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.

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editorial
Uncharted waters, no compass?

At last, the Department for Constitutional Affairs (DCA) has broken its silence on the subject of the tribunal system. Its white paper, *Transforming public services: complaints, redress and tribunals*, represents an ambitious position statement on the future of dispute resolution between citizen and state, worker and employer. Firmly located within the current vogue for user-friendly reform of public services, *Transforming public services* sets out a model that would provide a range of options for resolving disputes – while aiming to stop them arising in the first place (see page 4 of this issue).

The white paper adopts many of the findings of the Leggatt review of tribunals, including a view that the present system is incoherent and inefficient. The document endorses the need for a new type of organisation, which is visibly independent from the departments whose decisions are reviewed. Under this model, users would enter the tribunal system through a single gateway. They would benefit from standardised information; tribunals would share hearing centres; and tribunal judges, led by a senior president, would have a common status and work more flexibly across jurisdictional boundaries.

More radically, the DCA proposes re-engineering the processes of redress so that resolution of many disputes would be possible without formal hearings. The DCA makes no secret of its enthusiasm for ombudsman services. The Financial Ombudsman Service (FOS), in particular, is praised for its multiple tiers of intervention – ranging from initial advice through to conciliation and adjudication, with a final decision by the ombudsman only if necessary. Two attractions of the FOS scheme are its feedback systems, designed to help the industry avoid future disputes, and its low unit cost – an average of £217 per case.

It would be unfair to suggest that *Transforming public services* lacks a genuine mission to improve the system for users. But it is clear that these proposals are also firmly driven by resource factors. Persuading decision-makers to 'get it right first time' would certainly reduce departmental expenditure. Judges are expensive – and by allowing certain disputes to be resolved by staff with delegated judicial powers, as is suggested, no doubt savings could be made. Tribunal hearings also cost money: the questionable assumption seems to be that other processes, such as mediation, would cost less.

LAG agrees that alternative processes could work well for certain users. Not all disputes have to be resolved at a full hearing. Early neutral evaluation could certainly be used to good effect in many cases. But some central questions need to be addressed. Who decides, and at what stage, how a particular case should be handled? And what are the implications of blurring the boundaries between judicial and non-judicial staff?

Another concern is that the DCA's theoretical guarantee of the right to a hearing means little in practice if users have to fight a strong presumption against one being held. If too few cases are decided by judges and the higher courts rarely hear appeals, there is a real danger that complex and evolving legal areas will become semi-detached from the rule of law.

The idea of extending the role of tribunal judges raises more subtle problems. Expecting them to develop mediation techniques in addition to conventional judgecraft skills is unrealistic – it also confuses two entirely different professional approaches, both underpinned by distinct ethical frameworks. Judges' roles could be further confused by expecting them to comment, ombudsman-style, on the manner in which a department took its original decision.

Transforming public services is predictably blunt about the DCA's aim of ensuring that the majority of people with disputes against the state have their case resolved 'with little support or assistance'. It can see no justification for extending legal aid. But it concedes that the not for profit sector should have a larger role in providing users with independent advice on the merits and presentation of their cases. The decision to pilot an 'enhanced advice project' is to be welcomed.

The ambition behind this white paper is both its strength and its weakness. LAG agrees that the vision of proportionate dispute resolution must be given a chance to succeed. But such a profound transformation will be an expensive process, not least in terms of IT infrastructure – it cannot be viewed as a cost-cutting exercise. The DCA must also engage in a proper dialogue to bring about a profound reappraisal of what society understands to be the values and purpose of the justice system. The new tribunals' organisation must be equipped with this vital compass to deal with the uncharted waters that lie ahead.

news

Resolving housing disputes – a review

Martin Partington, head of the Law Commission's Administrative Justice team, writes:

In June, the government announced that it was asking the Law Commission to undertake a major review of the law and procedure relating to the resolution of housing disputes. This work arises from the commission's current project on the reform of substantive housing law.[1]

The proposed project reflects the Department for Constitutional Affairs' new emphasis on ensuring that the legal system meets users' needs. Reference to the project is also found in the latest white paper on administrative justice, *Transforming public services: complaints, redress and tribunals.*[2]

In undertaking its work, the commission will seek to address a number of questions including:

- What types of housing problems do people have in practice? How do they arise?
- To what extent are they legal or non-legal problems?
- How can legal problems and disputes best be dealt with? Can disputes be avoided? Can people be empowered to resolve disputes themselves? What are the proper functions of negotiation, mediation and conciliation?
- For disputes that require formal adjudication, should this be in a court? Or tribunal? Or other forum, for example, an ombudsman process?
- To what extent, if any, should the collective views of tenants inform the dispute resolution process?
- How can a system for the resolution of legal problems and disputes tie in with access to other housing and related services?
- What lessons can be learned from practice in other countries?

This will be a challenging project that will involve a detailed consultation process. *Legal Action* readers with initial thoughts are invited to contact the commission at: housingandadmin@lawcommission.gsi.gov.uk.

1 See 'Renting homes – Law Commission recommendations' December 2003 *Legal Action* 6.
2 Available at: www.dca.gov.uk. See also page 3 of this issue.

Asylum Bill update

Martin Penrose, of the Immigration Law Practitioners' Association, writes:

The Asylum and Immigration (Treatment of Claimants, etc) Bill completed its passage through parliament in July. The government succeeded in reinstating the five-day deadline for applications to reconsider an immigration appeal decision, but clarified, at least, that this is meant to be working, and not calendar, days.

Under pressure in the Lords, the government appeared to water down the legal aid scheme for challenges to appeal decisions. The Asylum and Immigration Tribunal (AIT) is still to award costs retrospectively when it conducts a reconsideration of a first decision, to cover both the reconsideration and the preceding application (to the AIT or by statutory review) for an order to reconsider.

However, the award of costs by the AIT will not now be 'conditional' on the final outcome, but instead will involve an assessment of the merits of the case at the time that the application was initiated. Nevertheless, costs will only be awarded exceptionally for an application that fails to get an order for reconsideration. During the final House of Commons debate on the bill, parliamentary under-secretary of state at the Department for Constitutional Affairs (DCA), David Lammy, stuck to the old script that only 'wins' and 'near misses' should be funded. The details will be finalised subject to consultation, but the government promised that the merits test would be 'robust'.

The government has also conceded the retention of lay members in the new AIT, but their use will be wholly at the discretion of the tribunal's president, and the requirement that the AIT usually sit as a panel of three is gone.

Before this bill had even finished its parliamentary progress, there were signs of the government's agenda for future radical change. The DCA, in *Research Programme 2004*, poses the question 'whether asylum-seekers and immigrants should have any right to challenge Home Office decisions either to a tribunal or a court'.*

* Available at: www.dca.gov.uk/research/resprog04.htm.

Legal aid inquiry – findings published

The Constitutional Affairs Committee (CAC) has just published the findings of its inquiry into civil legal aid provision (see page 6 of this issue). The CAC's report, *Civil legal aid: adequacy of provision*, concludes that the system of civil legal aid faces some serious problems, and that the process to control costs has resulted in a 'wasteful and self-defeating system of cost compliance auditing which bears little relation to quality or even shows much accuracy in the assessment of costs'.

The CAC also comments on the impact of changes in eligibility on customers. In a key conclusion, the report states: 'At present, the legal aid system is increasingly being restricted to those with no means at all. There is a substantial risk that many people of modest means, but who are homeowners, effectively will fall out of the ambit of legal aid. In many cases, this may amount to a serious denial of access to justice.'

Civil legal aid: adequacy of provision. Fourth report of session 2003–04 is available at: www.parliament.uk. Also available at: www.tso.co.uk and from TSO, £12.

CONSULTATION PAPERS FROM THE DCA

- ***Transforming public services: complaints, redress and tribunals*** **sets out plans for a number of judicial and other reforms. Comments should be sent to Claire Grey, DCA, Administrative Justice Division, Selborne House, 54–60 Victoria Street, London SW1E 6QW. See also page 3 of this issue.**
- ***The independent review of the Community Legal Service*** **(CLS), seeks views on the proposals and suggestions stemming from the review of the CLS produced by Matrix Research and Consultancy. The consultation ends on 17 September 2004.**

Copies of both papers are available at: www.dca.gov.uk.

news

CFAs made simple

A new consultation paper from the Department for Constitutional Affairs (DCA) sets out proposals for the reform of Conditional Fee Agreements (CFAs). *Making simple CFAs a reality*, which was published in June, summarises the responses to a previous DCA inquiry on CFAs, and identifies common concerns, including the complexity of the existing system.

The questions raised in the consultation paper concern proposed new regulations, fixed recoverable success fees and consequential amendments to Civil Procedure Rules or Practice Directions. They also seek suggestions for ensuring that costs recovered in defamation actions are reasonable and proportionate while excluding frivolous or excessive claims.

Parliamentary under-secretary of state at the DCA, David Lammy, commented: 'Too often consumers have been misled and confused by the label of 'no win no fee' and had their expectations of large sums of compensation unjustifiably raised.'

The DCA plans to work with the Law Society to revise costs information guidance and new model CFAs in the light of the new regulations.

Making simple CFAs a reality is available at: www.dca.gov.uk/consult/confr.htm, or from Kevin Rousell, DCA, Costs and Litigation Funding Branch, 3rd Floor, Selborne House, 54 Victoria Street, London SW1E 6QW. Tel: 020 7210 8712. Fax: 020 7210 0613.

Responses should be sent by 21 September 2004.

