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.

Deadline for letters and advertisements for March issue: Monday 13 February

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February 2006

Cover photo: Ankle cuffs at Guantanamo Bay by EMPICS.

Published by LAG Education & Service Trust Ltd, a registered charity incorporated in England (1095065), 242 Pentonville Road, London N1 9UN
Designed by Artworkers
Typeset by Regent Typesetting
Printed by Reflex Litho Ltd
ISSN 0306 7963

editorial
Quality assured?

Peace – or at least a truce – seems to have broken out in the long battle over the quality assessment of legal aid services. After years of complaints about the cost compliance audits, it seems that almost everyone now agrees that peer review is the best way forward. Yet despite this unusual state of consensus, there is more to say about quality. There remain questions about the standard of quality which legal aid suppliers are to meet, and what enables them to do so.

Until the development of peer review, skirmishes in the quality wars have focused on process issues, such as business, personnel, case management systems and supervision arrangements. The 'tick box' auditing system which these processes often entail has rightly been criticised as inadequate, particularly because it neglects the vital question of whether the advice given and action taken were correct and appropriate. Peer reviews have developed in response to this need, and have been generally welcomed because they are carried out by practitioners with an understanding of the legal and practical aspects of case management.

So far, so fairly good. But while peer reviews may prove to be an important tool in raising standards, this approach to quality is still rooted in a rigid monitoring and measurement system, albeit one that works according to a different, and generally preferable, method.

There is an unaddressed question here. Everyone involved in these debates rightly agrees that publicly funded lawyers should deliver good quality services that provide value for money. And, presumably, they also agree that standards should not be inferior to those of privately paid colleagues. Yet there is no benchmark for comparing the quality of private and publicly paid legal services in practice. In the absence of this, an academic mini-industry has been created to set standards and devise a new monitoring process. By its very nature, this has led to a bureaucratic system which focuses on files, written records and audit trails.

Why should this be? After all, other countries have markedly different and not self-evidently inferior approaches to ensuring quality legal aid services. These can include particular training requirements, or evaluation by users, judges and courts. In the USA there is an interest in limiting caseloads, in recognition of the impact on quality if practitioners are seriously overloaded and unable to keep on top of their work.

Let us be clear about this. A high quality service depends on the recruitment and retention of committed and competent practitioners. Publicly funded services should not be – or be seen as – a second-class career option. The sharp difference between the number of students who say that they want to do legal aid work, and who subsequently do so, is dramatic. Even when they do embark on their careers, it seems unlikely that most will remain in legal aid (as a straw poll at a meeting of the Young Legal Aid Lawyers group indicated. See January 2006 *Legal Action* 5).

Low and flat pay rates, compared with their privately paid colleagues, are not good recipes for attracting bright new recruits to legal aid work. Nor is continuing uncertainty over the future of the sector.

As the debate over price competitive tendering (PCT) in criminal duty solicitor work showed, there is a clear connection between quality and cost. The overwhelming reaction to PCT was hostile, with LAG and others arguing that price competition would force lawyers to push work down to less experienced staff and cut corners to get it done for the lowest cost, and lead to increased caseloads. Although the Legal Services Commission (LSC) has dropped its timetable for introducing PCT pending the outcome of the Carter review (see page 5 of this issue), the LSC has persistently refused to accept that such a move would have a damaging impact on the quality of services.

So, while peer reviews are welcome as far as they go, they are by no means the last word in the quality debate. The figures continue to show a decline in legal aid contracts and fewer numbers of people being assisted. Is it not time that the LSC accepted that the two might just be connected? Access to poor quality advice is not access to justice; nor is it enough for potential users to know of a high quality practitioner if s/he is too busy to see them. The LSC urgently needs to produce a few new carrots – and to ease up on the stick – in its efforts to raise the quality of legal and advice services.

news

Inaugural meeting of task force on public legal education

The first meeting of the Public Legal Education Strategy Task Force has just taken place. This independent task force, which is being sponsored by the Department for Constitutional Affairs (DCA) for this year, aims to develop and promote a national strategy for public legal education (see January 2006 *Legal Action* 5). The task force is chaired by Professor Hazel Genn, Professor of Socio-Legal Studies in the Faculty of Laws at University College London (pictured).

Initially, the task force, which began as a joint initiative by LAG, Advice Services Alliance and the Citizenship Foundation, will agree a definition of legal education and boundaries for the project. These will reflect:

- individuals' entitlement to know their rights and responsibilities;
- individuals' need to gain skills to make effective decisions on these issues; and
- the need for community public legal education as an integral part of the provision of effective advice and legal services.

An early exercise will be a review of existing examples of delivery of public legal education. The task force will then identify the needs, outcomes and resources to deliver a national strategy on a cost effective basis. Its recommendations are expected by the end of 2006.

Task force members have been selected for:

- their knowledge of, and interest in, the issues;
- their influence with key stakeholders (including a range of government, consumer, professional and voluntary sector interests); and
- their willingness to champion the development of a national strategy.

The current membership includes representatives from the DCA, Department for Education and Skills, Home Office, LAG, the Citizenship Foundation, Advicenow, National Consumer Council, British Institute of Human Rights, Council for Civil Justice, Youth Access, Age Concern, Office of the Children's Commissioner, Citizens Advice and the Disability Rights Commission.

LSC axes funding to specialist support services

The Legal Services Commission (LSC) has just announced that funding for the specialist support programme will end in July. The news has dismayed many suppliers, who have provided second tier services under the scheme. They have been given six months' notice by the LSC.

This 'Top Slice' of civil funding has been the subject of an internal LSC review. It was made against specified criteria, including:

- the LSC's priorities, which were set out in its Corporate plan 2005/06–2007/08;
- the LSC's strategy for the Community Legal Service; and
- whether the initiatives provide value for money in the light of continuing constraints on the legal aid budget.

Against these criteria, the LSC concluded that clear guidelines are needed to define what projects should receive Top Slice funding. The decision to end the contracts with specialist support services, and a number of other recommendations for changes, were made in the report, *Review of civil top slice budget*. In February, the LSC will hold a meeting for specialist support contractors to 'discuss any issues or concerns that may have arisen from this decision'.*

Alison Hannah, LAG's director, commented: 'This is sad news for clients, who have benefited directly from improved quality of services through second tier support. It is also bad news for suppliers of the services, who provided this highly regarded resource. Some may find their financial viability is significantly affected by the termination of contracts.'

* The meeting will take place on Monday 6 February 2006 at the LSC's offices in Gray's Inn Road, London. Contractors have been asked to contact the LSC to confirm their attendance.

New editor for *Independent Lawyer*

Jon Robins will be the new editor of *Independent Lawyer* from February 2006. He takes over from Fiona Bawdon, who was the magazine's founder and its editor since *Independent Lawyer*'s launch in May 2002.

Jon Robins said: 'I am looking forward to building on *Independent Lawyer*'s success during what promises to be a period of continuing challenges for publicly-funded lawyers.' Fiona Bawdon said: 'After more than four years, and more than 30 issues of the magazine, it is time for me to pursue other projects.'

All change at the Law Society

The Law Society has begun a profession-wide consultation on the future of the society's representation work. As well as inviting solicitors 'to have their say' on the society's future through a questionnaire and at a series of meetings across England and Wales, a cross-section of the profession is being asked to take part in a telephone survey.

As a result of the society's decision to separate its regulatory and representation functions, its council 'wants to reshape the way the society delivers its representation and law reform work, and the support services it offers solicitors'. From January 2006, as part of the separation of functions, two new boards, the Regulation Board and the Consumer Complaints Board, have overseen the society's regulatory and complaints functions.

news

Home Office pilots 'enhanced' returns scheme for asylum-seekers

Kay Everett, a solicitor in the Immigration and Asylum Department at Christian Khan solicitors, writes:
The Home Office has announced a six-month pilot for an 'enhanced returns scheme' for eligible asylum-seekers who decide to return to their country of origin under the Voluntary Assisted Return and Reintegration Programme (VARRP). The VARRP is run by the International Organization for Migration (IOM).

The financial aspect of the enhanced scheme provides an additional £2,000 on top of the usual £1,000 reintegration assistance package that is currently available to each person. Individuals who are eligible under the pilot scheme will receive £500 in cash at the airport as a relocation grant. This will be the first time that cash grants have been paid. The remaining amount will be given according to reintegration plans that IOM staff will arrange with each individual. The reintegration assistance package was increased from £500 to £1,000 in January 2005.

The enhanced scheme is available to those:
- who agree to leave the UK between 1 January 2006 and 30 June 2006; and
- who apply to leave by 31 May 2006.

The scheme is not available to those:
- who made an application for asylum after 31 December 2005.

The Home Office has already written to thousands of asylum-seekers, many of whom are confused by the letter because they believe that it has some bearing on their case. Concerns about the pilot scheme have also been voiced by a number of human rights and lobby organisations because IOM does not have a protection mandate for its work with refugees and displaced persons.

Furthermore, IOM has no remit to assess whether conditions in certain countries are safe enough to allow returns. The consequences of this 'enhanced' programme will only be known in the next few months.

IN BRIEF

Sarah Cooke, the ex-director of the British Institute of Human Rights, was awarded the OBE in the New Year Honours List for services to human rights.

The Legal Services Commission (LSC) has decided to delay its plan to introduce, in April 2006, competitive tendering for criminal legal aid work in London. The LSC is waiting until Lord Carter has announced the outcome of his review of legal aid procurement before it takes any action on this issue. According to sources, Lord Carter's report on the procurement of criminal legal aid services is expected at the end of January.

***A new Homicide Act for England and Wales? A consultation paper* sets out the Law Commission's provisional proposals on the reform of the law on murder. The consultation period will close on 13 April 2006.**

Campaign to end family court secrecy

Families Action for Court Transparency and Openness (FACTO), a new pressure group that intends to work to end secrecy in the family courts, has been set up by suspended lawyer Sarah Harman, who was sanctioned after showing MPs and the media family court papers in a case where she felt her client had been unjustly treated.

FACTO aims to persuade the Department for Constitutional Affairs, which is due to hold a consultation on the issue in February/March 2006, to make the necessary changes in the law to bring the family courts in England and Wales in line with the way that such courts in Canada, New Zealand and, indeed, Scotland operate. In these jurisdictions, family cases are heard in public, but the anonymity of children and families is protected.

FACTO's objective is to ensure the welfare of children remains the priority but not at the cost of closed and inaccessible courts. The group believes that there are concerns that the prohibitions on both families talking about their cases in public and the media reporting on matters of public interest are outdated and have diminished public confidence in the family courts. While several members of the judiciary and the Constitutional Affairs Select Committee on Family Justice are supportive of change, FACTO feels that the issue needs to be pressed further at the future consultation exercise.

DCA plans court fee reviews

The Department for Constitutional Affairs (DCA) has revealed that it will undertake two major reviews in 2006 as part of its long-term strategy for court fees. Details of the reviews were announced by Baroness Ashton in January, when she also confirmed a significant rise in civil, family and magistrates' court fees with immediate effect.

The first review is of the system for exemptions and remissions 'to ensure that it adequately protects access to justice'. The second review will look at the points at which fees are charged, with an objective to introduce trial fees in civil cases.

The current increases also form part of the DCA's long-term strategy for court fees. These are intended to raise about £10.6 million additional income in the current financial year. This is in line with the government's cost recovery targets and its policy that court fees should reflect the cost of the service provided.

The increases are in line with proposals in the DCA's September 2005 consultation paper, *Civil and family court fee increases*, in all but two instances. Fees were not raised for either ancillary relief applications or lower value money claims.

Alison Hannah, LAG's director, commented: 'The insistence on full cost recovery directly impacts on people's ability to access justice. It deters people on modest incomes from taking cases through the court system.'

CONSTITUTIONAL LAW

The dishonour of torture evidence

Eric Metcalfe, a barrister and director of human rights policy at JUSTICE, discusses the Lords' ruling, in *A and others v Secretary of State for the Home Department* [2005] UKHL 71, which prohibits the UK government from relying on evidence obtained by torture. JUSTICE, together with the International Commission of Jurists, the International Bar Association and the Commonwealth Lawyers Association, was part of a successful joint intervention in the case.

Introduction

The House of Lords' decision in *A and others* is a landmark ruling not only in terms of the support that it gives to the fight against torture internationally, but for its articulation of the prohibition against torture as a constitutional principle. Lord Hoffmann did not exaggerate when his judgment referred to '... the great importance of this case for the reputation of English law ...'. At the same time, the decision delivered less than was hoped for in terms of the evidential test by which courts should exclude torture evidence.

Background

The issue of torture evidence arose from the use of indefinite detention under Part 4 of the Anti-terrorism, Crime and Security Act (ATCSA) 2001. As part of the hearings before the Special Immigration Appeals Commission (SIAC), the detainees had argued that some of the evidence relied on by the Home Secretary had been received from foreign intelligence agencies in countries known to use torture. Thus, it was likely that the Home Secretary had relied upon evidence obtained by torture conducted abroad.

The SIAC's proceedings exposed an apparent loophole in UK law. Although the common law had long excluded evidence obtained by torture in criminal proceedings, the courts had never considered whether the same exclusionary rule would apply in civil proceedings.

Although the government maintained that it did not and would not use evidence which it 'knew or believed' had been obtained by torture, it argued that it would nevertheless be lawful for SIAC to take note of it (para 1). In October 2003, SIAC ruled in the government's favour, finding that the issue of torture would go to weight rather than admissibility. In August 2004, SIAC's ruling was upheld by a majority of two to one in the Court of Appeal. The court rejected the argument that the UK's obligation under article 15 of the UN Convention Against Torture ('the torture convention'), which provides that any statement 'established to have been made as a result of torture shall not be invoked as evidence in any proceedings', formed part of the common law or, alternatively, that the admissibility of such evidence was contrary to the right to a fair trial under article 6(1) of the European Convention on Human Rights ('the human rights convention').

The majority of the court held that to the extent that there was an exclusionary rule in civil proceedings, it only applied to the actions of UK officials and not foreign torturers. Similarly, the majority found that, even if there was such a common law rule, it had been implicitly overruled by the procedural rules of SIAC made under the ATCSA.

The judgment in *A and others*

The House of Lords, sitting as a panel of seven rather than the usual five, disagreed unanimously and wholeheartedly with the Court of Appeal's conclusions. Drawing on the full weight of both historical and international sources, the Lords held that the common law exclusionary rule against torture was absolute: '... irrespective of where, by whom, or on whose authority the torture was inflicted' (Lord Bingham).

Although article 15 of the torture convention had not been incorporated into UK law, the Lords found that, for all intents and purposes, it now expressed the relevant common law rule. Indeed, as Lord Bingham put it, to describe the prohibition against torture as a mere rule of evidence was to 'trivialise' it. The prohibition against torture was described variously as 'a constitutional principle ...' (Lord Bingham), '... a bedrock moral principle in this country' (Lord Nicholls), and the '... touchstone of a humane and civilised legal system' (Lord Hoffmann).

For the sake of completeness, a majority of the Law Lords – primarily Lord Bingham with whom Lords Nicholls, Hoffmann and Hope concurred on this point – found that the same exclusionary rule was also a requirement of the due process and fair trial guarantees of articles 5(4) and 6(1) of the human rights convention.

However, on the issue of the evidential test, the Law Lords were very much divided. A majority, ie, Lords Hope, Carswell, Brown and Rodger, held that SIAC should only exclude evidence where it was satisfied that, on the balance of probabilities, the information had been obtained by torture. If SIAC remained in doubt, then the evidence could be admitted. By contrast, the most senior Law Lords, ie, Lords Bingham, Nicholls and Hoffmann, argued strongly that given SIAC's unusual procedural regime – in which detainees were forbidden from knowing the closed evidence or from discussing it with the Special Advocates representing them – the test proposed by the majority would undermine the exclusionary rule and deny basic fairness to detainees. As Lord Bingham said: 'It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.'

Conclusion

Even though SIAC is no longer concerned with indefinite detention, the issue of torture evidence remains a live one. Most of those detained under the ATCSA are now subject to either control orders or deportation orders. This means that their appeals will either be heard by SIAC in the case of deportation or by the High Court (which operates SIAC-like procedures under the Prevention of Terrorism Act 2005) in the case of control orders. While the majority's test is likely to be less effective in preventing the admission of torture evidence, it will still oblige the government to make inquiries as to how the material it receives from abroad was obtained.

The impact of this duty should not be underestimated. Throughout this litigation, the government has maintained that it would never seek to 'rely upon or present evidence where there is a knowledge or belief that torture has taken place' (para 43). It has been able to do so because – as the director of MI5 made clear – the government does not ask foreign governments about their methods of interrogation and, indeed, plainly does not want to know. At any rate, it seems a monumental waste of time and resources for the government to have spent over two years arguing for something that even it agrees to be indefensible. But foolish expenditure of public funds has not been the government's worst sin. As Lord Hoffmann states in his judgment:

> *The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it.*

It has been a point of honour for the UK's legal system that the Law Lords have rejected the use of torture evidence decisively, and a point of dishonour that the government should ever have argued – even hypothetically – in favour of its admission.

ADMINISTRATION OF JUSTICE

Special Advocates – a change in the rules of the game?

Kay Everett, a solicitor in the immigration and asylum team at Christian Khan solicitors, looks at the developments in the use of the Special Advocate system under the Special Immigration Appeals Commission (SIAC) and analyses its shortcomings.

Introduction

'Let no one be in any doubt, the rules of the game are changing.'[1] This now familiar statement of the Prime Minister Tony Blair following the London bombings on 7 July 2005 has led to much speculation regarding 'new terror courts'. The new court procedure, which was mentioned in the same speech, proposed a pre-trial process to allow the extended detention, pre-charge, of suspects. The highly publicised amendment to detain individuals for 90 days without trial was defeated in the House of Commons in November 2005 but little has been said about the suspects' legal representation. Many commentators have suggested that one obvious solution would be to use Special Advocates (SA).

Background

Section 6(1)of the Special Immigration Appeals Commission Act (SIACA) 1997 introduced the ability to 'appoint a person to represent the interests of an appellant', now known as SA. Initially, the SIAC and the use of SA were seen as a marked improvement to the 'Three Wise Men' panel system that had existed before. The SIAC and SA appeared to introduce an element of fairness which had previously been lacking. The panel had been used where the Home Secretary acted, under powers in the Immigration Act 1971, to deport immigrants on national security grounds. These cases invariably involved classified or confidential materials. The decision to deport was taken by the Home Secretary based on the materials available to him, which it was thought could not be disclosed because to do so would, potentially, compromise national security. The panel would then consider that decision and make recommendations about whether it should stand.

In 1997, the European Court of Human Rights (ECtHR) held that the panel was not a 'court' within the meaning of article 5(4) of the European Convention on Human Rights ('the convention'), and that judicial review did not provide an 'effective remedy' within the meaning of article 13 (*Chahal v UK* (1996) 23 EHRR). However, the ECtHR did recognise that the use of confidential material may be unavoidable if national security is at stake.

How SIAC operates and the role of Special Advocates

The SIAC came into being to ensure that there was a statutory appeals process to protect the rights of the individual as well as state security. However, as the powers of the SIAC and SA have been extended through the introduction of other legislation, that element of fairness risks being jeopardised again.[2]

Initially, the SIAC was given jurisdiction to hear immigration appeals when the Home Secretary certified that a decision to deport had been taken either:

- in the interests of national security;
- in the interests of the relationship between the UK and another country; or
- otherwise in the public interest (Nationality, Immigration and Asylum Act 2002 s97(3)).

When a decision is certified in this manner, an appeal against it lies with the SIAC. It is almost inevitable that materials will be placed before the SIAC which the Home Secretary does not wish to be in the public domain on national security grounds.

SA are security-cleared lawyers, who are appointed to represent those appearing before the SIAC in the closed sessions when the sensitive materials are considered. However, a SA only acts in the 'interests' of an appellant and, more importantly, s/he is '... not ... responsible to the person whose interests [s/]he is appointed to represent' (SIACA s6(4)). This represents a significant departure from the usual duties of counsel or solicitors. SA do not 'act' for appellants; appellants are not their clients and they owe no duty of care in relation to their role as a SA.

In the aftermath of the terrorist attacks in America, in September 2001, the Anti-terrorism, Crime and Security Act (ATCSA) 2001 was hastily passed. Part 4 of the ATCSA expanded the role of both the SIAC and SA to include appeal hearings for persons detained by the Home Secretary on suspicion of being connected with terrorism. However, the role of SA is not defined in either the SIACA or the ATCSA but in the rules for the tribunal in question, for example, in the Special Immigration Appeals Commission (Procedure) Rules (SIAC(P) Rules) 2003 SI No 1034.

The system under the ATCSA amounted to indefinite detention of those foreign nationals, who were regarded as a threat to national security and were no longer recognised as refugees, but who could not be returned to their country of origin because they were at risk of torture, inhuman and degrading treatment or of being killed. Although ATCSA Part 4 was repealed by the Prevention of Terrorism Act (PTA) 2005, the principles and practices developed in the cases dealt with under the ATCSA, with respect to SA, are likely to continue to influence other proceedings that use such advocates. It should also be noted that the repeal of the ATCSA does not affect the continuation of any pending appeal against certification under this Act.

Special Advocates system and the SIAC reviewed

In 2003, the Privy Counsellor Review Committee ('the Newton Committee') undertook a detailed review of the ATCSA and found a number of problems in relation to Part 4.[3] Notably, the Newton Committee concluded that the ATCSA's powers were insufficient to meet the threat of international terrorism and there were unnecessary and indefensible risks of injustice.

The Newton Committee stated that ATCSA Part 4 '... is an adaptation of existing immigration and asylum legislation, rather than being designed expressly for the purpose of meeting the threat from international terrorism'. This criticism could surely be levelled against many recent pieces of legislation. Other criticisms made by the Newton Committee of ATCSA Part 4 included that:

- it failed to deal with threats from British nationals (a highly significant issue with regard to the 7 July terrorist attacks);
- it failed to provide for charges against those subject to the SIAC proceedings or to allow any opportunity for the appellants to rebut the evidence against them; and
- the danger of miscarriages of justice was compounded by the low standard of proof (namely reasonable belief and suspicion).

These difficulties are exacerbated by the fact that many SA are primarily immigration practitioners. The measures relating to the SIAC's role were bolted on to

immigration legislation and so were, initially, considered to be civil proceedings. However, as the SIAC's decisions could lead to deprivation of an individual's liberty, its procedures should be recognised as criminal proceedings.

Recently, the Constitutional Affairs Committee (CAC) undertook a detailed analysis of the operation of the SIAC and the role of SA.[4] As reported in *The operation of the Special Immigration Appeals Commission and the use of Special Advocates*, the SIAC is no longer a specialist immigration tribunal; it is now a de facto counter-terrorism court. Yet the SIAC does not carry with it the usual safeguards of the criminal process.

In *A and others v Secretary of State for the Home Department* [2004] UKHL 56, the House of Lords declared that the SIAC's ability (under ATCSA Part 4) to order the detention of non-nationals without trial on the basis that the Home Secretary has reasonable grounds to suspect that they are international terrorists, was in breach of the convention. The PTA is the government's 'solution' to this problem.

The appeal mechanism used under the ATCSA has been transposed into potential challenges to control orders under the PTA. Section 1(2) of the PTA provides for derogating control orders (which infringe article 5 convention rights) and non-derogating control orders . (See also Eric Metcalfe, 'Judges and terrorism after the 7/7 attacks', September 2005 *Legal Action* 7.) Under the new provisions, the Home Secretary need only demonstrate a reasonable suspicion that someone is engaged in a prescribed activity. The judicial review then only considers whether the Home Secretary's decision was reasonable and, it is submitted, does not adequately test whether there was sufficient evidence to justify that suspicion. This test is one step removed from whether there was, objectively, a reasonable suspicion.The Home Secretary now only has to show a court that he had reasonable grounds to suspect. This removes the need to demonstrate that that belief was reasonable to any objective standard.

