' and, in practice, a Gypsy or Traveller seeking planning permission for a site within the green belt will have to show that there are 'very special circumstances' – such as a pressing need for further sites and/or that their personal circumstances justify the grant of planning permission.

In both *Doncaster MBC v Secretary of State for the Environment, Transport and Regions* [2002] EWHC 808 (Admin), 10 April 2002 and *R (Chelmsford BC) v First Secretary of State and Draper* [2003] EWHC 2978 (Admin), 25 November 2003, Sullivan J emphasised the importance of the guidance in PPG 2 and, in *Doncaster*, he stressed that it is important that the need to establish the existence of '"very special circumstances" … is not watered down'.

However, in the cases of *South Bucks DC and another v Porter* [2004] UKHL 33, 1 July 2004, *R (Dartford BC) v First Secretary of State and Lee* [2004] EWHC 2549 (Admin), 26 October 2004, and *R (Basildon DC) v First Secretary of State and Temple (interested party)* [2004] EWHC 2759 (Admin), 8 November 2004, the courts have upheld decisions made by the First Secretary of State and his inspectors to grant planning permission to Gypsies residing in the green belt on the basis that the need for additional sites, coupled with their personal circumstances, amounted to 'very special circumstances' that clearly outweighed the harm to the green belt by reason of inappropriateness and any other harm.

Circular 01/06 paragraph 48 reminds us that there is a general presumption against inappropriate development within the green belt and that Gypsy sites are themselves usually considered to be inappropriate development. In these circumstances, the new Circular suggests that alternatives should be explored before green belt locations are considered. The degree to which a Gypsy or Traveller seeking to develop a caravan site in the green belt must search for more suitable sites was recently considered by the Court of Appeal in *First Secretary of State and another v Simmons* [2005] EWCA Civ 1295, 3 November 2005.

However, in Circular 01/06 paragraphs 50–51, the government recognises that in some areas, such as those which are washed-over by the green belt, it will be impossible to locate sites outside the area designated as green belt; and that where there is an identified need for additional sites, it would be possible for the LPA to alter the green belt boundary in order to accommodate sites within it.

1 Office of the Deputy Prime Minister Circular 01/06, *Planning for Gypsy and Traveller caravan sites; Gypsy and Traveller accommodation assessments: draft practice guidance;* and *Definition of the term 'gypsies and travellers' for the purposes of the Housing Act 2004. Consulation, February 2006* are available at: www.odpm.gov.uk.
2 In May 2006, the Commission for Racial Equality published *Common ground: equality, good race relations and sites for Gypsies and Irish Travellers*, an important report into equality, race relations and sites for Gypsies and Travellers. The report makes a number of important recommendations for the government, local authorities, the police, other public authorities and voluntary sector organisations [p20].The report is available at: www.cre.gov.uk/ commonground_report.pdf.
3 See note 1.
4 See note 1.
5 See note 1. Also, on 2 February 2006, the ODPM published *Local authorities and Gypsies and Travellers: guide to responsibilities and powers* and, in conjunction with the Home Office, the *Guide to effective use of enforcement powers: Part 1: unauthorised encampments*. Part 2 of this guidance will deal with unauthorised developments and is awaited. Part 1 will be examined, in detail, in the third article in this series.



Chris Johnson is a solicitor and partner of Community Law Partnership. He is head of the firm's Travellers' Advice Team. Dr Angus Murdoch is a Travellers Planning Adviser at Community Law Partnership. Marc Willers is a barrister at Garden Court Chambers, London WC2. Chris Johnson and Marc Willers are the editors of *Gypsy and Traveller Law*, LAG, August 2004, £29. Dr Angus Murdoch is one of the contributing authors of *Gypsy and Traveller Law*.

Articles 2 and 3 of the European Convention on Human Rights: the investigative obligation – Part 2

Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention on Human Rights ('the convention') rank as two of its most fundamental provisions, enshrining basic values of the democratic societies making up the Council of Europe. In Part 2 of a two-part series, Kristina Stern and Saimo Chahal look at the jurisprudential basis of the investigative obligation and recent developments in case-law, comparing medical negligence cases with near miss and deaths in custody cases. Part 1 was published in June 2006 *Legal Action* 30.

The jurisprudential basis of the investigative obligation

An issue arises about the jurisprudential basis of the investigative obligation under articles 2 and 3. What has not yet been finally established by the UK courts is whether or not the investigative obligation is only owed in cases where there is an arguable breach of either domestic laws for protecting life or the article 2 substantive obligation, or whether the investigative obligation is a free-standing obligation under articles 2 and 3, which is part of the general requirements of both these articles to protect life by putting in place procedures that make the state accountable where life has been taken within its control.

In *Salman v Turkey* 27 June 2000, App No 21986/93; (2000) 34 EHRR 425 (a case of injuries and death sustained during prison custody) the European Court of Human Rights (ECtHR) held at paragraph 99 that: '… where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused …'

The justification for such an obligation is set out at paragraph 105 of *Jordan v UK* 4 May 2001, App No 24746/94 as being: '… in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.

At paragraph 144 of *Jordan*, the ECtHR elaborates that:

Proper procedures for ensuring the accountability of agents of the state are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations …

This was reiterated in *Edwards v UK* 14 March 2002, App No 46477/99; (2002) 35 EHRR 19 at paragraph 69.

In *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, 16 October 2003; [2004] 1 AC 653, the House of Lords considered the investigative obligation in the context of the death of a prisoner at Feltham Young Offenders Institution, who was killed by his cell mate. Lord Bingham (at paragraph 20(3)) quoted from *Salman* at paragraph 99 (set out above) and held that this established the important proposition that: 'Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman*, paragraph 100; *Jordan*, paragraph 103.'

At paragraph 31, Lord Bingham specifically recognised that: the investigative obligation arises where a death has occurred or life-threatening injuries have occurred. The purpose of the investigation is to ensure that so far as possible the full facts are brought to light, that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

Also, in *Menson and others v UK* 6 May 2003, App No 47916/99, the ECtHR held that:

The court observes that the applicants have not laid any blame on the authorities of the respondent state for the actual death of Michael Menson; nor has it been suggested that the authorities knew or ought to have known that Michael Menson was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against that risk. The applicants' case is therefore to be distinguished from cases involving the alleged use of lethal force either by agents of the state or by private [bodies] with their collusion … [see, for example, McCann and others v UK *27 September 1995, App No 18984/91,* Jordan *or* Shanaghan v UK *4 May 2001, App No 37715/97] in which the factual circumstances imposed an obligation on the authorities to protect an individual's life, for example where they have assumed responsibility for his welfare … [see, for example,* Edwards*], or where they knew or ought to have known that his life was at risk …* [see, for example, *Osman v UK* 28 October 1998, App No 23452/94].

These authorities provide support for the contention that the investigative obligation arises in any case where death or a near miss occur in state custody, or by reason of the state's use of force. They also suggest that the obligation arises by reason of a breach of the procedural obligations to protect life and to ensure accountability for deaths, ie, it arises without the need for any arguable case of breach of the substantive requirements of article 2 or of domestic law being shown.

Medical negligence cases

The cases set out above must be considered in the light of the Court of Appeal's decision in *R (Takoushis) v Coroner for Inner North London* [2005] EWCA Civ 1440, 30 November 2005 – a case of death flowing from alleged medical negligence. In this case, the Court of Appeal held that:

- if the procedural obligation was linked to the positive obligation in article 2, the investigative obligation would be very limited;
- the need for an effective investigation was not limited to those cases where there was a potential breach of the positive obligations to protect life, but that where agents of the state potentially bear responsibility for the loss of life, the events should be subject to an

effective investigation;
- in order to comply with article 2, the state must set up a system which involves a practical and effective investigation of the facts. But there is not an independent obligation on the state to investigate every case in which it is arguable that there was, for example, medical negligence;
- the obligation is to establish a framework of legal protection, including an effective judicial system for determining the cause of death and any liability on the part of the medical professionals involved;
- the fact that the state has made it possible in law for a family to bring a civil action in negligence will not be a sufficient discharge of the state's obligation in every case. This may be because litigation is not practical or because liability has been admitted;
- where a person dies as a result of what is arguably medical negligence, the state must have a system which provides for the practical and effective investigation of the facts and for the determination of civil liability. Unlike in the cases of deaths in custody, the system does not have to provide for an investigation initiated by the state, but may include such investigation. The question in each case is whether or not, on the facts, there has been compliance with the obligation to provide the potential for a practical and effective investigation of the facts and the determination of civil liability;
- a system which provided only for civil liability, and not an inquest, may not be sufficient. However, a system which included a *Middleton*-compliant inquest would be sufficient;* and
- a clear distinction can be drawn between the clinical negligence cases and the custody cases.

Takoushis appears to reinforce the case-specific nature of the investigative obligation – one cannot know whether or not sufficient investigation has been put in place until such time as the reality of the investigation afforded by civil litigation has been ascertained (ie, is public funding available? Will the case settle? etc). Moreover, the effect of *Takoushis* on cases of life-threatening injuries in the clinical negligence context has yet to be ascertained. A further question arises about the threshold requirement, ie, does an arguable case for negligence have to be shown, or is it sufficient that the death or injuries occurred while under the care of the medical profession?

Near miss cases

In *R (D) v Secretary of State for the Home Department* [2005] EWHC 728 (Admin), 28 April 2005; [2006] EWCA Civ 143, 28 February 2006, Munby J, at first instance, and subsequently the Court of Appeal, considered a case where a prisoner had made a serious suicide attempt while in custody, as a result of which he suffered permanent and disabling brain damage. In this case, on the basis that D was a prisoner who was known to be a real and immediate suicide risk, the seriousness of the incident and its consequences, and the existence of issues about whether more could have been done to deal with the risk, the secretary of state accepted that the investigative obligation under articles 2 and 3 was triggered. The question that arose was what, in the light of this, was required in order to satisfy the obligation.

By his order and judgment Munby J decided that what was proposed by the Treasury solicitor in this case, ie, a private investigation by the Prisons and Probation Ombudsman (PPO), would not fulfil the article 2 obligation. He also decided that the potential for D to take civil proceedings was not relevant to the satisfaction of the articles 2 and 3 investigative obligation in this case. In his judgment and declarations, he set out the minimum requirements which would be necessary.

Munby J held that:
- Given the jurisprudential basis of the state's investigative obligation under article 2, there was no logical justification for treating a 'near miss' suicide attempt differently from that of a death in custody;
- In significant respects the investigation by the PPO, proposed by the secretary of state, failed to meet the state's obligations under the convention;
- The investigation culminating in the report, dated 22 July 2002, from the Senior Investigating Officer within the Prison Service, could play only a minimal contribution towards satisfaction of the state's investigative obligation;
- The availability of civil proceedings is irrelevant to satisfaction of the state's investigative obligation under article 2 in the case of a death or near miss in custody;
- In determining what the minimum requirements are one has to have regard to the circumstances surrounding D's suicide attempt: the fact that it was accepted that, at that time, he was known by the prison authorities to be a real and immediate suicide risk, the seriousness of the incident and its consequences, and the existence of issues about whether more could have been done to deal with the risk;
- This judgment should not be read as saying that the kind of inquiry which the circumstances of the present case required would be needed in every case of attempted suicide in custody, let alone in cases of non-suicidal self-harm;
- The inquiry should be in public (except where there are convention-compatible reasons to hear the evidence of a particular witness, or other parts of the hearing, in private);
- The inquiry should be set up so that it is capable of being given the necessary power to compel the attendance of witnesses;
- D's representatives must be able to attend all public hearings of the inquiry and put questions to witnesses directly;
- D's representatives should be provided with reasonable access to all relevant evidence in advance; and
- The funding offered by the secretary of state to D's representatives should be adequate, should not have inappropriate conditions attached and should be at such a level so as to allow D to be involved in the investigative procedure to the extent necessary to satisfy his legitimate interests.

On appeal, the secretary of state did not seek to draw any distinction about the requirements of articles 2 and 3 between cases where death was or was not caused, but sought to argue that it is not necessary in every case of death or near miss in custody to have a public hearing with power to compel witnesses. Thus, the secretary of state argued that while in the UK inquests are in fact required to be held where there is a death in custody, that is not required as a matter of ECtHR's jurisprudence.

The Court of Appeal allowed the appeal only to the extent that it said that it was not necessary for D's representatives to have the right to cross-examine witnesses at the public hearing in order for the investigation to comply with articles 2 or 3 (bearing in mind that they were to be involved in the proposed procedure in any event). The Master of the Rolls elaborated on what a public hearing might involve (para 24) and clearly held that a public hearing was necessary in order to comply with article 2. The secretary of state's application for leave to appeal to the House of Lords was refused.