Ombudsman reports on legal services complaints

The latest annual report from Legal Services Ombudsman, Zahida Manzoor, has both good and bad news for the Law Society. The report shows that the society has improved its complaints-handling capacity during the past year: it regularly completed more cases than it received, and produced a modest reduction in the backlog of outstanding complaints.

However, the ombudsman was satisfied with the quality of complaints management in only 53.3 per cent of cases, which is significantly lower than the 67.2 per cent recorded in the previous year. The society also failed to meet almost all of its targets for complaints' turnaround time. The report contrasts this with the good progress made by the Bar Council during the same period and its high satisfaction rating.

The report suggests that more attention should be directed to the causes of complaints, ie, 'excessive delays, excessive costs, poor responsiveness to communications, failure to follow instructions, failure to act in the clients' best interest and failure to clarify the implications of proposed actions'.

In 2003, Zahida Manzoor was also appointed as Legal Services Complaints Commissioner to work with the society to improve its complaints' handling. However, in her submission to the Clementi review, the commissioner said that the legal profession's complaints handling had lost legitimacy among consumers owing to the potential conflicts of regulation and representation. She called for a new regulatory regime in which an independent Legal Services Complaints Office investigates complaints.

In whose interest? 13th annual report of the Legal Services Ombudsman for England and Wales 2003/2004 is available at: www.olso.org and from TSO.

LSC to launch immigration and asylum legal service

The Legal Services Commission is to launch a new Public Legal Service (PLS) this autumn. The PLS will provide publicly funded immigration and asylum legal services. It will cover the Black Country (where there is limited access to such services) and Birmingham; and pilot outreach services will also operate in a number of nearby towns.

The PLS will be based at the Public Defender Service's offices in Birmingham, but will operate independently of the service. The PLS will be made up of a senior solicitor (who will head the PLS), a senior immigration solicitor, an assistant solicitor, a senior caseworker, a trainee solicitor and a trainee caseworker. Recruitment for the posts is currently under way. Staff will comprise around five per cent of publicly funded immigration and asylum solicitors and advisers in the West Midlands.

Nony Ardill, LAG's policy director, commented: 'This is the latest in a string of measures in legal aid for immigration and asylum – the LSC seems to be suffering from initiative overdrive. LAG has no problem with the idea of a salaried service, provided it is fully independent. We are disappointed that this project will be run by the commission.'

ILPA

LAPG/*Independent Lawyer* Legal Aid Lawyer of the Year Awards 2004
Louise Christian, senior partner at Christian Khan, was named the legal aid personality of the year at the second annual Legal Aid Lawyer of the Year awards. She received her award from Cherie Booth QC and compere John Howard at a ceremony in central London.

Other award winners were:

- Greg Powell, London (crime);
- Finola O'Neill, London (social welfare);
- Richard Charlton, London (mental health);
- David Gray, Newcastle (immigration);
- Anne Marie Hutchinson, London (family);
- Jamie Ritchie and Patrick Lefevre, London (team of the year); and
- Rachel Edwards, London (young lawyer).

Louise Christian is a co-author of *Inquests – a practitioner's guide* (LAG, 2002).

LSC publishes annual report and corporate plan

The Legal Services Commission's annual report was published in July. The report contains information on how the LSC has developed its services during 2003/04, including information on resources and expenditure. It covers five key themes: Tackling social exclusion through partnership, Community Legal Service, Criminal Defence Service, Enabling delivery, and Resources and financial control. *The corporate plan 2004/05–2006/07* sets out the LSC's intentions for developing its services over the next three years. Copies of both reports are available at: www.legalservices.gov.uk or from TSO, £18.50.

LEGAL AID

MPs' legal aid inquiry reports

Rt Hon Alan Beith MP, chair of the Constitutional Affairs Select Committee, summarises the findings of its scrutiny into the adequacy of civil legal aid provision.

Over the past seven months, the Constitutional Affairs Committee in the House of Commons has been engaged in an extensive inquiry focusing on the adequacy of civil legal aid provision, taking both written and oral evidence from a range of key people and organisations (see June 2004 *Legal Action* 8).

It has proven to be a simultaneously uplifting and disheartening process. I say this because, for all the excellent work that is undertaken in the civil legal sphere, our report makes it abundantly clear that civil legal aid has become the Cinderella of the government's services to address social exclusion and poverty: the highly desirable extension of provision and services has been possible only at the expense of cutting back on eligibility, scope and remuneration. In the committee's view, this is a process that clearly has gone too far.

If the legal aid system is to protect some of the most vulnerable people in society from social exclusion, then it is vital that it should function effectively and efficiently. Yet, the overwhelming amount of evidence that we received during our inquiry indicated that the system is facing some serious problems.

Legal aid advice deserts

It showed that the legal aid system is increasingly being restricted to those with no means at all. 'Advice deserts' have already emerged in certain geographical areas and in some specific fields of law, raising significant concerns about access to justice. The Legal Services Commission (LSC) was quick to point out the value of 'outreach services', which were cited as a non-traditional method of satisfying demand, plugging gaps in provision and targeting hard to reach groups. While we accepted that there is a role for such programmes the devil, as always, is in the detail. More information is urgently needed on implementation, and the way in which these schemes interact with other services. One fact is clear: they must complement existing activity, not simply replace it.

Recruitment and retention

Our report highlights a range of factors which have led to restricted access to justice. Top of the list are the serious recruitment and retention problems facing the legal aid sector. Indeed, we conclude that this is one of the most serious threats to the provision of publicly funded legal advice.

Wide-ranging evidence presented to the committee has shown that there are serious disincentives to practise in the legal aid sphere. Low fees mean that firms find it difficult to compete for able lawyers in a marketplace where higher salaries are on offer elsewhere. From the client's perspective, there is a serious risk that if legally aided work is associated with very low fees, this may have a serious impact on the quality of people who undertake legally aided cases.

While we welcomed the initiatives made by the LSC to provide some support to students who wish to go into, and stay in, legal aid work, we are fearful that this may be insufficient to cope with the immense problems surrounding student debt. The significant trend of young lawyers away from legal aid work under such circumstances is understandable, but it is a problem that must be urgently addressed if the civil legal aid system is to have an adequate supply of practitioners. It is clear that more support must be made available to encourage talented young lawyers into legal aid work.

Emphasis must also be placed on broadening the availability of legal advice by building on the good work undertaken by knowledgeable advisers in Law Centres® across the country. This model shows that such advisers are at least as good as, or better than, solicitors in providing for the needs of clients in their area of specialism, for example, welfare benefits or debt.

Bureaucracy and reviews

There are other issues which must be tackled urgently. During the inquiry, we heard repeatedly about problems of excessive bureaucracy associated with civil legal aid contracts and a cost-compliance system that is arbitrary, inaccurate and ill-conceived.

Clearly, there is a need to ensure that professional standards are maintained, but the evidence we received drew attention to the fact that reputable firms and competent and honest solicitors are being punished by an audit system that imposes what can only be described as draconian review methods. For the committee, this is the most serious criticism of the current system for managing legal aid work that we have found.

The combination of the 'two strikes and you're out' rule – which applies to firms receiving two successive category '3' marks – and the arbitrary application of the LSC's rules are unacceptable. A similar mark should begin a process of consultation and assistance that would help solicitors, who may be providing a perfectly good service to the community, to improve their management systems. Simply eliminating them from the list of contract holders is wasteful and counter-productive. Peer review may be the way forward and we are pleased that the LSC has shown a willingness to explore this option further, as the present system is doing little for either morale or effectiveness.

Conclusion

Following our inquiry, we are also in no doubt that the system continues to function largely because of the dedication and goodwill of solicitors who are committed to the service that they provide. It is therefore only right that there should be more recognition for the work that they do. At present, firms undertaking legal aid work are subsidising the system in a way that is not sufficiently quantified or acknowledged by government. Every amendment to the system of administration of legal aid involves firms in considerable expense on business systems to cope with the changes. Much of this is taken for granted, but most definitely ought not to be.

Urgent change is needed if the civil legal aid system is to survive. Too much has already been squeezed out of the Community Legal Service budget as a result of the twin pressures of criminal and asylum work. It is now time for the government to respond to the 24 conclusions and recommendations the Constitutional Affairs Committee has issued, explaining how it plans to tackle the problems that we have identified.

House of Commons Constitutional Affairs Committee – Civil legal aid: adequacy of provision. Fourth report of session 2003–04, evidence transcripts and further information about the committee are available at: www.parliament.uk/parliamentary_committees/conaffcom.cfm.

LEGAL SERVICES ABROAD

Salaried legal services abroad

Steve Hynes, director of the Law Centres Federation, examines the provision of community-based legal services in Australia and Canada, and discusses how they can inform debate on the UK's legal services system.

One of the recommendations of the Matrix report (see June 2004 *Legal Action* 6) was a salaried service pilot.[1] Law Centres Federation's (LCF) instinctive reaction to this suggestion was that Law Centres®, and similar not for profit (NFP) organisations should perhaps be studied more thoroughly before such a pilot is contemplated. However, we seem to have been overtaken by events, with the Legal Services Commission's (LSC) announcement of an immigration and asylum legal service, the Public Legal Service (PLS).[2] For the moment, at least, the PLS seems to be a one-off, perhaps more motivated by the political machinations around legal advice for asylum-seekers than heralding the future for the delivery of legal advice services in social welfare law.