In the CAC's report, the committee considered that the SIAC system could be made fairer through a variation of the current test, whereby the Home Secretary would have to prove that the material objectively justified his 'reasonable suspicion'. This would require moving from judicial review on non-derogating control orders to an objective appeal considering whether or not there is a 'reasonable suspicion' that an appellant is involved in terrorist-related activity. If the rules of the game have changed, this recommendation is unlikely to be implemented. The effect of the PTA is to extend the use of SA to cases in the High Court. This is a substantial expansion of the role of SA, but the scope of their duties has not been developed accordingly and the inherent defects still exist.

The CAC's report noted that the functions of SA are to represent appellants' interests by:

- making submissions to the SIAC at any hearings from which the appellant and his/her representatives are excluded;
- cross-examining witnesses at these hearings; and
- making written submissions to the SIAC (see SIACA s6 and SIAC(P) Rules Part 7).

Some of the disadvantages faced by SA are that:

- once they have had sight of the closed material, they cannot take further instructions (save for a few narrow exceptions) from either the person that they are representing or his/her ordinary legal representatives;
- SA lack the resources of an ordinary legal team;
- SA have no power to call witnesses; and
- the arrangements for their appointment are unsatisfactory.

Nine SA put in a joint written submission to the CAC when it called for evidence on the operation of the SIAC and the use of SA.[5] From this evidence, it is clear that SA are selected at the discretion of a law officer who is a member of the executive which has authorised the detention of the person in question. Therefore, a serious concern is whether appellants have any confidence in their SA. The CAC recommended the creation of a pool of SA to allow appellants to have a choice of representative. While this has been accepted by the government in principle, it has imposed a restriction that '... the Special Advocate must not have had prior access to relevant closed material, as otherwise he would not be in a position to speak to the appellant or his legal representative'.[6]

Press announcements and information that is available in the public arena suggest there may be considerable overlap in the material that the Home Secretary is choosing to rely on in individual cases. This would lead to a continual narrowing of the pool of SA available. Although this issue has previously been dealt with by the introduction of 'generic' materials for cases, it is difficult to see how this will be able to be applied on an ongoing basis.

Once the closed material has been shown to a SA, s/he can no longer have contact with the person that s/he is representing. SA have suggested that the opportunity to discuss the case with the appellant and their 'normal representative' before being privy to the closed material is next to useless. The government has sought to respond to this criticism by stating that SA can request to be allowed to discuss specific issues with an appellant and his/her representative. However, in their submission to the CAC, the nine SA highlighted the limited nature of any 'contact' in practice.[7]

The CAC considered that: 'It should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the Special Advocate system.' It is difficult to see how the current legislation reaches an appropriate balance to protect these potentially competing requirements.

Despite the CAC's comprehensive review of the SIAC and the use of SA, the government's response has been wholly inadequate in addressing the recommendations and issues raised. As demonstrated in the example above, there is a reluctance to accept that the issues raised present a real threat to fundamental rights, such as the right to a fair trial and equality of arms. Although efforts have been made to address some of the CAC's recommendations, these steps focus on practical issues rather than the fundamental questions raised by the committee's report, for example, the Treasury Solicitor has produced *Special Advocates: a guide to the role of Special Advocates. Part 1: open manual.*[8] A 'closed manual' is also available for those who are appointed as Special Advocates. It must be questioned whether practitioners in the role of SA are able to serve the interests of justice effectively.

1 A full transcript of the press conference, which was held on 5 August 2005, is available at: www.number-10.gov.uk.
2 For further details see Anti-terrorism, Crime and Security Act 2001 Part 4 and House of Commons, Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates. Seventh report of session 2004–05*, Volume 1, para 50, available at: www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf and from: The Stationery Office Limited, £12.
3 *Anti-terrorism, Crime and Security Act 2001 review: report* available at: www.archive2.official-documents.co.uk/document/deps/hc/hc100/100.pdf and from: The Stationery Office Limited, £16.
4 See note 2.
5 See note 2, *Volume II, oral and written evidence* available at: www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf and from: The Stationery Office Limited, £14.50.
6 See note 5.
7 See notes 2 and 5, p33 and Ev 55 para 9 respectively.
8 Available at: www.lslo.gov.uk/pdf/open_induction_manual.pdf.

SCOTTISH LEGAL ACTION GROUP

Legal action in Scotland

The Scottish Legal Action Group (ScoLAG) recently celebrated its 30th anniversary. **Brian Dempsey**, editor of the group's *SCOLAG Legal Journal*, reviews ScoLAG's history of promoting access to justice.

Early concerns

In mid-1975, Scottish members of the Legal Action Group (LAG) separated and established an independent group north of the border. The development was largely amicable. Although LAG had appointed an area convenor for Scotland, 'it has inevitably had to concentrate on the English legal system, and English problems' (editorial, *SCOLAG Bulletin #1*, October 1975).

If members were understanding of the inevitable focus of LAG's work there was less patience with the state of Scottish law. 'Some [members] also felt that there was a desperate need for a body to inject new life into a legal system which has shown distinct signs over the past few years of becoming increasingly moribund' (as above).

This first edition of the *SCOLAG Bulletin*, edited by the now Sheriff McCreadie, carried material on divorce reform, referrals to the children's hearings system, demands for electricity supply deposits by the now MP Frank Doran, unfair dismissal by the now QC Ian Truscott, access to bail by the now Advocate General Lynda Clarke and several items by Professor Ian Willock of Dundee University.

The 1980s

ScoLAG's credibility was boosted when it made a major intervention in the Hughes Commission (the Royal Commission on legal services in Scotland), which reported in 1980 (Cmnd 7846). However, hopes for a speedy resuscitation of the near 'moribund' Scottish system were dealt a blow with the failure to secure enough of a majority in the referendum on the Scotland Act 1978.

The complaints were that Scottish business received far too little time at Westminster and that distance and procedures made influencing developments very difficult. Whether or not it had much significance in practice, there was also unease at English MPs voting on changes to a legal system that they had little sympathy with or knowledge of.

All of this was compounded as the number of Conservative MPs returned by Scottish constituencies fell inexorably over the 18 years of Conservative rule at Westminster. With eventually only one in seven of Scotland's MPs, Conservative politicians held power in the Scottish Office on the basis, some said, of little in the way of democratic legitimacy.

The introduction of the Poll Tax in Scotland a year earlier than in the rest of the UK was only the most extreme example of the imposition of policy in the face of opposition from many quarters in Scotland. Another example, chosen here more or less at random from any number, was the proposal to introduce a new code of guidance on homelessness, based on the guide in England, and consulted on in the last months of the Conservative government in late 1996 (1996 *SCOLAG* 150). *SCOLAG Legal Journal* analysed the responses and found that, of 128 responses, precisely none supported the government's proposals to extend the use of temporary accommodation. The editorial stated: 'We hope the Scottish housing minister abandons the adoption of a contradictory English solution to a non-existent Scottish problem.'

Recent times

But lest anyone think that ScoLAG is party-political and unduly 'down' on the Conservatives, the last eight years of Labour rule have provided plenty of opportunities to criticise regressive steps taken by New Labour in London and the Scottish Labour/Liberal Democrat executive coalitions in Edinburgh.

Asylum has become a huge issue in Scotland and it reveals, in a most stark way, the tensions in the devolution settlement. The incarceration of children at the detention centre in Dungavel in Lanarkshire demonstrated the powerlessness of Scottish ministers. Despite the treatment of children being condemned by the Scottish Commissioner for Children and Young People, and child protection, education and family law being devolved, it seems nothing will be done to alleviate the maltreatment of young people.

In recent months, there have been several intense campaigns against dawn raids carried out by Home Office officials in Scotland, acting under orders from London. These campaigns are often headed by school colleagues of the children involved, shocked that their friends wake to find more than a dozen people in their home, are separated from their parents and forced to use the toilet and dress in front of uniformed strangers, and then carted off they know not where. Despite assurances from Scottish First Minister Jack McConnell that public displeasure at such tactics was being conveyed to the Home Office and that some form of protocol was being developed to stop such treatment, Home Office Minister Tony McNulty has rubbished this suggestion, rejecting the idea of a protocol and saying that raids on families between 5.30 am and 7 am (he denies these are dawn raids) will continue as part of a robust policy.

But some applications of pressure do get results. A recent article in the *SCOLAG Legal Journal* seems to have stopped the Scottish Executive's plans to introduce compulsory HIV testing in their tracks. Under pressure from the Scottish Police Federation, the executive consulted on how best to introduce compulsory tests where police officers come into contact with suspects' body fluids. James Chalmer's article 'Mandatory HIV and hepatitis testing: the flaws in the executive's proposals' in the June 2005 issue of *SCOLAG Legal Journal* forced a rethink and has encouraged various trade unions and charities, such as Victim Support Scotland, to review their policies. While it is too much to expect the executive to admit that it got it wrong (or rather did not think the issue through at all), ministers have now set up a working group rather than press ahead with their plans.

Current and future tasks

As well as providing a forum for discussion of identity cards, ScoLAG continues to respond to consultations as diverse as summary justice, the abolition of Scottish civil appeals to the House of Lords and the guidance on unauthorised camps used by Gypsies and Travellers.

Work in 2006 will focus on access to legal representation (a perennial issue if ever there was one) and on developing ideas about legal education and information for school students. To that end, members of ScoLAG will be meeting with key MSPs in February.

Conclusion

Over the years, ScoLAG has played its part in raising and, so far as possible, resolving, difficulties in many of the same areas that LAG has tackled in England and Wales. And while the Scottish legal system is far from perfect, it can no longer be said to show many signs of being moribund.

■ Brian Dempsey can be contacted at: editor@scolag.org. James Chalmer's article on HIV testing and the entire October 2005 edition of *SCOLAG Legal Journal* are available at: www.scolag.org.

law & practice

FAMILY AND CHILDREN

Family and children's law review


Nigel Humphreys and **Yvonne Spencer** keep readers up to date with legislation, practice matters and case-law relating to family and children's law in this six-monthly series.

LEGISLATION

Over the last six months, there has been a significant amount of new legislation for children's and family lawyers to embrace. Most notably the Civil Partnership Act (CPA) 2004 has come into force, with the first same-sex civil registration taking place on 19 December 2005 in Belfast. On 30 December 2005, the adoption provisions of the Adoption and Children Act (ACA) 2002 finally came into force, providing for significant modernisation of the laws on adoption, including, for the first time, adoption eligibility for unmarried and same-sex couples.

Civil Partnership Act 2004

This Act came into force on 5 December 2005, providing for the first civil partnerships to be registered in that month. Civil registration is modelled on civil marriage, with essentially corresponding provisions, and represents a fundamental change in family law.

Section 1(1) of the CPA defines a civil partnership as a relationship between two people of the same sex ('civil partners') formed by registration. The parties must not already be in a registered civil partnership or married, must both be over 18 (or over 16 and have the appropriate parental consent) and must not be within the prohibited degrees of relationship set out in Sch 1 Part 1.

Notice of intended registration must be given under s8 to a registration authority, following which there is a general waiting period of 15 days (subject to some exceptions) (ss11 and 12). The effect of this is that the first civil partnership registrations mostly took place on 21 December 2005.

The effects of registering a civil partnership are far-reaching:

- Schedule 24 provides for equal treatment of civil partners and married couples for social security, child support and tax credit purposes. They will also be treated equally for purposes of inheritance tax, capital gains tax and income tax.
- Schedule 9 provides equal protection in respect of domestic violence and occupation of the family home.
- Schedule 8 extends to same-sex couples the provisions of the Rent Acts in relation to succession to tenancies.
- Schedule 4 makes amendments to wills, administration of estates and family provision to place civil partners in the same position as married partners.
- Civil partners will be able to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975. They will be entitled to compensation under the Fatal Accidents Act 1976, to equal treatment under employment legislation (ss251–252) and to recognition for immigration and nationality purposes (Sch 23).

On the breakdown of a civil partnership, a dissolution process mirroring the divorce process is provided for in CPA Chapter 2. Court proceedings for dissolution will be necessary. The court will be able to make orders for nullity, separation and dissolution. Dissolution will be based on irretrievable breakdown, supported by the familiar 'facts' with the exception only of adultery.

Financial claims on dissolution can be made under Sch 5, under provisions which correspond to those in the Matrimonial Causes Act (MCA) 1973, the Domestic Proceedings and Magistrates' Courts Act 1978 and the Matrimonial and Family Proceedings Act 1984. In addition to the familiar factors under MCA s25, the court may consider:

- pre-registration cohabitation and the length of a civil partnership;
- pre-registration agreements; and
- cultural differences between the civil partners.

Chapter 5 of the CPA (ss75–79) places civil partners in the same position as step-parents in relation to parental responsibility, guardianship, the right to apply for residence and contact orders without leave, financial applications under Children Act (CA) 1989 Sch 1, adoption, and financial provision for 'children of the family' under the MCA. The effect of the CPA on family law practice will be profound.

Special guardianship orders: Adoption and Children Act 2002 s115

ACA s115 inserts a new s14A–G into the CA 1989, which empowers the court to make a special guardianship order (SGO) in cases where a child or young person is living with someone other than his/her parent on a long-term basis. The SGO is intended to be more robust than a residence order in that it not only secures the placement, but also confers parental responsibility on the special guardian and authorises him/her to exercise parental responsibility to the exclusion of anyone else. It has been described as a 'hybrid' order because it is expected to be made in both public and private law proceedings. This section came into force on 30 December 2005.

Special Guardianship Regulations 2005 SI No 1109

These provisions came into force on 30 December 2005. Part 1 outlines the definitions and procedures. Part 2 relates to the requirement in CA 1989 s14F(1) for local authorities in England to make arrangements for special guardianship support services. Support services for these purposes are defined in CA 1989 s14F(1) as counselling, advice and information and other services prescribed by regulation. Regulation 3 states that this may include financial assistance.

Part 2 Chapter 2 outlines the circumstances when a local authority may make financial payment to a special guardian. Financial assistance is also available to cover the special guardian's legal costs and court fees incurred in making the application.

Before making an order, a report must be prepared by the local authority. Regulation 21 prescribes the details which must be included in a court report whenever a person gives notice of an application for special guardianship. The report must also include the child's wishes and feelings.

Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005 SI No 2897

From 30 December 2005, this Order brought into force the transitional adoption provisions of the ACA. Article 3 sets out, with exceptions, how cases in progress under the Adoption Agencies Regulations 1983 SI No 1964 should be dealt with. For cases still in progress on 30 December, the general rule is that any decision taken before the appointed day shall be taken as a decision for the purposes of Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005 SI No 2720 or the Adoption Support Agencies (Wales) Regulations 2005 SI No 1514.

Article 4 makes transitional provision for the case of a child free for adoption as a result of a freeing order made under Adop-

tion Act (AA) 1976 s18. If freed before 30 December, the child can be placed for adoption, as ACA ss18 and 22 will not apply.

Article 5 is concerned with transitional arrangements in the case of a child who, because of the repeal of AA ss32–36, ceases to be a protected child and becomes a privately fostered child.

Articles 6–8 make transitional arrangements for inter-country adoption cases. Article 6 sets out a general rule with exceptions for Hague Convention cases in progress on 30 December. Any convention case in progress on this appointed day will be treated as if it were a decision under the corresponding provisions of Part 3 of the Adoptions with a Foreign Element Regulations (AFE Regs) 2005 SI No 392. Article 7 makes transitional arrangements concerning the conditions to be met by the prospective adopters in non-convention cases. If, before 30 December, the prospective adopter received notification from the secretary of state that s/he has issued the certificate referred to in Adoption (Bringing Children into the United Kingdom) Regulations 2003 SI No 1173 reg 5(a), and if the adopter has visited the child but s/he has not yet entered the UK, the AFE Regs will not apply.

Part 4 of the Order makes savings provisions in relation to the disclosure of adopter information and parental information under Human Fertilisation and Embryology Act 1990 s30.

Family Procedure (Adoption) Rules 2005 SI No 2795

The new court rules came into force on 30 December 2005. These apply to adoption proceedings in the High Court, county courts and magistrates' courts. The overriding objective in r1 is described as enabling the court to 'deal with cases justly, having regard to the welfare issues involved'. Dealing with a case justly includes:

- Ensuring the case is dealt with fairly and expeditiously;
- Dealing with the case in a way that is proportionate to its nature and complexity;
- Ensuring that parties are placed on an equal footing;
- Saving expense; and
- Allotting to the case an appropriate proportion of the court's resources while taking into account the need to allot resources to other cases (rr1–4).

Part 3 of the rules outlines the court's case management powers in relation to:

- Extending/shortening time limits for compliance;
- Adjourning or bringing forward a hearing;
- Requiring a legal representative to attend court;
- Consolidating or staying proceedings;
- Excluding an issue for consideration;
- Directing a party to file and serve an estimate of costs;
- Taking advice by telephone or any other method of direct oral communication;
- In addition, there is a broad discretion described as the taking of any step or the giving of any other direction for the purpose of managing the case and furthering the overriding objective (rr12–16).

The rules have been drafted in a logical order:

- Part 4, 'How to start proceedings', outlines the forms which must be completed and the documents to be filed with the application (rr17–21);
- Part 5 specifies the procedure for applications in adoption, placement and related proceedings (rr22–33);
- Part 6 deals with 'General rules about service' (rr34–41);
- Part 7 refers to the appointment of the litigation friend, children's guardian, reporting officer and the children and family reporter (rr49–76);
- Part 8 describes the procedures for disclosure of documents and information (rr77–85);
- Part 9 details the procedure for making other applications in the course of the proceedings (rr86–96);
- Part 10 outlines alternative procedures for applications (rr97–105);
- Part 13 deals with the raising of human rights arguments. The court should be given 21 days' notice of any point being raised under the Human Rights Act 1998 (r116);
- Part 17 covers the procedures for expert evidence in the proceedings (rr154–167);
- Part 18 facilitates the process for a change of solicitor (rr168–170); and
- Part 19 deals with appeals against the court's decision (rr171–183).

Practice direction: Reports by the adoption agency or local authority[1]

This direction supplements Family Procedure (Adoption) Rules 2005 Part 5 r29(3). Matters to be contained in the report to the court, where there has been an application for an adoption order, are set out in Annex A. Adoption court reports must provide details of:

- Section A: The report and matters arising from the proceedings;
- Section B: The child and the birth family;
- Section C: The prospective adopter of the child;
- Section D: The placement; and
- Section E: Recommendations.

Statutory guidance to the Adoption and Children Act 2002[2]

This document explains the content of the different sets of regulations made under the ACA, which came into force on 30 December 2005. It also outlines the duties and responsibilities which the regulations impose on adoption agencies.

The main sections of this guidance are issued under Local Authority Social Services Act 1970 s7, which requires local authorities in their social services functions to act under the general guidance of the secretary of state. As such, the document does not have the full force of statute but should be complied with unless local circumstances indicate exceptional reasons which justify a variation.

New court rules on disclosure of information in family court cases involving children

On 31 October 2005, new rules came into force specifying the circumstances in which information from family proceedings involving children, heard in private, may be disclosed without needing the express permission of the court. The new rules are:

- Family Proceedings (Amendment No 4) Rules (FP(ANo4) Rules) 2005 SI No 1976; and
- Family Proceedings Courts (Miscellaneous Amendments) Rules (FPC(MA) Rules) 2005 SI No 1977.

The FP(ANo4) Rules flow from CA 2004 s62. The rules amend the Family Proceedings Rules (FP Rules) 1991 SI No 1247 in relation to the disclosure of information in certain proceedings held in private:

- Proceedings brought under the inherent jurisdiction of the High Court;
- Proceedings brought under the CA 1989; and
- Proceedings which otherwise relate wholly or mainly to the upbringing of a minor.

Rule 6 inserts a new r10.20A into the FP Rules and new r10.20A(3) sets out a table which details who may communicate what to whom, and for what purpose, without prior permission of the court. Persons who may disclose information include legal representatives as well as the parties who may disclose information to McKenzie Friends, experts, the police, the Crown Prosecution Service and the General Medical Council.

The FPC(MA) Rules amend the Family Proceedings Courts (Children Act 1989) Rules 1991 SI No 1395 by inserting a new r23A, 'Communication of information relating to proceedings'.

The new rules deal specifically with circumstances when disclosure may be authorised by a court or justices clerk. A table is inserted into r23A(2) which details the parties who may disclose, to whom and for what purpose. Parties themselves and their legal representatives may disclose limited information to McKenzie Friends, professional mediators, authorised researchers, accrediting bodies such as the Law Society and the Legal Services Commission (LSC).

There is also a published leaflet available for court users explaining the new disclosure rules. Copies can be downloaded from the Court Service website.[3]

The Family Law (Property and Maintenance) Bill

This bill was introduced to the House of Commons on 2 November 2005 and is the government's response to a 1997 commitment to ratify Protocol 7 of the European Convention on Human Rights. Ratification was delayed due to concerns about the compatibility of domestic law and article 5 of the Protocol. Article 5 provides:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interests of the children.

The bill abolishes the common law duty of a husband to maintain his wife and the presumption of advancement as it applies between married and engaged couples. It amends Married Women's Property Act (MWPA) 1964 s1 so that money derived from housekeeping is treated in the same way whether the allowance is made by a husband to a wife or a wife to a husband. The bill also provides for housekeeping allowances made by civil partners to be treated in the same way.

Clause 1 abolishes the common law duty on a husband to maintain his wife in order to equalise the position between spouses.

Clause 2 abolishes the presumption of advancement between married and engaged couples. Currently, as the presumption applies, where there is no evidence to the contrary, if a husband transfers property to his wife he is presumed to be making her a gift. However, if a wife transfers property to her husband no such presumption exists. So, in the absence of any evidence to the contrary, the husband holds the property on a resulting trust for his wife. The same applies to engaged couples. Clause 2 abolishes this rule so that there is no presumption in favour of one spouse or party to an engagement on the basis of gender.

Clause 3 amends the MWPA. Currently, if a husband pays a housekeeping allowance to his wife, any money or property derived from this allowance (in the absence of a contrary agreement) belongs to the spouses in equal shares. But the MWPA is silent on housekeeping allowances that the wife pays. Clause 3(1) amends the position by extending the presumption to housekeeping paid by the wife to the husband.

Clause 4 inserts a new s70A into the CPA so that, in England and Wales, housekeeping allowances made between civil partners will be treated in the same way as housekeeping allowances between married persons.

FAMILY LEGAL AID

Availability of commercial loans

A further amendment to the Funding Code has been announced. With effect from 3 October 2005, the LSC is refusing applications for Full Legal Representation Certificates where it considers that there are available assets or sufficient disposable income to repay a commercial loan, for example, a bank loan to fund the case.[4]

Statutory charge changes

From 1 October 2005, the statutory charge interest rate increased from 5 per cent to 8 per cent and greater payment enforcement measures came into force so that a client may be forced to repay the charge by increasing a mortgage.

Early dispute resolution

One of the drives behind the above changes is to encourage early dispute resolution without issuing proceedings. The LSC expects that General Family Help will be used to fund the majority of private law children cases. There will be an increased expectation that mediation will be used wherever possible and the LSC will limit the scope of certificates to mediation in appropriate cases.

'Next step on' from FAInS

At a family workshop at the Legal Aid Practitioners Group's annual conference, held on 7 October 2005, Angela Lake-Carroll, Director of the Children and Family Services Division at the LSC, explained the up to date position on the Family Help pilot, and the next stage of the Family Advice and Information Service FAInS' initiative. She described the next stage as 'the first designed standard fee scheme for family law'.

The standard fees will apply in Family Help (what used to be Legal Help), General Family Help and help with mediation. There will be two levels, a lower and a FAInS level for staff with two or more years' experience, plus a way in for ILEX and paralegal staff. The aim is to bring in a new contract based on the Family Help pilot by 2007. This will combine with the tailored fixed fee scheme and the preferred supplier pilot. In the Family Help pilot there is a strong emphasis on early resolution in line with the government's drive for early settlement. The new fee system will promote incentives for lawyers to identify cases where it is possible to reach an early settlement.

NEW RULES ON ANCILLARY RELIEF

The rules have been slow to come into force having been first considered by the costs sub-committee of the President of the Family Division's Ancillary Relief Advisory Group in 2003, and endorsed by the president in *Norris v Norris and Haskins v Haskins* [2003] EWCA Civ 1084. It is anticipated that the rules will apply from 1 March 2006.