The two lines of authority

A distinction has thus been maintained both in ECtHR's and domestic cases between an obligation adjectival to article 2 to make judicial redress available if state agents may have been involved in a death, for example, in clinical negligence cases (such as *Powell v UK* 4 May 2000, App No 45305/99 and *Calvelli and Ciglio v Italy* 17 January 2002, App No

32967/96), and cases arising out of a death in custody or a 'near miss' incident in custody, in which case there must be compliance with the principles set out in *Jordan*, *Edwards* and *Amin*. The custody cases have been specifically distinguished from cases arising in other contexts in this regard.

Moreover, the scope of the obligation, as identified in *Powell*, is quite different to that which arises in the custody context. It is an obligation to establish an effective independent system for establishing the cause of death and any liability on the part of health professionals (*Powell* at p18 and *Calvelli and Ciglio* at para 49). There is no obligation to ensure that an investigation takes place in every case. Thus, in *Powell*, there was no scope to complain of a breach of article 2 given that the claimants had decided to accept compensation in settlement of a civil claim based on medical negligence. Such a determination stands in stark contrast to the approach of the ECtHR in cases arising out of the use of force by state agents, or from death or life-sustaining injuries sustained in state custody.

In the domestic courts, in *Goodson v HM Coroner for Bedfordshire and Luton* [2004] EWHC 2931 (Admin), 17 December 2004, and *Takoushis*, it is accepted that different principles apply to establish what is required by way of articles 2 and 3 depending on whether or not the death (or, it would follow, near miss) occurred in custody or in the context of clinical negligence.

Unanswered questions

A number of questions remain for the courts considering the scope or content of the investigative obligation under articles 2 and 3:

- To what extent is it necessary to show a breach of the protective obligation, or an arguable breach, before the obligation arises?
- To what extent is it necessary to show an arguable breach of domestic law before the obligation arises?
- What other limits are there on the scope of the obligation?
- To what extent does convention authority, which emphasises the importance of context, apply in domestic law?
- What precisely is meant by a public hearing – in particular, which parts of the investigative process have to be subject to public scrutiny and which parts are pre-hearing information gathering?

* *R v HM Coroner for the Western District of Somerset and another ex p Middleton* [2004] UKCIO, 11 March 2004.

Kristina Stern is a barrister at 39 Essex Street, London and Saimo Chahal is a partner in the Public Law and Human Rights Department at Bindman and Partners, London.

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 and lower courts relevant to housing. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Eligibility for housing

In England, the eligibility rules for both homelessness assistance and council housing allocation changed on 1 June 2006 when the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 came into force. The new regulations prescribe the classes of people from abroad who are ineligible (or eligible) for an allocation of housing accommodation under Housing Act (HA) 1996 Part 6 and for homelessness assistance under HA 1996 Part 7. A useful separate *Explanatory memorandum* appears on the Office of Public Sector Information website outlining the changes.[1] Three features of the new regulations should be noted:

- They do not apply to applications made to local housing authorities before 1 June 2006;
- They revoke (presumably in error) Homelessness (England) Regulations 2000 SI No 701 reg 6 (which designates five years as the relevant period for the local connection provision in HA 1996 s198(4)(b)); and
- They do not apply in Wales.

Although the Welsh Assembly government is considering similar regulations for Wales, there may be at least a short period in which those who would be found 'ineligible' if they applied to English authorities may find themselves 'eligible' in Wales even if any consequent duty to accommodate under HA 1996 s193 is then 'transferred' to an English authority under local connection provisions.

Gypsies and Travellers

A new Gypsy and Traveller Enforcement Task Group (chaired by Sir Brian Briscoe) held its first meeting in May 2006. It draws together key agencies to address wide variations in the use of enforcement powers. It will monitor the operation of Temporary Stop Notices, introduced in March 2005, intended to prevent the development of unauthorised Gypsy and Traveller sites. The group will also seek to underline the importance of adequate site provision as a key to effective enforcement: Department for Communities and Local Government (DCLG) news release 2006/0017 (25 May 2006). See also page 20 of this issue.

Mobile homes

On 10 May 2006, the government began consulting on proposed changes to the maximum rate of commission that park owners can charge on the sale of a mobile home. *Consultation paper on park home commission rate* can be downloaded from the DCLG website. The consultation period closes on 2 August 2006: DCLG news release 2006/0003.[2]

Also, in May 2006, the government published a draft of the Mobile Homes Act

1983 (Amendment of Schedule 1) (England) Order 2006. The Order, which is intended to be brought into force in October 2006, requires an affirmative resolution of both Houses of Parliament. It would amend the terms implied into agreements for the stationing of mobile homes on park sites in England.

Possession statistics

The official statistics for court business for 2005 in England and Wales were published in May 2006. They show a substantial increase in the number of possession claims started in the county courts (including a 48.7 per cent increase in the number of mortgage possession claims): *Judicial statistics: annual report* 2005, Cm 6799, 2006.[3]

Fire safety

On 6 March 2006, the government confirmed that the delayed commencement date of the Regulatory Reform (Fire Safety) Order 2005 SI No 1541, made in June 2005, would be 1 October 2006: ODPM news release 2006/0034.

Information about council housing

On 4 May 2006, the deputy information commissioner issued a decision notice under the Freedom of Information Act (FOIA) 2000 requiring Mid Devon DC to disclose the addresses of its council houses.[4] That information had been sought by a local councillor who wished to conduct a mail-shot to council tenants in relation to a stock transfer proposal. An original request for the tenants' names had not been pursued on review. No similar application could have been made after the stock transfer because the FOIA does not apply to housing associations.

PUBLIC SECTOR

Postponed possession orders

■ Bristol City Council v Hassan; Bristol City Council v Glastonbury

[2006] EWCA Civ 656, 23 May 2006[5]

A solicitor representing secure tenants in possession claims based on rent arrears argued that suspended possession orders should be in a form which did not specify a date for possession, in order to avoid the tenants becoming tolerated trespassers immediately on any breach. Two district judges held that the court had no jurisdiction to make suspended possession orders in any form other than Form N28. The defendants appealed. HHJ Darlow transferred the appeals for hearing in the Court of Appeal under Civil Procedure Rules (CPR) 52.14 because the cases raised important points of principle.

The Court of Appeal allowed the tenants' appeals. After reviewing a number of authorities (including *McPhail v Persons Unknown* [1973] 1 Ch 447, CA and *American Economic Laundry Ltd v Little* [1950] 2 All ER 1186, CA) and statutes, the court held that:

- it is not obligatory for the court to use Form N28 in any given case. CPR 4 provides that 'a form may be varied by the court or a party if the variation is required by the circumstances of a particular case';
- judges are not obliged to set out an absolute date for possession on the face of their orders; and
- although it is not:

necessary or appropriate to give a fair wind to any procedure which will require a further hearing before a date for possession can be fixed, with all the attendant expense and delay that this might involve, [it] would … be sufficient for possession to be postponed on the terms that if a claimant landlord wishes a date to be fixed, it must write to the defendant giving details of the current arrears and its intention to request a date to be fixed at least 14 days before it makes that application. If the tenant does not respond, or if the landlord wishes to apply for a date to be fixed notwithstanding the tenant's response, it will then be at liberty to apply to the court on a 'without notice' basis requesting a date to be fixed. With its application the landlord must submit to the court a copy of its letter (and the tenant's response, if any), together with a copy of the rent account since the date of the order postponing possession. Other evidence will seldom be required (para 37).

It is both lawful and appropriate to make an order along the lines shown in the box below.

What order the court will in fact make in any case will be a matter for the discretion of the judge on that occasion, although the [Department for Constitutional Affairs (DCA)] working party (and in due course the Rules Committee) will no doubt wish to prescribe or recommend simple forms of alternative order for the use of courts. If a tenant has a particularly bad record of payment, for instance, but is not yet deserving of an outright possession order, the court might wish to make an order along the lines of the current form N28, although the use of the phrase 'in addition to your current rent' would be inapposite since the contractual tenancy would have been brought to an end by the making of the order (para 43).

Comment: It is impossible to over-emphasise the importance of this case. Without any legislation or change in the rules, the Court of Appeal has overcome the twin problems of tolerated trespassers and the current Form N28 identified in *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; (2006) *Times* 15 March; April 2006 *Legal Action* 31. If courts follow the form of order set out in the box below, secure tenancies will not terminate automatically on the making of suspended possession orders or indeed on breach of postponed possession orders. There will be far fewer tolerated trespassers.

Understandably, the Court of Appeal did

1 The defendant is to give up possession of [address] to the claimant.

2 The date on which the defendant is to give up possession of the property to the claimant is postponed to a date to be fixed by the court on an application by the claimant.

3 The defendant must pay the claimant £[_____] for rent arrears and £[_____] for costs. The total judgment debt is £[_____] to be paid by instalments as specified in paragraph 4 below.

4 The claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's tenancy so long as the defendant pays the claimant the current rent together with instalments of £[_____] per week towards the judgment debt.

5 The first payment of the current rent and the instalment must be made on or before [date].

6 Any application to fix the date on which the defendant is to give up possession may be determined on the papers without a hearing (unless the district judge considers that such a hearing is appropriate) provided that:

(a) the claimant has written to the defendant at least 14 days before making its application giving details of the current arrears and its intention to request that a date be fixed; and

(b) a copy of that letter (and the defendant's response, if any) together with the rent account showing any transactions since the date of this order are attached to the application.

7 This order shall cease to be enforceable on [date] [when the judgment debt is satisfied] (para 39).

not address the problem of those former secure tenants who are the subject of N28 orders made between October 2001 and the decision in *Hall*. However: 'The court has an inherent power to vary its own orders to make the meaning and intention of the court clear' (CPR Practice Direction 40b para 4.5). Alternatively, it is possible to apply retrospectively to postpone the date for possession (HA 1985 s85(2). See also page 4 of this issue.

■ Southwark LBC v Swainson

26 May 2006,
Lambeth County Court[6]

This case illustrates the practical issues raised by *Hassan*. Ms Swainson was a secure tenant of Southwark. In 2003, she accumulated rent arrears as a result of delays in assessing her student grant and student loan. She also made an application for housing benefit (HB) which was not decided. In June 2005, Southwark issued possession proceedings claiming arrears of about £1,200. Between July 2005 and March 2006, the case was adjourned several times on terms pending resolution of Ms Swainson's HB problem. When the case came back to court in March 2006, there were no outstanding HB problems. However, in the light of the finding in *Hall* that a 'suspended possession order' results in the tenant becoming a tolerated trespasser from the date specified on the face of the order, HHJ Behar adjourned the case further for the parties to file skeleton arguments concerning whether it was necessary to amend court Form N28 should the court decide to make a possession order but postpone the date for possession.

On 26 May 2006, HHJ Behar considered first the substantive part of the case and decided that, in all circumstances, it was reasonable to make a possession order but to postpone the date for possession. He then considered what terms he should use in the light of *Hassan*. Southwark argued that the court should use the template suggested in paragraph 10 of the *Hassan* judgment, ie, in the form suggested by the DCA before the judgment in *Hassan*. The effect of this would be that a date for possession would be fixed in the body of the order and then postponed on terms. The tenant would become a tolerated trespasser if she breached the terms of the order, but not before. The defendant asked the court to make the order in the form set out in full in the box (see left).

HHJ Behar rejected the claimant's argument. A postponed possession order should be made in the form adopted by the Court of Appeal in *Hassan*, in paragraph 39 of the judgment. The Court of Appeal's judgment had to be followed, and it was both lawful and appropriate to make a postponed possession order in those terms.

ANTI-SOCIAL BEHAVIOUR

■ Knowsley Housing Trust v McMullen

[2006] EWCA Civ 539,
9 May 2006,
(2006) Times 22 May

The defendant was an assured tenant. She lived with her 19-year-old son. Possession proceedings were brought under HA 1988 Sch 2 Grounds 12, 13 and 14. The claimant relied on admitted acts of nuisance by the defendant and her son and damage to the property. It was accepted that the son was 'a recidivist young offender with a string of convictions and a history of relapsing into misconduct'. He had been sentenced to 12 months in a Young Offenders Institution, and on his release an anti-social behaviour order (ASBO) was made against him. The author of a psychiatric report said that the defendant had a low IQ and was 'an immature and vulnerable person'. The claimant also relied on damage to a door and furniture being thrown into the back yard of the house. The claimant sought a suspended possession order.

HHJ Platts found that the defendant's own acts of nuisance were relatively slight and historic. It would not have been reasonable to make an order for possession if they had been the sole basis of the claim. However, in view of the damage to the house and, more importantly, the nuisance for which the son was responsible, a suspended possession order was justified. Ms McMullen appealed.