Recent years have seen a significant rise in funding from the LSC to NFP agencies, including Law Centres. The bulk of spending still goes on the private sector, to pay for individual cases in a judicare model of delivery. This has led, in part, to the public perception that the legal aid system is some sort of state subsidy for lawyers, rather than a public service. Also, there is widespread suspicion from policy makers about the motives of suppliers in the system when they complain of underfunding.

Having an expanded NFP sector would counter these perceptions, and help to foster a stronger public service ethos within the legal aid system. In Ontario, Canada, and Australia, a large proportion of legal services is provided by salaried services in the NFP sector.

Australia

Australia has a network of 207 Community Legal Centres (CLCs), mainly serving local neighbourhoods. The centres employ lawyers, and though more numerous than their UK counterparts, (there are still only 59 UK Law Centre outlets), the Australian centres do share similar problems over funding.

Only 125 of the Australian centres receive grants from the Commonwealth government. The rest of the funding is received from state and territory governments, as well as some charitable sources. Julie Bishop, director of the National Association of Community Legal Centres, said, 'No attempt has been made by government to bridge the gaps caused by the lack of a coherent funding strategy for legal advice. This failure means we cannot respond in an effective and holistic way to people's legal needs.'[3]

Canada

The dual strategy of combining casework with social policy work around legal education and law reform is a characteristic shared by both the Australian CLCs and the Legal Aid Clinics in Ontario, Canada. The funding agreements in both Ontario and Australia acknowledge this strategy.

With 79 clinics serving a population of 11.5 million, the Ontario clinics are a much more extensive service (see November 2003 *Legal Action* 8). The Ontario system is more akin to a partnership arrangement and seems preferable to the UK's current purchaser/provider system. The current contract only narrowly defines the hours of work being purchased in a specific area of law, and reflects the government's desire to control tightly what is funded in the legal aid system. But this is not the most effective way of developing a system that reflects both the needs of clients and encourages a public service ethos among service providers.

Northern Ireland: lessons for the rest of the UK

An example of a more coherent funding strategy can be found nearer to home. The Northern Ireland (NI) office mainly funds the Law Centre NI, which provides specialist casework services and second-tier support to community-based advice organisations funded by local government. Representatives from the LCF, LSC and Department for Constitutional Affairs recently visited Law Centre NI as part of a study into the future direction of Law Centres, which is to be published in the autumn. Law Centre NI's director, Les Allamby, told the group, 'We see the centre as sitting at the hub of a wheel with the affiliated organisations in the community acting as the spokes.'

The two branches of the Law Centre, located in Derry and Belfast, provide daily telephone advice services to support workers in advice agencies that are affiliated to the Law Centre. The Law Centre will take on complex cases and has a test case strategy that seeks to identify cases which will have a positive impact on the development of the law. The Law Centre also has an extensive training programme for advice workers and a publications department; these help to develop social welfare law expertise and influence social policy on behalf of clients.

Benefits of partnership contracts

Partnership-type contracts do not do away with the necessity to win the political argument over cash for legal services, but we would argue that they are more likely to create a positive impact on public opinion. To demonstrate value for money, in both Australia and Ontario, funders are looking to develop outcome measures.

Speaking at the Ontario Legal Clinics conference in June this year, Julie Bishop described the Australian government's first attempt to develop outcome measures as a 'useless exercise'. The management consultants trying to develop the outcome measures failed to consult the clinics on their relevance. This led to the original work being scrapped, and the development started again.

Similarities between systems

Like much travel abroad, what is striking about the Australian, Ontario and UK services is that they share more similarities than differences. All three systems have community governance arrangements, seek to remedy injustice by both casework and social policy programmes and are staffed by lawyers committed to the NFP ethos.

With issues such as outcome measures, peer review, the difficulties in recruiting and retaining staff, as well as the likely phasing out, by the LSC, of contract compliance audits, community-based legal services need to communicate internationally. Not least, to exchange information and perhaps try and keep ahead of our respective legal aid bureaucracies. Above all, we can, hopefully, take the best aspects of the systems in other jurisdictions and adapt them to the UK.

1 The *Independent review of the Community Legal Service* was commissioned by the Department for Constitutional Affairs from Matrix Research and Consultancy, April 2004. It is available at: www.dca.gov.uk/pubs/reports/clsreview.pdf.
2 See LSC press release 16 June 2004 at: www.legalservices.gov.uk and page 5 of this issue.
3 See *Doing justice – acting together to make a difference*, available at: wwww.naclc.org.au.

LEGAL SERVICES ABROAD

Access to justice in Hong Kong

In March 2004, the British Council in Hong Kong held an access to justice conference to update local lawyers and members of the judiciary on some of the latest developments in the UK. LAG's director, **Alison Hannah**, attended the conference and in this feature presents the main issues discussed by each speaker.

Introduction

When the British government handed Hong Kong back to China in 1997, China promised that under the 'one country, two systems' policy there would be no change in the legal and constitutional systems for 50 years. Hong Kong's legal system is based on that of the UK, sharing many of the same principles, structures and common law values. Therefore, while delivered to an audience in Hong Kong, the Access to Justice conference 2004 also provides a useful summary for lawyers and advisers in the UK.

The speakers' panel consisted of Lord Phillips, Master of the Rolls and head of civil justice; Paul Jenkins, then director-general of the Legal and International Group in the Department for Constitutional Affairs (DCA); Hazel Genn, Professor of Socio-Legal Studies at University College London; Maya Sikand, a barrister at Two Garden Court Chambers; and me, LAG's director.

The Woolf reforms

Lord Phillips spoke of the changes brought about by the Woolf reforms of civil procedure, and discussed what had worked well and the lessons to be learnt. His first observation was that access to justice required proper funding. While the reforms had anticipated an increased use of information technology by the courts, which would improve efficiency, this had not yet happened. He also spoke of the introduction of conditional fees to fund areas of civil work, particularly personal injury. In his view, these have caused substantial problems, particularly in relation to costs, where the courts have become log-jammed with satellite litigation. While some of these problems have been resolved by introducing fixed costs for some road traffic claims and fixed mark-up for success fees for personal injury claims, his second piece of advice to the Hong Kong lawyers was 'not to follow us down the road of conditional fees'.

Discussing the costs issue more generally, he said that where costs can easily become disproportionate to the amount at stake, interlocutory costs orders were helpful in keeping overall costs down. The recommendation to appoint a single joint expert wherever possible was also, in his view, a valuable change that has led to a significant saving in costs.

Case management by judges (particularly district judges) has speeded up the progression of cases through the courts, and brings them to trial sooner. However, in itself, this did not make litigation much easier, and Lord Phillips felt that the adversarial system is 'almost inevitably, too expensive a way of resolving disputes unless there is a very large amount of money involved indeed'. Cost incentives for claimants to settle and the pre-action protocols in civil claims are helpful in keeping costs down.

He expressed interest in the use of alternative dispute resolution (ADR), while commenting that judges are somewhat ambivalent about this. For some areas of law, ADR may be a better way to resolve disputes than litigation through the courts. For example, better information for creditors and debtors before loans are agreed could prevent some of the debt work that currently ends up in court, and in housing rent arrears and disrepair cases, litigation is not the best way to resolve disputes.

Lord Phillips reinforced the view that litigation should be seen as the last resort, and legal costs should be proportionate and predictable. In conclusion, he stressed that there should be adequate resources 'to ensure that the civil justice system is soundly based and effectively operated'.

British Council

Lord Phillips, Master of the Rolls, addressing delegates at the Access to Justice conference

Developments from the DCA

Paul Jenkins spoke of recent developments initiated by the DCA. These included the establishment of a unified court service, bringing 42 different magistrates' court systems into one. This has benefited victims, defendants and members of the public. He also referred to the Clementi review, with its wide remit to look at the regulation of, and possible changes to the structure for providing, legal services.

However, his main focus was on the major constitutional reforms taking place:

- the abolition of the post of Lord Chancellor;
- the setting up of an independent commission for the appointment of the judiciary; and
- the establishment of a Supreme Court.

He pointed out the contradictions in the position of Lord Chancellor, who has traditionally been both a judge and a senior politician. This anomaly will now be resolved as part of the DCA's move to create greater transparency and accountability and ensure a distinction between the judiciary, executive and legislature.

The appointment of the judiciary has previously been a secretive process that led to 'white male dominance' within the profession. It is proposed that judges will now be appointed by an independent judicial appointments commission making recommendations to the secretary of state – names will be put forward which the secretary of state has very limited ability to reject. There will be a statutory duty to protect the independence of the judiciary; the secretary of state will not be a judge or sit in a judicial capacity, and the Lord Chief Justice will become the most senior judge.

Setting up the Supreme Court is part of this division of responsibilities: the court will be separate from the legislature. Parliament will remain the highest authority, and the Supreme Court will not be able

to override its will (unlike in some other countries where the court may interpret a written constitution).

British Council

Members of the speakers' panel listening to Lord Phillips, Master of the Rolls, deliver the keynote speech at the Access to Justice conference.

Research on 'justiciable' problems

Hazel Genn is well known for her research into civil justice, particularly unmet need for legal advice and services, set out in her ground-breaking book, *Paths to Justice: what people do and think about going to law*. She spoke about the latest research findings on 'justiciable' problems: what sort of problems people experience, and what they want from the justice system. The research shows that one-third of people suffer from one or more problems, that these often occur in clusters – with one triggering another – and that these can seriously impact on people's lives, causing family breakup, unemployment, ill health or disability. The problems cover a wide range of areas – consumer, housing, money, employment, personal injury, and relationship breakdown, to mention just a few. An incident of domestic violence is likely to trigger further problems, including relationship breakdown, divorce and children-related issues. An accidental injury can lead to employment and money problems, or raise welfare benefit issues.