The existing FP Rules for costs will be abolished and Civil Procedure Rule 44 disapplied. There will be one rule, FP Rule 2.71, which will abolish the use of *Calderbank* letters. It will still be possible to make without prejudice offers which can only be used at financial dispute resolution appointments. The use of open offers will become a tactically powerful weapon for practitioners.

The principle that costs follow the event is scrapped and replaced with the general rule that the court will not make an order for costs at either a final or interlocutory hearing. Litigants' conduct will be a factor that is taken into account as costs will become part of the substantive application and treated as a legitimate liability which will form part of the overall pot.

If costs are to be dealt with as part of the substantive hearing, it remains to be seen what impact this has practically on the time it will take for cases to be heard. It will also be interesting to see how lawyers will advance their litigation tactics in light of the court's assessment of litigation conduct.

CONSULTATIONS

Consultation response: *A single civil court?*[5]

The consultation paper, *A single civil court?,* was published by the Department for Constitutional Affairs (DCA) on 3 February 2005. It invited comments on the case for unifying the first instance civil and family jurisdictions currently held by the High Court, the county courts and the Family Proceedings Courts.

The paper formed the first phase of a scoping study to assess the feasibility and desirability of establishing a unified court with a national, comprehensive and fully flexible jurisdiction, capable of dealing with all first instance civil and family business. In particular, the paper considered:

- Structure – whether the work of the Family Proceedings Court should be included in reforms as well as that of the High Court and county courts;
- Judges – how unification could facilitate more efficient judicial deployment;
- Powers – how the powers currently afforded to the most senior first instance judges might be restricted or distributed in a unified system;
- Business processes – how the processes could be aligned to achieve maximum flexibility, simplicity and efficiency; and
- Miscellaneous – the consequences of any reforms.

A total of 131 responses were received and a summary of the consultation findings was published in October 2005:

- Approximately one quarter of the responses were from individual members of the judiciary and from associated bodies representing the judiciary;
- One quarter came from groups of lawyers, including representative associations and individual firms; and
- The remaining responses were received from an assortment of individual lawyers, members of the public and voluntary sectors.

Broadly, in terms of overall support for a unified system:

- 41 per cent of respondents were supportive of a revised system because of the perceived benefits that could be obtained;
- 31 per cent of respondents were broadly opposed largely because of the perceived threat a unified system would have to the treatment of specialist and top-end litigation, for example, 'Chancery' work and the need to invest in IT before embarking on wider reforms; and
- 28 per cent of respondents were broadly neutral.

In response to the consultation, the DCA reports that ministers have concluded that reform to create single civil and family courts would be justified and beneficial. This has now been adopted as a long-term government objective. There will be new primary legislation to give effect to the proposed reforms.

In the short term the DCA is taking forward several initiatives to streamline and improve the civil and family justice systems utilising its existing powers, including:

- The *Judicial Resources Review*, a joint government/judiciary initiative aimed at optimising the use of judicial resources, including seeking to match cases (as well as civil and family jurisdictions) with the most appropriate level/type of judge.
- With regards to the family justice system, the government and the judiciary are currently working on detailed proposals on more efficient and effective business allocation mechanisms. They are also considering how best to integrate the Family Proceedings Courts and the county courts in order to make the family justice system as seamless and user-friendly as possible.

CASE-LAW

Lambeth revisited

The last review (August 2005 *Legal Action* 15) referred to the case of *Lambeth LBC v S, C, V and J and The Legal Services Commission* [2005] EWHC 776 (Fam), where Mr Justice Ryder, in the High Court, apportioned the cost of a residential assessment equally between the local authority and legally aided parties so that, effectively, the LSC bore half the cost. It was expected that the case would be taken to the Court of Appeal, but instead the LSC has made changes to the Funding Code (*Focus 48* newsletter, August 2005, and updated the *Legal Services Commission manual*).[6] Ryder J acknowledged that the Funding Code is binding on the court. The new guidance provides that costs or expenses in relation to 'treatment, therapy, training or other interventions of an educative or rehabilitative nature' cannot be met under the public funding scheme. While *Lambeth* is still good authority for the apportionment of the costs of assessment, legally aided parties will not be able to recover the costs of any treatment or therapy element under their funding certificates. The case of *Kent County Council v G* (see below) shows a similarly hardening attitude by the courts to ordering assessments that are primarily therapeutic, or which focus on long-term prospects of rehabilitation.

Constructive trusts and jointly owned properties

■ **Stack v Dowden**

[2005] EWCA Civ 857

The Court of Appeal considered an application under Trusts of Land and Appointment of Trustees Act 1996 s14 for a declaration that a property was held by an unmarried couple as tenants in common in equal shares. They had purchased the property in their joint names and the evidence was that they had given no express consideration to what their shares should be. The transfer of the registered property into their joint names contained no declaration of trust, but did provide that the survivor was entitled to give a valid receipt for capital. On the face of it, therefore, the parties had created a beneficial joint tenancy in equal shares.

The Court of Appeal nevertheless felt able to go behind this and to adopt the approach taken in *Oxley v Hiscock* [2004] 2 FLR 669; [2004] EWCA Civ 546, and to award each party a share in the property which the court considered fair 'having regard to the whole course of dealing between them in relation to the property'. For many practitioners, this will be a surprising departure from the principle that where parties have specifically agreed to hold the legal interest as joint tenants, there should be at least a presumption that the beneficial interests will be equal, in the absence of clear evidence of some contrary intention. The case is being appealed to the House of Lords to clarify this issue.

Short marriages and behaviour in ancillary relief

■ **Miller v Miller**

[2005] EWCA Civ 984

This case, decided by the Court of Appeal, and the original decision of Singer J reported at [2005] EWHC 528 (Fam), have been the subject of considerable comment and of concern among practitioners. A robust academic criticism of the Court of Appeal's decision has been made by John Eekelarr of Pembroke College, Oxford University, in his article *Miller v Miller: the descent into chaos*, [2005] Fam Law 870.

After a childless marriage lasting two years and nine months, the wife was awarded capital provision of £5m. The husband's net worth was put between £14m and £20m. During the course of the ancillary relief proceedings, the wife confirmed that she would not be relying on conduct under MCA s25(2)(g). However, she later changed tactics following the decision in *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011. In that case, the Court of Appeal had allowed the husband's conduct to be relied on by the wife as a shield to the argument that the marriage was only a short one.

In *Miller,* Singer J found that the wife's express declaration that she would not rely on conduct did not debar him from taking the husband's conduct into account. Furthermore, the court can take into account behaviour falling short of conduct covered by s25(2)(g) in exercising its overall discretion under s25. He found that the husband was to blame for the breakdown of the marriage in starting a relationship with another woman. The wife in this case had a 'legitimate expectation' that she would enjoy a higher standard of affluence than she had before her marriage, and on a long-term basis. The Court of Appeal refused to overturn Singer J's award, finding it within the permissible discretion of the trial judge.

Practitioners who have struggled to persuade their clients that allegations of behaviour are very rarely relevant in ancillary relief proceedings are now concerned that behaviour issues will have to be raised much more widely than before, increasing both acrimony and expense in financial proceedings. In the Court of Appeal, Lord Justice Wall dismissed this 'floodgates' argument, limiting the likely relevance of behaviour issues to a minority of 'short childless big money marriages'. The case is to be heard on further appeal by the House of Lords. It is listed for hearing from 30 January 2006 to 2 February 2006.

Medical or psychiatric examination or assessment of the child

■ **Kent County Council v G and others**

[2005] UKHL 68

In this case the House of Lords examined the important question about the extent of the court's power to make an order for assessment under CA 1989 s38(6). The Lords specifically considered the question: 'In what circumstances may a court direct a local social services authority to pay for a family's admission to a treatment centre for assessment?'

Practitioners are aware that this question has been highly contentious since the decision in *In re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489. The House of Lords decided unanimously that medical or psychiatric examination or other assessment of the child should be given a broad construction, enabling the court to order a joint assessment of the child and parents, including the parents' attitude and behaviour towards the child (per Lord Browne-Wilkinson at p502).

The facts were complex. The local authority wished to place a baby in local authority care and ultimately for adoption. The baby's mother had previously failed to provide an account for the death of her previous child. Following assessment, which included high levels of therapeutic interventions at the Cassel Hospital, the mother made enormous strides towards caring for her new baby and it was felt that, with ongoing treatment, she could deal with the past and move on.

When the matter returned to court, the first instance judge decided that he had no power to direct the social services authority to fund a further period of in-patient treatment in the Cassel Hospital because the proposal fell on the side of treatment rather than assessment. The family remained in the Cassel Hospital pending an urgent appeal which was successful. Happily, following treatment, mother and child remain united. As a matter of principle the local authority appealed as treatment at the Cassel Hospital for the mother and her child was in excess of £200,000.

Delivering an impressive judgment, Baroness Hale examined the history of the CA 1989 and subsequent reports, guidance and reviews. Concluding, she held that the framers of the CA 1989 had not intended s38(6) to be used to order the provision of specific services for either the child or his/her family. In short, the section should be used to direct an examination or assessment of the child, to enable the court to make a decision about his/her case with the minimum of delay.

For anyone wishing to research or understand the background and development of the CA 1989, Baroness Hale's judgment provides an authoritative wealth of information that will be of interest to both practitioners and students.

■ Nigel Humphreys and Yvonne Spencer are solicitor advocates at Fisher Jones Greenwood LLP, Essex.

1 Available at: www.dca.gov.uk/family/procrules/practice_directions/pd_part05c.htm.
2 Available at: www.dfes.gov.uk/adoption/update290705.shtml.
3 Available at: www.hmcourts-service.gov.uk/docs/ex710_1105.pdf.
4 *CLS Focus 49*, December 2005, pp14–15 available at: www.legalservices.gov.uk/docs/civil_consultations/GuidanceAmendments.pdf.
5 A full text of the response is available at: www.dca.gov.uk/consult/civilcourt/civilcourt_cp0605.htm.
6 New Funding Code para 1.3 available at: www.legalservices.gov.uk/docs/civil_consultations/IntroFCamendments2005.pdf.

SOCIAL SECURITY

Recent developments in social security law

Sally Robertson and **Stewart Wright** discuss important topics in social security law and summarise significant Social Security Commissioners' decisions since their last article was published in February 2005 *Legal Action* 10.

ADMINISTRATION

Overpayments

Failure to disclose

The test that someone who knows a fact may only be said to have failed to disclose it if disclosure was 'reasonably to be expected', has long formed part of the core of case-law on whether an overpayment may be recoverable under Social Security Administration Act (SSAA) 1992 s71. The test was first formulated over 20 years ago in *R(SB)21/82*. It has been applied in countless decisions both at first instance before appeal tribunals, and at the commissioners (see, for example, the Tribunal of Commissioners' decisions in *R(SB)15/87*, *CG/44494/1999* and *R(IS)5/03*).

However, this was all changed in **CIS/4348/2003**, where a Tribunal of Commissioners ruled that whether disclosure is reasonably to be expected has nothing to do with the test of failure to disclose under SSAA s71 (see February 2005 *Legal Action* 10). In the commissioners' view, failure to disclose requires a person to be in breach of a legal obligation to disclose and no more; once this responsibility is identified, all that failure means is non-performance of that obligation, and the reasons why it was not performed are irrelevant. In most cases, the legal obligation to disclose will be found in Social Security (Claims and Payments) Regulations (SS(CP) Regs) 1987 SI No 1968 reg 32, with its obligation (in reg 32(1A)) to notify the secretary of state of any information which he has asked the claimant to report to him.

In *CIS/4348/2003*, the claimant had not notified her local Department for Work and Pensions (DWP) office that her children had left home as the order book required her to do. This failure was sufficient to conclude that the claimant had failed to disclose that fact, notwithstanding the finding in her favour that, due to her quite severe learning disabilities, she did not appreciate (in benefit terms) the significance of her children's move from home, and so had not realised that she ought to report it.

This decision has now been upheld by the Court of Appeal on a further appeal by the claimant in **B v Secretary of State for Work and Pensions** [2005] EWCA Civ 929, (2005) 20 July, unreported. However, the court was clearly troubled by the consequences of the Tribunal of Commissioners' approach (for example, that a person who was rendered unconscious on his/her way to tell the local income support office that s/he had just won the lottery and was, thus, physically incapable of reporting that fact would, nonetheless, have breached reg 32(1A) and so would have failed to disclose).

In the court's view, the meaning of 'failed to disclose' in SSAA s71(1) admitted no qualification in favour of claimants who did not appreciate that they had an obligation to disclose something once they were aware of it. In other words, non-compliance with reg 32 was not only a necessary but a sufficient condition of the secretary of state's entitlement to recover under s71(1).

Moreover, there were only a limited number of cases in which the 'reasonably to be expected' thesis had been adopted by commissioners before *CIS/4348/2003*, but all without argument. However, this was not enough to suggest that the test had been adopted by parliament as an integral part of 'failure to disclose' when it re-enacted (and extended) the test in the Social Security Act (SSA) 1986.

***Comment*:** The claimant has recently petitioned the House of Lords for leave to appeal. Even assuming that leave is granted, the House of Lords is unlikely to decide any appeal before the end of 2006 at the earliest. Therefore, if advisers have appeals in which the reasonably to be expected test could make the difference between an overpayment being held to be recoverable or not then they should urge that the appeals be stayed until the House of Lords' proceedings have come to an end.

Failure to disclose: test for disclosure

Secretary of State for Work and Pensions v Hinchy [2005] UKHL 16; (2005) *Times* 4 March, was the long awaited decision on the secretary of state's appeal against the Court of Appeal's ruling that the secretary of state could not disown his own decision under the SSA 1998. Therefore, Mrs Hinchy could not have failed to disclose (to the income support office) that her Disability Living Allowance (DLA) had come to an end as the secretary of state, by his decision to award DLA for a time-limited period, already knew this fact.

The House of Lords, by a majority of four to one, reversed the decision of the Court of Appeal. The Lords held that Mrs Hinchy had failed to disclose because she had not reported to her local income support office that her DLA had come to an end when her order book had clearly instructed her to notify such a change. Reading the social security scheme as a whole, and SSAA s71 together with SS(CP) Regs reg 32, it was clear that the focus of the failure to disclose test was on the claimant doing something, and was not to be judged by some out of context test of what 'disclose' could mean.

***Comment*:** The House of Lords' ruling means that the case-law is back with the traditional test laid down in *R(SB)15/87*, ie, the claimant has to report any changes to the local office concerned with that benefit. The focus of argument, assuming that *B* is not successful before the House of Lords, will now have to shift to the quality of instructions given to claimants about what they are required to report.

Appeal tribunals

Exclusion of appeal rights in respect of decisions made under reciprocal agreements

In **Campbell v Secretary of State for Work and Pensions** [2005] EWCA Civ 989, (2005) 28 July, unreported, the Court of Appeal dismissed the claimant's appeal from the decision of the Tribunal of Commissioners in *CIB/3645/2002*. The court endorsed the view that Mr Campbell had no right of appeal against a decision of the secretary of state under Social Security (Jamaica) Order 1997 ('the Jamaica Order') SI No 871 article 13(2).

An appeal tribunal had allowed Mr Campbell's appeal against such a decision. It decided that when Mr Campbell had left GB to go to Jamaica, he was likely to be permanently incapable of work and that he was, therefore, exempt from the general disqualification for receiving incapacity benefit while absent from GB under Social Security Contributions and Benefits Act (SSCBA) 1992 s113. The Tribunal of Commissioners had allowed a further appeal by the secretary of state on the basis that the tribunal had no jurisdiction to consider such an appeal because of the terms of SSA 1998 s12(1)(a) and Sch 2 para 9 when read with Social Security and Child Support (Decisions and Appeals) (SSCS(D&A)) Regulations 1999 SI No 991 Sch 2 para 22.

Upholding the commissioners' approach in the main, the Court of Appeal noted that Mr Campbell's appeal could succeed only if he could show both that the decision was not made on an award and that it was made under SSCBA s113 (otherwise he could not come within SSA 1998 Sch 3 para 3(c)). In its view, he failed in both steps.

First, the ruling not to pay benefit under article 13(2) of the Jamaica Order was not a decision under SSCBA s113(1). It was a

decision taken under a bipartite inter-government agreement which, critically, is given effect, in the context of English domestic law, by SSAA s179. The decision thus '… falls to be made … by virtue of …' the SSAA, and it is that link which brought the decision within SSA 1998 s8(1)(c). The Court of Appeal recognised that it was a decision which, once made, affected the scope and effect of SSCBA s113(1). However, that did not lead to the conclusion that it was a decision which fell to be made 'under' or 'by virtue of' s113(1).

Second, the decision not to pay benefit under article 13(2) of the Jamaica Order was not a decision within SSA 1998 Sch 3 para 3(a), but was rather a decision taken under a bipartite inter-government agreement that the person is to be treated as if s/he were not within s113(1).

Supplemental reasons for decisions

At times it has been debated whether an appeal tribunal can either supplement the reasons for a decision that have already been given or, more particularly, be asked by the commissioner (or other parties) to supplement its reasons. The view in favour of supplemental reasons may have been lent support by the Court of Appeal in **Barke v SEETEC Business Technology Centre Limited** [2005] EWCA Civ 578, (2005) 16 May, unreported, where the court held that it was possible for reasons to be supplemented at the request of the Employment Appeal Tribunal (EAT) under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI No 1861 r30(3). The wording of r30(3)(b) permitted the EAT to request written reasons in relation to any judgment or order at any time. Of more relevance perhaps is the view in *Barke* (see paras 25–28) that a tribunal does not become functus officio once it has delivered the reasons for its decision (for example, setting aside decisions, correcting accidental errors, etc).

Comment: If the comments about a tribunal still having legal powers after it has delivered its statement of reasons can apply to social security appeal tribunals, then there would seem to be nothing in the language of SSCS(D&A) Regs reg 53(4) to compel the view that a statement can never be returned to. But see now, contrary to this suggestion, *CA/4297/2004*.

Inquisitorial approach where issues are not raised

In **Mongan v Department for Social Development** [2005] NICA 16, (2005) 13 April, unreported, the Northern Ireland Court of Appeal took a, perhaps, surprisingly claimant-friendly attitude to when a tribunal should go into an issue that was not expressly raised on an appeal.

The context of the case was one where the claimant completed the claim form for DLA setting out that:

- she suffered from arthritis and severe asthma that caused breathlessness;
- she was unable to walk very far without severe discomfort;
- she often became lightheaded and needed to be accompanied when outdoors; and
- on some occasions she would fall and need help to get up again.

The appeal tribunal rejected her claim for care and the higher rate of the mobility component, and recorded that 'no claim was presented in relation to the lower rate mobility component'. The commissioner held that the tribunal had not erred in not considering the lower rate mobility component as it had not been expressly raised as an issue on the appeal. As a result, the tribunal, on the evidence before it, was entitled to conclude that the claimant had elected not to claim the lower rate and, in any event, the evidence presented to the tribunal did not raise the possibility of entitlement that needed to be explored.

Allowing a further appeal by the claimant, the Northern Ireland Court of Appeal ruled that the words 'raised *by* the appeal' (the court's emphasis) suggest that a tribunal is not absolved of its duty to consider relevant issues simply because they have been neglected by the claimant or his/her legal representatives. If an issue is sufficiently raised by the available evidence, then a tribunal would err in law in not considering that issue even if it has not been raised by either the appellant or his/her legal representatives.

An appeal tribunal, in carrying out this exercise, may have regard to the fact that an appellant is legally represented; but a poorly represented party should not be placed at any greater disadvantage than an unrepresented one. This need to investigate issues not raised by the parties where the evidence suggests that there may be other points in question, remains the case even where (as here) the claimant is represented and his/her solicitor indicates that a particular point (here the lower rate mobility component) is not in issue on the appeal.

In so far as the Tribunal of Commissioners in *R(IB)2/04* had suggested that the words 'raised by the appeal' were limited to issues actually raised by the parties then, arguably, this view was wrong: an issue can be raised by the appeal if it arises from the evidence.

When to call a child witness

In **CDLA/1721/2004**, a Tribunal of Commissioners addressed when it is appropriate for a tribunal to call a child to give evidence before it (particularly in the context of his/her entitlement to DLA). The commissioners gave detailed guidance on the matters which must be considered but, in summary, their view is that the discretion to call a child to give evidence should be exercised 'with great care and caution'.

In particular, they stated that a tribunal should be slow to require a child to give evidence if his/her parent or carer takes the view that that may be detrimental to the child's welfare. Also, it would be wholly exceptional for a tribunal to call a child if there is evidence from a competent professional that to do so might be harmful. In addition, if a child is to give evidence, the tribunal must consider how that evidence will be taken (for example, whether by video link, how the tribunal's room is to be set up and who will question the child, etc).

Commissioners

Granting leave to appeal to the Court of Appeal

In **Fryer-Kelsey v The Secretary of State for Work and Pensions** [2005] EWCA Civ 511, (2005) 21 April, unreported, the Court of Appeal has emphasised that its decision in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All ER 279 (which stated that a robust attitude to the prospects of success criterion ought to be adopted when the Court of Appeal was deciding whether to grant leave to appeal from a commissioner) should apply equally to the commissioners when they were engaged in the same exercise. Moreover, the error of law on the part of the commissioner must be clearly identified by the applicant in the application for leave to appeal.

HUMAN RIGHTS AND EQUAL TREATMENT

Widowers' entitlement pre-April 2001

R v Secretary of State for Work and Pensions ex p Hooper and others [2005] UKHL 29; (2005) *Times* 6 May concerned a number of widowers who had asked the secretary of state to make extra-statutory payments to them in lieu of the widows' benefits that they could not obtain under the SSCBA. The widowers argued that the secretary of state's refusal to make such payments would mean that he was acting contrary to their human rights under the Human Rights Act (HRA) 1998. When he refused to make these payments, Mr Hooper and the other widowers judicially reviewed these refusals.

Two key issues arose for the Lords' consideration (the Court of Appeal had found against the

government on both matters, though it had dismissed the widowers' claims for other reasons).

- First, whether the non-payment of the widow's pension to men whose wives had died before 9 April 2001 was objectively justifiable.
- Second, even if the non-payment of widows' benefits to widowers was not justified and infringed rights under the European Convention on Human Rights ('the convention') (the government conceded that this was the case with the widow's payment and widowed mother's allowance) whether HRA s6(2) compelled the secretary of state not to make any payments to the widowers to remedy these breaches.

On the first issue, the Lords considered, in some detail, the statistical evidence. They started from the premise that there has never been any social or economic justification for extending the widow's pension to men under pensionable age (and that, therefore, the more accurate question was how quickly the government should have abolished its payment to women).

The House of Lords concluded that the government had been justified in not equalising the position between men and women in respect of the pension until 2001 (when it was abolished for all new claims). Accordingly, the Court of Appeal had been wrong to conclude that the justification had not existed from 1995 onwards.

On the second issue, the House of Lords' view was that even assuming the non-payment to widowers of the widow's payment and widowed mother's allowance before April 2001 breached the widowers' convention rights, HRA s6(2) precluded the secretary of state from making good these breaches. As the Court of Appeal had held – and against which no contrary argument was made to the House of Lords – the provisions of SSCBA ss36 and 37 could not be read so as to cover widowers as well as widows. Once this point had been reached then, regardless of whether the secretary of state had a power at common law to make extra-statutory payments, these were precluded by the clear wording of SSCBA ss36 and 37. Therefore, either HRA s6(2)(a) or 6(2)(b) acted as an absolute bar to such payments being made.

Comment: This decision closes off, decisively, the extra-statutory payment route for widowers whose wives died before 9 April 2001. However, the concession by the government that the denial of the widow's payment and widowed mother's allowance is not justified as a matter of convention law, should now, arguably, free up all those cases before the European Court of Human Rights (ECtHR) in which those are the only issues in play for settlement.

No pension uprating for pensioner in countries without reciprocal agreement with UK and lesser amount of income support paid to single person under 25

The negative decision of the House of Lords in **R v Secretary of State for Work and Pensions ex p Carson; R v Secretary of State for Work and Pensions ex p Reynolds** [2005] UKHL 37; (2005) *Times* 27 May on the claimants' separate but joined appeals was not unexpected. In each case, the claimant argued that the failure to treat her in the same way as, respectively, a pensioner living in the UK or a country with a reciprocal agreement with the UK (where the pension is uprated in line with inflation) and an income support claimant aged 25 or over was unjustified discrimination in respect of her 'possessions': this was contrary to article 14 of the convention when read with article 1 of the First Protocol to the convention.