The Court of Appeal dismissed the appeal but amended the order to provide that the claimant should apply on notice before seeking a warrant. It held that:

■ It is clear that the court can make an outright or suspended order for possession on the ground that a person living with the tenant has been guilty of nuisance. There is no restriction on the making of an order for possession simply because the tenant cannot control the other person's behaviour. Dicta by Sedley LJ in *Portsmouth City Council v Bryant* (2000) 32 HLR 906, that 'it will almost certainly be unreasonable to make an outright order against such a person' went 'further than is justified by principle or authority. It … [is] wrong in principle to rule out an outright order for possession' in such circumstances. The fact that a tenant cannot control the nuisance-maker may help the tenant in resisting an order in relation to past breaches if the nuisance-maker has vacated or is about to vacate, but otherwise may assist the landlord;

■ There is 'no intrinsic reason why the existence of an ASBO against the person responsible for the nuisance should prevent the making of an order for possession, whether outright or suspended', although the existence of an ASBO may be a relevant matter when deciding whether to suspend an order. (See too *London and Quadrant Housing Trust v Root* [2005] HLR 439; *Manchester City Council v Higgins* [2005] EWCA Civ 1423, 24 November 2005 and *Moat Housing Group South Ltd v Harris and Hartless* [2005] HLR 512.) The weight given to the evidence of an ASBO must inevitably turn on the particular facts of the case in question;

■ It was 'a rational and proper, indeed a proportionate, exercise of the judge's powers to have made the suspension of the order dependent on [the son's] good behaviour, as well as that of the defendant';

■ However, on the facts of this case, Knowsley should not be entitled to apply for a warrant without first applying on notice to the court for permission to do so. Such a restriction is not appropriate in the 'normal run of cases' but, in the light of the defendant's disability and the existence of the ASBO, this was an 'exceptional' case where it was justified. The Court of Appeal also stated that HA 1988 s9A does 'not in practice alter the previous approach of the court, at any rate in the great majority of such cases: its effect is to codify and mandate the already existing jurisprudence'.

■ Washington Housing Company Ltd v Morson

[2005] EWHC 3407 (CHY),
25 October 2005[7]

Mrs Morson was an assured tenant. Her tenancy agreement included an express term requiring her to take all reasonable steps to prevent people, such as her children, from committing any acts of nuisance. After allegations of anti-social behaviour, her landlord sought possession under HA 1988 Sch 2 Grounds 12 and 14 or, alternatively, a demotion order. All but one of the allegations involved her children. It was admitted that some of them had committed criminal offences.

HHJ Carr found that Mrs Morson's daughter was the leader of a group of young people who drank and shouted 'at all hours of the day and night', congregated around the premises, used foul and abusive language and smashed windows. He made a demotion order. Mrs Morson sought permission to appeal, complaining that the judge had taken into account hearsay evidence comprising complaint forms filled in by local residents, mainly anonymously.

Patten J refused permission to appeal. When confronted with hearsay evidence, judges should 'in weighing up the strength and weight to be attributed to it, have regard to the various factors set out in section 4(2) of the Civil Evidence Act, but … assessment of that evidence will necessarily depend on the view which [the judge] takes of the case overall and, in particular, on whether the hearsay evidence is corroborated by any live evidence given by other witnesses' (para 53). In this case, the judge was entitled to weigh up the hearsay evidence having regard to the admitted background. It was impossible for Patten J to conclude that it was not open to the judge to accept the veracity of the hearsay allegations having regard to the state of the evidence as a whole.

He also found that the judge was entitled to come to the conclusion that a demotion order was necessary and reasonable. '[The] children in this case are faced with a choice: they either conform their behaviour to what is acceptable, or their parents lose their home. Although that is obviously a draconian sanction, it is not as draconian as an immediate order for possession, and the judge, although pessimistic perhaps about what the future holds, judged it to be a reasonable way of balancing the parents' rights and entitlement to a secure home with the public interest in preventing this sort of behaviour in the future' (para 67).

■ R v Dickens

22 March 2006,
Llandudno Magistrates' Court

Steven Dickens, a landlord from Rhos-on-Sea in Conwy, has been jailed for eight weeks after admitting the breach of an ASBO a fortnight after it was imposed for threatening council officials. The ASBO prevents him from using threatening or abusive behaviour towards his tenants, or unlawfully evicting them. He is also barred from attending Conwy Council's housing department. He had locked a young mother out of her new flat, which he had rented to her, because it was his policy not to let properties to anyone under 25. District Judge Andrew Shaw told Dickens it was a 'fundamental and serious breach of the order'.[8]

■ R (Errington) v Metropolitan Police Authority

[2006] EWHC 1155 (Admin),
12 April 2006

Police officers obtained evidence that premises let to a secure tenant were being used as a 'crack house'. A closure notice was issued under Anti-social Behaviour Act 2003 Part 1. Magistrates subsequently made a closure order.

The tenant's application for judicial review was dismissed. Although the notice was defective because it stated that the authorising police officer had grounds to 'suspect' the supply of Class A drugs, rather than a 'belief' that it had occurred, the issue of whether a notice is defective, or whether all people have been properly notified, is to be decided by magistrates. Judicial review is an inappropriate method of challenging the making of a closure order. Appeals should be made to the Crown Court as soon as possible after the order has been made, preferably within days.

PROTECTION FROM EVICTION

■ Desnousse v Newham LBC

[2006] EWCA Civ 547,
17 May 2006

Mrs Desnousse approached Newham's Homeless Persons Unit on the basis that she was, or was about to become, homeless on eviction from a council flat of which her husband had been a tenant. After being accommodated in bed and breakfast accommodation, she was transferred to self-contained residence owned by Veni Properties Ltd but managed by Paddington Churches Housing Association on behalf of Newham. Five months later, Newham decided that she was intentionally homeless and informed her that her accommodation booking would be cancelled about four weeks later. When she discovered that Veni was planning to evict her without bringing court proceedings, she obtained an interim injunction restraining Veni from evicting her without a court order. However, at trial, following *Mohamed v Manek and Kensington and Chelsea RLBC* (1995) 27 HLR 439, CA, HHJ Roberts dismissed her claim.

The Court of Appeal dismissed her appeal (Lloyd LJ dissenting). All three judges held that *Manek* was binding authority which had to be followed and that Mrs Desnousse's case did not fall within any of the exceptions in *Manek*. Tuckey and Pill LJJ both held that once a decision has been taken that no duty is owed, local authorities should not have to take proceedings to evict any applicant who refuses to vacate. They rejected Mrs Desnousse's submission that a reading of Protection from Eviction Act (PfEA) 1977 s3 that did not allow it to extend to the recovery of possession from someone in Mrs Desnousse's position was incompatible with article 8 of the European Convention on Human Rights ('the convention'). Any eviction in these circumstances is in accordance with the law. The question is one of proportionality: whether the possibility of eviction without the procedural safeguards contained in the PfEA can be justified. Tuckey and Pill LJJ held that it could. Evictions are likely to be under local authorities' control. They can be trusted to act lawfully and responsibly.

■ Pirabakaran v Patel

[2006] EWCA Civ 685,
26 May 2006[9]

The claimant landlords let premises, which comprised a shop on the ground floor and a residential flat on the first floor, to Mr Pirabakaran. He lived in the flat. He fell into arrears and the landlords exercised their right of re-entry to forfeit the lease by taking possession of the shop premises. Mr Pirabakaran continued to live in the flat and so the landlords began possession proceedings claiming that, as a result of their re-entry, the lease had become forfeit. Later, the landlords excluded Mr Pirabakaran from the flat. He issued a claim for an injunction against the landlords, relying on PfEA s2 and claiming that the purported forfeiture of the lease was unlawful. HHJ Oppenheimer found that the demised premises were not 'let as a dwelling', that accordingly the landlords were not constrained by s2 and that, therefore, the lease had been lawfully forfeited.

The Court of Appeal allowed an appeal. After extensive consideration of the Rent Acts and the effect of PfEA s8, the Court of Appeal held that the phrase 'let as a dwelling' in s2 means 'let wholly or partly as a dwelling'. It therefore applies to premises which are let for mixed residential and business purposes. Furthermore, article 8 of the convention supports this interpretation.

SURRENDER AND REGRANT

■ Coker v London Rent Assessment Panel

CO/6913/2005,
19 May 2006

Mr Coker was the tenant of a flat. For many years there were substantial disputes between him and his landlord. In October 2004, these were settled by a Tomlin Order which had the effect of varying the rent, rendering insurance rent non-payable, modifying the covenant against alterations and changing the contract from a business tenancy to an assured tenancy. The rent payable was £950 a month. Later, the landlord served a notice of increase of rent under HA 1988 s13. Mr Coker referred the notice to the Rent Assessment Panel (RAP). He argued that it was invalid because the Tomlin Order amounted to the surrender of the old tenancy and grant of a new tenancy.

The RAP rejected that argument on the basis that the amendments created by the order could not amount to a new tenancy as they were not sufficiently substantial. The RAP inspected the flat and concluded that £1,120 a month was the rent for which the flat could reasonably be expected to be let on the open market in accordance with s14. Mr Coker appealed against that decision.

James Goudie QC, sitting as a deputy High Court judge, dismissed the appeal. The Tomlin Order had not resulted in any increase in the premises demised or in the length of term. The absence of both features did not mean that there could never be a surrender, but that there would only exceptionally be one. At the date of the Tomlin Order, it was common ground that Mr Coker had an assured tenancy and not a business tenancy. The only variations to the tenancy agreement (ie, agreement by the landlord not to enforce the insurance rent and a modification to the covenant against alterations) were not sufficient to imply a surrender and re-grant.

HOMELESSNESS

Priority need

■ Williams v Oxford CC

[2006] EWCA Civ 562,
29 March 2006

Ms Williams was a victim of violence and applied to Oxford for accommodation as a homeless person (HA 1996 Part 7). An officer initially decided that she had suffered violence but that it did not render her 'vulnerable' for the purposes of Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051 article 6. On a review, the reviewing officer received medical evidence which suggested that Ms Williams may not have suffered violence to the extent she had suggested, and his decision included the phrase 'if there is little or no supporting evidence of violence then it is arguable you cannot rely on this category … '. However, he upheld the original decision that the applicant was not vulnerable. HHJ Corrie dismissed an appeal.

Ms Williams sought permission to bring a second appeal contending that the reviewing officer's evident doubt about the correctness of the original decision should have triggered the 'minded-to' obligations of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2). The Court of Appeal refused a renewed application for permission. The reviewing officer had, in the event, proceeded on the assumption that there had been violence but that it had not caused vulnerability. There had been no unfairness to the applicant as the reviewing officer had invited responses to questions raised in the review process but had received no specific reply.

■ Aman v Camden LBC

[2006] EWCA Civ 750,
11 May 2006

Mr Aman applied to Camden for homelessness assistance under HA 1996 Part 7. It decided that he had no priority need as he was not 'vulnerable'. It also decided that he was intentionally homeless. Both the decisions were confirmed on review. HHJ Ryland QC dismissed an appeal on the priority need point (although he allowed the appeal on the intentional homelessness point).

Mr Aman contended on a second appeal that the council had applied a narrower 'functional' test rather than the correct approach to vulnerability set out in *R v Camden LBC ex p Pereira* (1999) 31 HLR 317. The Court of Appeal dismissed a second appeal. Although Mr Aman's GP had expressed the opinion that homelessness would have a deleterious effect on each of his medical problems (chronic low back and shoulder pain, irritable bowel syndrome and depression), the question of whether he was vulnerable was for the council to answer. Both its initial and review decisions had set out the *Pereira* test correctly. The council had been entitled to take account of Mr Aman's eyesight, hearing, intelligence, literacy, ability to communicate and capacity to work, which were factors relevant to the composite question of whether he would be able to fend for himself if made homeless. That did not amount to the application of a test different from the *Pereira* test.

Intentional homelessness

■ Aw-Aden v Birmingham City Council

[2005] EWCA Civ 1834,
7 December 2005[10]

Mr Aw-Aden lived with his wife and child in a rented flat in Belgium. In June 2003, his employment contract in Belgium ended and he came to the UK to look for work. He stayed with friends in Birmingham and was later joined by his wife and child. In March 2004, the accommodation became overcrowded. He applied to Birmingham for accommodation under HA 1996 Part 7 (homelessness). The council decided that he had become homeless intentionally from his last settled home in Belgium. That decision was upheld on review and Recorder Cleary dismissed an appeal against the review decision.