Research shows that not everyone takes action to resolve their problem – they may not seek advice at all, or may not find (or take) it. Surprisingly, almost one in five people with a problem takes no action, because they either think nothing can be done about it, or do not know where to turn. The research also shows that much depends on the nature of the problem regarding whether people seek advice and from whom. The 'advice maze' covers a bewildering variety of sources that people ask for advice – from social workers, the police, the media, employers, and insurance company helplines to the more predictable citizens advice bureaux (CABx) or solicitors. Far from living in a compensation culture, it seems that many people just want to resolve the issue troubling them and get on with their lives. They are not rushing into law – only a small minority is involved in a legal process to resolve a dispute.

For those seeking advice, there are many barriers – not knowing whom to contact, worry about the anticipated cost, problems getting through on the telephone, and the awkward opening hours of advice agencies – all of which can discourage and prevent people from getting advice. Ways to improve access to justice will include providing better information so that people know what sort of assistance exists and how to access it. The information must be available when and where people seek help, and a more creative use of telephone, internet and outreach services is needed. To develop a strategy, we need to understand how problems arise – in particular, what triggers a whole cluster of related issues – so that a more holistic approach can be planned, and information and advice offered to prevent escalation of these problems.

Impact of Access to Justice Act 1999

As LAG's director, I spoke of the legal help which is currently available through advice agencies and lawyers, and how this has been affected by the Access to Justice Act 1999. Unlike in Hong Kong, there is a large network of advice and other not for profit agencies throughout the UK, which offer free advice and assistance. The best known of these are the CABx, but there are many other advice organisations and, in addition to these, there are 59 Law Centres which can provide representation and other legal services to the community.

I referred to some of the ways in which the Legal Services Commission (LSC) has improved services, for example, by encouraging firms and advice agencies to provide specialised services, through contracting. The LSC has also made it easier for people to find an organisation working in a particular field. Through the Community Legal Service (CLS), the LSC has aimed to improve awareness of local services and the network of referrals.

Funding has been provided for telephone, outreach and second-tier specialist services, and to provide advice in different ways (for example, through the Family Advice and Information Service Pilot Project). The LSC has also funded some training places for solicitors with legal aid firms.

However, there have been problems in the provision of legal services following the establishment of the LSC and CLS. These are currently causing much anxiety and uncertainty within the legal and advice sectors, whose future is unclear. A rising legal aid budget has caused government to look for ways to save money, for example, by cutting legal aid for some of the people in greatest need – immigrants and asylum-seekers, among others. Many specialist solicitors have given up the work that they have been doing, in some cases, for decades. Advice agencies have to means-test clients in a way that often goes against the ideology of the organisation. Increased funding has not followed the imposition of quality marks, and bureaucratic audit requirements have disappointed many. There are many imaginative proposals for the methods in which legal services may be delivered, but there must also be adequate funding to enable people to be effectively represented in the current adversarial system.

The role of the Bar

The final speaker, **Maya Sikand**, spoke about the role that the Bar plays in upholding the rule of law and ensuring access to justice. Her chambers is one of a small number that provide specialist support for advice agencies in the areas of housing, employment and immigration law through a contract with the LSC.

Judicial review is another area where the Bar has acted in public interest cases to enable the courts to scrutinise the legality of administrative decisions, and restrain the excess or abuse of power. She gave examples of this in relation to asylum-seekers and death in custody cases.

The Human Rights Act 1998 has also played a part in asserting the individual's rights against the state and in upholding the rule of law. Referring to the current threat to diminish legal rights for asylum-seekers, Maya Sikand commented: 'If we believe in fundamental human rights, then even one person sent back to torture or death is one person too many.' In concluding her speech, she referred to a question raised previously by Lord Woolf – a theme for many of the conference speeches – 'What is the use of the courts, if you cannot access them?'

LEGAL AID ABROAD

Developing legal aid in Uganda

Sara Chandler, senior supervising solicitor at the College of Law's Legal Advice Centre, describes the development of legal aid provision in Uganda.

Uganda has a population of 25 million, many of whom do not live within walking distance of a legal aid lawyer. Though the country has one of the fastest growing economies in Africa, there are high levels of poverty and low levels of literacy. Also, Aids has spread through the population. Access to justice is vital for accessing basic human rights, and the reconstruction of a civil society during the past 25 years has meant a slow growth in the number of lawyers in the country. But until the Uganda Law Society (ULS) set up the Legal Aid Project (LAP) in 1992, there was little chance of poor people getting any legal services if they could not raise the money to pay for them. The LAP is a non-governmental organisation (NGO), and similar to a voluntary sector project in the UK. The closest sister organisations to the project are Law Centres®. The Ugandan economy cannot fund a legal aid service through taxation, so the efforts of the ULS were put into fundraising for the LAP. The project's funding comes from the Norwegian Bar Association and a board of trustees manages it.

In 2003, a programme to strengthen the capacity of the LAP began. The programme is partly funded by a European Commission grant obtained through the steadfast efforts of the Law Society of England and Wales' International Department. The department's work is rarely heard of or recognised for the fundamental importance that it has in contributing to the growth of human rights in the post-Idi Amin reconstruction of Uganda.

In June 2003, a small group of UK lawyers, including Roger Smith, director of human rights and law reform organisation, Justice, two members of the Huddersfield Law Society (which is twinned with the ULS) and I, attended a conference on access to justice in Entebbe, as speakers and workshop facilitators. One hundred East African lawyers attended the conference, 75 per cent of whom were from Uganda. The remaining delegates were from five neighbouring countries. By the end of the week-long conference, two networks had been built: one of East African legal aid lawyers and another of Ugandan legal aid service providers (LASP).

Legal Aid Service Providers' Network

During the two weeks in February 2004 that I spent in Kampala for a training seminar, I met lawyers from the six organisations that form the LASP network and was able to learn about their work.

The Legal Aid Project

When I visited the project's offices, I immediately felt at home. The waiting area was very like that of a Law Centre: all the seats were taken by clients, with more people waiting to be seen by the receptionist. There were handmade posters with information about legal rights on the walls, and statistics about the numbers and kinds of cases dealt with by the LAP. The lawyers worked from offices on the ground floor of the ULS's building, and were able to hold three interviews at a time with the help of volunteer lawyers from the Law Development Centre's (LDC) Legal Aid Clinic in Kampala. The LDC was set up by statute to provide postgraduate training for law graduates (see below). The lawyers deal with criminal and civil matters – with land rights (landlord and tenant), family matters and criminal cases being the most frequent enquiries.

Sara Chandler

The Legal Aid Project's minibus and a member of the survey team

The Legal Advice Clinic

The LDC's Legal Advice Clinic runs an advice and representation service. The clinic has existed since 1998. The service is provided by postgraduate law students under the supervision of the clinic's staff. Alongside their direct advice and representation service, staff and researchers produce reports on specific areas of their work, for example, police station and prison advice. The clinic is situated off campus, and clients access its services directly.

I visited the clinic's offices and met Theo Websdale, the director, who is a pioneer of clinical legal education in Uganda. The clinic is initiating work on children's rights, especially for children in need of care and protection or who commit offences. Ms Websdale told me that one of the clinic's key areas of work has been representing young children who are under arrest. A community response has been developed where an arrested child or young person can have his/her case transferred out of the magistrates' court (which can impose long custodial sentences) and into the local council court system. Working closely with local council committee members, social service agencies and probation officers, the clinic's lawyers and law students offer this alternative to trial in the magistrates' courts. The clinic provides training for the police and court staff so that children's cases can be transferred swiftly to the local council committee.

The clinic also works on law reform issues and provides valuable research to support changes in the law. Funding comes from the Ford Foundation, the US Agency for International Development and Save the Children UK. Part of the clinic's mission is to promote lawyers' role of service to the community through learning that is based on practical experience and legal representation of needy persons.

FIDA-Uganda

The Uganda Association of Women Lawyers (FIDA-Uganda) is one of the key

Sara Chandler

The Legal Aid Survey Report is presented at a conference, which was held in May 2004

members of the LASP network. FIDA is part of a larger organisation working in several African countries. It seeks to protect the rights of women and children, and represents its clients in court. Volunteer lawyers work alongside paid staff to provide as full a service as possible. FIDA has pioneered work with Aids victims, for example, where a husband has died leaving a widow and children. Under Ugandan law, the family's home returns to the husband's relatives. The widow and children can either be evicted or remain in the home. This decision is subject to the goodwill of the deceased's family. FIDA has a wills programme that involves drawing up a client's will, making several copies and arranging for their storage in various safe places to avoid loss or destruction. FIDA is also at the forefront of legal representation and campaigning on domestic violence.

Other network members

The other LASP network members are:

- The Public Defenders Association of Uganda (PDAU). It was set up, in 2002, with funding from the Danish International Development Agency. PDAU is an NGO that provides representation for prisoners charged with capital and other serious offences. It is committed to promoting human rights observance and the rule of law through the criminal justice system.
- The Foundation for Human Rights Initiative (FHRI) is a campaigning NGO that keeps a human rights watch on Uganda and works on law reform issues. FHRI works closely with the Uganda Human Rights Commission. The commission acts as the conduit for reporting human rights abuses to the UN.
- Uganda Gender Resource Centre works on gender rights and law reform issues.