However, in each of the appeals the House of Lords ruled that, even assuming that both the state retirement pension and income support were 'possessions' and that the grounds of the alleged discrimination (place of residence and age respectively) were forms of 'status' under article 14, there was, in law, no discrimination: Ms Carson and Ms Reynolds were in relevantly different situations from those whom they sought to compare themselves to.

In article 14 discrimination cases, a distinction has to be drawn, in the House of Lords' view, between those grounds where, prima facie, no different treatment can be justified (for example, on the basis of race) and those lesser forms of status that merely require some rational justification. Public interest considerations generally underpin differences in treatment under the second category and, as such, were matters for the democratically elected bodies of government.

Ms Carson's and Ms Reynolds's cases fell into this second category. The refusal of the uprating to Ms Carson was not a denial of respect for her as an individual. She had been under no obligation to leave the UK, but in so doing she had put herself outside the primary scope of the UK's social security system. As a result she could not complain that she should be treated similarly to a person who had remained in the UK, and who had remained subject to its interlocking benefits and tax rules. Moreover, the mere fact that she had paid national insurance contributions did not give her that same connection with the UK tax and benefits systems.

As for Ms Reynolds, there was even less to be said in favour of her appeal. What the case turned on in the end was that the situation of single people aged under 25 was relevantly different from those aged 25 or over: many more of the former either lived with their parents or in shared accommodation and so had lower expenses; it was, therefore, rational for them to be treated differently.

All benefits are 'possessions'

It is very difficult for a benefits challenge to succeed under Protocol 1 article 1 of the convention alone, given the wide defence which a national government has under that article. However, if a benefit can nonetheless be classified as a 'possession' under Protocol 1 article 1, this will enable the anti-discrimination provisions in article 14 of the convention to be brought into play. The problem, however, has been in getting all benefits to count as 'possessions' with, until recently, a distinction being made between contributory benefits, which were possessions, and non-contributory benefits, which were not.

However, in **Stec and others v UK** 6 July 2005 (App Nos 65731/01 and 65900/01), the Grand Chamber of the ECtHR has ruled, arguably decisively, that non-contributory benefits are 'possessions' for the purposes of Protocol 1 article 1 of the convention.

The Grand Chamber conclusion was that:

… if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of article 1 of Protocol No 1, there is no ground to justify the continued drawing of such a distinction.

… If … a contracting state has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of article 1 of Protocol No 1 for persons satisfying its requirements.

In cases, such as the present, concerning a complaint under article 14 in conjunction with article 1 of Protocol No 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by article 14, the relevant test is whether, but for the condition of entitlement about which

Social Security Commissioners' decisions: significant cases since February 2005

Bereavement benefits

CG/2973/04
Widow's benefit – late claim – whether original claim form received – legal burden is on the sender – photocopy supplied – once it is accepted that the form was posted, an evidential burden falls on the recipient to produce evidence that it was not received – CP Regs reg 6(1)(a) indicates an intention that the rebuttable presumption of receipt in IA s7 should not apply to claim forms.

CP/3108/04
Validity of marriage – on a claim by the second wife, comes to a different decision on the deceased husband's domicile at the time of a 1961 talaq than in *CP/3990/98* (claim by first wife) – full analysis.

CP/1516/04
Validity of marriage challenged after an interview by an International Pension Service Officer – Yemen – tribunal erred by deciding the claimant was an impostor without warning her of its view.

CP/4062/04
Validity of marriage – severe criticism of approach taken by pension liaison officers and decision-makers on widows' claims in Pakistan, Bangladesh, Yemen, India and Jamaica – pointers given on the assessment of evidence.

Child benefit

CF/699/05
Overpayment – failure to disclose that child had left full-time education – claimant unaware of that fact – tribunal's reasoning confusing – misdirection on constructive knowledge – legally permissible approaches to assessing evidence of actual knowledge and of constructive knowledge.

Child tax credit

CTC/2090/04
Practice and procedure – competing claims – sole ground of appeal was that the tribunal could not decide which parent had main responsibility for a child without hearing from both parents – it was the Board's responsibility to get the information it needed to decide the claim: *Kerr v Department for Social Development* [2004] 1 WLR 1372 – in the circumstances the tribunal was entitled to assume that the Board was content for the appeal to be decided without hearing from the mother – noted that the legislation does not prevent inconsistent decisions, nor does it join the absent parent as a party to the proceedings.

Disability living allowance

CSDLA/791/04
Practice and procedure – tribunal not entitled to address the merits of a claim without first being satisfied that any of the grounds for supersession have been made out.

C12/04–05(DLA)
Practice and procedure – supersession – a lessening of care needs is a change of circumstances – not fatal that the original ground for supersession was the presence of additional conditions.

CDLA/4208/04
Practice and procedure – medical report not based on an examination as no chaperone available – matter of professional judgment – tribunal must take lack of examination into account when weighing the value of findings and opinions in the report.

CDLA/1721/04(T)
Practice and procedure – evidence from a child – no adverse inference from non-presence. Learning difficulties – disability, severity and diagnosis considered at length.

CDLA/4475/04
Practice and procedure – child – diagnosis was to be considered at a medical review within a few weeks – given the importance of a diagnosis, notwithstanding *CDLA/1721/04(T)*, erroneous not to adjourn to await outcome of medical review.

CDLA/3831/04
Mobility component – lower rate – under DLA Regs reg 12(7) and (8) it is the severity of the anxiety that counts, not the severity of the mental condition.

CDLA/4389/04
Practice and procedure – tribunal's decision erroneous – failure to comply with DA Regs reg 51 – tribunal itself refused postponement – claimant unaware of refusal.

CSDLA/731/04
Mobility component – lower rate – fear of accidental evacuation of bowels outdoors – if a rational fear, no entitlement; if a symptom of mental disability, depression in this case, then capable of satisfying DLA Regs reg 12(8).

CDLA/1859/04
Overpayment – claimant abroad – orders cashed by daughter – secretary of state not entitled to recover from a claimant benefit that has been wrongly obtained by an agent where the agent was acting outside her authority and the claimant derived no advantage from the wrong-doing.

Incapacity benefit

CIB/4253/04
Practice and procedure – fair hearing – late submission of evidence – refusing to look at that evidence was not a proportionate response to the unrepresented claimant's non-compliance with directions.

CIB/1985/04
Exempt work – met all conditions save for notification – as claimant would have remained entitled had he disclosed, SSAA s71(3) could not be satisfied – no overpayment.

CIB/760/05
Exempt work – helped father-in-law with labouring work – no payment – admission at interview that he had been working, plus stopping work immediately, is to give the required notice – no overpayment.

CIB/4012/04
Medical examination – notice of examination posted – to which address unclear – calculation of time limits – inadequate evidence – secretary of state failed to satisfy IFW Regs reg 8(3).

CSIB/598/04
Personal capability assessment – the tribunal was entitled to correct the decision-maker's error and apply the original version of the schedule – *R(IB)3/03 (Howker)* leaves the validity of the purported 1996 amendments* to be decided on a case by case basis – validity dependent on amendment having a neutral effect.

CIB/2916/04
Personal capability assessment – chronic obstructive airways disease – lifting and carrying – tribunal erred by excluding the effects of breathlessness on the activity.

CIB/3743/04
Personal capability assessment – electronic medical report – authenticity – *CIB/3984/04* wrong – ECA s7(1) has no application to tribunals as the strict rules of evidence do not apply.

CIB/511/05
Personal capability assessment – electronic medical report – use of stock phrases generated by the programme increases the risk of accidental discrepancies or mistakes remaining undetected – tribunals should take care to identify and deal with apparent discrepancies to satisfy themselves that an electronic report really does represent the considered clinical findings and opinions of the examining doctor.

CIB/1522/05
Personal capability assessment – electronic medical report – mental health descriptors – illustrates why a tribunal must make its own decisions on each of the descriptors in issue.

Income support

CIS/255/05
Resources – capital – reduced from date claimant sent cheque to recipient, not from the later date the sum was cleared from the bank account.

CIS/218/05
Resources – notional capital – share of proceeds of sale of former matrimonial home – gifts made to adult children – tribunal failed to address the significant operative purpose of the gifts – whether a gift is reasonable or prudent, although relevant, does not answer that question.

CIS/4757/03
Resources – capital – disregard of proceeds of sale of former home – relevant factors considered at length – obiter comment: a change of circumstances may enable an extension of the disregard to commence well after the end of the initial 26 weeks.

CIS/1064/04
Resources – deemed income from child tax credit in 2003/2004 – ignore actual payments – take the most recent award (or amended award), identify its period and attribute that award at a weekly rate over the identified period – repeat exercise for each amended award – exhaustive analysis.

CIS/1657/04
Overpayment – approach where a claimant has been found to be capable of work because of doing work that is not 'exempt work' – onus on decision-maker to establish whether claimant remains entitled as a 'disabled worker' within IS Regs reg 6(4)(a) – compliance with SSAA s71(5A) – complexities explored at length.

CIS/4434/04
Overpayment – recoverability – to satisfy SSAA s71(5A) there must be a valid supersession or revision of the awarding decision – insufficient to decide simply that the claimant was living with a man, as husband and wife, during the relevant period – not a defective decision at all, just one of the building blocks of a decision altering entitlement.

CSIS/73/05
Overpayment – decision under appeal combined a supersession with a determination on recoverability – that included the purported exercise of all that was required under SSAA s71(5A) – tribunal had power to alter, by supersession or revision, all the awarding decisions underpinning the calculation of how much was paid in excess of entitlement during the overpayment period.

CIS/3280/03
Entitlement – habitual residence – approach to be taken by tribunals and on appeal to the Commissioner – authorities reviewed – tribunals should give more cogent reasons if going outside the one-to-three months conventional period for establishing habitual residence – a tribunal errs if it does not consider making an advance award – it thus can find habitual residence established from a date after the date of the secretary of state's decision.

CIS/1697/04
Entitlement – person subject to immigration control – onus on secretary of state to prove that a claimant is excluded from benefit by IAA s115 – innocent error in completing sponsorship undertaking – rectification is not within a Commissioner's powers – but no need to rely on that equitable remedy – question of whether there was a valid maintenance undertaking considered and decided.

Industrial injuries

CI/207/04
Disablement benefit – prescribed occupation for disease A11 – vibration white finger – use of percussive tools in bed-making – the automatic staple gun used in this process was a metal-working tool – the actions required fell within the meaning of 'hammering' – meaning of the terms explored in the legislative and factual context.

CI/564/05
Disablement benefit – prescribed disease D7 – occupational asthma – any other sensitising agent – cement dust – in this type of case the diagnosis and prescribed occupation questions are intertwined – the question is whether the claimant was exposed to, and sensitised by, a sensitising agent in the course of his work or by some non-work-related agent.

Invalid care allowance

CG/3189/04
Entitlement – full-time education – a student's exemption from standard course requirements is to be taken into account.

CG/3102/04
Linked claims and overlapping benefits – state of confusion – departmental errors – wrong to adopt too literal or formalistic approach to the meaning of 'issue raised by the appeal'.

Jobseeker's allowance

CJSA/3084/04
Late claim – reasonably thought that the form given to him was a claim form – getting no response to submitting that form amounted to 'information' falling within CP Regs reg 19(5)(d).

CJSA/1425/04
Resources – deprivation of capital – significant operative purpose – extensive consideration of the authorities – credit card debts – no suggestion that generation of the debt was to secure benefit – although the timing of repayment was prompted by the desire to claim benefit, the actual payment of the debt was to avoid further substantial liabilities for interest payments and not to obtain benefit.

Retirement pension

CP/3037/04
Increase of pension for spouse – payable from date of original claim – ticking the relevant box on the claim form is sufficient to count as a claim, thus bringing into play CP Regs reg 4(7) – of wider interest as an illustration of making findings of fact on limited evidence.

CP/271/05
Claim – category A retirement pension in payment – on her spouse later attaining pensionable age she became entitled to either a category B retirement pension or to an increase in her category A pension based on his contributions – SSCBA s51A – a separate claim is required.

Social fund

CIS/4531/04
Funeral payment – qualifying conditions – claimant need only show an underlying entitlement to the council tax second adult rebate – no need for it to have been awarded.

CIS/751/05
Winter fuel payment – late claim – tribunal had no jurisdiction to decide that without a claim the secretary of state should, in the previous years, have made payments under WFP Regs reg 4(1) – follows *CIS/2337/04*.

CIS/4088/04
Winter fuel payment – late claim – previously paid automatically – stopped on cessation of incapacity benefit – tribunal erred by not considering the supersession or revision issues arising from WFP Regs reg 4(4) – secretary of state had power to consider whether, at the relevant time, he held official records that might have established the claimant's entitlement – if so, to reconsider decision not to include him within the reg 4(1) automatic payments and authorise retrospective payment – takes opposite view to *CIS/751/05*, decided the day before, but no authorities cited to Commissioner.

CIS/1491/04
Winter fuel payment – claimant ordinarily resident in Spain – not able to acquire entitlement for the first time, only to export an existing entitlement – full analysis.

CIS/1691/04
Winter fuel payment – claimant ordinarily resident in Britain, even though he also became ordinarily resident in France.

Abbreviations
ECA = Electronic Communications Act 2000
IA = Interpretation Act 1978
IAA = Immigration and Asylum Act 1999
SSAA = Social Security Administration Act 1992
SSCBA = Social Security Contributions and Benefits Act 1992
COE Regs = Social Security Benefit (Computation of Earnings) Regulations 1996 SI No 2745
CP Regs = Social Security (Claims and Payments) Regulations 1987 SI No 1968
DA Regs = Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991
DLA Regs = Social Security (Disability Living Allowance) Regulations 1991 SI No 2890
IFW Regs = Social Security (Incapacity for Work)(General) Regulations 1995 SI No 311
IS Regs = Income Support (General) Regulations 1987 SI No 1967
WFP Regs = Social Fund Winter Fuel Payment Regulations 2000 SI No 729

* Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 SI No 3207.

the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question … Although Protocol No 1 does not include the right to receive a social security payment of any kind, if a state does decide to create a benefits scheme, it must do so in a manner which is compatible with article 14.

Shared care and jobseeker's allowance

Hockenjos v Secretary of State for Social Security [2004] EWCA Civ 1749, 21 December 2004; (2005) *Times* 4 January is the result of the appeal, by both parties, from the decision of Mr Commissioner Mesher in *CJSA/4890/1998*. In the Court of Appeal, the secretary of state continued to concede that the rule, which ties entitlement to the child addition within jobseeker's allowance (JSA) to whether the claimant is getting child benefit for the child, indirectly discriminated against more men than women. However, as he did before the commissioner, the secretary of state argued that this discrimination was justified. His case on this point was that the child benefit link ensures consistency in the decision-making process and removes the need for JSA and income support decision-makers to rely purely on a claimant's uncorroborated evidence when seeking to establish parental responsibility.

The Court of Appeal accepted that the above factors provided some justification for Jobseeker's Allowance Regulations (JSA Regs) 1996 SI No 207 reg 77(1), as it was administratively convenient, cost-effective and provided for consistent decision-making. But it was a rough-and-ready measure which in 'shared care' cases had the disbenefit that the family premium and child additions are not targeted at the right destination. Both issues – that is, having an efficient benefit system and fairness to individual claimants – had to be balanced when considering whether the discrimination was justified, in the sense of being a proportionate measure. That balance had to be considered against the policy aim of '… establishing a fair and efficient distribution of the public funds available to maintain children within the confines of a subsistence benefit such as JSA'. The difficulty for the secretary of state here was that he had never explored whether the provisions of reg 77(1) met this aim, or whether any other form of arrangement could meet this aim. Therefore, he could not discharge the burden of establishing justification, which was undoubtedly his burden to discharge.

However, unlike the commissioner, the Court of Appeal considered that all of reg 77 had to fall away. Absent reg 77, the decision about entitlement had to found on Jobseekers Act (JA) 1995 s35. There was no reason to construe the word 'responsible' in s35 as meaning a person with sole or primary responsibility. Moreover, there was no reason, as a matter of ordinary interpretation, why more than one person should not be responsible for the same child. Accordingly, as a substantial minority carer, Mr Hockenjos was responsible for the children under JA s35 each week, and was to be paid the child additions in respect of each child (and the family premium) for each such week, notwithstanding that those same additions and the premium were being paid to Mrs Hockenjos for the same children for the same period.

Comment: The secretary of state petitioned the House of Lords for leave to appeal but the application was refused. The trigger for whether child additions can be paid to a 'non-resident parent' was described by the court as attaching to 'substantial minority carers'. The court seems to have set it at having care of the child(ren) for at least 104 nights a year.

MEANS-TESTED BENEFITS

Sponsorship undertakings

Secretary of State for Work and Pensions v Ahmed [2005] EWCA Civ 535, (2005) 19 April, R(IS)8/05, concerned whether an 'undertaking' must amount to an unequivocal promise to support a person, or can be met merely by a declaration of ability and willingness to maintain him/her. It was the secretary of state's appeal from *CIS/426/2003*, where the former meaning of the word had been adopted.

The Court of Appeal dismissed the appeal. A formal document of itself and for that reason alone could not amount to an undertaking. It is the wording of the document that is signed which must amount to an undertaking. The word 'sponsor' need only connote support and not the promise of support; nor did the immigration rules require an undertaking to be given before a person was allowed entry to the UK. Here the language used was not sufficient to amount to an undertaking, in the sense of being a promise about the future.

Housing costs: meaning of 'abandoned'

The Court of Appeal's decision in **Secretary of State for Work and Pensions v W** [2005] EWCA Civ 570, (2005) 18 May, unreported, dismisses the appeal of the secretary of state from **CIS/2816/2003**.

In November 2001, the husband of the claimant in *W* was arrested and charged with indecent assault of their children. In February 2002, the wife applied for income support stating that her husband was 'expecting a custodial sentence' and, in April 2002, he was sentenced to five years' imprisonment. The claimant filed her divorce petition in August or September 2002 and was granted a divorce in January 2003.

The secretary of state decided that the claimant was not entitled to have her housing costs considered in calculating her entitlement to income support because they were new housing costs: she had not been 'abandoned' so as to fall within Income Support (General) Regulations (IS(G) Regs) 1987 SI No 1967 Sch 3 para 8(3)(b). Therefore she could not be treated as having been entitled to housing costs for 39 weeks. The appeal tribunal had upheld this decision because, in its view, the word 'abandoned' required a deliberate withdrawal by the husband of his financial support from the claimant.

A further appeal by the claimant was allowed on the ground that she had, by February 2002, been constructively abandoned by her husband. The fact that the husband was required, as a condition of his bail, to live away from the family home did not of itself mean that he had abandoned her. However, the distinguishing feature of this case was the nature of the offences because they, inevitably, made it impossible for him to continue living with his wife and their children.

The Court of Appeal stated that the term 'abandonment' was intended to bear the same meaning as had 'deserted' in matrimonial law. Moreover, it was right that the provision in IS(G) Regs Sch 3 para 8(3)(b) was intended to cover cases of 'constructive abandonment', that was to say, where a claimant and child(ren) were effectively forced out of the home by the violence or other unacceptable conduct of his/her partner. There was, in such a case, just as much of an abandonment as if the violent partner had left the claimant. The same was true if, as a result of such conduct, the innocent partner refused to allow the other into the home. Whether that was seen as abandonment or constructive abandonment was of little consequence.

Jobseeker's allowance and the legality of the habitual residence test

CJSA/4065/1999 is the commissioner's decision on the referral back to him by the European Court of Justice (ECJ) of *Collins v Secretary of State for Work and Pensions* Case No C-138/02; [2005] QB 145. The first question was whether Mr Collins could be said to be a worker for the purposes of Council Regulation (EEC) No 1612/68 and, thus, treated as habitually resident,

notwithstanding that he was not a 'worker' for the purposes of article 7(2) of that regulation. The commissioner decided that the reference in JSA Regs reg 85(4) to a '… worker for the purposes of … regulation … 1612/68 …' must have been intended to have a narrower effect than a reference to a person within the scope of application of reg 1612/68 as a whole. What 'worker' therefore meant here was a person who falls within the EC law concept of worker in relation to the parts of reg 1612/68 that expressly confer entitlements on people in their capacity as workers, rather than in their capacity as nationals of a member state. This, therefore, restricted the meaning of the reference in the JSA Regs to persons who are workers for the purposes of reg 1612/68 Part I Title II.

The second question was whether the habitual residence test could be justified, so as to justify the discrimination between UK and non-UK EU nationals inherent in the habitual residence test. In the end, what this came down to was an assessment of what the ECJ meant by the following sentence in its judgment: 'In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host member state' (para 72).

The commissioner had no doubt that the sentence did not have the effect that the sole legitimate question to be asked is whether the claimant was genuinely seeking work on any particular day, in the sense merely of taking active and appropriate steps to seek suitable work. The relevant legitimate aim in making the JSA legislation was to ensure that there is a genuine link between the claimant and the UK's employment market.

In this context, the pivotal part of the sentence from the ECJ's judgment is the reference to what period of residence is necessary 'for the national authorities to be able to satisfy themselves' that the claimant is genuinely seeking work. Accordingly, it must be legitimate for the national authorities to say that they are not able to satisfy themselves about the genuineness of a search for work until a proper search has continued for some period. Thus understood, the condition of proportionality laid down in the above sentence is that a residence requirement cannot be applied to deny entitlement to benefit beyond the date at which the DWP has become satisfied of the genuineness of the claimant's search for work.

Comment: The claimant has been granted leave to appeal to the Court of Appeal. The hearing is due to take place on 22–23 February 2006.

NON-MEANS-TESTED BENEFITS

Disability Living Allowance

Evidence of mental or physical disability in cases of 'learning difficulties'

The appeal in **CDLA/1721/2004** also addressed whether a person has to have a medical diagnosis or recognised medical label in order to 'count' as disabled. The ascendant view before this decision was that a definite diagnosis or recognised medical condition was necessary: see *CDLA/944/2001*, the commissioner's decision in *R(DLA)2/00*, and *R(A)2/92*. The Tribunal of Commissioners rejected this view. It took as its definition of 'disability': 'any restriction or lack … of ability to perform an activity in the manner or within the range considered normal for a human being', adapting the World Health Organisation's definition. In the commissioners' view 'disability' is conceptually distinct from 'medical condition'. Accordingly, the tests in SSCBA ss72 and 73(1)(d) of 'so severely disabled that' cannot and must not be equated with 'has such a serious medical condition that'. The commissioners went on to say that behaviour (in cases of behavioural disorders) cannot of itself be the disability, but it may be a manifestation of a disability, namely an inability to control oneself within the accepted norms of behaviour. The severity of that disability is then tested by asking whether the person requires, for example, attention for a significant portion of the day. Therefore, medical evidence is not essential in all cases, but in many instances it will be important in the overall assessment of whether the claimant has a disability and what his/her care needs may be.

Lower rate mobility: whether guidance or supervision can overcome disability

Mongan above also holds that the supervision (or guidance) required by Social Security Contributions and Benefits (Northern Ireland) Act 1992 s73(1)(d) entails more than mere accompaniment and reassurance of the claimant. More importantly, perhaps, the court has followed *CDLA/2643/1998* and *CSDLA/12/2003* (and ruled against *CDLA/42/1994*) in holding that the guidance or supervision must enhance the claimant's ability to take advantage of the faculty of walking.

Comment: Decisions of the Northern Ireland Court of Appeal are not formally binding on commissioners and tribunals in GB, but are of great persuasive force. However, if, as here, they rule on provisions that are worded identically in GB's scheme, then they should be treated as binding: *R(SB)10/91*.

Incapacity benefit

Post-Howker

The reverberations following the Court of Appeal's decision in *Howker v Secretary of State for Work and Pensions and Social Security Advisory Committee* [2002] EWCA Civ 1623; [2003] ICR 405, and particularly that the Social Security Advisory Committee was misled about the effect of a number of amendments in 1996 to the Social Security (Incapacity for Work) (General) Regulations 1995 SI No 311, continue to be felt.