On a second appeal, Mr Aw-Aden contended that he had been unaware of a relevant fact – the true prospect of being able to find work in Birmingham sufficient to provide the means for him to pay for his own accommodation – and that the council's decision-making had failed to consider whether that ignorance had been in 'good faith' for the purposes of HA 1996 s191(2) . That subsection was not referred to in the original decision or review decision (or in his solicitors' correspondence).

The Court of Appeal dismissed the appeal. The correct legal approach to facts such as these had been stated by Carnwath J in *R v Westminster City Council ex p Obeid* (1997) 29 HLR 389, ie, that ignorance of the true prospect for future employment could constitute a relevant fact provided it was 'sufficiently specific (that is related to specific employment …)' and was 'based on some genuine investigation and not mere "aspiration"'. Mr Aw-Aden's prospects when leaving Belgium did not meet that threshold and 'rested on little more than a wing and a prayer'. Accordingly, there had been no error by the council in not addressing the 'good faith' issue in s191(2).

Brooke LJ noted that early in the course of the council's review, Mr Aw-Aden's solicitors had requested a copy of the documents on the homelessness file (and the interview notes) so that they could make effective representations in the review. Those had not been provided. Brooke LJ said at paragraph 22: '… if the law entitles an appellant to make representations and if solicitors acting for an appellant make a reasonable request for documentary material before they can make their representations, then the review decision should certainly not be made without complying with that request'.

■ Lee-Lawrence v Penwith DC

B2/05/2565,
9 May 2006

An arson attack rendered Mr Lee-Lawrence's home uninhabitable. As a result, he was offered and accepted a housing association tenancy and claimed HB to pay the rent. He later terminated that tenancy and applied to Penwith for assistance under HA 1996 Part 7 (homelessness). The council rejected his claim that he had never occupied the housing association premises and decided that he had become homeless intentionally by ceasing to occupy that accommodation: HA 1996 s191(1). That decision was upheld on review and a county court judge dismissed an appeal.

The Court of Appeal dismissed a second appeal. The fact that a person had a legal right to possession or held the keys was not, of itself, sufficient to establish that s/he was in occupation of particular premises. However, those factors, combined with the benefit claim and other representations by the applicant that he had been resident in the

premises, were sufficient to ground a finding of occupancy. The council's conclusion could be sustained on the material before it and was not perverse.

Accommodation for the intentionally homeless

■ R (Conville) v Richmond Upon Thames LBC

[2006] EWCA Civ 718, 8 June 2006[11]

On the claimant's application for homelessness assistance, the council found that she was eligible, homeless, had a priority need (because she had dependent children) but that she had become homeless intentionally. In those circumstances, its acknowledged duty was to assess her housing needs, to supply advice and assistance and to provide her with accommodation 'for such period as … will give [her] a reasonable opportunity' of securing her own housing: HA 1996 s190.

The claimant's only realistic opportunity for securing accommodation was to rent in the private sector but she could not afford the deposit or rent in advance required by private landlords. The council declined to provide a grant or loan to meet those costs and directed itself that in determining the 'reasonable opportunity' it could have regard to its own resources and the other demands on these resources made by homeless people. Goldring J dismissed a claim for judicial review (see September 2005 *Legal Action* 16).

The Court of Appeal allowed an appeal. A housing authority, in assessing a 'reasonable opportunity' could not lawfully take into account 'conditions peculiar to them, such as the extent of their resources and other demands upon them' (Pill LJ at para 36). The court held that 'it is the opportunity given to the appellant which must be reasonable and not what is reasonable from the authority's standpoint' (para 37). Although an authority's reasons for fixing a particular period may be 'stated briefly', the court doubted whether the analysis by the council's officer (set out in four sub-paragraphs) was 'sufficiently comprehensive in the circumstances' (para 41).

Accommodation for asylum-seekers

■ R (M) v Slough BC

[2006] EWCA Civ 655, 25 May 2006[12]

The claimant was a destitute asylum-seeker in need of housing. He was diagnosed as HIV-positive and as possibly having AIDS. He required accommodation which would include provision for refrigeration of his medication. He applied to Slough social services for assistance with accommodation as he was not eligible for homelessness assistance: HA 1996 s185.

The council decided that any physical effects of his homelessness would solely result from his destitution and that, accordingly, National Assistance Act (NAA) 1948 s21(1A) debarred him from assistance that might otherwise have been provided under s21. The issue was whether housing should be provided by the National Asylum Support Service (on the basis that the claimant had no need of care and attention) or by Slough.

In judicial review proceedings, Collins J held that responsibility lay with Slough. It was not a case of simple destitution but of 'destitution plus the illness'. The Court of Appeal dismissed Slough's appeal. It considered itself bound by authority to hold that care and attention was not to be 'interpreted in the narrow way for which [Slough] contends but could extend to the provision of shelter, warmth, food and other basic necessities' (para 15). The judge had been right to direct himself that it could not be said, on the facts of this case, that the claimant's needs for such assistance would derive 'solely' from his destitution as s21(1A) requires.

DISABILITY DISCRIMINATION

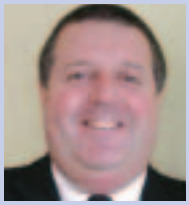
■ Williams v Richmond Court (Swansea) Ltd [No 2]

5 April 2006, Swansea County Court[13]

The defendant freeholders declined to give their consent to the disabled claimant's proposed installation of a stairlift at the communal entrance to the block of flats in which she lived. On the trial of preliminary issues, HHJ Wyn Williams QC decided that the refusal constituted discrimination contrary to Disability Discrimination Act 1995 s22(3) (see February 2006 *Legal Action* 31).

Although pursuing an appeal against that ruling, the defendants subsequently withdrew a pleaded claim of 'justification'. On 5 April 2006, the judge ordered that consent be given for the stairlift installation, subject to agreed conditions, and that the defendant pay damages of £5,000 (not to be recouped by way of any service charge) and costs.

1 See: www.opsi.gov.uk/si/em2006/uksiem_20061294_en.pdf.
2 See: www.communities.gov.uk.
3 See: www.official-documents.co.uk/document/cm67/6799/6799.pdf.
4 See: www.ico.gov.uk.
5 Derek McConnell, solicitor, SouthWestLaw, Bristol and Robert Latham, barrister, London.
6 Yannis Constantine, Anthony Gold, solicitors, London.
7 Tracey Bloom, barrister, London.
8 See BBC news: http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/north_west/4835296.stm and *Daily Post*, 23 March 2006.
9 Van-Arkadie & Co, solicitors, south Harrow.
10 Nik Nicol, barrister, London and Catherine Rowlands, barrister, Birmingham.
11 Liz Davies, barrister, London and Anthony Gold, solicitors, London.
12 Stephen Knafler, barrister, London.
13 Robert Latham, barrister, London.



Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder. Nic Madge is a circuit judge. They are grateful to the colleagues at notes 5–7 and 9–13 for supplying transcripts or notes of judgments.

Housing benefit law update

This series by **Bethan Harris**, **Desmond Rutledge** and **David Watkinson** is designed to keep readers up to date with legislation, case-law and other recent developments in housing benefit (HB) law. The authors would like to hear of any decisions relevant to HB, in particular commissioners' decisions not published on the official website, which may be of interest to practitioners. The last article appeared in July 2005 *Legal Action* 23.

POLICY AND LEGISLATION

Housing benefit law reform

Roll out of the Local Housing Allowance

The Local Housing Allowance (LHA), which replaces HB with a flat-rate payment, will commence national roll out, at the earliest, in April 2008. Eighteen local authorities are now piloting the scheme. The government is proposing several changes, including capping the amount of LHA that claimants can receive above the level of their rent rather than allowing them to keep all the difference, and setting the rate at the median rent rather than at the mid-point of the rental market. The government is undecided about whether LHA is appropriate for the social housing sector: see *Housing Benefit Direct*, Issue 51, March 2006 (LHA special issue) and June 2006.[1]

Housing benefit sanctions for anti-social behaviour

Under the government's 'Respect' agenda, it proposes, in 2007, to pilot a scheme of cutting HB payable to those evicted for anti-social behaviour who refuse to undergo rehabilitation. The sanction will be a ten per cent loss of benefit for four weeks, 20 per cent loss for a further four weeks, and a total removal for up to five years if people still do not co-operate. Lower rates will apply to those in hardship. Normal payments resume at any stage if rehabilitation is accepted: see Department for Work and Pensions (DWP) press release, 5 June 2006.

Rent arrears pre-action protocol

In June 2005, the Civil Justice Council issued a draft pre-action protocol for rent arrears possession cases (see August 2005 *Legal Action* 16). At the time of writing, it is anticipated that it will be introduced in October 2006. The aim of the protocol is to ensure that all reasonable steps are taken to avoid issuing proceedings. There are 11 steps that the landlord should follow before issuing proceedings. HB is relevant to steps 6, 8 and 10.

- Step 6 requires that: 'The landlord should make every effort to establish effective ongoing liaison with the housing benefit departments and to make direct contact with them before taking enforcement action.'
- Step 8 requires that after service of the statutory notice but before the issue of proceedings, there should be an interview which should include a discussion of the HB position.
- Step 10 requires that the landlord should disclose its knowledge of the tenant's HB situation no later than ten days before the hearing.

Statutory instruments

New definition of 'couple'

Civil Partnership (Pensions, Social Security and Child Support) (Consequential, etc Provisions) Order 2005 SI No 2877

This order came into force on 5 December 2005, on the same day as the Civil Partnership Act 2004. It inserts a new definition of 'couple' into the HB regulations to provide for four different categories of couple:

- Married couples who are members of the same household;
- Unmarried couples who are living together as husband and wife;
- Same-sex couples who have formed a civil partnership and are members of the same household; and
- Same-sex couples who are living together as if they are civil partners. Transitional provisions apply for any claimant who is a member of a couple living together as if they are civil partners, in respect of whom there was an award of HB on 5 December 2005. The transitional provisions allow the claimant a reasonable time to notify the HB authority that s/he is a member of a couple living together as if they are civil partners, before there can be any question of an overpayment of HB resulting from the change in the law. Guidance on what counts as a reasonable period in the transitional provisions and on implementing the new definition of couple is to be found in DWP circular HB/CTB A16/2005 and bulletin HB/CTB U11/2005.[2]

Termination of housing benefit after suspension of payments

Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) (No 4) Regulations 2005 SI No 2894

These regulations came into force from 10 November 2005 and include an amendment to Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations (HB&CTB(DA) Regs) 2001 SI No 1002 reg 14(2) . Where payment of benefit has been suspended due to failure to provide information, entitlement may now be terminated if after one month (rather than two months) the information has still not been provided: see DWP circulars HB/CTB A21/2005 and HB/CTB A2/2006.

Recovery of overpayments from landlords

Housing Benefit and Council Tax Benefit (General) Amendment Regulations 2005 SI No 2904

With effect from 10 April 2006, these regulations (HB&CTB(G)A Regs) amended Housing Benefit (General) Regulations (HB(G) Regs) 1987 SI No 1971 reg 101 (now replaced by Housing Benefit Regulations (HB Regs) 2006 SI No 213 reg 101), so that the chief consideration when deciding from whom to recover an overpayment will be who has misrepresented or failed to disclose information or, in the case of official error, who could reasonably have been expected to realise that there had been an overpayment. A person from whom an overpayment is sought has a right of appeal. The policy behind the amendment is to avoid local authorities recovering overpayments from landlords simply because it is the quickest and easiest method of getting the money back: see DWP circular HB/CTB A4/2006.

Consolidation of housing benefit regulations

On 6 March 2006, the HB(G) Regs 1987 and the Housing Benefit and Council Tax Benefit (State Pension Credit) Regulations 2003 SI No 325 were revoked.

Housing Benefit Regulations 2006 SI No 213

The HB Regs 2006 consolidate the existing provisions in relation to HB for claimants who have not attained the qualifying age for pension credit, and for those who have attained that age and are receiving, or whose partner is receiving, income support (IS) or income-based jobseeker's allowance (JSA).

Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 214

These regulations (HB (qualifying age for state pension credit) Regs) consolidate HB regulations in relation to the category of claimant described.

Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 SI No 217

These regulations list all statutory instruments that have been revoked and make consequential amendments to other regulations.

Habitual residence

Social Security (Persons from Abroad) Amendment Regulations 2006 SI No 1026

These regulations came into force on 30 April 2006. They amend the HB Regs 2006 and the (HB (qualifying age for state pension credit) Regs) 2006 (see above) in the light of Council Directive 2004/38/EC (also known as the Rights of Residence Directive), which provides for new rights of residence for EC nationals for the first three months.