Legal aid survey

The lawyers who formed the LASP network decided to look for support to increase access to legal aid. From June to December 2003, LASP met with a variety of different funders to work out a strategic programme for legal aid provision. LASP resolved to carry out a baseline survey to map legal aid providers and undertake a needs analysis. This will sound familiar to anyone involved in a local Community Legal Service Partnership (CLSP) in the UK. Like many CLSPs, the LASP network had no money to pay consultants to carry out the survey and decided to do the work itself. Legal aid lawyers, law students and some social scientists from Makerere University formed teams to carry out a survey of the entire country over a six-week period from February to April 2004. I provided training for the volunteers because I had been involved in survey work for the CLSP in Greenwich, south London.

The legal aid survey was a huge project, which the volunteers tackled with admirable dedication and at some risk to themselves. For example, the survey teams flew to the northern towns to avoid travelling by road, where they could have been kidnapped or killed by members of the Lord's Resistance Army (LRA). The LRA has waged a guerrilla war of terror on people in northern Uganda for over a decade, and frequently kidnaps children to train them as fighters. While I was in Uganda, a massacre took place near the north eastern town of Lira. One hundred and ninety-three people were killed by members of the LRA in a displaced persons' camp for refugees who had fled from villages destroyed by rebel fighters. Some people were hacked to death, and others, mostly women and children who had hidden in their huts, died when the attackers set the whole camp on fire.

The survey teams divided up the country and visited seven districts. On arrival in each district, the survey team held an 'open house day' and invited local people. These open days would include judges and court staff (if there was a local court), officials from local council committees, probation and social work staff, lawyers, human rights workers, project users and potential legal aid users. In addition to the open day, interviews were arranged with key informants, local organisations and focus groups comprising officials or project users and potential users. Where there was a local legal aid provider, the team would work with its help, and use its offices and vehicles to collect survey information.

The LAP has three offices outside Kampala. A local facilitator worked from each office to prepare and facilitate the survey: access to photocopiers, fax machines, computers and vehicles was vital for the lawyers and survey teams. FIDA was able to help with logistical support. In fact, each of the partners in the LASP network seconded members of staff to the survey teams.

The future of legal aid

In May 2004, at a conference that brought together stakeholders from all over Uganda, the legal aid survey report was presented to the funders, which were mostly overseas donor organisations. The survey's findings revealed that, of the 56 districts in the country, only seven have legal aid lawyers (ie, from the LAP or FIDA) who provide representation. The following months will involve decisions about how to expand the existing service and bring in new providers. This raises questions of quality of legal aid services and standard setting. Part of the training seminar that I carried out in February was on regulatory frameworks for legal aid service providers. As yet there is no Quality Mark system in Uganda's legal aid scheme. The next task is to develop a system that can encourage new providers and maintain high standards for legal aid provision, alongside the setting up of a legal aid fund.

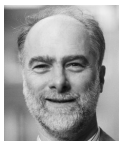
Under the Advocates (Amendment) Act 2002, which came into force in 2003, Ugandan lawyers in private practice are expected to contribute some pro bono hours annually or put funds into the LAP. However, this new provision is not expected to be a major source of funding for legal aid projects or for volunteer lawyers to provide free legal services.

Wherever I went in Uganda, I recognised the scarcity of resources that, in the UK, legal aid lawyers take for granted. Office equipment, stationery, mobile phones' airtime (which lawyers use instead of landlines), all have to be squeezed out of the same small budgets that pay staff. The Huddersfield Law Society, where possible, provides support in kind to the ULS. This support includes setting up a law library this year. The work of the Law Society's International Department has facilitated the programme to improve legal aid provision in Uganda through the access to justice conference in 2003, and advocacy and mediation training for the legal aid lawyers employed in the LAP. The department also supported the legal aid survey.

At present in Uganda, there are only 12 legal aid project lawyers working from four offices in a country with a population of around 25 million. It is a small service, but it is set to grow.

LEGAL AID ABROAD

Developing legal aid in Lithuania



Roger Smith, former LAG director and now director of Justice, reveals legal aid developments in Lithuania, which is on the eastern periphery of the EU.

Introduction

The last Soviet troops only left Lithuania, the southernmost Baltic state, in 1993. In 1991, the inhabitants of the capital city, Vilnius, had surrounded the building in which their parliament sits in an attempt to repel an invasion aimed at bringing the country back into the Soviet Union. Yet, in March this year, Lithuania joined NATO and, in May, it joined the EU. Lithuania, sometimes known as the 'Baltic tiger' because of its economy, is even inching towards a new law on legal aid.

Legal aid working group

Such reform is necessary. Lithuania inherited a Soviet-dominated legal system – legal representation was mandatory at various stages of the criminal process, but was provided by lawyers acting ex officio and in a fairly perfunctory way. In February 2003, the Prime Minister set up a working group 'to prepare the concept for improvement of the state guaranteed legal aid and draft legal acts related to it'. The working group included two MPs, a number of civil servants and three particularly interesting members – a representative of the Open Society Justice Initiative (JI) and two representatives of the Public Defender Office, which the Open Society Fund-Lithuania and JI fund, in Vilnius, with a small contribution from the Ministry of Justice (the ministry).

Behind the Open Society operations stands George Soros, the controversial financier who combines spectacular currency speculation with the role of global Robin Hood. His vehicles have spent more than $400m worldwide promoting greater democracy and justice. In Lithuania, he funded two public defender offices, in Vilnius and in the city of Siauliai. JI has brought in external experts from the US and Israel to train the public defenders in a more adversarial approach. The working group's final report acknowledges the value of this practical demonstration of what could be done. However, the original establishment of the public defender offices had to overcome some initial hostility from law enforcement agencies that sought to bypass them in favour of more amenable contacts within the legal profession. As the report somewhat delicately put it, the offices displayed their value 'despite an environment that was not ready-made for such an entity'.

The experience of the public defender offices blew apart the previous Soviet model, as the working group acknowledged. For example, 'because police, prosecution and the courts must confirm lawyer payment vouchers, it is difficult for private lawyers to challenge their actions ... because lawyers depend on those agencies for their pay, they cannot, de facto, be entirely independent from government interests'.*

Beginnings of a new legal aid structure

The working group's concept paper has been lodged with the ministry, and there is some hope that a new structure will be approved within the next few months. Lithuania is enjoying the vigour of a new democracy. The two MPs on the working group, for example, have simultaneously been playing a major role in the impeachment of the former President for corruption. Unsurprisingly, therefore, there are actually two versions of a draft law in circulation, and a degree of political positioning between the ministry and parliamentary representatives. To an outsider, however, it seems likely that these matters will resolve themselves.

Debate

It is interesting to note the issues on which there has been debate, some of which are rather different from those in the UK. For example, there has been a major difficulty in conveying the advantages of creating something like the Legal Aid Board, or its replacement the Legal Services Commission, to administer legal aid. Lithuanian civil servants had some difficulty with the concept of a quasi-autonomous non-governmental organisation. They were queasy over the 'quasi'. Thus, the nature and powers of the National Legal Aid Co-ordination Council, which will administer legal aid, have proved controversial. A further issue is the way in which means are to be tested. The draft law proposes what seems to be a highly bureaucratic procedure that requires a certificate from the equivalent of the Inland Revenue.

Some of the other issues are more recognisable. The Lithuanian structure distinguishes, probably rather too sharply, between legal representation and 'primary' legal aid or, as we would put it, legal advice or help. There are also issues about how such legal advice will be provided. The responsible bodies will be local authorities, but will act in a way that, to an outsider, is not entirely clear – seemingly involving lawyers employed by the municipalities. In addition, there will be 'state-guaranteed legal aid' or legal representation, both in civil and criminal cases. This duplicates, in some ways, the increasing divide between the providers of legal advice and legal representation under the Community Legal Service.

Current state of legal aid

Some indication of the dire straits of existing legal aid in Lithuania can be gained from the figures. The ex officio lawyers providing legal aid outside the public defender offices are being paid between £2 and £3 an hour. This is not quite as bad as it initially seems – average annual income is around £2,000 per person – but it is still pretty low. What is more, the legal advice structure is just not working. In 2002, less then £5,000 was spent out of a budget allocation of around £100,000 – a larger relative figure than it might first appear because the population of Lithuania is less than four million. The crucial element will be the overall amount of funding that the government is prepared to advance. This is, as yet, uncertain.

In the broader picture of legal aid development around the world, Lithuania is a good example of the latest wave of development. As a country emerging out of its Soviet past, Lithuania is seeking to respond to the challenge of compliance with its obligations under the European Convention on Human Rights. These obligations are given added force by its membership of the EU as initiatives like the European Arrest Warrant will give all member states an interest in the effectiveness of legal aid in every other member state. Clearly, much needs to be done to meet such standards, but Lithuania, greatly to its credit, is on its way.

* The Lithuanian legal aid reform papers, which include four documents relevant to the reorganisation of the legal aid system in Lithuania, can be found at: www.justiceinititative.org/db/resource2?res_id=101541.

law & practice

TRAVELLERS

Gypsy and Traveller law update



Chris Johnson, **Marc Willers** and **Angus Murdoch** continue this occasional series. The last update appeared in July 2002 *Legal Action* 22. The authors welcome case notes and comments from readers. There have been many recent developments in this area of law, and a new book on the subject is about to be jointly published by LAG and the Commission for Racial Equality. See page 18 of this issue for further details.

INTRODUCTION

In 2003, there were two very shocking examples of the discrimination that Gypsies and Travellers continue to suffer in this society. In the village of Firle, in Sussex, those 'celebrating' bonfire night burned an effigy of a Gypsy caravan. Six people were charged with incitement to racial hatred, although ultimately criminal prosecutions did not proceed. Tragically, last year also saw the death of a young Irish Traveller boy, Johnny Delaney, who was kicked to death in what was seen as a racist attack. Two youths were subsequently convicted of manslaughter.