In **CSIB/598/2004**, an argument that the decision in *Howker* meant that any personal capability assessment made following the 1996 amendments was invalid in so far as it removed entitlement to benefit or credit. However, the commissioner held that *Howker* did not invalidate the 1996 amendments in their totality, and left open the question of whether individual amendments were lawful.

CIB/1239/2004 held, on *Howker* grounds, that the 1996 amendment to Activity 3 (sitting) was unlawful. However, **CIB/3397/2004** holds that the amendment to Activity 3 was not unlawful (as, in the commissioner's view, the amendment made no practical difference to the basic requirement that the claimant found it essential to get up from the chair). This decision is followed in **CIB/2821/2004**, which also holds that the amendment to Activity 15(c) (completion of tasks: concentration) was unlawful. This was because the amendment added 'or television' to the descriptor, and that made it more difficult to satisfy as, '… less concentration is needed to follow a programme in the medium of television than in that of radio'. However, subsequently, in **CSIB/279/2005**, the commissioner declined to follow this decision because, in her view, the addition of 'or television' was providing an additional hurdle for the secretary of state to prove and was not an adverse change. She also doubted whether a lesser amount of concentration was needed to follow a television programme compared with that needed to follow a radio programme.

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PRISONERS

Recent developments in prison law – Part 2



Hamish Arnott, **Simon Creighton** and **Nancy Collins** 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 2 of this update reviews the recent developments in case-law in a number of areas including categorisation and segregation. Part 1 reviewed the recent developments in case-law regarding life sentences and recall of determinate sentence prisoners.

Categorisation

■ **R (G) v Home Secretary**
[2005] EWHC 2340 (Admin)

The claimant had been a protected witness and located in a Protected Witness Unit (PWU) on a previous sentence as he had given evidence against a number of others convicted of robberies. After his release he committed further offences and so returned to prison and was made a category A prisoner. Although not initially located in a PWU the claimant challenged this decision and was subsequently located in the unit in HMP Woodhill. The police also indicated that on his eventual re-release the claimant would be on the witness support scheme and given a new identity. In January 2005, he was moved from the PWU at HMP Woodhill because of concerns that he had orchestrated a 'sit down protest'. There was also security information that he had intimidated other prisoners in the unit.

As the only PWU was the one at HMP Woodhill, the claimant was transferred to HMP Manchester and then to HMP Belmarsh where he was held in a self-contained unit, where no other prisoner could gain access to him and where efforts were made to protect his anonymity. The move to HMP Belmarsh coincided with a decision by the Director of High Security Prisons to retain the claimant as a category A prisoner.

The claimant challenged the regime applied to him at HMP Belmarsh and the decision to keep him as a category A prisoner by way of a claim for judicial review. In particular, the claimant sought a declaration that the conditions in HMP Belmarsh were not consistent with his status as a protected witness and constituted a breach of article 2 (the right to life) of the European Convention on Human Rights ('the convention'). In relation to the category A decision it was submitted that because the definition of such a prisoner was one whose escape 'would be highly dangerous to the public' (see, for example, Prison Service Order (PSO) 1010 para 1.2) and that the decision in question stated that the claimant was 'potentially highly dangerous', this meant that the director had applied the wrong test. It was further stated that the decision had failed to take into account adequately the fact that the claimant was highly unlikely to escape, as if he were to do so he would lose the protection offered to him by the police in the community (propensity to escape being relevant to category A decisions in exceptional circumstances – *Pate v Home Secretary* [2002] EWHC 1018 (Admin)). The director had made no mention of this factor in his decision.

The challenge to the categorisation decision was rejected. The reference to the claimant being 'potentially highly dangerous' was really the same as saying 'if the claimant were to escape' and so there was no error in the test applied. In relation to the propensity to escape issue, the judge held that this was a very different case to that in *Pate* where the prisoner, although highly dangerous, was elderly and in poor health with such injuries to one leg that amputation was a possibility. The policy formulated following *Pate* confirmed that while consideration may need to be given to whether the aim of making escape impossible for highly dangerous prisoners could be achieved in conditions of lower security, 'this will only arise in exceptional circumstances since escape potential will not normally affect the categorisation as it is rarely possible to foresee all the circumstances in which escape may occur' (PSO 1010 para 1.3). The judge held that on the facts of this case it was 'fanciful' to consider that the claimant fell into the category of low escape potential.

In relation to the article 2 issue, the judge considered that the authorities had not breached the duty to protect the claimant's life by locating him within the regime at HMP Belmarsh. The applicable test was that set out in *R (Bloggs 61) v Home Secretary* [2003] EWCA Civ 686 (another PWU case) where Lord Justice Auld held in relation to the state's duty to protect its citizens:

> *To be a candidate for engaging article 2, all that is needed is 'a risk to life'. To engage it depends, in the circumstances of each case, on the degree of risk, which necessarily includes considerations of the nature of the threat, the protective means in being or proposed to counter it and the adequacy of those means.*

In this case, taking into account the evidence relating to why the claimant had to be removed from HMP Woodhill, and the steps in place to protect him from contact with other prisoners since that removal, it was neither disproportionate to remove him from the PWU nor a failure to take proper care to protect his life in the regime applied to him at HMP Belmarsh.

■ **R (Bryant) v Home Secretary**
[2005] EWHC 1663 (Admin)

The claimant, who was serving a 14-year sentence, was returned to closed conditions and removed from category D status. The decision was made under the policy contained in Prison Service Instruction (PSI) 45/2004, which was introduced after a high-profile, long-term prisoner absconded from an open prison. The policy stated that prisoners who were more than five years from their automatic release date should not be in open prisons, unless there were 'exceptional circumstances'. The decision in the claimant's case, therefore, was not due to his behaviour and, moreover, severely impacted on the contact he had with his children.

The claimant challenged the decision on the basis that the recategorisation decision in his case had not adequately taken into account his family circumstances. The claim was rejected on the basis that security categorisation (see the policy in PSO 0900) concerns solely issues of risk (of escape and offending) and security. The new policy contained in PSI 45/2004, which indicated that public confidence was an issue to be considered when deciding whether prisoners with many years to serve should be eligible for open conditions, did not change the nature of the categorisation exercise. Therefore, family circumstances did not need to be considered unless relevant to the issues of risk and security. The 'exceptional circumstances' referred to in the new policy therefore related only to these issues. The decision did not interfere with the prisoner's article 8 rights as, insofar as the article was engaged, the interference was in accordance with the considerations in article 8(2).

Release on temporary licence

■ **R (X) v Home Secretary and others**
[2005] EWHC 1616 (Admin)

The claimant was a woman prisoner who was removed from open to semi-open conditions. While in open conditions she had been allowed release on temporary licence (RoTL) to have overnight stays with her children, who did not visit her as she did not wish them to know that she was in prison. Although the original reasons for her transfer eventually appeared unfounded,

she remained in semi-open conditions where, although eligible, she was refused further periods of RoTL because of security intelligence. This related primarily to alleged contact with her former partner who had been charged with murder. She challenged the refusal of RoTL for the purposes of contact with her children on the basis that it was a disproportionate interference with her right to family life under article 8 of the convention.

While it was common ground that article 8 was engaged (see *R (P and Q) v Home Secretary* [2001] 1 WLR 2002) the judge held that the decision to withhold RoTL was necessary and proportionate. The decision could not be characterised as one that separated the claimant entirely from her children, as it was open to her to receive visits from them (and there was no independent evidence about whether it was in the children's best interests to be misled about the whereabouts of their mother). Furthermore, it was justified by the prison's concerns over the risks, not to the claimant herself, but to her children and other members of the public, of a possible attack on her. Moreover, there was also a risk of her being pressurised into refusing to give, or to alter, evidence about the call to her partner. This being an area in which the prison was entitled to a 'discretionary area of judgment' (see *Samaroo and Sezek v Home Secretary* [2001] EWCA Civ 1139), it was entitled to come to the conclusion that there were no less restrictive means of meeting its legitimate concerns, subject to the need to keep the matter under 'careful review'.

The judge also rejected challenges to the procedure adopted, holding that there was no requirement for the children to be represented when such decisions were being made (compare with the situation where a child is removed from a mother and baby unit – *Claire F and another v Home Secretary* [2004] EWHC 111 (Fam)), and also no requirement for the claimant to be given an opportunity to make representations before the first decision refusing RoTL as she was entitled to make a fresh application dealing with any concerns raised in the refusal immediately.

Comment: This decision, and the categorisation challenge in *Bryant* above, demonstrate that, in the prison context, engagement with article 8 is easy, but defeating the authorities' claims of justification for the interference under article 8(2) is rare. Concerns of good order and discipline, and prison security, are accepted as being firmly within the prison's 'discretionary area of judgment' and only second-guessed by the courts in extreme circumstances (the mother and baby unit cases of *P and Q* and *Claire F* referred to above being good examples). It is in these cases that great care must be taken by claimants to establish compelling evidence about the consequences of the alleged interference.

Segregation

■ **R v Ashworth Hospital Authority (now Mersey Care NHS Trust) ex p Munjaz**

[2005] UKHL 58

The respondent patient in this case challenged the appellant special hospital's policy on seclusion. The House of Lords confirmed that improper use of seclusion may (depending on the facts):

■ found complaints under articles 3 or 8 of the convention; but

■ cannot form the basis of a claim for breach of article 5 (the right to liberty).

This is because, although article 5 can be breached where a patient is detained in an institution of an inappropriate type (where, for example, no treatment is offered), it cannot found a complaint in relation to the *conditions* a detainee is held in within an appropriate institution. If the detention is lawful, there is no 'residual liberty' that can be lost by further confinement (see Lord Bingham at para 30 and Lord Hope at para 85).

Comment: There are obvious parallels between the use of seclusion in the special hospital system and the use of segregation in prisons under Prison Rule 45. The long-standing authority that improper segregation cannot form the basis of a claim for false imprisonment, relying on the notion that prisoners have no 'residual liberty', is *R v Deputy Governor of Parkhurst Prison and others ex p Hague* [1992] 1 AC 58. The case did not rule out the fact that such decisions may found claims based on other torts such as negligence and misfeasance.

The majority in *Munjaz* confirmed that the *Hague* principle effectively applies to complaints brought under article 5. However, the opinions include a very strong dissenting view from Lord Steyn to the effect that *Hague* should no longer be treated as good law since the coming into force of the Human Rights Act 1998.

Hague predates the Human Rights Act 1998. It is cast in the lexicon of the old law. It excluded a remedy for intolerable prison conditions on the basis of false imprisonment and breach of statutory duty. Lord Bridge suggested a possible remedy in negligence: at 165H–166C. But as Feldman, Civil liberties and human rights in England and Wales, 2nd ed, 440, has pointed out, 'the remedies depend so heavily on the supply of resources by government that it is hard to imagine that a duty of care in tort would ever be adequate to provide a remedy for those who are condemned to live in [inhuman and degrading] conditions'. In Hague Lord Bridge observed: 'In practice the problem is perhaps not very likely to arise': 166C. It is not to be assumed that in 2005 such conditions do not sometimes occur in our prisons. Under domestic law Hague effectively denies prisoners any effective remedy for a breach of their residual liberty. Even in respect of convicted prisoners Hague should no longer be treated as authoritative. (Para 42)

In relation to the convention, Lord Steyn relied on a comment by the Strasbourg court in *Bollan v UK* App No 42117/98 that 'the court does not exclude that measures adopted within a prison may disclose interferences with the right to liberty in exceptional circumstances', to find that the European Court of Human Rights (ECtHR) has not ruled out the possibility of prisoners retaining 'residual liberty' for article 5 purposes even when detained in an appropriate institution. Lord Steyn's dissent is the first sign of judicial concern at the implications of *Hague* in terms of preventing prisoners from having any effective remedy for unlawful segregation.

Offenders 'unlawfully at large'

■ **R (Lunn) v Governor of HMP Moorland**

[2005] EWHC 2558 (Admin)

The claimant was given a two-and-a-half year sentence together with an order to return to prison under Powers of Criminal Courts (Sentencing) Act (PCC(S)A) 2000 s116. The latter was expressed by the court as having to be served before the new sentence. However, the order of imprisonment issued by the court wrongly identified the two terms as being concurrent with the result that the claimant was wrongly released early. The releasing prison released him on licence and he complied with the conditions. The order of imprisonment was subsequently corrected, and the claimant returned to custody having been in the community for 65 days.

When the prison subsequently calculated his release dates, no account was taken of the 65

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days spent in the community on the basis that the claimant was unlawfully at large within the meaning of Prison Act 1952 s49. The claimant challenged this decision on the basis that he should not have been considered unlawfully at large for the 65 days as:

- at the time of his release the governor was acting under the authority of the uncorrected order of imprisonment and therefore had no discretion to do otherwise;
- for the whole of the 65 days he was on licence and was, therefore, serving his sentence, albeit in the community.

The Divisional Court rejected the claim on the basis that an offender was not entitled to benefit from a mistake by the court which would undermine the statutory provisions relating to release dates. Furthermore, it was unsustainable to equate the period in the community in this case with the serving of the sentence in custody as the licence granted was ultra vires. The court also rejected any suggestion that statutory release dates, calculated by reference to the proper sentence of the court, could be altered by reference to the doctrine of legitimate expectation (distinguishing *R v Governor of Her Majesty's Prison Pentonville ex p Lynn,* unreported, 7 December 1999).

Comment: This is obviously a harsh decision, although it is difficult to see how the court could have come to a different conclusion while respecting the strict application of the statutory release scheme to the sentence of the court. The answer in such situations may be for the prisoner to make an application for 'special remission', where the length of a sentence is reduced by operation of the royal prerogative in exceptional circumstances. The policy on such applications is contained in Chapter 13 of PSO 6650, which states that consideration to such applications should be given 'where a prisoner has been given to understand for several months that he or she will be released on a date before the correct release date'. (Para 13.1.4)

Sentence calculation

■ **R (Gilbert) v Home Secretary**
[2005] EWHC 1991 (Admin)

This case concerned an application for judicial review of the decision of the prison authorities in calculating the claimant's release date, and the date on which his licence expired. It focused on the correct interpretation of the Criminal Justice Act (CJA) 1991 s40 (as amended) and the extent of its effect on the operation of CJA 1991 s39. The case is unlikely to have any ongoing application because the provisions of the CJA 1991 have been repealed, from 4 April 2005, by the coming into force of the CJA 2003.

On 19 January 2003, the claimant was sentenced to three years' imprisonment. He was released on licence having served half of his sentence. His licence period was due to remain in force until 23 December 2004, the three-quarters point of his sentence. He was recalled to prison on 29 April 2004 for shoplifting offences under CJA 1991 s39. His representations against recall were rejected and he was told that he would remain in prison until his licence expiry date (23 December 2004) under CJA 1991 s33(3).

On 30 June 2004 he was given a four-month sentence for shoplifting. It was made clear that a sentence of nine months would start on 30 June 2004; this was composed of five months' imprisonment remaining from his previous sentence (under PCC(S)A s116) and four months to be served consecutively for the shoplifting offence. It was confirmed that CJA 1991 s40A would apply so that the claimant would be released at the halfway point of his sentence (four-and-a-half months) after which he would be subject to licence for a period of three months. This meant that the claimant would be released earlier than he would have been following his recall to prison under s39.

However, the Prison Service sentence calculation showed the claimant's release date as 23 December 2004, his original licence expiry date. This was the decision the claimant sought to challenge.

The court rejected the claimant's submissions. It held that s40A, when considered as a whole, is intended only to refer to the new sentence that is passed. The court was satisfied that parliament did not intend that s40A should in any way interfere with the secretary of state's powers of recall in respect of the original sentence. It was therefore concluded that the claimant's recall under s39 meant that he was lawfully detained in prison until 23 December 2004, and remained on licence until 23 September 2005.

Comment: This judgment may well be the last in a line of authorities over the past ten years that have sought to examine the interrelationship between administrative recalls to custody and the imposition of new sentences for reoffending during the licence period. The outcome of this case has confirmed the general trend for the courts to construe these legislative provisions unfavourably for prisoners who have been returned to custody.

Prison conditions

■ **Khudoyorov v Russia**
8 November 2005,
App No 6847/02

The applicant alleged that the conditions of both his detention and transport to and from the court violated article 3 of the convention. He also argued that his pre-trial detention after 4 May 2001 was unlawful and excessively long, that his applications for release had not been considered speedily and that the length of his criminal proceedings had been excessive.

The court held that there had been a violation of article 3 in relation to both the applicant's conditions of detention and his transport conditions. In relation to the former, it noted that the applicant had been held in a cell where the number of inmates exceeded the number of available beds. Therefore, the applicant had to share sleeping facilities with other detainees. He had less than two square metres of personal space and, in a slightly larger cell, less than three square metres of personal space, even when the cell was filled below its design capacity. The applicant was allowed one hour outside his cell for exercise, the rest of the time he remained locked in his cell where he and other prisoners shared a washbasin, lavatory and eating utensils. The applicant remained in these conditions for over four years and three months.

The court considered that these conditions were sufficient to cause the applicant distress or hardship which would exceed the unavoidable level of suffering inherent in detention, and arouse in him feelings of anguish and inferiority capable of humiliating and debasing him. The court considered that the length of the applicant's detention would have exacerbated these feelings.

Furthermore, the court considered the following factors as contributing to its finding of a violation of article 3: the lavatory had no flushing system; until December 2002 the cell windows were covered with metal shutters blocking access to fresh air and natural light; and the applicant was not allowed to talk to his close relatives in their own language.

In relation to the transport conditions, the court considered the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). It noted that, while the applicant had been unable to establish beyond reasonable doubt his allegations of ill treatment relating to his transportation, the government had failed to submit details in support of its submissions disputing the applicant's evidence.

It was noted that the applicant had to share an individual travelling compartment of one square metre with another detainee, taking turns to sit on each other's lap. Such conditions would not

have been acceptable to the CPT nor did the court consider them to be so, irrespective of the length of the journey. The court noted that the applicant had to endure these conditions twice a day over 200 times in four years. On these days he received no food and missed outdoor exercise. He was subject to these conditions at times when he required his powers of concentration and mental alertness for his trial.

The court went on to analyse the court proceedings to which the applicant had been subject and, having analysed the domestic law provisions, concluded that: the applicant had been unlawfully detained in violation of article 5(1) in respect of certain periods of his detention on remand; that his detention on remand had been excessively long in violation of article 5(3); that there had been a failure to provide him with a speedy hearing in violation of article 5(4) in relation to certain appeal hearings; and that the length of the criminal proceedings against the applicant was incompatible with the 'reasonable time' requirement of article 6(1). The applicant was awarded non-pecuniary damages for the period of unlawful detention and for the failure to ensure that the lawfulness of his detention was considered speedily.

The right to vote

■ **Hirst v UK (No 2)**

6 October 2005,
Grand Chamber,
App No 74025/01

The applicant alleged that as a convicted prisoner in detention he had been subject to a blanket ban on voting in elections. He argued that this violated article 3 of Protocol 1 alone, and in conjunction with article 14 and article 10 of the convention.

In a judgment dated 30 March 2004, the Chamber of the ECtHR held unanimously that there had been a violation of article 3 of Protocol 1 and that no separate issues arose under articles 14 and 10. On 23 June 2004, the government made a request for the case to be referred to the Grand Chamber.

The majority of the Grand Chamber upheld the judgment of the Chamber by 12 votes to five. It concluded that there had been a violation of article 3 of Protocol 1. In reaching this conclusion the court began highlighting that the severe measure of disenfranchisement must not be taken lightly, and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. To establish whether there had been a violation of article 3 of Protocol 1, the court considered whether the ban on prisoners voting pursued a legitimate aim in a proportionate manner.

The court accepted the government's arguments that the ban on prisoners voting pursued the aims of preventing crime by sanctioning the conduct of convicted prisoners and of enhancing civic responsibility and respect for the rule of law. In addition, the ban on voting conferred an additional punishment on prisoners. It also accepted that these aims were compatible with the right guaranteed under article 3 of Protocol 1.

However, it did not accept that the ban was proportionate to the aims it sought to achieve. It noted that the ban applied to a significant number of people and included a wide range of offenders and sentences. Whether a person is deprived of the right to vote depends entirely on whether s/he receives a custodial punishment, rather than on the nature of the crime s/he has committed. It noted that the sentencing courts in England and Wales make no reference to disenfranchisement when passing a sentence. The court considered that there is no evidence that parliament or the courts have ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.

The court noted that it is only a minority of contracting states that impose a blanket restriction on the right of convicted prisoners to vote. In any event, it considered that the fact that a similar restriction existed in other member states was not determinative of the issues in this case. The court concluded that, although a wide margin of appreciation (ie, the leeway afforded to member states) was granted on the issue of whether convicted prisoners should have the right to vote, the general, automatic and indiscriminate restriction in England and Wales fell outside this margin of appreciation.

Comment: The court declined to give any guidance on the restrictions on the right of convicted prisoners to vote that would be compatible with the convention, considering that this is a matter for the contracting state. Contrary to the tabloid spin on the case, the judgment does not mean, therefore, that any prisoners will necessarily be given the right to vote. A number of countries do have total bans on prisoners voting which have not been held to violate convention rights. The decision highlights the lack of attention that is paid to penal policy in this country, with successive governments seeming to operate on the basis that there is no need to explain or justify restrictions that are placed on prisoners' rights.

The arbitrariness of the impact of the legislation relating to voting rights for prisoners was one of the main reasons for the finding of the court in this case. The decision illustrates the tendency that the domestic courts still have to be overly deferential to the legislature in assuming that all relevant matters have been fully considered when legislation is enacted, whereas the ECtHR is prepared to be more objective.

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ASYLUM-SEEKERS

Asylum support: new rights under EC law

In February 2005, the Home Office made a number of significant amendments to the Immigration Rules (HC 395) and Asylum Support Regulations (AS Regs) 2000 SI No 704 to comply with the EC Directive on reception conditions for asylum-seekers ('the Reception Directive').[1] JUSTICE has published a practitioners' guide to the Reception Directive which examines its requirements, its transposition into UK law and its implications for those advising asylum-seekers. **Anneliese Baldaccini**, the author of the guide, highlights some key areas where she believes the Home Office has failed to write correctly or fully into domestic law important requirements placed on it by the Reception Directive.

Key requirements of the Reception Directive

The Reception Directive came into force on 6 February 2003. It requires member states bound by it (all states except Ireland and Denmark) to implement its provisions within two years from its entry into force – a date that came to fruition on 6 February 2005.

Under the Reception Directive, member states have, for the first time, a legal duty to provide support where the criteria for entitlement are met. Housing and financial support must 'ensure a standard of living adequate for the health of applicants' and be 'capable of ensuring their subsistence' (article 13(2)). However, the Reception Directive does not set out minimum standards only in relation to housing and financial support, but makes additional requirements binding on member states in relation to a wider set of measures, all of which come under the definition of 'reception conditions' (article 2(i)). These include:

- The duty to provide information;
- The right to documents confirming status;
- The right to free movement with limited exceptions;
- The duty to maintain family unity;
- Access to education;
- Access to employment;
- Access to health care;
- The duty to assess and meet special needs of vulnerable people;
- The duty, when dealing with children, to safeguard their best interests and make specific support arrangements for them;
- The circumstances in which support may be withdrawn; and
- The right to appeal negative decisions in relation to reception conditions.

The Reception Directive is expressed to impose only minimum standards and most provisions state the standards that member states must meet. Naturally, it permits member states to keep or add more favourable provisions (article 4). Those advising asylum-seekers should be aware that the Reception Directive's provisions expressed to impose a duty can be directly relied on in the national courts by the individuals concerned if implementing measures do not interpret correctly the Reception Directive's requirements or when there is, on the face of it, no domestic provision giving effect to the Reception Directive. Where domestic law is found to be in conflict with the Reception Directive's requirements, it is also important to bear in mind that EC law takes precedence.

UK implementing measures

The Home Office enacted a number of measures to give effect to the requirements of the Reception Directive. Changes were made to the Immigration Rules to create a new section (Part 11B) dealing with:

- The duty to provide written information to applicants;
- The duty to provide applicants with a document certifying their status as an asylum applicant;
- Arrangements for an applicant to apply for permission to work after 12 months; and
- The duty on applicants to notify the Home Office of their current address. (Statement of changes in Immigration Rules HC 194, January 2005.)