A person is ineligible for HB where s/he is a 'person from abroad', that is to say s/he is not habitually resident in the UK, Channel Islands, Isle of Man or Republic of Ireland. A person cannot be habitually resident unless s/he has a right to reside. Claimants whose rights to reside derive from the Rights of Residence Directive will be treated as not satisfying the right to reside aspect of the habitual residence test.

CASE-LAW

All references below are to the HB(G) Regs 1987 unless otherwise stated. The equivalent consolidated regulation under HB Regs 2006 (see above) is stated where applicable.[3]

Requirement of a national insurance number in relation to 'any other person in respect of whom [the claimant] is claiming benefit' (Social Security Administration Act 1992 s1(1A) and (1B))

■ CH/3801/2004

7 June 2005

The claimant was a local authority tenant. He had been receiving HB in his own name. He married a Thai national who had entered the UK on a visitor's visa and was subject to a condition that she did not work or have recourse to public funds. She had applied to remain in the UK as a spouse of a settled person, but had been refused and was awaiting a decision on her appeal. When the claimant made a new claim for HB, it was refused on the basis that his wife did not have a national insurance number. He appealed successfully to the appeal tribunal. The authority appealed to the commissioner.

Mr Commissioner Levenson dismissed the appeal. He held that a partner was not invariably a person in respect of whom the claimant was claiming benefit for the purposes of Social Security Administration Act (SSAA) 1992 s1(1A). The claimant's wife was affected by the decision to award benefit, but she was not a beneficiary of it as she was not allowed by law to have recourse to public funds. She was not a person in respect of whom the claimant was claiming benefit.

Note: The secretary of state has been granted permission to appeal to the Court of Appeal (*Secretary of State for Work and Pensions v Wilson*). The DWP has issued guidance to its decision-makers that all look-alike cases should be stayed pending the outcome of the Court of Appeal case: see DMG letter 17/05, December 2005.[4]

Circumstances in which a person is or is not to be treated as occupying a dwelling as his home (reg 5; HB Regs 2006 reg 7)

Trial period in a care home

■ Secretary of State for Work and Pensions v Selby DC and another

[2006] EWCA Civ 271, 13 February 2006

The claimant was the tenant of 26 Commercial Street, in respect of which he received HB. He was in frail health and moved into a residential care home in order to ascertain whether it was suitable for his needs. On 22 July 2003, the claimant entered the home with the intention of returning to 26 Commercial Street if the care home did not suit his needs. By 19 August 2003, he decided that he was happy at the care home. On 25 August 2003, his daughter-in-law informed the council of this fact and the claimant gave notice to terminate his tenancy with effect from 3 September 2003. Sadly, the claimant died on 7 September 2003. The authority terminated his award of HB with effect from 19 August. It sought to recover a small overpayment made from 19 to 24 August.

On appeal to the appeal tribunal, it held that the claimant had been entitled to HB until his tenancy expired on 3 September. On appeal, Mr Commissioner Turnbull held that HB ought not to have been terminated until 25 August and, therefore, there was no overpayment. The secretary of state appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. It observed that the secretary of state's view about the correct interpretation of reg 5(7B) and (7C) had changed in April 2004. It commented, 'So the delicious irony of this appeal is that the secretary of state does not seem to know what the regulations drafted by himself really and truly mean, and he comes before us saying, in effect, "You clever chaps in the Court of Appeal sort it out for me please".' The court held that reg 5(7C) was a deeming provision under which the claimant was treated as occupying his old home even though he manifested the intention of not returning to it. Reg 5(7C) applied if the conditions in reg 5(7B) were satisfied. To satisfy those conditions, the claimant had to enter residential accommodation with the intention of going home if it did not work out satisfactorily for him, and at no time during his stay in residential care was his dwelling let. The claimant satisfied those conditions. The claimant remained entitled to HB during his lifetime and, had he lived, would have remained so entitled to the expiration of the notice to quit.

Moving into a nursing home: meaning of intention to return home

■ CSHB/405/2005

15 February 2006

The claimant, who had schizophrenia, received substantial support from his housing association (HA) landlord, which was paid for in a service charge. He moved into a nursing home because of terminal cancer, without terminating his tenancy and left all his possessions untouched. The HA's staff continued to visit him at the nursing home. Two months after entering the nursing home, the claimant died. The local authority decided to recover an overpayment of HB from the HA. The HA appealed. It relied on a staff memorandum stating that the claimant intended to return home to die. The local

authority relied on a letter from the nursing home stating that he was resident there on a permanent basis. The tribunal dismissed the appeal on the basis that the claimant had no intention to return to his previous home and, therefore, was not entitled to HB under reg 5(7B), (8) or (8B), which required an intention to return to the dwelling normally occupied as a home.

Mrs Commissioner Parker dismissed the landlord's appeal. She held that it was not perverse for the tribunal to prefer the information from the nursing home as representing the claimant's intention. She also held that the question of intention did not depend solely on the subjective wish of a claimant, however unrealistic his/her desire to return to the former home. It was a question of whether there was a realistic possibility of a return home.

Comment: The fact that a person has a permanent placement in a nursing or residential care home will not rule out his/her intention to return home. See, for example, *Hammersmith & Fulham LBC v Clarke* CA, 20 November 2000; (2001) 33 HLR 77, in which the Court of Appeal upheld the finding that the tenant intended to return to her council property, even though she had a permanent placement in a nursing home.

Tenancy not on a commercial basis (reg 7(1)(a)); tenancy created to take advantage of the HB scheme (reg 7(1)(l); HB Regs 2006 regs 9(1)(a) and 9(1)(l))

Asylum-seeker granted tenancy on the strength of future housing benefit claim

■ CH/3619/2005

27 January 2006

The claimant was an Orthodox Jew from the Yemen who came to the UK to seek asylum. He was assisted by a small charity that was established to help the Yemeni Jewish community. He did not seek accommodation from the National Asylum Support Service as that accommodation would not have enabled him to live within the small Yemeni Jewish community in London. The claimant had no means of paying rent unless and until his claim for asylum was decided in his favour, when it would be backdated to the date of the asylum claim. Before the claimant had been granted asylum, the charity took a lease of a house and sub-let it to him. The claimant was eventually granted asylum and claimed HB. The claim was refused. The claimant appealed successfully to an appeal tribunal. The local authority appealed to the commissioner.

Mr Commissioner Jacobs held that the tribunal was entitled to find on the evidence that the charity knew the claimant's claim for asylum, and therefore his claim for HB, would be decided in his favour. The tenancy was on a commercial basis and there was no abuse of the HB scheme. The tenant's motive was to house himself and his family and the charity's was to provide the support that accorded with its purposes.

Landlord is a close relative (reg 7(1)(b); HB Regs 2006 reg 9(1)(b))

■ CH/3017/2005

17 March 2006

The claimant moved into a three-bedroom property to live with her mother and sister. When her mother died, the claimant submitted a claim for HB. The claim was refused on the grounds that her liability for rent was to a person who also resided in the dwelling and who was a close relative. The claimant contended that reg 7(1)(b) infringed her rights under the European Convention on Human Rights ('the convention'), in particular articles 8 and 14, because its effect was, by reason of her relationship with her sister, to treat her less favourably than any other person wishing to rent the property. The claimant's appeal to an appeal tribunal was dismissed. She appealed to the commissioner.

Mr Commissioner Turnbull was prepared to proceed on the assumption that, for the purposes of article 14, the facts of the case fell within the ambit of both article 8 and article 1 of Protocol 1 of the convention, and that the relationship with the sister fell within the terms 'birth or other status'. However, in both *R (Painter) v Carmarthenshire County Council Housing Benefit Review Board* [2001] EWHC Admin 308, 4 May 2001 and *Tucker v Secretary of State for Social Security* [2001] EWCA Civ 1646, 8 November 2001, the court held that reg 7 was a legitimate and proportionate response to the aim of eradicating abuse. Furthermore, the alleged ground of discrimination, namely the claimant's close relationship with her sister, was within the category of less sensitive grounds of discrimination and would 'merely require some rational justification' (*R v Secretary of State for Work and Pensions ex p Carson* [2005] UKHL 37, 26 May 2005; [2005] 4 All ER 545 per Lord Hoffmann at para 16). As it involved a decision about the general public interest, this was very much a matter for the democratically elected branches of government (see Lord Hope's statement in *R v Director of Public Prosecutions ex p Kebiline* HL, 28 October 1999; [2000] 2 AC 326 at 381B-D).

Residential care (reg 7(1)(k); HB Regs 2006 reg 9(1)(k))

Claimant occupying a room in a registered care home but not receiving care

■ CH/1326/2004

26 April 2005

The claimant was an 85-year-old woman who moved into a room at Alexandra House, an establishment run by a benevolent fund containing different types of accommodation. She was classed as a 'hostel' resident, and received one meal a day and other services, but no personal care as defined in the Department of Health (DoH) circular *Supported housing and care homes*. The claimant was awarded HB. After the floor on which her room was situated was registered for residential care, the local authority withdrew the award of HB under reg 7(1)(k) on the ground that she was in residential accommodation. The claimant's appeal to the appeal tribunal was dismissed. She appealed to the commissioner.

Ms Commissioner Fellner allowed the appeal. The claimant was living in a registered care home but neither came within any of the definitions of vulnerable people in Care Standards Act 2000 s3(2) nor received care as set out in the DoH circular. She was not excluded from HB under reg 7(1)(k) because she was not in residential accommodation.

Persons from abroad (reg 7A; HB Regs 2006 reg 10)

Habitual residence

■ Secretary of State for Work and Pensions v Bhakta

[2006] EWCA Civ 65,
15 February 2006,
R (IS) 7/06

The Court of Appeal upheld a commissioner's decision that, where the only reason for refusing a claim for benefit is that the claimant has not resided in the UK for a sufficient period to be habitually resident by the date of the secretary of state's decision, the decision-maker (or tribunal) has the power to make an advance award (reg 72(11)) from the date that habitual residence is likely to be established, subject to a maximum of 13 weeks from the date of claim.

Note: In *CH/2484/2005* (see below), a Tribunal of Commissioners made the following observations on the effect of *Bhakta*. First, it will not assist the claimant where there has been no finding of settled intention. Second, the period of residence required to establish intention could not be reduced to a tariff. The commissioners disagreed with the suggestion, based on *CIS/4474/2003*, that a period of between one and three months

would always be sufficient to fulfil the appreciable period test.

Right to reside

■ CH/2484/2005; CIS/3573/2005

12 May 2006

A Tribunal of Commissioners considered the legality and nature of the right to reside test introduced into the main means-tested benefits in May 2004. The commissioners heard five cases together in which all of the claimants were economically inactive at the time they claimed benefit. The commissioners' main conclusions on the law can be found in *CIS/3573/2005*. The facts in that case were as follows.The claimant was born in Somalia. She went to Sweden as a refugee and was subsequently granted citizenship of that country. She came to the UK in March 2004 with her three children and claimed HB in June 2004. She had not worked during her time in the UK. The HB claim was refused. An appeal tribunal allowed the appeal on the basis that the claimant was lawfully resident under UK national law, so the test was discriminatory against EU nationals. The local authority appealed.

The Tribunal of Commissioners set aside the appeal tribunal's decision. It held that the claimants' lawful presence in the UK under domestic law was not equivalent to them having a right to reside. The commissioners also rejected a submission that the application of the test amounted to a breach of the European Convention on Social and Medical Assistance. As far as the commissioners were concerned, the test did not contain any ambiguity and was entirely in accordance with the Treaty of Rome and Council Directive 90/364/EEC. The UK government was entitled under EU law to restrict social assistance to EU nationals even if they were resident under a lawful right of entry, and no steps had been taken to remove them.

Note: It is understood that some, if not all, of the claimants intend to appeal.

Overpayments and official error (reg 99; HB Regs 2006 reg 100)

■ CH/3761/2005[5]

24 April 2006

The claimant, whose first language was Cantonese, was awarded HB based on the fact that he received JSA. In March 2004, he found employment as a chef. He told the Jobcentre and his JSA was terminated. His personal adviser (who was Chinese) told the claimant that he need not inform the council as the Jobcentre would do so. The DWP failed to notify the council and an overpayment of HB occurred.

In May 2004, the claimant received letters from the council which showed that HB was continuing to be paid based on his JSA claim. The claimant took these letters to the adviser at the Jobcentre. He was again told that he need take no further action and that a letter would be written to the council. The HB overpayment was discovered in August 2004 during a routine review, and the council decided to recover it from the claimant. An appeal tribunal dismissed the claimant's appeal.