In 2004, there have been some high-profile evictions of Gypsies and Travellers from unlawful developments, including those at Bulkington, in Warwickshire, and Meadowlands, in Essex. There has been mounting criticism of the force used by police and bailiffs during these incidents.[1]

The Office of the Deputy Prime Minister (ODPM) is currently carrying out an inquiry into Gypsy and Traveller sites. Many influential organisations and individuals have already presented written and/or oral evidence to the ODPM's committee. Central in this process has been the Gypsy and Traveller Law Reform Coalition, a remarkable amalgamation of Gypsy and Traveller campaigners, support groups, advice agencies and others.

OFFICIAL CARAVAN SITES

Gypsies and Travellers who live in their caravans on sites run by local authorities have little security of tenure. They are specifically excluded from the protection afforded by the Mobile Homes Act (MHA) 1983. Instead, the Caravan Sites Act (CSA) 1968 provides that a local authority can evict a Gypsy or Traveller living on its site by issuing the occupant with a notice to quit of not less than four weeks' duration, and then obtaining a possession order from the county court. Unlike those protected by the MHA and the Housing Act (HA) 1985, there is no requirement that a local authority must prove to the court that there are grounds for possession or that it would be reasonable for possession to be granted; the only way in which a Gypsy or Traveller can challenge a decision to evict is by way of judicial review. Gypsies and Travellers have challenged the lack of security of tenure provided by the legislation in two domestic cases on the basis that it is discriminatory and incompatible with the Human Rights Act (HRA) 1998.

■ **Somerset CC v Isaacs**
[2002] EWHC 1014 Admin, 24 May 2002
Mr Isaacs, a Gypsy, had been served with a notice to quit an official, council-run site for alleged misbehaviour. When defending the claim for possession Mr Isaacs sought to compare his lack of security of tenure under the CSA with that enjoyed by those protected by the MHA. He claimed that his eviction would be in breach of articles 8 and 14 of the European Convention on Human Rights ('the convention'). Mr Isaacs sought a declaration of incompatibility. Though the court accepted that the eviction would interfere with Mr Isaacs' rights under article 8(1) of the convention, it held that the statutory framework, as a matter of general principle and policy, satisfied the requirements of article 8(2).

■ **R (Albert Smith) v Barking & Dagenham LBC**
[2002] EWHC 2400 Admin, 19 November 2002
Mr Smith was an occupant of a council-run Gypsy site. He was served with notice to quit as a result of a dispute with another occupant. He challenged the council's decision to evict him by way of judicial review. Mr Smith argued that the CSA breached his rights under articles 8 and 14 of the convention because it failed to provide him with the protection given to secure tenants in conventional housing by HA 1985. The court dismissed his claim and concluded that the absence of security of tenure on local authority sites was still appropriate and justified.

In both cases, the courts accepted the government's argument that the lack of security of tenure was justified because it gave local authorities the ability to manage and operate their sites in a flexible way that met the special accommodation needs of Gypsies. However, that argument has been recently rejected by the European Court of Human Rights (ECtHR), and no longer seems tenable.

■ **Connors v UK**
App no 66746/01, 27 May 2004
Mr Connors and his family are Gypsies, and they lived on a local authority site. Their licence to occupy the site was terminated as a result of allegations of nuisance. Mr Connors disputed those allegations. He judicially reviewed the council's decision to seek his family's eviction. That application failed and the council obtained a possession order. Mr Connors complained to the ECtHR that his family's eviction breached article 8 of the convention.

In its judgment, the ECtHR indicated that:

- there was a positive obligation on the UK to facilitate the Gypsy way of life;
- the eviction was a serious interference with Mr Connors' article 8 rights, and it required particularly weighty reasons of public interest to justify it;
- the court was not persuaded that there was any particular feature about local authority Gypsy sites which would render their management unworkable if authorities were required to establish reasons for evicting long-standing occupants; and
- the power to evict without the burden of giving reasons which were liable to be examined on their merits by an independent tribunal had not been convincingly shown to respond to any specific goal or provide any particular benefit to members of the Gypsy community.

The ECtHR concluded that the eviction could not be justified by a 'pressing social need' nor was it proportionate to the legitimate aim pursued. As a consequence, the court held that there had been a violation of article 8 of the convention.

This decision should lead the UK government to change the law so that Gypsies and Travellers, who are living on local authority sites, are provided with similar rights and security of tenure to that enjoyed by those protected under the MHA and/or HA 1985 (see July 2004 *Legal Action* 26).

PLANNING

Gypsy status

Romani Gypsies are a separate racial group for the purposes of the Race Relations Act 1976 (*Commission for Racial Equality v Dutton* [1989] QB 783; [1989] 1 All ER 306 CA). Irish Travellers have also been recognised as members of a separate ethnic group.[2] Somewhat confusingly, the word 'Gypsy' is defined in

legislation not on the ground of ethnicity, but as meaning: '… persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or persons engaged in travelling circuses, travelling together as such'.[3]

This is the definition used by the government in planning guidance. It is also used specifically in Department of the Environment (DoE) Circular 1/94 (Welsh Office 2/94), which was designed to provide that the planning system recognised the need for accommodation consistent with Gypsies' nomadic lifestyle. It follows that a Romani Gypsy or an Irish Traveller, who seeks planning permission for a 'Gypsy' caravan site and wishes to rely on the government guidance in support of the application, must first prove that s/he falls within the statutory definition. In *R v South Hams DC ex p Gibb* [1995] QB 158; [1994] 4 All ER 1012, CA, the Court of Appeal qualified the definition by holding that statutory Gypsies should travel for an economic purpose. The court decided that those 'who move from place to place merely as the fancy may take them and without any connection between the movement and their means of livelihood' could not claim Gypsy status.

As a consequence, the question of whether an applicant for planning permission qualifies as a statutory Gypsy is often a hotly contested issue at planning inquiries. The courts have had to grapple with the issue on a number of occasions in the last two years.

■ **Wrexham CBC v National Assembly for Wales and Berry**
[2002] EWHC 2414 Admin, 31 October 2002
Mr Berry, an ethnic Irish Traveller, was granted planning permission for use of his land as a Gypsy caravan site by a planning inspector. The council challenged that decision on the ground that Mr Berry was no longer a statutory Gypsy because he had become too ill to continue to travel for work.

In the High Court, Sullivan J rejected the council's challenge. He argued that he could not see anything in *Gibb* to suggest that, had the Court of Appeal been confronted with what might be described as a 'retired' Gypsy, it would have said that he had ceased to be a statutory Gypsy because he had become too ill and/or too old to travel in order to search for work. Indeed, Sullivan J stated that he believed: 'such an approach would be contrary to common sense and common humanity … It would be inhuman pedantry to approach the policy guidance … upon that basis …'.

The council appealed against the decision. However, before the Court of Appeal heard the case, the High Court considered another challenge to Gypsy status in the context of the refusal of planning permission.

■ **O'Connor v First Secretary of State and Bath & North East Somerset DC**
[2002] EWHC 2649 Admin, 19 November 2002
A planning inspector decided that an Irish Traveller was not a statutory Gypsy because she had become too ill to travel, and wanted to settle for her children's health and educational needs. Field J quashed that decision. He held that it was not enough, as the inspector had done, simply to focus on the travelling currently being undertaken or likely to be undertaken in the future. Field J reviewed the authorities on Gypsy status, and made the following observations:

In my opinion, the authorities to which I have referred show that, where an individual or family has ceased travelling and has settled for health, educational requirements, or old age, then all the surrounding circumstances must be looked at to determine whether they are Gypsies for planning purposes, including: (1) the person's history; (2) the reasons for ceasing to travel; (3) the person's future wishes and intentions to resume travelling when the reasons for settling have ceased to apply; and (4) the person's attitude to living in a caravan rather than a conventional house.

It is not enough, as the inspector did in this case, to focus on the travelling currently being undertaken or likely to be undertaken in the future. The inspector … gave disproportionate weight to the Gibb decision … [and] makes no reference to the fact that Mrs O'Connor is undoubtedly of Irish Traveller descent … Nor does he take account of the fact that her decision to settle was not born out of a desire to give up her nomadic life, but was caused by ill-health and the educational needs of her children …

■ **Wrexham CBC v The National Assembly for Wales and Berry**
[2003] EWCA Civ 835, 19 June 2003
Ultimately, the Court of Appeal allowed Wrexham's appeal against Sullivan J's decision. In doing so, Auld LJ stated that those deciding whether an individual was a statutory Gypsy should apply the following propositions of law:

… 2) Whether applicants for planning permission are of a 'nomadic way of life' as a matter of planning law and policy is a functional test to be applied to their way of life at the time of the determination. Are they at that time following such a habit of life in the sense of a pattern and/or a rhythm of full-time or seasonal or other periodic travelling? The fact that they may have a permanent base from which they set out on, and to which they return from, their periodic travelling may not deprive them of nomadic status. And the fact that they are temporarily confined to their permanent base for personal reasons such as sickness and/or, possibly, in the interests of their children, may not do so either, depending on the reasons and the length of time, past and projected, of the abeyance of their travelling life. But if they have retired permanently from travelling for whatever reason, ill health, age or simply because they no longer wish to follow that way of life, they no longer have a 'nomadic habit of life'. That is not to say they cannot recover it later, if their circumstances and intention change … But that would arise if and when they made some future application for permission on the strength of that resumption of the status.