At the same time, amendments were made to the AS Regs (by the Asylum Support (Amendment) Regulations 2005 SI No 11) in order to bring them into line with the Reception Directive's provisions on discontinuation, withdrawal or reduction of support. In addition, a new set of regulations, the Asylum Seekers (Reception Conditions) Regulations (AS(RC) Regs) 2005 SI No 7, was introduced to deal with family unity, unaccompanied asylum-seeking children, and vulnerable persons. These changes came into force on 5 February 2005.

Scope of the new rules and regulations

The Home Office has not implemented the discretionary provision allowing the Reception Directive to apply to all claims for protection made by non-EU nationals, whether under the Refugee Convention or on human rights or other compassionate grounds. Accordingly, the new AS(RC) Regs only apply to those who claim asylum under the Refugee Convention (reg 2(1)(c)).

The AS Regs, however, as amended, continue to reflect the domestic legal regime for asylum support, whereby applicants with a claim under article 3 of the European Convention on Human Rights are treated in the same way as asylum applicants under the Refugee Convention.[2] The Home Office's decision not to extend the personal scope of the Reception Directive in implementing legislation is difficult to reconcile with the current single procedure, where human rights issues can be raised alongside an asylum claim or are inherent in that claim, and introduces unnecessary complexity in the domestic support regime.

The Home Office has also decided to restrict the scope of the new AS(RC) Regs to asylum-seekers whose claims are recorded on or after 5 February 2005 – the Reception Directive's transposition deadline (reg 1(2)). This approach is questionable on two grounds: first, the Reception Directive has been in force from 6 February 2003, although it became enforceable as such only after expiry of the two-year transposition period. Second, Community case-law suggests that while new rules are valid only for the future, they also apply, in the absence of a provision to the contrary, to the future effects of situations which arose under the old rules.[3]

Interim support cases

The Home Office's view that only those who claim asylum on or after 5 February 2005 come within the scope of the Reception Directive denies asylum-seekers supported by local authorities under the Interim Provisions the opportunity to benefit from the Reception Directive's provision. The Home Office is phasing out interim support for all asylum-seekers, other than unaccompanied children and, by April 2006, they will be transferred to National Asylum Support Service (NASS) support (Asylum Support (Interim Provisions) (Amendment) Regulations 2005 SI No 595). The majority of people involved (several thousand) will have to move in line with NASS's dispersal policies, although they will normally have been accommodated since at least 2000. This practice would arguably fall short of the Reception Directive's standard, under article 14(4), prohibiting unnecessary moves of asylum-seekers from one housing facility to another. Any challenge to such enforced moves under EC law would need to be based on the direct applicability of article 14(4) to these cases and the argument that the government, by failing to adapt the Interim Provisions, has not implemented the Reception Directive adequately.

Access to benefits

Problems are likely to arise on account of the requirement under domestic law that a claim has to be recorded to trigger entitlement to support (Immigra-

tion and Asylum Act (IAA) 1999 s94(1)). The Reception Directive contains no such requirement. It simply refers to asylum claims being made (article 2(c)). In practice, therefore, asylum-seekers who fulfil the eligibility criteria may be left without support because of delays in recording a claim or where it is disputed that a claim has been brought. The Home Office may in fact decide not to record an asylum claim if it is a second claim that does not disclose new evidence. Although, following a High Court judgment, the Home Office has extended IAA s4 (hard cases) support to such cases, it is arguable that the domestic requirement that a claim must be recorded to trigger entitlement to support is unlawful under the Reception Directive (see *R (Nigatu) v Secretary of State for the Home Department* [2004] EWHC 1806 (Admin)).

Access to employment

The Home Office has given effect in the Immigration Rules to the Reception Directive's requirement that asylum-seekers be granted access to employment if their asylum application has been awaiting a first instance decision for one year (article 11(2)). However, it has written in the Immigration Rules the requirement that a claim needs to be recorded, thus making access to employment subject to an additional requirement which may result in asylum-seekers being delayed or denied their entitlement to take up employment.

In cases where there was a delay in recording the asylum claim (especially fresh-claim cases), advisers can argue that the Immigration Rules do not reflect the UK's obligations to asylum-seekers under the Reception Directive and that the one year runs from the date the application is presented, not the date the Home Office belatedly accepts it is an asylum claim.

Duty to maintain family unity

The AS(RC) Regs implement the Reception Directive's principle of family unity by placing a new obligation on the secretary of state to accommodate members of a family together (AS(RC) Regs reg 3). The Home Office has, however, interpreted this duty as only relating to family members as defined in the Reception Directive, that is:

(i) the spouse of the asylum-seeker or his/her unmarried partner in a stable relationship;

(ii) the minor child of the couple referred to in point (i) or of the applicant as long as the child is unmarried and dependent on the applicant (AS(RC) Regs reg 2(d)).

It maintains a discretion to accommodate other dependants with the family, as defined in the AS Regs, such as close relatives who lived together as part of the household, subject to certain conditions (reg 2(4)). The implications of adopting a limited definition of family members in domestic implementing measures are significant in the context of the UK's dispersal policy. If a family member is not treated as a dependant, s/he could be dispersed to a different part of the UK from other relatives claiming support.

It is arguable that the UK's limited application of the principle of family unity in the AS(RC) Regs does not adequately interpret EC law. The definition of 'family members' in the Reception Directive would appear to fulfil the function of defining the scope of those who have rights under the Reception Directive and does not necessarily restrict the duty to maintain family unity to those so defined. This argument is supported by other provisions of the Reception Directive which recognise a wider family, such as in relation to the duty to ensure that minors are lodged with their parents or with the adult family member responsible for them by law or by custom (article 14(3)), or to place unaccompanied minors, among others, with adult relatives or a foster family (article 19(2)).

Detention

The Reception Directive provides that asylum-seekers' freedom of movement may be restricted or excluded in only two circumstances. These are:

- When residence is required in a particular area or location for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of applications (article 7(2)); and
- When it is necessary, for legal reasons or reasons of public order, to confine applicants to a particular place in accordance with domestic provisions (article 7(3)).

Residence restrictions which are allowed under article 7(2) are distinct from detention which the Reception Directive defines as 'confinement … within a particular place, where the applicant is deprived of his or her freedom of movement' (article 2(k)). The exception to freedom of movement under article 7(3) thus clearly refers to detention situations.

Detention, as an exception from the right to freedom of movement, is narrowly construed under the Reception Directive: it must be necessary for 'legal reasons' or 'reasons of public order'. Expeditious processing of a claim would appear to come neither within the concept of legal reasons, which refers to obligations of law and is different from the notion of lawfulness, nor within that of public order. Rather it is a matter of administrative convenience. Moreover, confinement must be 'necessary'. While the UK's policy of a short period of detention for speedy processing of claims has been found to be lawful and consistent with human rights standards by domestic courts (see *R (Saadi and others) v Secretary of State for the Home Department* [2001] EWCA Civ 1512), this policy should now be reviewed as a matter of EC law on proportionality grounds. It should be possible to argue that detention will not be necessary where other measures can be adopted which promote the principle of minimal interference with liberty and do not penalise those exercising an international right to seek protection abroad.

Special needs

The Reception Directive imposes specific duties in respect of persons who may be vulnerable or have special circumstances requiring extra assistance (articles 15(2) and 17–20). Vulnerable persons include minors, unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor children and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence (article 17(1)). The special needs of individuals belonging to these groups must be assessed on an individual basis (article 17(2)).

The AS(RC) Regs transpose the Reception Directive's provisions concerning vulnerable persons. They define a vulnerable person as someone belonging to the categories listed above, who has had an individual evaluation of his/her situation that confirms that s/he has special needs. However, the new regulations explicitly place no duty on the Home Office to carry out or arrange for the carrying out of an individual evaluation of a vulnerable person's situation to establish whether s/he has special needs (reg 4(4)).

It is difficult to see how, in the absence of a duty to carry out an assessment, asylum-seekers with special needs will be identified and their vulnerabilities taken into account when arrangements for their support and health care are made. It would also appear to be an implicit requirement of the Reception Directive that such identification is made early in the process. This would prohibit, for instance, the practice of placing individuals in fast track detention facilities before their induction is complete and before any assessment of their special needs can be made.

Best interests of the child

The Reception Directive requires that the best interests of the child be a primary consideration when implementing the provisions of the Reception Directive involving minors (article 18(1)). The UK has not transposed this provision. The government maintains that the Children Act (CA) 1989 is relevant to some provisions of the Reception Directive, and has the best interests of the child as an underpinning principle. However, the CA 1989 does not make reference to the principle of the 'best interests' of a child being an overriding and primary concern, nor does it make explicit provision for the welfare of asylum-seeking children. Therefore, this notion of legislative underpinning is neither accurate nor relevant to the proper implementation of the Reception Directive.

Appeal right

The Home Office has not given effect to the requirement of the Reception Directive that negative decisions relating to reception conditions, or which interfere with the right to free movement, are subject to an appeal and that, at least in the last instance, an appeal or review by a judicial body is granted (article 21(1)). Thus, it remains the case that appeals to Asylum Support Adjudicators are restricted to decisions that the claimant is ineligible for support, or a decision to stop support before it would otherwise end.

The Reception Directive imposes a duty to provide a right of appeal (not merely a right to review on legal grounds) in many of the circumstances in which, currently, the only domestic remedy would be a judicial review of the relevant decision. In such circumstances, advisers may wish to claim judicial review of the Home Office's failure to provide a right of appeal from a negative decision in relation to support arrangements and other entitlements under the Reception Directive (rather than, or as well as, the negative decision itself), so as to require access to an independent appeal mechanism.

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1 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (*Official Journal of the European Union*, 6 February 2003, L31/18).
2 See IAA 1999 s94(1) for statutory provisions on the meaning of asylum support which the AS Regs, as amended, refer to.
3 See, for example, *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer* (Case C-162/00) [2002] ECR I-1049 and the Attorney-General's opinion in *Österreichischer Gewerkschaftsbund v Republik Österreich* (Case C-195/98) [2000] ECR I-10497.

HOUSING

Recent developments in housing law


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

POLITICS AND LEGISLATION

Housing cases in the civil courts

The 40th set of amendments to the Civil Procedure Rules (CPR) made a number of changes, from 1 October 2005, to rules concerning housing litigation in the civil courts: Civil Procedure (Amendment No 3) Rules 2005 SI No 2292. These include:

■ Amendments to CPR 55 and 65 to accommodate applications made by landlords of secure tenants under Housing Act (HA) 1985 s121A to suspend tenants' rights to buy (on account of anti-social behaviour);

■ A new Practice Direction PD 55B and amendments to CPR 55 to enable the introduction of a new procedure for making possession claims 'online';[1]

■ A new 'deemed costs' order in CPR 44.13(1A) which provides that where a court 'makes –
(a) an order granting permission to appeal;
(b) an order granting permission to apply for judicial review; or
(c) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case.';

■ An amendment to CCR Order 49 r17(6), to deal with the admissibility of answers to questions posed under Disability Discrimination Act (DDA) 1995 s56 in claims for discrimination brought under that Act.

Small claims and housing disrepair cases

The House of Commons Constitutional Affairs Committee's (CAC) report *The courts: small claims* (HC 519, 6 December 2005) recommends that the lower small claims limit of £1,000 for personal injury and housing disrepair cases should be reconsidered with a view to an increase to £2,500. The CAC appears to have accepted the evidence of Dyson LJ that: 'In my view, it is entirely illogical to accord special treatment to housing disrepair claims' (para 45). It suggests that any adverse impact on vulnerable tenants can be addressed by increasing the availability of advice. The government's response to the recommendation will be published later this year.

Homelessness prevention

On 12 December 2005, the housing minister (Yvette Cooper MP) announced the distribution of £88m over two years to help every English local authority work on homelessness prevention: Office of the Deputy Prime Minister (ODPM) news release 2005/0275.[2] The methods being successfully used to prevent homelessness are reviewed in the *Survey of English local authorities about homelessness: policy briefing 13* (ODPM, December 2005). These are said to have contributed to the continuing downward trend in homelessness acceptances since 2004 and the lowest number of new homelessness acceptances for a third quarter since 1985.

Temporary accommodation for homeless people

Statutory homelessness: 3rd quarter 2005, England (ODPM statistical release 2005/0274) show that despite the continuing fall in acceptances, over 101,000 households are still in temporary accommodation provided under HA 1996 Part 7.

In Wales, the *Welsh housing statistics: Homelessness: January–March 2005* SDR81/2005 (National Assembly for Wales, September 2005) found 3,349 homeless households in tempor-

ary accommodation compared with 2,890 at the end of the same quarter in 2004.

In Scotland, an analysis of annual homelessness statistics (published as *Scottish Executive statistical bulletin* HSG/2005/6) found that, on 31 March 2005, there were 7,539 homeless households in temporary accommodation compared with 6,574 on the same date in 2004.

Further guidance for English authorities on standards in temporary accommodation and arrangements to move homeless households to more settled homes is expected to be contained in the revised *Homelessness code of guidance* due to be published by the ODPM in early spring 2006.

Anti-social behaviour orders

Figures published on 20 December 2005 show that another 918 anti-social behaviour orders (ASBOs) were granted in the second quarter of 2005, bringing the total to 6,497 as at 30 June 2005. On the same date the Home Office also announced (Home Office press notice 208/2005) that:

- The Environment Agency will be added to the list of 'relevant authorities' able to apply for ASBOs;
- All ASBOs made against children will be reviewed 12 months after they were granted;
- Further central government guidance will be issued on the most effective use of ASBOs.

The provision for early review of ASBOs made against young people may reflect in part the recommendations made in *Transitions: Young adults with complex needs* (ODPM Social Exclusion Unit, November 2005) paras 3.68–3.69. That report also encouraged greater use of Individual Support Orders (ISOs) by magistrates' courts when granting ASBOs: Crime and Disorder Act 1998 s1AA (inserted by Criminal Justice Act 2003 s322). It recorded that only seven ISOs had been made since they became available on 1 May 2004 (paras 3.63–3.67) despite the requirement to consider making an ISO whenever an ASBO is made against a child or young person: s1AA(1).

New initiatives on anti-social behaviour in housing

The government's Respect Action Plan was published on 10 January 2006.[3] The plan proposes new powers including:

- Cutting housing benefit to households who are evicted for anti-social behaviour and refuse help:
- A new house closure order temporarily sealing properties that are the constant focus of anti-social behaviour;
- Amending the provisions relating to anti-social behaviour injunctions (to make them more widely available;
- Giving rights of audience in the civil courts to lay anti-social behaviour practitioners;
- Appointing local county court staff as co-ordinators for anti-social behaviour cases;
- A 'Respect Standard' for housing management to ensure that all social landlords tackle bad behaviour and promote good behaviour.

Implementation of the measures included in the plan will be co-ordinated by the Respect Taskforce, a cross-governmental unit based in the Home Office.

Disabled Facilities Grants

In January 2004, the government announced the creation of an inter-departmental review of Disabled Facilities Grants (DFGs). The review commissioned research, the results of which were published in October 2005 as *Reviewing the Disabled Facilities Grant Programme, ODPM Housing Research Summary 223/2005.*

The main report of the review, *Reviewing the disabled facilities grant programme* (ODPM, October 2005), recommends the retention of the mandatory DFG and proposes a range of detailed changes to the DFG regime. The reviewers found that: 'Adaptations given through the DFG are consistently effective. They produce significant health gains and prevent accidents and admission to residential care' and that: 'The DFG is therefore contributing to a raft of government policies, including social inclusion, community care, [etc] …'.

On 27 October 2005, the ODPM announced that one of the recommendations – that means-testing for DFGs should be abolished where the adaptations are needed for a disabled child – had been accepted immediately and that a consultation paper on other changes would be issued in early 2006: ODPM news release 2005/0215.

PUBLIC SECTOR

Secure tenancies

Subletting

- **Lambeth LBC v Vandra**

19 December 2005, Court of Appeal

The defendant was a secure tenant. A housing officer visited the premises on two occasions and concluded that she had unlawfully sublet and was no longer occupying as her only or principal residence. As a result, Lambeth served a notice to quit and took possession proceedings. A district judge found that:

- the defendant had not been in occupation of the premises at the time of either of the housing officer's visits;
- there was no evidence or sign of any family occupation of the premises by the defendant or her four children;
- five or more people who were in occupation had been met during the two visits;
- there were Yale locks on all the doors and one had a padlock;
- there was no sign of any room being used as a living room and there were beds in all the rooms which the housing officer saw; and
- four of the occupants said that they paid rent to a person whom the defendant claimed to have put into occupation of the premises rent-free as a caretaker.

In the light of those facts, a district judge found that an explanation was called for by the defendant. The explanations offered by the defendant were not accepted by the district judge as credible. The district judge concluded that the whole of the premises had been unlawfully sublet, and that the defendant had ceased to be a secure tenant. She made an order for possession. The defendant appealed and a circuit judge found that the district judge had erred in reversing the burden of proof. He found that, on the evidence, it was possible that the defendant had only let part of the premises and allowed the appeal and set aside the order for possession. Lambeth appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. The district judge had been entitled to come to her conclusions, and the circuit judge had been wrong to interfere with them. The fact that there was another possible explanation for the various people who appeared to be living in the property did not mean that there was no evidence or insufficient evidence for the inference made by the district judge from the primary facts found as to the subletting of the whole property. The district judge was entitled to make inferences of probability from established primary facts and was entitled to conclude there had been an unlawful subletting of the whole of the premises.

Comment: This decision is in line with earlier Rent Act authorities that:

- the burden of proof initially lies on a landlord to show that a tenant is absent; but
- once a landlord has established this, it is for the tenant to show a physical presence in the premises and an intention to return (see, for example, *Roland House v Cravtitz* (1974) 29 P&CR 432).

Right to buy

■ **Copping v Surrey CC**

[2005] EWCA Civ 1604, 21 December 2005

Mr Copping lived in accommodation provided by his employers, Surrey County Council. In 1991, he served notice on Surrey under HA 1985 s122(1), seeking to exercise the right to buy. The council served a counter-notice denying the right to buy on the basis that the tenancy was not secure as Mr Copping was required to occupy the house for the better performance of his duties. In 2001, he again tried to exercise the right to buy. That application was denied on the same ground. In 2002, he sought a declaration that he was entitled to exercise the right to buy. No reference was made to the 1991 application.

HHJ Sleeman found that there was no express or implied term that he was obliged to occupy the house for the better performance of his duties and that he was entitled to exercise the right to buy. Subsequently, Mr Copping claimed that the relevant valuation date was 1991. Surrey claimed that the earlier application had been abandoned and that the date for valuation was 2001.

HHJ Michael Cook, sitting as a deputy circuit judge, held that the 1991 notice was still extant and that Mr Copping could rely on it. Accordingly the valuation date was 1991. Surrey appealed.

Nelson J allowed the appeal ([2005] EWHC 754 (QB), 29 April 2005). Mr Copping appealed to the Court of Appeal.

The Court of Appeal dismissed his appeal. Although HA 1985 s118 grants a right to buy, it is expressly subject to the conditions set out in Part V. Section 138 expressly requires the right to be established before the duty to convey arises. It follows that the procedural provisions of s122 have to be complied with before the right can be effective. In the present case, Mr Copping's right was established by the s181 proceedings before HHJ Sleeman. Those proceedings were based solely on the 2001 s122 notice. The procedure required by the HA 1985 accordingly flowed from that notice and no other. When determining 'the relevant time' for the purposes of establishing the price under s126, it was inevitable that it was the date on which that notice was served. The suggestion made on behalf of Mr Copping that, if a claim under s122 is denied, but not withdrawn in writing, it should remain effective 'ignore[d] reality'.

■ **Terry v Tower Hamlets LBC**

[2005] EWHC 2783 (QB), 2 December 2005

The claimant was a secure tenant who sought to exercise the right to buy. Although he maintained that he had sent form RTB1 by first-class post on 6 March 2003, Tower Hamlets denied that it had received it by 26 March 2003, the date when the discount rules were changed. If it was received, as Mr Terry claimed, he would have been entitled to the full statutory discount of £38,000, whereas if the form was not served until after the deadline the discount would have been capped at £16,000.

After hearing evidence, Michael Supperstone QC, sitting as a Deputy High Court Judge, was satisfied that Mr Terry sent the RTB1 form to Tower Hamlets by first-class post on 6 March 2003 and that it was properly addressed. The judge found that Tower Hamlets had failed to show on a balance of probabilities that it did not receive form RTB1 before 26 March 2003. Tower Hamlets was Mr Terry's landlord. If service on its home ownership department had been necessary (as Tower Hamlets claimed), then the driver who collected the home ownership department's mail from the local delivery office acted not only as the agent of Tower Hamlets, but also as the agent of its home ownership department in relation to the mail to be received by that department. On the balance of probabilities, it was much more likely that Tower Hamlets had mislaid the letter, given the number of steps from the collection of the form through its processing and delivery to the appropriate department. The form had, on the facts, been received by the authority in the relevant time.

Assured tenancies

Rent increases

■ **Riverside Housing Association Ltd v White**

[2005] EWCA Civ 1385, 6 December 2005

Mr and Mrs White were assured tenants. Riverside sought possession on the ground of rent arrears. The tenants claimed that the 'arrears' were not due because four annual notices of rent increases were invalid. HHJ Stewart QC, determining certain preliminary issues, rejected most of the tenants' arguments about the invalidity of notices of increases, but accepted that Riverside had failed to adhere to the procedure for the increase of rent in the tenancy agreement. In particular, he found that there was no proposed variation of the tenancy agreement, no notice in writing of a proposed variation and no invitation to the Tenant Participation Forum to comment on the proposed variation. Both the landlord and the tenants appealed.

The Court of Appeal, although 'uneasy' at the result, also found that the rent increases were invalid. Following *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, it held that time was of the essence when it came to the service of notices seeking to vary rent. The term dealing with rent variation was not a formal or non-essential term. It was 'an important provision, linked with the rent formula, which gives the tenant the certainty of the date from which an increased rent can be demanded if the stipulated procedures are followed'. HHJ Stewart was entitled to conclude that Riverside had not complied with the procedure in the tenancy agreement. The Court of Appeal also held that although all the necessary ingredients for an estoppel by convention were present, Riverside could not rely on that doctrine 'as a sword rather than a shield'.

HARASSMENT AND UNLAWFUL EVICTION

■ **Poku-Awuah v Lenton**

5 December 2005, Lambeth County Court[4]

Mrs Poku-Awuah was an assured shorthold tenant from April 2004. On 2 February 2005, her landlord attended the property late at night with four men and two women and knocked on her door. When she opened it they went into her room and started packing her belongings into black bags. One of the group changed the locks to the property and she was forcibly removed. She slept in her car that night, followed by a night at her daughter's accommodation and 15 nights in a hotel. On 19 February 2005, following the court award of an interim injunction, her landlord allowed her to stay at a neighbouring property. Following a breach of directions, the landlord's defence and CPR Part 20 claim (rent arrears) were struck out, judgment was entered for Mrs Poku-Awuah and the matter was set down to decide quantum.

District Judge Jacey found that the whole episode on 2 February must have been very distressing for Mrs Poku-Awuah. He had particular regard to *Bamberger v Swaby* Lambeth County Court, December 2005 *Legal Action* 21, although he also considered *Drane v Evangelou* [1978] 1 WLR 455 (exemplary damages), *Asghar v Ahmed* (1985) 17 HLR 25 (aggravated damages) and *Tvrtkovic v Tomas* August 1999 *Legal Action* 29. He awarded Mrs Poku-Awuah £5,100 (ie, general damages of £300 per day), £390 special damages (including hotel costs), £1,000 aggravated damages and £2,000 exemplary damages. He also awarded interest from the date of readmission at the rate of eight per cent having taken into account that Mrs Poku-Awuah had beaten the CPR Part 36 offer she had made in August 2005. This totalled £537.78. He also awarded costs against the landlord, including costs on the indemnity basis from the date of expiry of the Part 36 offer.