Mr Commissioner Turnbull allowed the claimant's further appeal. He referred to the test in *R (Sier) v The Housing Benefit Review Board of Cambridge City Council* [2001] EWCA Civ 1523, 8 October 2001. In *Sier*, the claimant had been overpaid HB by Cambridge as the council was not aware that he had taken out a second tenancy in London and had claimed HB on that too. The claimant argued that the failure of the IS office to send a standard change of address form (NHB 8) to the relevant authority in London had caused HB to be paid on the two properties.

Mr Commissioner Turnbull held that what the claimant in *CH/3761/2005* had been told by the Jobcentre's adviser did not absolve him from his statutory duty to notify the council that he had started work. However, up until the claimant received the letters from the authority in May 2004, the substantial cause of the overpayment was the Jobcentre's mistake; it was the Jobcentre's advice that caused the claimant not to comply with his obligation to notify. *Sier* could be distinguished, as the mistake identified in that case – the department's failure to send a change of address form to the council – did not excuse the claimant from his duty to notify the council of the change of circumstances.

The cause of the overpayment after May 2004, when the claimant received the letters about his HB, was less clear. The matter was remitted to a new tribunal to consider whether the cause of the overpayment continued to be the DWP's mistake or whether the claimant, at that stage, could have reasonably been expected to realise that he was being overpaid.

See also *CH/602/2004*, a council tax benefit case in which the fact that industrial injuries benefit payments were clearly identified on bank statements submitted to the authority meant that the overpayment was due to the official error of not noting them. The claimant's failure to mention the benefit payments in his claim form did not mean that he had either caused or contributed materially to the error.

Overpayment: mistake in calculation of earnings

■ CH/1780/2005

9 September 2005

The claimant was working and claimed HB. He provided a letter from his employer reporting that he was working occasional overtime. The authority made an award on 13 August 2003 but failed to take the overtime into account. The claimant requested a revision, on the grounds that his income had been incorrectly calculated and the award was too low in September 2003, but the authority did not reply until November 2003, when it requested details of earnings for the last two months. As the claimant was disputing the calculation in relation to August, he did not pursue his revision any further. Four months later the authority took the view that he was being overpaid and sought to recover the overpayment. An appeal tribunal decided that the overpayment was recoverable because the claimant had contributed to the error by failing to reply to the authority's letter of November 2003.

Mr Commissioner Jacobs allowed the claimant's further appeal. He held that the authority's letter did not impose a duty on the claimant to provide further information under reg 73(1). It was merely an invitation to do so if he wished to pursue his application for a revision under HB&CTB(DA) Regs reg 4(5).

Applying the test in *Sier* (see above), the commissioner held that the overpayment was caused by the local authority without contribution by the claimant. The authority should have obtained more precise information about the claimant's income before making the award. The claimant did not contribute to that mistake. The claimant could not have reasonably been expected to realise that he was being overpaid as the notification letter was not precise enough about the calculation of his earnings to allow him to know that his award was too generous.

Overpayment: what claimant was told by officials

■ CH/1675/2005

23 September 2005

The claimant received HB on the basis of his entitlement to IS. In March 2004, he found work and ceased to be entitled to IS. As a result, he ceased to be entitled to HB. The authority wrote to the claimant informing him that he must start paying rent in full and enclosed a form for him to renew his claim on the basis of his current income. HB continued to be paid for another four weeks to 11 April 2004 as an extended award. The claimant contacted the council in May and offered to pay his rent and council tax in full. There was a record of a telephone conversation between

the claimant and the authority's council tax section on 7 May 2004, in which he was told that full benefit was still being credited to his council tax account. HB continued to be credited to the claimant's rent account in error until 17 May 2004. No further action was taken until October 2004, when the authority decided that the overpaid HB was recoverable from the claimant. An appeal tribunal dismissed the claimant's appeal.

Mr Commissioner Bano allowed the claimant's further appeal. He observed that reg 99 envisages that where an authority is made aware of an overpayment, it will take steps to bring this to an end. If the authority reassures a claimant that there has been no overpayment, s/he must be allowed to argue that it was reasonable to accept what s/he was told.

The case was remitted to a fresh tribunal with directions that findings of fact should be made on what the claimant had been told by the authority's representatives each time he contacted them by phone during the period of the overpayment. This was crucial to deciding whether the claimant ought reasonably to have realised that he was actually being overpaid.

From whom the recovery of an overpayment is made (reg 101; HB Regs 2006 reg 101)

■ CH/4234/2004

12 May 2006

The local authority decided that the claimant had been overpaid HB because he had failed to disclose that he had a student loan and that the subsequent overpayment was recoverable from him. The authority later decided that there had been a further overpayment arising out of a misrepresentation by the landlord about his status and that that overpayment was recoverable from the landlord. The claimant appealed to the appeal tribunal. He contended that the first overpayment should not be recoverable from him but from the landlord. His appeal was dismissed on the ground that, following the Court of Appeal's decision in *Secretary of State for Work and Pensions v Chiltern DC and another* [2003] EWCA Civ 508, 26 March 2003 (see June 2003 *Legal Action* 27), the appellate jurisdiction was restricted to setting aside the decision on the ground of error of law in the exercise of the local authority's discretion about from whom to recover.

On the claimant's further appeal, the Tribunal of Commissioners set aside the appeal tribunal's decision. It held:

■ The appeal tribunal erred by treating the authority as having a discretion to decide from whom an overpayment was recoverable. The overpayment was recoverable from both landlord and tenant, unless the landlord persuaded the authority that reg 101(1) applied to it and reg 101(2) did not.

■ *Chiltern DC and another* was not relevant to the legislation as amended from 1 October 2001 and 10 April 2006.

■ Under the legislation in force from 1 October 2001 to 9 April 2006, an overpayment of HB was always recoverable from any person within the scope of reg 101(2) as well as, if different, the person to whom the overpayment was made, except where reg 101(1) applied (para 55).

■ Under the legislation in force from 10 April 2006 (HB Regs 2006 reg 101(2), as amended by the HB&CTB(G)A Regs (see above)), it was intended that recovery may be sought from the claimant and any partner of the claimant as well as the person to whom the overpayment was made, subject to exceptions (para 57).

■ In every case where a recoverable overpayment had been made, the authority should make a single decision referring to all those from whom the overpayment was recoverable, rather than separate decisions addressed to each of them. Moreover, where a local authority decided that an overpayment was not recoverable from the person to whom it was made, a proper decision to that effect should be made and included within the decision as to the person from whom the overpayment was recoverable. It should be communicated to the person to whom the overpayment was made and to those from whom it was recoverable (para 60).

■ If, contrary to that suggestion, a local authority issued a decision against only one of, say, two people from whom an overpayment was recoverable, an appellant would be entitled to a finding that s/he was not the only person from whom HB was recoverable (para 61).

■ The question of from whom to enforce the liability to repay the overpayment was a matter for the local authority, in respect of which the appellate tribunals had no power. There was nothing to prevent an authority from enforcing the liability partly against one person and partly against the other person. This might be done in a way that reflected the extent to which each party caused the overpayment, but that was not the only basis on which the decision could be taken (para 67).

Whether housing benefit overpayment recoverable after discharge from bankruptcy

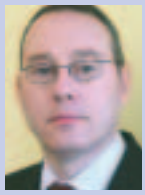
■ R (Steele) v (1) Birmingham City Council (2) Secretary of State for Work and Pensions

[2005] EWCA Civ 1824, 16 December 2005

The claimant was made bankrupt on his own application in September 2001. He was discharged from bankruptcy two years later. He had been overpaid JSA both before and after the bankruptcy order. He brought a claim for judicial review challenging the local authority's power to recover the overpayments from his HB after his discharge from bankruptcy. At the first instance, it was held that an overpayment made before the date of the bankruptcy order was a bankruptcy debt and was not recoverable, but that an overpayment made after the bankruptcy order was recoverable. The secretary of state appealed.

The Court of Appeal allowed the appeal and reversed the decision of the High Court. The Court of Appeal held that the overpayment was a potential liability only as the claimant was under no obligation or liability to repay the overpaid benefit until a determination had been made under SSAA s71. Accordingly, at the time the claimant was made bankrupt, he was not under a liability to repay the benefit and it was not a bankruptcy debt within the meaning of the Insolvency Act 1986. The overpayment was, therefore, recoverable from the claimant despite the fact that he had been discharged from bankruptcy.

1 Available at: www.dwp.gov.uk/housingbenefit/news/newsletter/index_2006.asp.
2 The DWP circulars and bulletins referred to in this article are available at: www.dwp.gov.uk/hbctb. They provide a useful but not definitive guide to the interpretation of HB legislation.
3 The full text of Social Security Commissioners' decisions is available at: www.osscsc.gov.uk unless otherwise stated.
4 Available at: www.dwp.gov.uk.
5 Michael Barris, Roehampton Citizens Advice Bureau supplied this case report. The decision was not circulated.


Bethan Harris, Desmond Rutledge and David Watkinson are barristers at Garden Court Chambers, London.

updater

Legislation

CIVIL LIBERTIES

Identity Cards Act 2006 (Commencement No 1) Order 2006 SI No 1439

This Order brings into force, on 7 June 2006, the following provisions of the Identity Cards Act (ICA) 2006:

- s25 (possession of false identity documents etc);
- s26 (identity documents for the purposes of s25);
- s30 (amendments relating to offences), except for the purposes of the references to ICA ss27 and 28 in the amendment made by ss(4);
- s40 (orders and regulations);
- Sch 2 (repeals); and
- ss1(5) to (8) (definition of registrable fact) and 42 (interpretation) so far as necessary for the interpretation of the provisions specified above.

CRIMINAL

Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006 SI No 1116

Criminal Justice Act (CJA) 1988 Part 4 empowers the Attorney-General to refer certain criminal cases to the Court of Appeal, with the leave of that court, where he considers that the sentences imposed were unduly lenient. As a result of CJA 1988 s35(3)(b)(i), Part 4 applies to offences which are triable on indictment only. The Home Secretary may by Order, made under CJA 1988 s35(4), specify further cases to which Part 4 is to apply. Article 2 of this Order provides that Part 4 is to apply to the cases specified in Sch 1.

- Sch 1 para 1 specifies serious fraud cases which have been transferred to the Crown Court by way of a notice of transfer made under CJA 1987 s5, and serious fraud cases in which proceedings were brought by way of a voluntary bill of indictment following dismissal of charges which were the subject of a notice of transfer.
- Sch 1 para 2 specifies cases in which a sentence has been passed for one of the miscellaneous offences listed.

Sch 1 para 3 specifies cases in which a sentence has been passed for one of the offences listed, all of which are offences under the Sexual Offences Act (SOA) 2003.

- Sch 1 para 4 specifies cases in which a sentence has been passed for attempting to commit or inciting the commission of any of the offences listed in paras 2 and 3 other than those at para 2(i).

This Order revokes the Orders set out in Sch 2 and consolidates their contents. It also adds further offences to those which Part 4 applies to, the majority of which derive from the SOA. In force 16 May 2006.

DEBT

Consumer Credit (Exempt Agreements) (Amendment) Order 2006 SI No 1273

This Order amends the Consumer Credit (Exempt Agreements) Order 1989 SI No 869 to provide that the Consumer Credit Act 1974 shall not regulate debtor-creditor agreements where the creditor is a credit union and the rate of the total charge for credit does not exceed 26.9 per cent. In force 1 June 2006.

Credit Unions (Maximum Interest Rate on Loans) Order 2006 SI No 1276

This Order increases the limit on the interest which a credit union may charge on loans made by it. The maximum rate of interest is increased from one per cent to two per cent a month. In force 1 June 2006.

DISCRIMINATION

Equality Act 2006 (Commencement No 1) Order 2006 SI No 1082

This Order brings into force certain provisions of the Equality Act (EA) 2006. Article 2 lists those provisions of the EA that shall come into force on 18 April 2006. Article 3 specifies the provisions that shall come into force on 4 December 2006 and article 4 lists those provisions that shall come into force on 6 April 2007.

Disability Discrimination Code of Practice (Supplement to Part 3 Code of Practice) (Provision and Use of Transport Vehicles) (Appointed Day) Order 2006 SI No 1094

This Order appoints 18 April 2006 for the coming into effect of the supplement to the Code of Practice on the duties under Disability Discrimination Act 1995 Part 3, entitled *Provision and use of transport vehicles*, which was issued by the Disability Rights Commission on 11 April 2006.

EDUCATION

Education (Change of Category of Maintained Schools) (Amendment) (England) Regulations 2006 SI No 1164

These regulations further amend the Education (Change of Category of Maintained Schools) (England) Regulations (E(CCMS)(E) Regs) 2000 SI No 2195 for the purpose of inserting Sch 2B (setting out in full the changes made under Sch 2A) into the E(CCMS)(E) Regs. In doing so it rectifies the fact that the Education (Change of Category of Maintained Schools) (Amendment) (England) Regulations 2005 SI No 1731 failed to give effect to this. In force 31 May 2006.