3) Where, as here, a question is raised before a planning inspector as to whether applicants for planning permission are 'Gypsies' for the purpose of planning law and policy, he should: 1) clearly direct himself to, and identify, the statutory and policy meaning of that word; and 2) as a second and separate exercise, decide by reference to that meaning on the facts of the case whether the applicants fall within it …

4) In making the second, factual, decision whether applicants for planning permission are Gypsies, the first and most important question is whether they are – to use a neutral expression – actually living a travelling life, whether seasonal or periodic in some other way, at the time of the determination. If they are not, then it is a matter of fact and degree whether the current absence of travelling means that they have not acquired or no longer follow a nomadic habit of life.

5) On such an issue of fact and degree, the decision-maker may find any one or more of the following circumstances relevant and, if so, of varying weight: 1) the fact that the applicants do or do not come from a traditional Gypsy background and/or have or have not followed a nomadic way of life in the past – the possible relevance in either case being that respectively they may be less or more likely to give it up for very long or to abandon it entirely; 2) the fact that the applicants do or do not have an honest and realistically realisable intention of resuming travelling and, if they do, how soon and in what circumstances; 3) the reason or reasons for the applicants not living a travelling way of life at the time of the determination and their likely duration.

Mr Berry was refused permission to appeal to the House of Lords. He is now pursuing his case in Strasbourg on the basis that the Court of Appeal's decision amounted to a breach of his rights protected by, inter alia, article 8 of the convention because it ignored the fact that living in caravans is an integral part of his traditional way of life as a Gypsy. Mr Berry will argue that the duty to facilitate the Gypsy way of life (recognised by the ECtHR in *Chapman v UK* [2001] 33 EHRR 399) does not end when the person concerned becomes too ill to continue travelling in search of work. It will also be argued that the position of Mr Berry's wife and adult children must be taken into account: do they too lose their status as Gypsies because of Mr Berry's illness? Meanwhile, other cases on Gypsy status continue to arise in the domestic courts.

■ **Basildon DC v First Secretary of State and Rachel Cooper**
[2004] EWCA Civ 473, 25 March 2004
Mrs Cooper, a Romani Gypsy, was granted planning permission for use of her land as a caravan site by a planning inspector. The local authority appealed against that decision. It argued that the inspector had wrongly decided that Mrs Cooper should be accorded Gypsy status.

The Court of Appeal rejected that argument. It accepted that Mrs Cooper was a statutory Gypsy in circumstances where:

■ she had given up a wholly nomadic way of life because of the shortage of stopping places; and
■ she had continued travelling to traditional Gypsy fairs during the summer months and sold craft items at those events.

Article 8 and offers of conventional housing

Significantly, the provisions of HRA and the convention have been applied by the domestic courts to establish whether the availability of conventional housing should be taken into account (ie, as a material consideration) when Gypsies and Travellers seek planning permission for their own caravan sites.

■ **Clarke v Secretary of State for Environment, Transport and the Regions and Tunbridge Wells BC**
[2001] EWHC Admin 800, 9 October 2001
A planning inspector dismissed an appeal against the council's refusal of planning permission to site a Gypsy caravan in a special landscape area. Mr Clarke argued that the inspector had wrongly taken into account an offer by the authority of conventional housing accommodation, and that this was in breach of articles 8 and 14 of the convention. At first instance, Burton J held:

... it can amount to a breach of articles 8 and 14 to weigh in the balance and hold against a Gypsy applying for planning permission, or indeed resisting eviction from ... land, that he or she has refused conventional housing accommodation as being contrary to his or her culture. Such circumstances ... are and should be, limited, just as they are if, for example, it is to be alleged similarly to be impermissible, in relevant circumstances, to hold it against or penalise a religious or strictly observant Christian, Jew or Muslim because he or she will not, and thus cannot, work on certain days, or to hold it against, or penalise, a strictly observant Buddhist, Muslim, Jew or Sikh because he eats or will not eat certain foods, or will or will not wear certain clothing. It is not, and cannot be, a formality to establish this, and the onus is upon the person such as a Gypsy who seeks to establish it.

... if such be established then ... bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat-infested barn. It would be contrary to articles 8 and 14 to expect such a person to accept conventional housing and to hold it against him or her that s/he has not accepted it, or is not prepared to accept it, even as a last resort factor. (paras 30 and 34)

The inspector's decision was quashed on the basis that he either took into account impermissible factors relating to conventional housing or made insufficient findings in respect of such factors. The council's appeal to the Court of Appeal was dismissed ([2002] EWCA Civ 819).

Green Belt – very special circumstances

The government's *Planning policy guidance 2: Green Belts*, at paragraph 3, states that there is a general presumption against 'inappropriate development' within the Green Belt. Paragraph 3.2 states that inappropriate development is, by definition, harmful to the Green Belt, and that such development should not be approved except in 'very special circumstances'.[4]

It is for an applicant to justify 'inappropriate development', and 'very special circumstances' will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

Gypsy and Traveller sites are not categorised as 'appropriate development'. In practice, a Gypsy or Traveller, who is seeking planning permission for a site within the Green Belt, will have to show that there is a pressing need for further sites, and/or that his/her personal circumstances justify the grant of planning permission.

In both *Doncaster MBC v Secretary of State* [2002] EWHC 808 Admin, and *R (Chelmsford BC) v Secretary of State and Draper* [2003] EWHC 2978 Admin, Sullivan J stressed the importance of the advice in the *Planning policy guidance*. In *Doncaster*, he emphasised the fact that it is important that the need to establish the existence of '"very special circumstances" ... is not watered down'.

The education of Gypsies' and Travellers' children may be of particular relevance in a planning application. If those needs are sufficiently strong then they may 'clearly outweigh' the Green Belt objections to the use of land as a caravan site (on their own or in conjunction with other considerations) (*Basildon DC v Secretary of State for the Environment, Transport and Regions* (2000) 21 September, unreported, CO/3315/2000). Similarly, health considerations are often a very important factor in planning cases and can prove to be crucial.

■ **Porter v South Bucks DC**
[2004] UKHL 33, 1 July 2004
Mrs Porter, a Romani Gypsy, had lived in caravans on her land in the Green Belt since 1985 without planning permission. In 2000, the council obtained an injunction requiring her to cease her residential use of the land, but that injunction was subsequently quashed (*South Bucks DC v Porter and others* [2003] 2 WLR 1547, 22 May 2003, see below). Meanwhile, Mrs Porter applied for planning permission. The council refused her application and she appealed to the Secretary of State against that refusal.

At the subsequent planning inquiry, it was accepted that the use of the land as a caravan site constituted inappropriate development in the Green Belt. The main issue was whether there were very special circumstances that clearly outweighed the harm by reason of inappropriateness. In the event, the planning inspector concluded that: very special circumstances did exist given Mrs Porter's status as a Gypsy, her ill-health, her aversion to bricks and mortar, and the fact that she had nowhere else to go. Therefore, the grant of planning permission was justified.

The council's appeal against that decision was dismissed by Rich J. When the case came before the Court of Appeal, the grant of planning permission was quashed on the grounds that the inspector had failed to conduct a 'clear and cogent analysis' of the main issue, and that he had failed to take into account the unlawfulness of her occupation of the site, which had been in persistent breach of planning control (see [2003] EWCA Civ 687, 19 May 2003; [2004] JPL 207).

Mrs Porter appealed to the House of Lords. The council

argued that the Court of Appeal had been right to demand that the inspector gave a much fuller analysis of his reasons for granting planning permission on the facts of the case, as the Green Belt restrictions should not be 'watered down'. The House of Lords unanimously rejected that argument and restored the planning permission. Lord Brown said:

I cannot accept that submission. To my mind the inspector's reasoning was both clear and ample. Here was a woman of 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. All of this was fully explained in the decision letter (and, of course, described more fully still in the reports produced in evidence at the public inquiry). Should she be dispossessed from the site onto the roadside or should she be granted a limited personal planning permission? The inspector thought the latter, taking the view that Mrs Porter's 'very special circumstances' 'clearly outweighed' the environmental harm involved. Not everyone would have reached the same decision but there is no mystery as to what moved the inspector.

The council also argued that the Court of Appeal had been right to conclude that the planning inspector had failed to take account of a material consideration, namely, Mrs Porter's lengthy breach of planning control. However, the House of Lords also unanimously rejected this point. Lord Brown accepted that the unlawfulness of Mrs Porter's prior occupation of the site was capable of being a material consideration. But he took the view that it would only be relevant if she was actually seeking to pray in aid her long period of occupation. However, as Mrs Porter was not relying on her continuing unlawful occupation, in itself, as constituting part of her hardship claim, the fact that she had occupied the site without planning permission since 1985 was of little, if any, materiality in the particular circumstances of the case.

Article 8 and the enforcement of planning control

Town and Country Planning Act 1990 s187B(1) provides that where a local planning authority (LPA) considers 'it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction'.

■ **South Bucks DC v Porter and others**

[2003] 2 WLR 1547, 22 May 2003

This judgment relates to four consolidated appeals. In each case, Gypsies and Travellers, who were living in caravans on land without the requisite planning permission, were defendants to proceedings brought by a LPA for a planning injunction under s187B. Each court, at first instance, had granted an injunction to the LPA requiring the Gypsies/Travellers to move off its land. The Gypsies and Travellers appealed to the Court of Appeal. They argued that the decisions were disproportionate in circumstances where the courts had been prohibited by earlier case-law from considering the hardship that the families would suffer if they complied with the injunctions – previously, the court's 'mind was foreclosed' to issues such as hardship and lack of sites.