HOMELESSNESS

Priority need

■ **South Tyneside MBC**
04/C/18995,
12 December 2005
The complainant, when aged 17, attended the council's offices to apply for accommodation. The council accepted that he had been 'thrown out of' his parental home. He was given a form to complete to join the council's housing allocation scheme but was not given a homelessness application form or provided with any interim accommodation. No enquiry was made into his circumstances and his application for allocation was not even logged on to the council's computer for two months. He slept at friends' houses. Having heard nothing he returned to the council's offices to be told that, because he had by then turned 18, he no longer had a priority need.

The Local Government Ombudsman found maladministration causing injustice. The council agreed to pay £2,000 in compensation and to review its housing services for young people.

Local connection

■ **Bellis v Woking BC**
[2005] EWCA Civ 1671,
3 November 2005
Ms Bellis's former partner and the father of her children lived in the Woking area but she did not. She claimed to have a local connection with Woking either as a result of 'family associations' (HA 1996 s199(1)(c)) between her children and their father or because of 'special circumstances' (HA 1996 s199(1)(d)), namely her wish to live in Woking to make contact between the children and their father easier. The children had never lived with their father but had had regular contact with him. Woking's decision that Ms Bellis had no connection with its area was upheld on review and an appeal was dismissed by HHJ Reid. An application for permission to bring a second appeal was made on the ground that the case raised an important question of principle about whether a 'family association' was a matter of degree or simply a question of whether two persons were actually associated as 'family' members – as a parent and child would be.

The Court of Appeal refused a renewed application for permission. Jacob LJ said:

As to whether there is a question of principle, while in theory I suppose one might say that the question of whether a family association is strong or weak could be one of principle, it is so obviously one which involves a question of degree that it is not a serious question of principle. It is self-evident that when someone says they have a family association, one has to look into the degree of association. A third cousin once removed whom one has never met will not do. Someone who is a relative and is deeply dependent on you will be at the other extreme. The council looked in this case at the degree of association which was the right thing to do. They said the association is the same as it always has been, tenuous and not enough.

DISABILITY DISCRIMINATION

■ **Williams v Richmond Court (Swansea) Ltd**
25 November 2005,
Swansea County Court[5]
The claimant was the long lessee of a third-floor flat in a block of flats. The lease contained the express grant of a right to use the communal stairs to gain access to the flat. A local authority occupational therapist recommended that, on account of her disability, the claimant should have a stair lift fitted to enable her to mount the communal staircase. The claimant sought the permission of her lessor and the block's freeholder to install the stair lift. The freeholder agreed but the lessor refused consent.

The claimant brought an action alleging unlawful discrimination by the lessor contrary to DDA 1995 ss22–24. Having unsuccessfully applied to a district judge for summary dismissal of the claim, the defendant sought permission to appeal.

HHJ Wyn Williams QC refused permission to appeal and further decided, as preliminary points of law, that:
■ The staircase was a 'facility' for the purposes of s22(3)(a) or (b);
■ The refusal of consent was a decision relating to whether the claimant should be permitted to use that facility in a particular way (mounting it on foot only rather than by stair lift);
■ Alternatively, the refusal subjected the claimant to a 'detriment' for the purposes of s22(3)(c);
■ The decision was discriminatory within the meaning of s24(1)(a); and
■ The fact that the statute contained no duty on the lessor to 'make adjustments' was of no significance.

The question of whether the discrimination was unlawful or could be justified was reserved for trial.

PROCEDURE

Closure notices

■ **R (Turner) v Highbury Corner Magistrates' Court**
[2005] EWHC 2568 (Admin),
11 October 2005
Mr Turner was the tenant of a flat which the police suspected was being used as a 'crack house'. A search found drugs paraphernalia including needles, syringes and silver foil. Residents had complained about Mr Turner's conduct, and about 'drugs debris', the disorderly behaviour of visitors and the possession of a gun and knives at the flat. On 9 February 2005, the police issued a closure notice under Anti-social Behaviour Act (ASBA) 2003 s1 and gave notice that an application for a closure order under s2 would be made at court on 11 February. At that hearing Mr Turner's solicitor indicated that the application would be opposed and it was adjourned for trial on 25 February. At that hearing Mr Turner's brother attended. He indicated that his brother had mental health problems, had dismissed his solicitor and would need time to take fresh legal advice. The court adjourned to 9 March 2005. At that hearing it refused an application for a further adjournment and made the closure order sought.

The claimant applied for judicial review on the grounds that:
■ the proceedings should have been stayed on 9 March 2005 because a closure order application could not be adjourned for more than 14 days but had been (ASBA s2(6)); or
■ it had been unfair on the facts to proceed on 9 March 2005 as the claimant had not been able to prepare for trial.

A Divisional Court dismissed the claim. The adjournment had been granted under the court's general power in Magistrates Courts' Act 1980 s54 which remained available for use in an appropriate case notwithstanding the timetable in ASBA s2(6). On the facts, the claimant and his representatives had had sufficient opportunity to prepare for a trial on 9 March.

■ Jan Luba QC is a barrister at Garden Court Chambers, London WC2 and a recorder. Nic Madge is a circuit judge. They are grateful to the colleagues at notes 4–6 for supplying transcripts or notes of judgments:

1 See: www.possessionclaim.gov.uk.
2 All ODPM documents can be found at: www.odpm.gov.uk.
3 It is available at: www.respect.gov.uk.
4 Dawn McPherson, Fisher Meredith Solicitors, London; Andrew Lane, barrister, London.
5 Robert Latham, barrister, London.
6 Stephen Knafler and David Watkinson, barristers, London.

HUMAN RIGHTS

Recent developments in European Convention law

Philip Leach continues his series on cases at the European Court of Human Rights (ECtHR) that have particular relevance to the UK. This article covers the period from June to November 2005.

PRACTICE AND PROCEDURE

In view of the ECtHR's still rapidly increasing caseload, the Third Summit of Council of Europe heads of state in Warsaw, in May 2005, decided to appoint a 'Group of Wise Persons' to devise a comprehensive strategy to ensure the future effectiveness of the court system. This decision amounts to an acknowledgement that, in spite of the changes to the system implemented under Protocol 11, in 1998, and even following the adoption of Protocol 14, in May 2004, which has not yet entered into force, the ECtHR still cannot cope with the number of cases that it receives each year. The Group of Wise Persons, which includes Lord Woolf, will make its recommendations later in 2006.[1]

CASE-LAW

Right to life (article 2)

Fatal shooting of Roma conscripts by military police

■ **Nachova and others v Bulgaria**

6 July 2005,
App Nos 43577/98 and 43579/98

The applicants were the relatives of A and P, two men of Roma origin who were shot dead by the military police when attempting to arrest them. They absconded from compulsory military service. After an arrest warrant was issued, four military officers, under the command of Major G, were sent to locate and arrest them. When A and P tried to evade arrest, after several warnings, Major G shot at them in an attempt to prevent their escape and fatally wounded them. According to one of the neighbours, Major G had insulted him by pointing his gun at him and saying: 'You damn Gypsies!'.

A criminal investigation concluded that Major G had done everything within his powers to save the lives of A and P, with the intention of avoiding the use of lethal force, and had not committed an offence. The applicants complained that there had been violations of articles 2, 13 and of article 14 taken together with article 2 of the European Convention on Human Rights ('the convention').

On 26 February 2004, a Chamber of the ECtHR found that articles 2 and 14 had been violated (see July 2004 *Legal Action* 27). The case was then referred to the Grand Chamber.

Decision: There were violations of article 2 (both as a result of the breach of the duty to protect life and the duty to conduct an effective investigation). There was also a violation of article 14 in conjunction with article 2 in its procedural aspect (but not its substantive aspect).

The test of necessity under article 2 could not be met when state agents were attempting to arrest individuals who were not dangerous, even if the failure to use lethal force might result in the fugitive's escape. The right to life had not been adequately protected because the appropriate legal and administrative framework was not in place: under existing, unpublished regulations, the military police were allowed to use lethal force in arresting even the most minor offender. This had proved grossly disproportionate in the present case.

In the planning and conduct of the arrest operation, the authorities ignored the obligation to minimise the risk of loss of life, by sending heavily armed officers in pursuit of the unarmed and non-violent fugitives and, in effect, allowing use of all means in their arrest. An arresting officer had fired an automatic weapon at the fugitives. One of them was shot in the chest which suggested there had been an attempt to surrender. The arresting officers had a jeep and could easily have pursued them instead of shooting them dead.

The investigation of the incident had been flawed in various ways, including the failure to take into account a number of significant facts and the questionable objectivity of those conducting it. The very fact that the use of lethal force was found to be lawful under the existing regulations was a further indication of their failure adequately to protect life.

In relation to article 14, taken together with article 2, the applicants had not established that racist attitudes were a 'causal factor' in the shooting of A and P. However, there was a duty to investigate possible racist motives for violent acts, which had been breached. The investigator and the prosecutors in the case failed to follow through and verify reports of racist verbal abuse by the major who shot the men, or investigate his record regarding anti-Roma attitudes and similar incidents.

Comment: This case is distinctive because of the finding of a violation of the prohibition of discrimination, in conjunction with the right to life, as a result of the treatment of the Roma victims. However, the Chamber and Grand Chamber reached different decisions on this point. The Chamber had found that, due to the failure to investigate the possible racial motivation to the killing, article 2 in its substantive aspect and article 14 had been violated. In view of the evidential difficulties of establishing discrimination, the Chamber also held that, in such situations, it could draw negative inferences or shift the burden of proof to the government. The Grand Chamber, however, disagreed that the failure to investigate should have the effect of shifting the burden of proof in that way, in relation to the alleged violation of article 14 in conjunction with the substantive aspect of article 2, as 'such an approach would amount to requiring the respondent government to prove the absence of a particular subjective attitude on the part of the person concerned'.[2] The Grand Chamber concluded that it had not been established that racist attitudes had been a causal factor in the killings. Nevertheless, the Grand Chamber reconfirmed the Chamber's findings regarding the procedural obligation to investigate possible racist motives for acts of violence, arising from articles 2 and 14, which was found to have been breached in this case: the investigator and prosecutors had had 'plausible information' that should have been sufficient to alert them to the need to investigate a possible racial aspect to the shootings.

Prohibition of slavery, servitude and forced labour (article 4)

Treatment of domestic servants

■ **Siliadin v France**

26 July 2005,
App No 73316/01

In January 1994, the applicant, a Togolese national aged 15, arrived in France with Mrs D, a French national of Togolese origin. Mrs D had undertaken to regularise the applicant's immigration status and to arrange for her education while the applicant was to do housework for Mrs D. The applicant effectively became an unpaid servant to Mr and Mrs D, and her passport was confiscated.

In around October 1994, Mrs D 'lent' the applicant to Mr and Mrs B to help them with household chores and to look after their young children. The applicant became a 'maid of all work' to Mr and Mrs B, who made her work from 7.30 am until 10.30 pm every day with no days off. She slept in the children's bedroom on a mattress on the floor and wore old clothes. The applicant was never paid.

In 1998, criminal proceedings were brought against Mr and Mrs B for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person, and for subjecting that person to working or living condi-

tions incompatible with human dignity. Mr and Mrs B were convicted at first instance and sentenced to, among other penalties, 12 months' imprisonment, but they were subsequently acquitted on appeal at the Court of Cassation. The Court of Appeal found Mr and Mrs B guilty of making the applicant work unpaid for them, but considered that her working and living conditions were not incompatible with human dignity. The couple were ordered to pay the equivalent of damages of €15,245. An employment tribunal also awarded the applicant €31,238 in salary arrears.

The applicant alleged a violation of article 4 of the convention, as French criminal law did not afford her sufficient and effective protection against servitude or against forced and compulsory labour, which, in practice, had made her a domestic slave.

Decision: There was a violation of article 4. The applicant had worked for years, without respite, against her will and without being paid. She had been a minor at the relevant time, was unlawfully present in a foreign country and was afraid of being arrested by the police. Therefore, she had, at the least, been subjected to forced labour within the meaning of article 4. She had not, however, been held in slavery in the traditional sense of that concept. The applicant had been held in servitude within the meaning of article 4 (an obligation to provide one's services under coercion). Slavery and servitude were not, as such, classified as criminal offences in French criminal legislation. Mr and Mrs B were not convicted under criminal law and, therefore, the domestic legislation had not provided the applicant with effective protection against the actions of which she had been victim.

Comment: This is the ECtHR's first finding of a violation of article 4. The court took the opportunity to elucidate the meaning of the practices which are prohibited by it, ie, 'slavery', 'servitude' and 'forced labour'. The court emphasised that the article gives rise to positive obligations on states to adopt and implement effective criminal law provisions that make the practices set out in article 4 criminal offences. The court also noted that the Parliamentary Assembly of the Council of Europe had regretted that 'none of the Council of Europe member states expressly [made] domestic slavery an offence in their criminal codes' (see recommendation 1523 (2001), 26 June 2001). The Council of Europe Convention on Action against Trafficking in Human Beings has been open for signature since May 2005. It has been signed by 24 states, but not the UK.

Right to a fair hearing (article 6)

See also *Roche v UK* (issue of certificate under Crown Proceedings Act (CPA) 1947 s10 to block legal proceedings) below.

Non-compliance with court orders for the closure of thermal power plants

■ **Okyay and others v Turkey**

12 July 2005,
App No 36220/97

This case was brought by ten lawyers from Izmir, about 250km from three thermal power stations which were operated by the Ministry of Energy and Natural Resources and a public utility company, Türkiye Elektrik Kurumu (TEAS). Between 1993 and 1994, the applicants called on the Ministry of Health and the station operators to close the power stations, claiming that they were operating without the necessary licences and represented a growing danger to public health and the environment. They received no response which, under Turkish administrative law, amounted to a refusal.

The Administrative Court found that TEAS had been illegally operating the power stations without the necessary permits and, on the basis of experts' reports about levels of pollution, the court ruled that the authorities' refusal to close the power stations had been unlawful. The court issued an injunction for the suspension of the power stations' operation. Appeals against the injunction were dismissed. However, despite the administrative courts' judgments, the Council of Ministers, composed of the Prime Minister and other cabinet ministers, decided that the thermal power stations should continue to operate. The applicants complained under article 6 that their right to a fair hearing had been breached on account of the authorities' failure to enforce the administrative courts' decisions and orders to halt the operations of the power plants.

Decision: There was a violation of article 6(1). In relation to the applicability of article 6, although the applicants were not affected personally, ie, they did not suffer any economic or civil loss – they were concerned about their country's environmental problems and the violation of their constitutional right to live in a healthy and balanced environment. The fact that it was an alleged violation of a constitutional right satisfied the ECtHR regarding the existence of a genuine and serious dispute.

In establishing whether that amounted to a 'civil right', the ECtHR noted the extent of environmental degradation, the risk to public health, the sheer scale of the affected area, and the applicants' right to protection of physical integrity, coupled with the refusal of the authorities to enforce the judgments. Thus, article 6(1) was found to be applicable. The non-enforcement of the domestic courts' decisions by the administrative authorities within the prescribed time limits was incompatible with law and contravened the requirements of article 6(1). The decision of the Council of Ministers permitting the continued use of the plants had no legal basis and was unconstitutional.

Comment: This is an interesting decision and an encouragement to environmental campaigners, particularly in view of the court's finding about the applicability of article 6 in spite of the relatively 'loose' locus standi which the applicants could claim they were not personally directly affected by the operation of the power plants. For a further environmental decision in the context of the application of article 8, see also *Fadeyeva v Russia* below.

Failure to answer financial investigator's questions

■ **Shannon v UK**

4 October 2005,
App No 6563/03

The applicant was the chair of the Irish Republican Felons Club (IRFC), a registered social club in Belfast. The Royal Ulster Constabulary searched the IRFC's premises and seized documents. A financial investigator, who was appointed under the Proceeds of Crime (Northern Ireland) Order (PC(NI) Order) 1996 SI No 1299, interviewed the applicant, who was later charged with false accounting and conspiracy to defraud. He was subsequently again questioned by financial investigators in relation to various issues, but his solicitor advised him not to attend the interview, on the basis that any answers he gave could be used as evidence at his trial and would compel him to disclose his defence. The applicant was fined for failing, without reasonable excuse, to comply with the financial investigator's requirement to answer questions. He appealed successfully to the county court, but the Northern Ireland Court of Appeal upheld his conviction. It found that article 6(1) did not apply to extra-judicial inquiries.

Decision: There was a violation of article 6(1). The special problems of investigating crime in Northern Ireland did not warrant coercive measures imposed on the applicant by the

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PC(NI) Order. His attendance at interview might have required him to give information on matters that could have arisen in criminal proceedings for which he had been charged. Accordingly, the requirement to attend an interview and be compelled to answer questions in connection with the events in respect of which the applicant had already been charged with offences was not compatible with his right not to incriminate himself.

Comment: The ECtHR rejected the government's arguments that as the underlying proceedings in the case for false accounting and conspiracy to defraud were never pursued, the right not to incriminate oneself could not be in issue. The court reiterated that it is open to an applicant to complain of an interference with the right not to incriminate oneself, even though no self-incriminating evidence or reliance on a failure to provide information was used in other, substantive criminal proceedings (see also *Weh v Austria* 8 April 2004, App No 38544/97).

Length of criminal proceedings

■ **Yetkinsekerci v UK**

20 October 2005,
App No 71841/01

The applicant was convicted of knowingly being involved in the attempted importation of a controlled drug and was sentenced to 14 years' imprisonment. His appeal was dismissed, in 2001, and he complained under article 6(1) about the length of the proceedings against him, the appeal stage of which lasted for just under three years.

Decision: There was a violation of article 6(1). The length of proceedings was excessive and failed to meet the 'reasonable time' requirement.

Comment: The government was not able to put forward any particular reason for the delay in the appeal proceedings in this case. The applicant was awarded €1,000 as non-pecuniary damages.

Right to respect for private and family life (article 8)

Use of human embryos during fertility treatment

■ **Evans v UK**

27 September 2005 (admissibility hearing),
App No 6339/05

Before having her ovaries removed to prevent the spread of cancer, the applicant had her last eggs used to create six embryos which were stored by a private clinic. The applicant wanted the opportunity to have those embryos implanted as that would be her only chance of bearing a child to whom she was genetically related. The Human Fertilisation and Embryology Act 1990 permitted her former partner to refuse to allow the embryos to be implanted and to require the clinic to destroy them. During domestic proceedings the storage of the embryos was continued by agreement between them. However, the embryos could be stored for only five years. The applicant complained of a violation of her rights under articles 8 and 14, and of the embryos' rights under article 2.

Decision: The case was communicated under article 8 and granted priority under Rules of the ECtHR r41. An interim measure was indicated under r39 to the effect that the government should 'take appropriate measures to ensure that the embryos are not destroyed by the clinic at which they are stored until the court has had the possibility to examine the case'.

Comment: While this case has not reached the admissibility stage yet, the decisions made on notification of the case demonstrate the potential breadth of the ECtHR's 'interim measures', which have hitherto usually been limited to cases where the threat of deportation or extradition lays the applicant open to a real risk of ill-treatment or death.

Environmental pollution in residential area

■ **Fadeyeva v Russia**

9 June 2005,
App No 55723/00

The applicant lived in a council flat within the 'sanitary security zone' of a privately-run steel plant. The plant was a major cause of environmental pollution which exceeded the national maximum permitted levels. In 1995, the applicant and other residents brought court proceedings against the steel works, seeking resettlement outside the security zone in an environmentally safe area. In 1996, the Town Court found that under domestic law the applicant had a right in principle to be resettled at the local authority's expense. The court made no specific resettlement order, but required the local authority to place the applicant on a 'priority waiting list' for new accommodation. She had since then remained on the waiting list. The applicant complained of a violation of article 8.

Decision: There was a violation of article 8. It was undisputed that the applicant's place of residence was affected by industrial pollution and that this was caused mainly by the steel plant. For article 8 to be engaged in cases of environmental nuisance, the applicant must show both actual interference with the private sphere and that a certain level of severity was attained.

Over a significant period of time, the concentration of various toxic elements in the air near the applicant's house had seriously exceeded national maximum permitted levels. The available evidence established that the applicant's health deteriorated due to prolonged exposure to industrial emissions from the steel plant, making her more vulnerable to disease and adversely affecting the quality of her life. The state authorities had been in a position to evaluate the pollution hazards and take adequate measures to prevent or reduce them. The state had authorised the operation of the polluting enterprise in a densely populated town and had established a territory around the plant which should be free of any dwelling, but legislative measures had not been implemented in practice. The state had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and private life. The applicant was awarded €6,000 as non-pecuniary damages.

Comment: This decision marks a further development in the ECtHR's case-law in the environmental field. This case concerned the extent of a state's positive obligation arising from article 8 to regulate a private polluter effectively, rather than a state being directly responsible for the pollution in question.

The government's application to have the case referred up to the Grand Chamber under article 43 of the convention has since been rejected and, accordingly, the Chamber's judgment has become final. This case may test the effectiveness of the process adopted by the Committee of Ministers in supervising the enforcement of judgments under article 46(2) of the convention. As the applicant is still living in the same flat, implementation of the judgment arguably either requires state support for her to be moved, or requires the state to ensure that the extent of any pollution is brought down to acceptable levels.[3]

Lack of access to medical records relating to nerve gas testing of service personnel

■ **Roche v UK**

19 October 2005,
App No 32555/96

The applicant served in the British Army between 1953 and 1968. In 1987, he developed high blood pressure and was suffering from various conditions, as a result of which he was registered as an invalid. He believed that his health problems were caused by his participation in mustard and nerve gas tests conducted at the Chemical and Biological Defence Establishment at Porton Down in 1962 and 1963.

Since 1987, the applicant had actively sought access to his service records, with only limited success. His claim for a service pension was rejected as he had not demonstrated a causal link between the tests and his medical condition. In 1994, the applicant threatened to bring proceedings against the Ministry of Defence, but the secretary of state issued a certificate under CPA s10, which effectively blocked any such proceedings concerning events before 1987, while allowing an application for a service pension. (See right to a fair hearing (article 6) above.)

The applicant applied to the Pensions Appeal Tribunal (PAT) for the disclosure of official information under Pensions Appeal Tribunal (England and Wales) Rules 1980 SI No 1120 r61 to enable the tribunal to decide whether his illness was either caused or aggravated by the gas tests. The PAT ordered the Ministry of Defence to disclose certain categories of records and it found that there was no evidence to link the applicant's exposure to gas with his present condition. The High Court allowed his appeal, and referred the matter back to the PAT before which the case was still pending.

The applicant complained that:

- he was denied adequate access to information concerning the gas tests, in violation of articles 8 and 10 of the convention;
- the s10 certificate constituted a violation of his right of access to court under article 6(1) and of article 1 of Protocol 1 taken alone and in conjunction with article 14; and
- article 13 had been violated.

Decision: There was a violation of article 8, but no violation of article 6(1) or of any of the other articles. As to the claim under article 8, the court held that a positive obligation arose to provide an 'effective and accessible procedure' to enable the applicant to have access to 'all relevant and appropriate information' that would allow him to assess any risk to which he had been exposed during his participation in the tests. The applicant should not be required to litigate to obtain disclosure; a structured disclosure process was required. The various 'medical' and 'political' means available to the applicant had resulted only in partial disclosure. The PAT had described as 'disquieting' the difficulties experienced by the applicant in obtaining records. Accordingly, the UK government had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the gas tests.

In relation to the claim under article 6(1), the court accepted the reasoning of the Court of Appeal and House of Lords about the effect of CPA s10 in domestic law. It did not remove a class of claim from the domestic courts' jurisdiction or confer immunity from liability which had been previously recognised; s10 was a provision of substantive law that delimited the rights of servicemen as regards damages' claims against the Crown and which provided a no-fault pension scheme for injuries sustained in the course of service. Therefore, the applicant had no 'civil right' recognised under domestic law to which article 6(1) would apply.

The applicant had had no 'possession' within the meaning of article 1 of Protocol 1, which therefore did not apply. Article 10 could not be construed as imposing a positive obligation on a state to disseminate information. The applicant was awarded €8,000 as non-pecuniary damages.

Comment: This Grand Chamber judgment has further established the right of access to information as an integral aspect of article 8 of the convention, notably in respect of hazardous activities which may have health implications. The court recognised a positive duty to establish a 'structured disclosure process' which should not require an individual to litigate in order to obtain disclosure.