ENVIRONMENT

Clean Neighbourhoods and Environment Act 2005 (Commencement No 2) (England) Order 2006 SI No 1361

This Order brings into force, on 4 August 2006, Clean Neighbourhoods and Environment Act 2005 s104 and Sch 5 Part 10. These provisions amend Environmental Protection Act 1990 s78L, which relates to appeals against remediation notices. The provisions are commenced only in so far as they relate to appeals against remediation notices served by a local authority in England or by the Environment Agency in relation to land in England. They make the appellate authority the secretary of state in relation to appeals against any remediation notice served on or after 4 August 2006.

Radioactive Contaminated Land (Modification of Enactments) (England) Regulations 2006 SI No 1379

Environmental Protection Act (EPA) 1990 Part 2A sets out a regime for the identification and remediation of contaminated land. The Radioactive Contaminated Land (Enabling Powers) (England) Regulations (RCL(EP)(E) Regs) 2005 SI No 3467 applied the powers under the EPA to make regulations and guidance in relation to radioactive substances. These regulations, which apply to England only, are made under the powers under EPA Part 2A, as modified by the RCL(EP)(E) Regs, and make provision for Part 2A to have effect with modifications for the purpose of the identification and remediation of radioactive contaminated land other than in circumstances where the operator of a nuclear installation is liable under the Nuclear Installations Act 1965, or in related circumstances (see reg 17).

These regulations also transpose articles 48 and 53 of Council Directive 1996/29/Euratom, laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation. In force 4 August 2006.

Natural Environment and Rural Communities Act 2006 (Commencement No 2) Order 2006 SI No 1382

Article 2 of this Order brings into force certain provisions of the Natural Environment and Rural Communities Act 2006 on 31 May 2006.

EUROPE

European Communities (Designation) (No 2) Order 2006 SI No 1461

This Order designates authorities to exercise the power to make regulations conferred by European Communities Act 1972 s2(2). The Order specifies matters for which that power may be exercised. In force 29 June 2006.

FAMILY

Civil Partnership Act 2004 (Relationships Arising Through Civil Partnership) Order 2006 SI No 1121

This Order applies Civil Partnership Act 2004 s246 to Social Security (Categorisation of Earners) Regulations 1978 SI No 1689 Sch 1 Part 3 para 7.

Section 246 provides that references to 'step' relationships and 'in laws', in any provision to which the section applies, are to be read as including relationships arising through civil partnership. In force 11 May 2006.

HEALTH

National Health Service (Pre-consolidation Amendments) Order 2006 SI No 1407

This Order makes minor amendments to the National Health Service Act 1977 and other health service legislation which facilitate, or are otherwise desirable in connection with, the consolidation of that legislation. The Order will come into force immediately before the consolidation comes into force.

HOUSING

Allocation of Housing and Homelessness (Amendment) (England) Regulations 2006 SI No 1093

These regulations amend the Allocation of Housing (England) Regulations (AH(E) Regs) 2002 SI No 3264 and the Homelessness (England) Regulations (H(E) Regs) 2000 SI No 701. The regulations apply to England only.

Under Housing Act (HA) 1996 s160A(1) and (3), a local housing authority must not allocate housing accommodation under Part 6 of the Act to people from abroad who are subject to immigration control (within the meaning of the Asylum and Immigration Act 1996) unless they are of a class specified by the secretary of state. Similarly, HA 1996 s185(2) provides that such persons are not eligible for housing assistance under Part 7 unless they are of a class which is so prescribed.

AH(E) Regs reg 4 prescribes the classes of person from abroad subject to immigration control who are eligible for an allocation of housing accommodation, and H(E) Regs reg 3 prescribes the classes of person who are eligible for assistance under HA 1996 Part 7.

■ Reg 2(1)(a) of these regulations revokes Class D in AH(E) Regs reg 4 (which makes provision for nationals of states which have ratified the European Convention on Social and Medical Assistance or the European Social Charter).

■ Reg 2(1)(b) of these regulations revokes two classes in H(E) Regs reg 3:

– class E, which is similar to class D in AH(E) Regs reg 4; and

– class I, which makes provision for persons on income-based jobseeker's allowance or receiving income support. In force 20 April 2006.

Housing (Right to Buy) (Priority of Charges) (England) Order 2006 SI No 1263

This Order specifies two bodies as approved lending institutions for the purposes of Housing Act (HA) 1985 s156 (which specifies that liability to repay the covenant required by s155 under the right to buy is a charge on the premises, and deals with priority of charges on disposals). In being specified for the purposes of that section the bodies also become approved lending institutions for the purposes of HA 1985 s36 (priority of charges on voluntary disposals by local authorities) and HA 1996 s12 (priority of charges on voluntary disposals by registered social landlords). In force 26 May 2006.

Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294

These regulations make provision for which persons from abroad will be ineligible or eligible for an allocation of housing accommodation under Housing Act (HA) 1996 Part 6 and for housing assistance under HA 1996 Part 7. These regulations apply in England only. In force 1 June 2006.

IMMIGRATION

British Nationality (Proof of Paternity) Regulations 2006 SI No 1496

British Nationality Act 1981 s50(9A) (as substituted by Nationality, Immigration and Asylum Act 2002 s9) sets out who is a child's father for the purposes of that Act.

Regulation 2 prescribes requirements about proof of paternity for these purposes. The person must either be named on a birth certificate issued within one year of the birth of the child, or he must satisfy the secretary of state that he is the father of the child. By regulation 3, in establishing whether a person is the father of a child, the secretary of state may have regard to any relevant evidence including, but not limited to, DNA test reports and court orders. In force 1 July 2006.

Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006 SI No 1497

Article 3 of this Order brings into force, on 16 June 2006, certain provisions of the Immigration, Asylum and Nationality Act 2006. Article 4 brings into force s45 (integration loans) of that Act on 30 June 2006.

Nationality, Immigration and Asylum Act 2002 (Commencement No 11) Order 2006 SI No 1498

Nationality, Immigration and Asylum Act (NIAA) 2002 s9 substitutes new s50(9), (9A), (9B) and (9C) into the British Nationality Act (BNA) 1981. The new provisions contain new definitions of a child's mother and father for the purposes of the BNA. New s50(9A) and (9B) enables the secretary of state to make regulations setting out requirements about proof of paternity for these purposes.

Article 2 of this Order commences NIAA s9 in two parts, on the day the Order is made (5 June 2006) (for the purpose only of enabling regulations to be made under new BNA s50(9A) and (9B)) and on 1 July 2006 (for all other purposes).

PLANNING

Planning (National Security Directions and Appointed Representatives) (England) Rules 2006 SI No 1284

Town and Country Planning Act 1990 s321 provides that all planning inquiries are to be held in public except where the secretary of state otherwise directs on the ground of national security. Section 321 (as amended by Planning and Compulsory Purchase Act 2004 s80(1)) makes provision for the appointment of people ('appointed representatives') to represent the interests of any person who will be prevented from hearing or inspecting any evidence at a local inquiry if such a direction is given.

These rules make provision about the procedure to be followed by the secretary of state when considering the giving of a national security direction, including provisions on publicity (r6), written representations (r8), hearings (rr9 and 10) and notification of the decision (r14). The rules also set out the functions of appointed representatives (r4). In force 7 June 2006.

POLICE

Police (Complaints and Misconduct) (Amendment) Regulations 2006 SI No 1406

Regulation 2 paras 1 and 4 – 9 of these regulations amend the Police (Complaints and Misconduct) Regulations 2004 SI No 643 consequent on the introduction, by the Serious Organised Crime and Police Act 2005, of a third category of matter over which the Independent Police Complaints Commission has jurisdiction, namely a death or serious injury matter. These matters arise where a person has died or has been seriously injured following some form of contact with the police, but where there has been no complaint and there is no indication that a criminal or disciplinary offence has been committed and so the case does not come within either of the two existing categories of matters (complaints and conduct matters). In force 22 June 2006.

SOCIAL SECURITY

Child Tax Credit (Amendment No 2) Regulations 2006 SI No 1163

These regulations amend the Child Tax Credit Regulations (CTC Regs) 2002 SI No 2007.

■ Reg 1 provides for the citation and commencement of these regulations.

■ Reg 2 amends CTC Regs reg 3(1) by adding a further case (Case F) in which a person is not to be treated as being responsible for a child or qualifying young person – that of a child or qualifying young person who is receiving working tax credit in his/her own right (whether alone or on a joint claim with a partner).

The new case provides that it does not apply to a person who was receiving child tax credit for the child or qualifying young person immediately before the making of these regulations until:

■ the child or qualifying young person ceases relevant education or approved training;

■ the person claiming child tax credit ceases to receive it; or

■ 24 August 2006, whichever occurs first. In force 24 May 2006.

Social Security (Income Support and Jobseeker's Allowance) Amendment Regulations 2006 SI No 1402

These regulations make amendments to the Jobseeker's Allowance Regulations (JA Regs) 1996 SI No 207 and the Income Support (General) Regulations (IS(G) Regs) 1987 SI No 1967, including:

■ Reg 2 amends the JA Regs to change some of the jobseeker's allowance entitlement conditions which a person can be treated as having met in two circumstances. First, where the person is required to attend a court or tribunal as a justice of the peace, a party to any proceedings, a witness or a juror (similar provision is also made in the case of a member of a joint claim couple). Second, where the person is detained in custody in specified circumstances.

■ Reg 3 amends the IS(G) Regs to change the circumstances in which a person can be entitled to income support where s/he is required to attend a court or tribunal as a justice of the peace, a party to any proceedings, a witness or a juror. In force 30 May 2006.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/Heather Williams
April 2005 ◆ Pb 0 905099 91 5 ◆ 760pp ◆ £37

Community care

Community Care and the Law
3rd edn
Luke Clements
2004 ◆ Pb 1 903307 19 8 ◆ 758pp ◆ £37

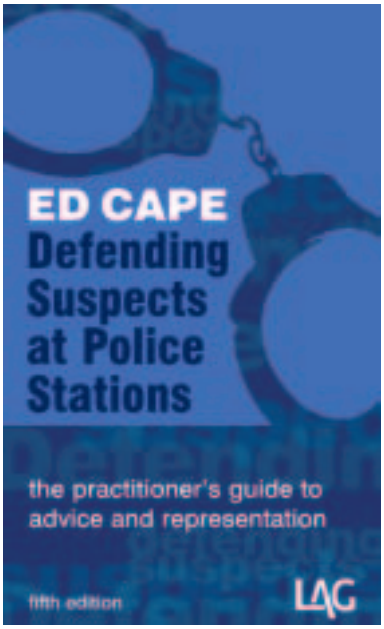
Crime

Defending Suspects at Police Stations 5th edn
Ed Cape COMING SOON
Sept 2006 ◆ Pb 1 903307 44 9 ◆ c900pp ◆ £45

ASBOs
a practitioner's guide to defending Anti-social Behaviour Orders COMING SOON
Maya Sikand
Sept 2006 ◆ Pb 1 903307 41 4 ◆ c500pp ◆ £45

Defending Young People
in the criminal justice system 3rd edn
Mark Ashford/Alex Chard/Naomi Redhouse COMING SOON
Sept 2006 ◆ Pb 1 903307 34 1 ◆ c900pp ◆ £48

Abuse of Process
a practical approach NEW
Colin Wells
June 2006 ◆ Pb 1 903307 46 5 ◆ 384pp ◆ £45



Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ◆ Pb 1 903307 25 2 ◆ 502pp ◆ £37

Reconcilable rights?
analysing the tension between victims and defendants
Edited by Ed Cape
2004 ◆ Pb 1 903307 31 7 ◆ 148pp ◆ £15

Employment

Discrimination Law Handbook
Camilla Palmer/Tess Gill/Karon Monaghan/Gay Moon/Mary Stacey/Barbara Cohen
Edited by Aileen McColgan COMING SOON
Oct 2006 ◆ Pb 1 903307 38 4 ◆ c900pp ◆ £50

Maternity and Parental Rights
a parent's guide to rights at work
3rd edn COMING SOON
Camilla Palmer/Joanna Wade/Katie Woods/Alex Heron
Sept 2006 ◆ Pb 1 903307 40 6 ◆ 500pp ◆ c£28

Employment Law
an advisers' handbook 6th edn
Tamara Lewis
Oct 2005 ◆ Pb 1 903307 36 8 ◆ 804pp ◆ £28

Employment Tribunal Claims
tactics and precedents
Naomi Cunningham
March 2005 ◆ Pb 1 903307 33 3 ◆ 440pp ◆ £25

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/Rebecca Tuck/Betsan Criddle
2004 ◆ Pb 1 903307 29 5 ◆ 758pp ◆ £37

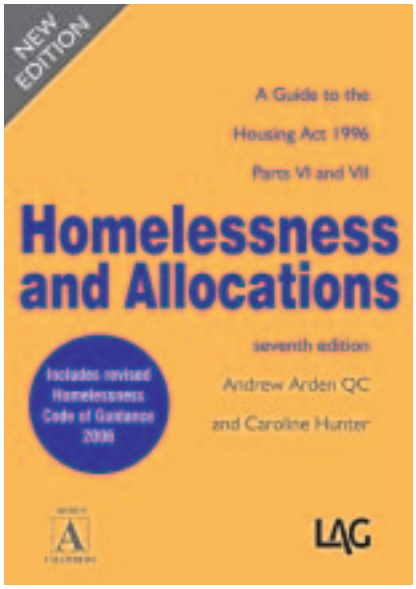
Gypsy and Traveller law

Gypsy and Traveller Law
Edited by Marc Willers/Chris Johnson
2004 ◆ Pb 1 903307 26 0 ◆ 488pp ◆ £29

Housing

Homelessness and Allocations
7th edn COMING SOON
Andrew Arden QC/Caroline Hunter/Lindsay Johnson
Aug 2006 ◆ Pb 1 903307 38 4 ◆ c700pp ◆ £45

Defending Possession Proceedings 6th edn
COMING SOON
Nic Madge/Derek McConnell/John Gallagher/Jan Luba QC
July 2006 ◆ Pb 1 903307 30 9 ◆ 750pp ◆ £48



Leasehold Disputes
a guide to Leasehold Valuation Tribunals
Francis Davey/Justin Bates
2004 ◆ Pb 1 903307 27 9 ◆ 256pp ◆ £20

Housing Law Casebook 3rd edn
Nic Madge
2003 ◆ Pb 1 903307 10 4 ◆ 1264pp ◆ £39

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/Andrew Dymond
2002 ◆ Pb 1 903307 14 7 ◆ 320pp ◆ £29

Housing and Human Rights Law
Christopher Baker/David Carter/Caroline Hunter
2001 ◆ Pb 1 903307 05 8 ◆ 252pp ◆ £19

Repairs
tenants' rights 3rd edn
Jan Luba QC/Stephen Knafler
1999 ◆ Pb 0 905099 49 4 ◆ 420pp ◆ £29

Human rights

Human Rights Act Toolkit
Jenny Watson/Mitchell Woolf
2003 ◆ Pb 1 903307 15 5 ◆ 256pp ◆ £22

European Human Rights Law
Keir Starmer QC
1999 ◆ Pb 0 905099 77 X ◆ 960pp
◆ *Reduced from £35 to £25*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn
Sue Willman/Stephen Knafler/Stephen Pierce
2004 ◆ Pb 1 903307 24 4 ◆ 788pp ◆ £39

noticeboard

Conferences and courses

Legal Aid Practitioners Group
Preferred supplier/Carter/CLS strategy – what you need to do now
4 July 2006 (Manchester)
7 July 2006 (London)
9.30 am–5.00 pm
£260 + VAT members,
£495 + VAT non-members
6 hours CPD
This course takes an in-depth, practical approach to helping organisations achieve preferred supplier status. The course will cover:
- Reporting and quality profiles
- Demonstrating value for money (which will be defined in the Carter reports)
- Financial criteria
- IT systems preferred suppliers will need
- Peer review and file assessment

Tel: 020 7960 6068
E-mail: kate@lapg.co.uk
www.lapg.co.uk

The Howard League for Penal Reform
Community sentences cut crime
11 July 2006
10.00 am–4.00 pm
London
£135 (web price)
This is a one-day national conference which will discuss the use of community programmes, showcase some of the best programmes in the country and offer training to practitioners working in the field.

Speakers include: Rob Allen, director, International Centre for Prison Studies, King's College, London and Catryn Yousefi, senior research and campaign officer, The Howard League for Penal Reform.
Tel: 020 7249 7373
E-mail: info@howardleague.org
www.howardleague.org

Shelter
Relationship breakdown and property rights
11–12 July 2006
Manchester
£290 + VAT (standard)
£240 + VAT (discount)
10 hours CPD
This course explores how relationship breakdown affects the property rights of both owner-occupiers and tenants, whether married or cohabiting, mixed or same-sex couples; and aims to enable participants to advise on a range of options.
Tel: 020 7490 6720
E-mail: training@shelter.org.uk
www.england.shelter.org.uk

The Bar Council/JSB Training and Development
Preparing for judicial appointment interviews
12 July 2006 (Part 1)
26 July 2006 (Part 2)
Early evening
London
£235 + VAT per participant, per session
In association with JSB Training and Development, the Bar Council has introduced this short, two-part programme to help applicants for judicial appointment prepare themselves better for the application process.
Tel: 020 8371 7030
www.jsbonline.com

Immigration Law Practitioners' Association (ILPA)
The Immigration, Asylum and Nationality Act 2006
14 July 2006
10.30 am–5.15 pm
Birmingham
£275 ILPA members, £150 concessionary rate, £650 others
5.5 hours CPD
Tel: 020 7251 8383
E-mail: info@ilpa.org.uk
www.ilpa.org.uk

Lectures, seminars and meetings

Human Rights Lawyers Association (HRLA) lectures
Applying human rights to law affecting people with disabilities: crime
5 July 2006
6.00 pm
London
Free to HRLA members,
£10 non-members
1.5 hours CPD
E-mail: MBooker@barcouncil.org.uk
www.hrla.org.uk

HRLA lectures
Procedural bars to Human Rights Act litigation: costs and standing
13 July 2006
6.00 pm
London
Free to HRLA members,
£10 non-members
1.5 hours CPD
E-mail: MBooker@barcouncil.org.uk
www.hrla.org.uk

HRLA lectures
Applying human rights to law affecting people with disabilities: family
19 July 2006
6.00 pm
London
Free to HRLA members,
£10 non-members
1.5 hours CPD
E-mail: MBooker@barcouncil.org.uk
www.hrla.org.uk

LAG's Annual General Meeting
11 July 2006
6.00 pm
London
Tel: 020 7833 2931
www.lag.org.uk

Child Poverty Action Group (CPAG) seminar
Incapacity for work appeals: case-law and tactics
19 July 2006
1.00 pm–4.30 pm
London
£100 lawyers,
£75 statutory organisations,
£65 voluntary organisations,
£50 reduced rates for Citizens Advice bureaux and DIAL UK members
3 hours CPD
This seminar, aimed at experienced appeal tribunal representatives, will provide an overview of the main case-law and other developments in incapacity for work appeals, and consider the implications for tactics at tribunals. Subjects considered include:
- case-law – past trends, future prospects
- medical evidence – its importance, use at tribunal, how it is weighed
- approaches to PCA descriptors – working context, fluctuating conditions

Tel: 020 7837 7979
E-mail: training@cpag.org.uk
www.cpag.org.uk

Advertise your events in noticeboard for FREE!

If you have an event you would like to advertise in *Legal Action*'s noticeboard, please e-mail a short description, including contact details, cost and any CPD accreditation to: hjones@lag.org.uk.

Trainee solicitor and pupil barrister vacancies
If you have a pupillage, training contract or vacation scheme vacancy, you can also advertise it for FREE in *Legal Action*'s noticeboard. Please contact Helen Jones for details, e-mail: hjones@lag.org.uk or tel: 020 7833 7430.

Copy deadlines for entries to appear in:

August: 10 July
September: 7 August
October: 11 September
November: 9 October
December: 6 November

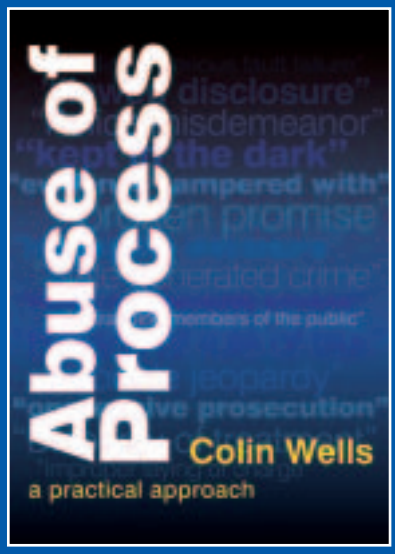
Advertise your event on this page contact: Helen Jones
tel: 020 7833 7430, fax: 020 7837 6094, e-mail: hjones@lag.org.uk

NEW from LAG Books

Abuse of Process: a practical approach

NEW!

Colin Wells



Essential reading for criminal lawyers, police station advisers, Crown Prosecutors, police officers, HM Customs and Excise and criminal litigation students, *Abuse of Process* supplements comprehensive coverage of criminal procedure with invaluable tactical guidance, skeleton arguments and reference materials.

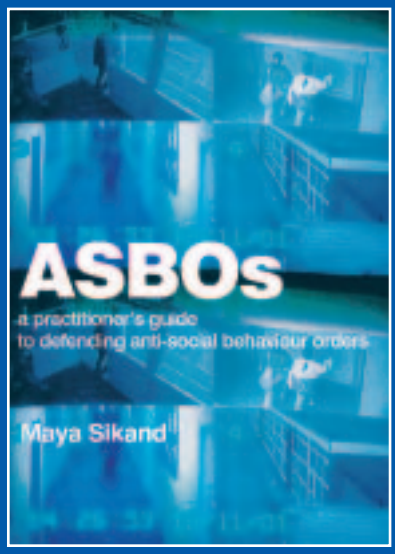
paperback 384pp 1 903307 46 5 £45

Available June 2006

ASBOs: a practitioner's guide to defending Anti-social Behaviour Orders

NEW!

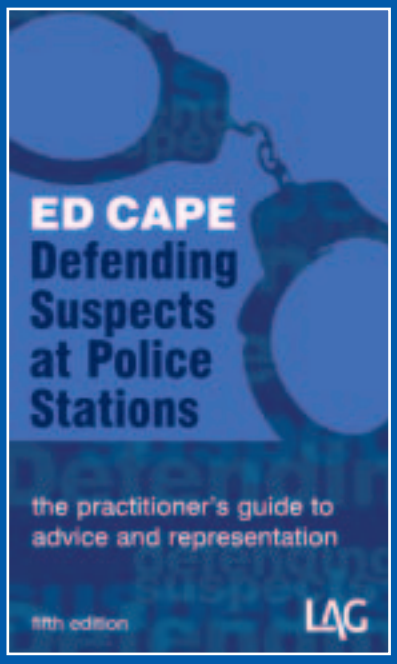
Maya Sikand



A unique new guide to the complex and overlapping law and procedure in both the criminal courts and the county court.

paperback c500pp 1 903307 41 4 £45

Available September 2006



Defending Suspects at Police Stations

NEW! EDITION

5th edition

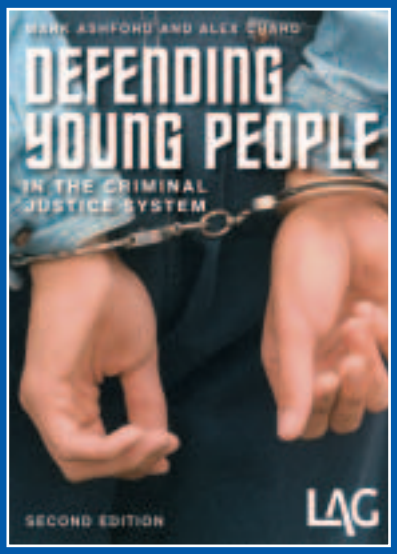
Ed Cape

'It is difficult to believe that a solicitor with a criminal practice dare leave his office without this work.' *Justice of the Peace* on 4th edition

The only fully comprehensive guide to representing clients in police custody. Essential reading for solicitors, solicitors' representatives and those preparing for the Police Station Accreditation Scheme.

paperback c900pp 1 903307 44 9 £45

Available September 2006



Defending Young People in the Criminal Justice System

NEW! EDITION

3rd edition

Mark Ashford, Alex Chard and Naomi Redhouse

'…an excellent source of material for all those involved with young defendants'. *New Law Journal* on 2nd edition

'No one working with young offenders in England and Wales will be able to practise effectively without this text.' *Youth Justice* on 2nd edition

paperback c900pp 1 903307 34 1 £48

Available September 2006

www.lag.org.uk

To order see orders pages inside or contact LAG Books on Tel: 020 7833 7424 or E-mail: books@lag.org.uk

LAG books