However, in relation to the application of article 6, the Grand Chamber was split by nine votes to eight. In *Matthews v Ministry of Defence* [2003] UKHL 4, the House of Lords was unanimous in concluding that the effect of CPA s10 was as a substantive – rather than a procedural – limitation on the liability of the Crown in tort to servicemen for service injury, to which article 6(1) did not, therefore, apply. A majority of nine of the 17 judges in the Grand Chamber relied on the Lords' decision and reasoning, and also exhibited a strong degree of deference to national courts:

Where … the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant convention case-law and principles drawn therefrom, this court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law … and by finding, contrary to their view, that there was arguably a right recognised by domestic law.

Preferring the reasoning adopted by the High Court in *Matthews,* eight dissenting judges nevertheless argued that s10 amounted to a procedural limitation, that article 6 was accordingly applicable, and had been breached.

Right to marry (article 12)

Prohibition of marriage of father-in-law and daughter-in-law

- **B and L v UK**

13 September 2005, App No 36536/02

The first applicant, B, married A and divorced in 1987. B and A had a son together, C. B then married D, but B and D divorced in 1997. The second applicant, L, married C, so the first applicant and second applicant were father-in-law and daughter-in-law. L and C had a son together, W, but were divorced in 1997. A relationship between B and L then developed and they had cohabited since 1996. B and L planned to adopt W, who lived with them.

In response to a request from B, the Superintendent Registrar of Deaths and Marriages informed them, in 2002, that under the Marriage Act (MA) 1949 (as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986), B and L could only marry if A and C were both dead. B and L were advised that they had no domestic remedy and the couple complained of violations of articles 12 and 14.

Decision: There was a violation of article 12, but no separate issue arose under article 14. The bar on marriage between parents-in-law and children-in-law meant that B and L were unable to obtain legal and social recognition of their relationship. The possibility of applying to parliament was an exceptional and costly procedure, was totally at its discretion and was not subject to any discernable rules or precedent. In any event, a system requiring a person of full age, who was in possession of his/her mental faculties, to submit to a potentially intrusive investigation to ascertain whether it was suitable for him/her to marry would be viewed with reservation. The bar on marriage between parents-in-law and children-in-law pursued a legitimate aim in protecting the integrity of the family, but it did not prevent such relationships occurring (and no incest or other criminal law provisions prevented extra-marital relationships) between such couples.

Comment: This decision will require an amendment to the MA. This has been accepted by the government, which has

undertaken to do so by way of a remedial order that will allow marriages between parents-in-law and children-in-law. The government has also confirmed that parallel provisions in the Civil Partnership Act 2004 will not be commenced, so that same-sex couples will have parity of treatment.[4]

Prohibition of discrimination (article 14)

See also *Nachova and others v Bulgaria* above and *Stec and others v UK* below.

Unavailability to unmarried father of tax relief on maintenance payments

■ **P M v UK**

19 July 2005,
App No 6638/03

Between 1987 and 1997, the applicant lived in a stable relationship with Miss D. They never married. In 1991, Miss D had a daughter and the applicant was registered as the girl's father on the birth certificate. After the applicant separated from Miss D in 1997, they entered into a Deed of Separation in which he undertook to pay weekly maintenance for his daughter. The applicant paid £1,300 under the deed for the tax year 1998/1999. The sum payable under the deed increased in line with the applicant's earnings, and since April 2002 he had made weekly maintenance payments of £35. The applicant was granted relief on his self-assessment tax return for maintenance payments for the year of assessment 1997/1998. The government stated that that had been an error by the Inland Revenue.

The applicant claimed the same relief for the tax year 1998/1999, which would have reduced his income tax liability by £195. The Inland Revenue refused the claim for tax relief on the basis that the applicant was never married to his daughter's mother. The applicant's appeal to the General Commissioners was dismissed, primarily on the ground that the Human Rights Act (HRA) 1998 did not apply to the case as it had only come into force on 2 October 2000, after the tax year in question. The applicant complained of violations of article 13, and article 14 in conjunction with article 1 of Protocol 1.

Decision: There was a violation of article 14 in conjunction with article 1 of Protocol 1, but no violation of article 13. As an unmarried father, the applicant could claim to have been treated differently to a married father who had divorced and separated and who was under an obligation to pay maintenance. The applicant differed from a married father only in his marital status. He was in a relevantly similar position to a married father for the purpose of the application.

As a general rule, unmarried fathers, who had established family life with their children, could claim equal rights of contact and residence with married fathers. There was no reason to treat the applicant differently from a married father, who had divorced and separated from the mother, as regards the deductibility of the maintenance payments. The applicant had been acknowledged as the father of the child and had acted in that role, including fulfilling his financial obligations towards her. The purpose of the deductions was purportedly to make it easier for married fathers to support a new family. It was not clear why that relief should not also be available to unmarried fathers who also wished to enter into new relationships.

Comment: The ECtHR reiterated that differential treatment on the basis of marital status may have an objective and reasonable justification. For example, in *McMichael v UK* 24 February 1995, App No 16424/90; (1995) 20 EHRR 205, concerning the Law Reform (Parent and Child) (Scotland) Act 1986, which did not automatically grant parental responsibility to unmarried fathers, such a distinction was considered to be justified because of the varying commitment of unmarried fathers to their children. However, the government's purported justification in this case – the special regime of marriage that confers specific rights and obligations on those who choose to join it – did not justify the difference in treatment relating to tax relief from maintenance payments.

Peaceful enjoyment of possessions (article 1 of Protocol 1)

Application of the law of adverse possession

■ **J A Pye (Oxford) Ltd v UK**

15 November 2005,
App No 44302/02

The applicant companies were the registered owners of a plot of 23 hectares of agricultural land in Berkshire, which was valued at £21 million. The owners of the adjacent property, Mr and Mrs Graham, occupied the land under a grazing agreement until 31 December 1983, when they were instructed to vacate the land as the agreement was about to expire. However, the couple did not vacate the land. In January 1984, the applicants refused the Grahams' request for a further grazing agreement because they anticipated seeking planning permission for development of the land and considered that continued grazing might damage their prospects of obtaining such permission. Nevertheless, from September 1984 until 1999, the Grahams continued to use the land for farming without the applicants' permission.

In 1997, Mr Graham registered cautions at the Land Registry against the applicants' title on the ground that he had obtained title by adverse possession. The applicants sought cancellation of the cautions before the High Court and issued further proceedings seeking possession of the plot. The High Court held that, since the Grahams enjoyed factual possession of the plot from January 1984 and adverse possession took effect from September 1984, the applicants had lost their title to the land under the Limitation Act (LA) 1980, and the Grahams were entitled to be registered as the new owners. The applicants appealed successfully, but their appeal was overturned by the House of Lords, which restored the High Court's order (*J A Pye (Oxford) Ltd and others v Graham and another* [2002] UKHL 30). The applicants alleged that the domestic law on adverse possession operated in violation of article 1 of Protocol 1 of the convention in their case.

Decision: The ECtHR held that there was a violation of article 1 of Protocol 1 by four votes to three. The effect of the domestic law had been to deprive the applicants of their substantive property rights and to preclude them from lawfully repossessing the plot as beneficial title to it had been lost. It was accepted that the Grahams' adverse possession of land for 12 years directly led to the applicants' loss of their title. However, had it not been for the provisions of the Land Registration Act (LRA) 1925 and the LA, adverse possession of the land by the Grahams would have had no effect on their title or on their ability to repossess the land at any stage. The legislative provisions alone deprived the applicants of their title and transferred the beneficial ownership to the Grahams. Accordingly, the operation of the relevant provisions of the two Acts constituted an interference with the applicants' rights under article 1 of Protocol 1.

A 12-year limitation period was relatively long, and the law of adverse possession was well-established and had not altered during the period of the applicants' ownership of the land. It was also accepted that, in order to avoid losing their title, the applicants had to do no more than regularise the Grahams' occupation of the land or issue proceedings to recover its possession within the 12-year period. Nevertheless, the key issue was whether the deprivation of the applicants' title to the land and the transfer of the beneficial ownership to the Grahams, who were in unauthorised possession, struck a fair balance with any legitimate public interest

that was served. It was noted that not only were the applicants deprived of their property, but they also received no compensation. The result for them was, therefore, exceptionally severe.

The taking of property in the public interest without payment of compensation reasonably related to its value was justified only in exceptional circumstances. The lack of compensation should also be viewed in the light of the lack of adequate procedural protection: no form of notification whatever was required to be given to a landowner, which might have alerted that owner to the risk of the loss of title. Therefore the application of the LRA 1925 and the LA to deprive the applicants of their title to land had imposed on them an excessive burden and upset the fair balance between the demands of the public interest and their right to peaceful enjoyment of their possessions.

Comment: The question of the applicability of article 1 of Protocol 1 had not been considered by the House of Lords because the matters in issue preceded the coming into force of the HRA. The LRA 2002 has subsequently made substantial changes to the law on adverse possession with respect to registered land.

The three dissenting judges argued that there had not been a disproportionate interference with the applicant companies' rights: they were 'professional real estate developers', and had lost their land as a result of the foreseeable operation of the relevant legislation.

Provision of reduced earnings allowance and retirement allowance

■ **Stec and others v UK**

6 July 2005,
App Nos 65731/01 and 65900/01

The five applicants had received reduced earnings allowance (REA) because of work-related injuries. In each case, on reaching retirement age, their REA was subsequently replaced by retirement allowance (RA). The applicants brought separate domestic proceedings to challenge the decisions on the basis of sex discrimination. Their cases were joined by the social security commissioner and were referred to the European Court of Justice (ECJ) in relation to Council Directive 79/7/EEC of 19 December 1978 ('the Equal Treatment Directive').

The ECJ held that the removal of the discrimination at issue would have no effect on the financial equilibrium of the UK, but that it had been objectively necessary to introduce different age conditions, based on sex, in order to maintain the coherence between the state retirement pension scheme and other benefit schemes (*Regina Virginia Hepple and others v Adjudication Officer* Case No C-196/98, 23 May 2000; 2000 ECR I-03701). The commissioner dismissed the applicants' cases following the ECJ's ruling. The applicants claimed that the REA and RA schemes were discriminatory, in breach of article 14 taken together with article 1 of Protocol 1.

Decision: Four applications were declared admissible. The striking out of a fifth case was confirmed.

Comment: This admissibility decision by the Grand Chamber of the ECtHR is significant because it clears up the confusion in the court's case-law concerning the applicability of article 1 of Protocol 1 to welfare benefits. The issue was whether such a benefit amounts to a 'possession' under article 1 of Protocol 1. Since *Gaygusuz v Austria* 16 September 1996, App No 17371/90; (1997) 23 EHRR 364 there have been inconsistent decisions about whether article 1 of Protocol 1 only applies to contributory benefits – ie, where there have been payments made to a fund financing the benefit in question – or whether it also applies to non-contributory benefits. Having considered the different systems within Council of Europe states, the Grand Chamber concluded that in view of the variety of funding methods and the interlocking nature of benefits under most welfare systems, it would be artificial to maintain that only benefits financed by contributions to a specific fund would fall within the scope of article 1 of Protocol 1. Accordingly, the Grand Chamber has clarified in this decision that no distinction should be made between contributory and non-contributory benefits. In future, where there is an assertable right under domestic law to a welfare benefit, article 1 of Protocol 1 will be applicable.

Prohibition of the denial of the right to education (article 2 of Protocol 1)

University ban on Islamic headscarf

■ **Leyla Şahin v Turkey**

10 November 2005,
App No 44774/98

The applicant came from a traditional family of practising Muslims and considered it her religious duty to wear an Islamic headscarf. She had been a student at the Faculty of Medicine at Istanbul University and, in 1998, the university's vice-chancellor issued a circular directing that students with beards and those wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. In March 1998, the applicant was refused access to an examination because she was wearing a headscarf. Subsequently, the university's authorities refused to enrol her on a course, or to admit her to various lectures and an examination on the same ground. The faculty issued the applicant with a warning for contravening the university's rules on dress. It also suspended her from the university for a semester for taking part in an unauthorised assembly that had gathered to protest against it. The applicant complained of violations of articles 8, 9, 10 and article 2 of Protocol 1.

Decision: There was no violation of articles 8, 9, 10 or article 2 of Protocol 1. The circular would be taken as constituting an interference with the applicant's right to manifest her religion. However, there was a legal basis for the interference in domestic law (ie, a decision of the Constitutional Court). It would have been clear to the applicant, from the moment she entered university, that there were restrictions on wearing the Islamic headscarf and, after the circular was issued, that she was liable to be refused access to lectures and examinations if she continued to wear it. The interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.

It was noted that the interference was based, in particular, on the principles of secularism and equality. The notion of secularism was found to be consistent with the values underpinning the convention : upholding that principle could be considered necessary to protect the democratic system in Turkey. The court also noted the emphasis placed in the constitutional system on the protection of the rights of women.

In the Turkish context, there had to be borne in mind the impact that wearing such a symbol, which was presented or perceived as a compulsory religious duty, might have on those who chose not to wear it. There were extremist political movements in Turkey which sought to impose on society their religious symbols and a conception of society founded on religious precepts. In such a context, where values of pluralism, respect for the rights of others and equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn on the university's premises. It was common ground that practising Muslim students in Turkish universities were free, within the limits imposed by educational

and organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. Accordingly, the interference was justified in principle and was proportionate to the aims pursued.

As to article 2 of Protocol 1, the applicant could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if she continued to wear the headscarf. The ban on wearing the headscarf did not impair the essence of the applicant's right to education. In relation to article 14, the regulations were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were intended to preserve the secular nature of educational institutions.

Comment: This decision of the Grand Chamber confirmed by 16 votes to one the outcome in the Chamber's judgment of 29 June 2004, which unanimously found no violation of the convention. A central aspect of this judgment is the particular importance of the principle of secularism within the state of Turkey. It is, therefore, a moot point whether this decision about the proportionality of restrictions on the wearing of Islamic headscarves can be considered to apply across other Council of Europe states.

The judgment is undoubtedly important in confirming, for the first time, that the provisions of article 2 of Protocol 1 prohibiting the denial of the right to education apply to higher education (in addition to primary and secondary education). In reaching its decision, the ECtHR noted that the Council of Europe had frequently stressed the key role and importance of higher education in the promotion of human rights and strengthening of democracy. This means that any higher education institution existing at a given time will come within the scope of the first sentence of article 2.

Right to free elections (article 3 of Protocol 1)

■ **Hirst v UK (No 2)**

6 October 2005,
App No 74025/01

In 1980, the applicant had pleaded guilty to manslaughter on the ground of diminished responsibility. He was sentenced to discretionary life imprisonment. In 1994, his tariff expired, but he remained in detention as the Parole Board considered that he continued to present a risk of serious harm to the public. In 2004, he was released from prison on licence.

As a convicted prisoner, the applicant was barred by Representation of the People Act (RPA) 1983 s3 from voting in either parliamentary or local elections. He issued proceedings in the High Court under HRA s4, seeking a declaration that RPA s3 was incompatible with the convention. His claim and subsequent appeal were both rejected.

The applicant complained that he was subject to a blanket ban on voting in elections in violation of article 3 of Protocol 1, article 14 and article 10.

Decision: There was a violation of article 3 of Protocol 1, but no violation of articles 10 or 14. The right to vote was a right and not a privilege. However, the rights bestowed by article 3 of Protocol 1 were not absolute. Any limitations on the right must reflect – or not run counter to – the concern to maintain the integrity and effectiveness of the electoral procedure which is aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risked undermining the democratic validity of the elected legislature and its laws.

In general, prisoners continued to enjoy all the fundamental rights and freedoms guaranteed under the convention, except for the right to liberty. There was no question that prisoners forfeited their rights merely because of their status as detainees following conviction. The severe measure of disenfranchisement was not to be undertaken lightly. The principle of proportionality required a discernible and sufficient link between the sanction and conduct and the circumstances of the individual concerned.

The court accepted the government's submissions that RPA s3 was aimed at preventing crime and enhancing civic responsibility and respect for the rule of law. The ban affected over 48,000 prisoners and included a wide range of offenders and sentences, from one day to life, and from relatively minor offences to offences of the utmost gravity. In sentencing, the criminal courts made no reference to disenfranchisement. It was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote. There was no evidence that parliament had ever sought to weigh the competing interests or to assess the proportionality of a blanket ban. There had not been a substantive debate by parliament on the continued justification for the ban. While the state's margin of appreciation was wide, such a general, automatic and indiscriminate restriction on a vitally important convention right had to be seen as falling outside any acceptable margin of appreciation.

Comment: The Grand Chamber underlined that there were numerous ways of organising and running electoral systems. Furthermore, there was a wealth of differences in the historical development, cultural diversity and political thought within Europe which was for each state to mould into its own democratic vision. However, it also noted that it was only a minority of Council of Europe states in which a blanket restriction was imposed or in which there was no provision allowing prisoners to vote. The Lord Chancellor, Lord Falconer's immediate public response to the judgment was to say that it would not mean that all convicted prisoners would be given the right to vote, but that the government would be considering which categories of convicted prisoners would be given such a right.[5]

The author would like to thank the following contributors: Thomas Barrett (AIRE Centre), Payam Beheshti (trainee solicitor, Liberty), Nancy Collins (solicitor, Prisoners' Advice Service), Joanne Drake (trainee solicitor, Liberty), Dr Caoilfhionn Gallagher (Liberty), Elizabeth Gormley (Liberty), Jonathan Halpern (AIRE Centre), Catharina Harby (AIRE Centre), Andrea Hopkins (barrister), Ulrike Kassner (AIRE Centre), Parham Kouchikali (Liberty), Oliver McClintock (trainee solicitor, Liberty), Shamim Razavi (Liberty), Deborah Russo (solicitor), and James Welch (solicitor, Liberty).

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1 In December 2005, Lord Woolf produced *Review of the working methods of the European Court of Human Rights*. It is available at: www.echr.coe.int/Eng/Press/2005/Dec/LORDWOOLF'SREVIEWONWORKINGMETHODS.pdf.
2 However, there were six dissenting judges in the Grand Chamber, who argued against a separate consideration of the substantive and procedural aspects of article 2 in relation to article 14, and in favour of an overall approach.
3 See further: 'Stay inside when the wind blows your way – engaging environmental rights with human rights', Philip Leach, [2005] 4 *Env Liability* 91–97.
4 *Hansard*, HL Written Statements col 110, 21 November 2005.
5 *Convicted prisoners and the franchise*, SN/PC/1764, Isobel White, Anwen Rees, House of Commons Library, 15 November 2005, available at: www.parliament.uk/commons/lib/research/notes/snpc-01764.pdf.

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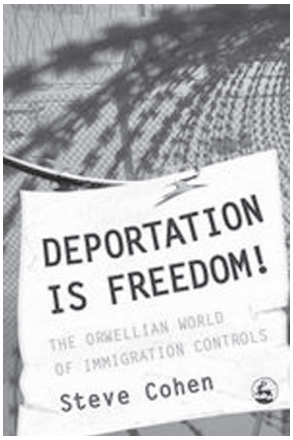
Deportation is freedom! The Orwellian world of immigration controls

by Steve Cohen, Jessica Kingsley Publishers, £12.99, 224pp



Steve Cohen, an immigration barrister and a campaigner for over 25 years, has produced here a compelling comparison between the 'Newspeak' language of one Blair (ie, Eric Arthur Blair aka George Orwell), as described in his 1949 novel *Nineteen eighty-four*, and the New Labour language of another Blair (the Prime Minister), in making the case for scrapping the UK's immigration controls.

With a remarkable lack of stridency, Steve Cohen notes the defensiveness of the political left, which fears that 'ordinary' people are not ready for the 'premature' abolition of such controls. He instances the large numbers of 'ordinary' people who have been – and still are – campaigning against them. Meanwhile, he seeks to resolve the dilemmas of three groups of 'resisters':

- The first group feels that success only comes through prayer or divine intervention (but we never saw God on the anti-immigration control demonstrations).
- The second group wants 'fair' or 'benign' controls, but these are, by their very nature, unjust, inequitable and racist.
- The third group just knows that the controls are insane – but any Marxist can show that they are the product of imperialism, through which newly industrialised countries control the global movement of labour.

However, over the years, Steve Cohen has come to admit that the third group is not wrong; and certainly is not mad. The UK's current immigration controls are indeed insane. In New Labour 'Newspeak', people who are seeking asylum have the 'freedom' to go home and get killed. If they want to avoid detention under the terrorism laws, they are 'free' to agree to be deported. If they do not want to be made destitute, or to be put out on the street and have their children taken away from them, they are 'free' to agree to 'voluntary' deportation. If they are worried about their right to family life under article 8 of the European Convention on Human Rights, they are 'free' to 'choose' to keep their family together, provided that they all leave together. It is all about 'choice'.

In fact, many people who are seeking asylum in the UK love and would like to be free to return to their countries of origin, but want to be free of persecution when they get there. And, in a world where wealth – and health – are increasingly divided, the truth is that what remains of 'our' welfare state is increasingly reserved for 'us'. Middle class racism is reported to have worsened precisely because of the fear that having a refugee family as a neighbour will bring down their house prices.

Nineteen eighty-four, while prophetic, did not get close to the language of 'bogus', 'illegal', and even 'clandestineness', never mind 'benefit shoppers' and 'health tourists'. 'Removal' is no longer something to do with furniture. New divisions have relegated those seeking family reunion (who were more evident in the 1970s), and now it is truly a case of 'genuine asylum-seekers good, illegal immigrants bad'. Even the central character in *Nineteen eighty-four*, Winston Smith, would have been hard-pressed to express the words of a Zimbabwean refugee who said, 'You cannot answer questions they do not put.' Other examples of the inherent iniquities of the system include the Turkish-Cypriot gay man who was told that he could avoid the risk of prosecution in his country of origin by self-restraint, and the HIV- positive man from central Africa whose appeal for continuing National Asylum Support Service's benefits was dismissed as his condition did not make him 'unfit for travel'. He was told by the judge who was hearing his case: 'You got here [Croydon] all right; you could get to the airport.'

There are the crocodile tears of government ministers, who effectively felt that their inhumane policies would hurt them more than they would hurt their recipients – including through the definitively titled Asylum and Immigration (Treatment of Claimants, etc) Act 2004. (Surely the Act should have had 'mistreatment' in its title instead of 'treatment'). And what does the 'etc' stand for? Perhaps for the need for a person, who is subject to immigration control, to get the Home Secretary's permission to get married, or for a failed asylum-seeker who must 'decide' to opt for 'voluntary' deportation if s/he does not want his/her child to be taken into local council care.

The themes in *Deportation is freedom!* are far from narrow. From the government that gave us 'weapons of mass destruction in 45 minutes' comes the assertion that there is so much 'peace' in Iraq now that people can be deported from here to there without fear. The Labour government's appeasement of the British National Party (BNP), through laws and media coverage that the BNP's own website admires, is echoed by the Immigration and Nationality Directorate's more obviously Orwellian letter-heading 'Building a safe, just and tolerant society'. And 'Big Brother' is now everywhere: a mass TV audience has transformed surveillance into home entertainment, and turned contestants into pariahs whose removals are screamed for.

The collusion in this system by local authorities and the voluntary sector is an important, though again not overstated, moral of this book. Voluntary agencies involve themselves in the system as 'stake-holders' in order to 'exert influence'. 'If we did not do it, someone else would', Steve Cohen does not quite report them as saying. Their claim that such a role will obtain information hardly outweighs the damaging legitimisation of the whole process. Only briefly does Steve Cohen raise the prospect of immigration lawyers deserting the courts, as Ian Macdonald QC and Rick Scannell have done, in terms of the Special Immigration Appeals Commission; though arguably practitioners very presence gives the system a veneer of respectability, which then helps the adjudicators in giving their negative judgments.

But the point of *Deportation is freedom!* is in the history of struggle. From 1895 to the more recent 'No one is illegal' campaign (the relevant manifestos are reprinted as appendices in the book) there have been ordinary people in heroic movements. From the campaigns to support Nasira Begum in 1978, Anwar Ditta in 1980, and Viraj Mendis in 1989 to the Sukula and the Samina Altaf family campaigns today, it is still the case, as (the other) Blair wrote in *Nineteen eighty-four*, that 'If there is hope, it lies in the Proles.'

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