The Court of Appeal unanimously allowed the Gypsies' and Travellers' appeals. It held that the previous case-law (including *Hambleton DC v Bird* [1995] 3 PLR 8, CA), which had greatly limited a judge's power to refuse a s187B injunction, was no longer good law.

Simon Brown LJ stated that:

Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought – here the safeguarding of the environment – but also that it does not impose an excessive burden on the individual whose private interests – here the Gypsy's private life and home and the retention of his ethnic identity – are at stake.

The local authorities that had sought the injunctions appealed to the House of Lords. In a unanimous decision, the House of Lords dismissed the appeals. It upheld the Court of Appeal's decision in its entirety. In its judgment, the House of Lords recognised that the *Hambleton* approach was 'too austere' as it seemed to suggest that even great hardship was irrelevant and that a more balanced approach was necessary.

Planning and Compulsory Purchase Act 2004

The Planning and Compulsory Purchase Act (PCPA) 2004 received royal assent on 13 May 2004. The Act introduces provisions designed to reform and speed up the planning system. Significantly, the PCPA provides that:

- there will be a regional spatial strategy (RSS) prepared for each region;
- the RSS will be monitored and kept under review by a regional planning body;
- local planning authorities will be required to prepare local development documents (LDDs). These will replace local, unitary development and structure plans;
- LDDs must be in general conformity with the RSS; and
- the secretary of state has the power to revoke or direct a revision of an LDD.

It is understood that the government will soon be issuing guidance, which will require that Gypsies' and Travellers' accommodation needs are assessed on a regional basis, and met on a local level by the local planning authorities in their LDDs.

The Act also provides LPAs with a new discretionary power to serve temporary stop notices to halt breaches of planning control for a period of up to 28 days. When reviewing the PCPA, the Joint Committee on Human Rights (JCHR) noted that the power could not be used to prohibit the use of a building as a dwelling house, but could be used to prohibit the use of a caravan as a dwelling. The JCHR expressed the view that the power would appear to discriminate against Gypsies and Travellers, and that there seemed to be no justification for the difference in treatment. As a consequence, the government has agreed that the power will not be brought into force until regulations are introduced, which will ensure that it is not used in a discriminatory fashion.[5]

UNAUTHORISED ENCAMPMENTS

Criminal Justice and Public Order Act 1994 ss62A–E

New police powers of eviction have been introduced by an amendment to the Criminal Justice and Public Order Act (CJPOA) 1994. Now, CJPOA ss62A–E (inserted by the Anti-social Behaviour Act 2003) provides that if the police are satisfied that two or more persons in one or more vehicles are trespassing on land and, if the police are further satisfied, after consultation with the relevant local authority or authorities concerned, that there is a suitable pitch on a relevant caravan site for the caravans in question, they may direct the Gypsies or Travellers to leave the land.

If Gypsies or Travellers given such a direction fail to leave the land or enter any land in the area of the relevant local authority within three months of the day on which the direction is given, they commit an offence and, on conviction, are liable to imprisonment or a fine.[6] This has been seen by many as a startling increase in the already draconian police powers of eviction, which already exist under CJPOA s61. See also page 21 of this issue.

The 'suitable pitch' can be within the area of the local authority where the encampment is located or, where relevant, within the county council area. The pitch must be on a 'relevant caravan site', which is a site man-

aged by either a local authority or a registered social landlord (CJPOA s62A(6)). The ODPM has indicated that, to be 'suitable', a pitch would need to provide basic amenities, including water, toilets and waste disposal facilities. There may, of course, be other factors to take into account when assessing suitability including the compatibility of families or groups on sites.

Failure to comply with a direction to leave, therefore, may result in an effective three-month ban for the Gypsies or Travellers in question from any land in that local authority area. Interestingly, it seems that many police forces realise the futility of using these powers, at present, given the acknowledged lack of adequate site provision.[7] Although the powers have been in force since 27 February 2004, the authors know of only one instance when they have been used.[8]

Guidance from the ODPM

The ODPM has issued new *Guidance on managing unauthorised camping*.[9] The guidance continues to emphasise the importance for local authorities of the information-gathering process. It also highlights the importance of written strategies being put in place by all relevant public authorities, especially local authorities and the police. The guidance further emphasises the need for site provision. Once again, as with the previous guidance – and in line with DoE Circular 18/94 (Welsh Office 76/94), *Gypsy sites policy and unauthorised camping* – the new guidance makes clear that welfare enquiries must be carried out, not only by local authorities, but by all public authorities, including the police, before eviction of an unauthorised encampment is considered or effected.[10]

■ **Drury v Secretary of State for the Environment, Food and Rural Affairs**
[2004] EWCA Civ 200, 26 February 2004
It has previously been the practice (upheld by the courts) of many large landowners, when seeking a possession order against an unauthorised encampment on their own land, to also obtain an order covering other parcels of land owned by them in a wide radius of the encampment. In *Drury*, the Forestry Commission (the commission) obtained an order against Ms Drury and other Travellers covering not only the piece of woodland that they were encamped on, but also 30 other pieces of woodland within a 20-mile radius.

The evidence adduced by the commission in support of its assertion that encampments were likely by this group of Travellers on the other areas of woodland was minimal. For example, reference was made to the fact that a registration plate on a vehicle involved in another encampment on commission land some five years previously was the same as the registration plate on a vehicle which was on the current encampment. The Court of Appeal quashed the order for the 30 other pieces of woodland. Wilson J stated:

... [I]f a claimant entitled to an order for possession of a certain area of land contends that its occupants are likely to decamp to a separate area of land owned by him, the separate area should in my view be included in the order for possession if, but only if, he would have been entitled to an injunction quia timet against the occupants in relation to the separate area ... It follows that the inclusion in a possession order of an area of land owned by the claimant which has not yet been occupied by the defendants should be exceptional. Although it would be foolish to be prescriptive about the nature of the necessary evidence, it seems safe to say that it will usually take the form either of an expression of intention to decamp to the other area or of a history of movement between the two areas from which a real danger of repetition can be inferred or ... of such propinquity and similarity between the two areas as to command the inference of a real danger of decampment from one to the other.

HOMELESSNESS

Homelessness Act 2002

The Homelessness Act 2002 imposed new duties on local authorities to carry out a homelessness review, and formulate and publish a homelessness strategy based on the results of that review (ss1(1) and 1(3)). Gypsies and Travellers without an authorised place to stop are 'homeless' under HA 1996 s175(2)(b). Research by Lord Avebury has shown that of 152 local authorities which recorded unauthorised encampments in their district, 107 failed to mention Gypsies and Travellers in their review and strategy.[11]

■ **R (Price) v Carmarthenshire CC**
[2003] EWHC 42 Admin, 24 January 2003
Mrs Price, an Irish Traveller, had made a homelessness application. The local authority offered her a house, which she refused. At the same time, eviction action was taken against her with regard to the encampment she was on which, until then, the local authority had 'tolerated'.

Quashing the decision to evict, Newman J stated that:

In order to meet the requirement to accord respect [for article 8 rights] something more than 'taking account' of an applicant's Gypsy culture is required ... [R]espect includes the positive obligation to act so as to facilitate the Gypsy way of life, without being under a duty to guarantee it to an applicant in any particular case.

Following this case, many Gypsies and Travellers throughout England and Wales have been making homeless applications (there having been an assumption previously that only bricks and mortar accommodation might be obtained from such an application).[12] In order to cater for the needs of homeless Gypsies and Travellers, local authorities should carry out a thorough assessment of the land in their area, including other public authority and even private land, and try to identify suitable sites.[13]

■ **Codona v Mid-Bedfordshire DC**
[2004] EWCA Civ 925, 15 July 2004
Ms Codona, a Romani Gypsy, made a homelessness application for herself and her extended family. The council offered bed and breakfast (B&B) accommodation for a limited period, stating that it had no sites available despite her accepted 'aversion to conventional housing'. While approving the judgment in *Price*, the Court of Appeal concluded that, in the circumstances of this case, the offer of B&B did not fall below the minimum line of suitability of an offer of accommodation. Ms Codona intends to petition the House of Lords for leave to appeal this judgment.

■ **Myhill and Faith v Wealden DC**
[2004] EWCA Civ 224, 9 February 2004
Two homeless Travellers, who were single men, argued that they were 'vulnerable' for 'some other special reason' for the purposes of HA 1996 s189(1)(c) on the basis that:

■ as Travellers, they were statistically far more likely to be homeless than the general population: the government statistics presented to the court, which were not challenged by the local authority, indicated that whereas 1.2 per cent of settled households were homeless, 18 per cent (at that time) of Gypsies and Travellers were homeless;

■ Gypsies and Travellers were much less likely to be able to find accommodation due to the acknowledged lack of sites;

■ while on unauthorised encampments, Gypsies and Travellers faced possible criminal prosecution under the CJPOA.

The county court judge rejected these arguments. He relied on Hobhouse LJ's judgment in one of the leading cases on 'priority need', *R v Camden LBC ex p Pereira* [1998] 30 HLR 317 at 330: 'The council must ask itself whether the applicant is, when

homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable person would be able to cope without harmful effects ...'

In refusing permission to appeal to the Court of Appeal, Buxton LJ stated:

The focus [in the above quote from Hobhouse LJ] *is quite clearly on the ability of the individual to deal with the condition of homelessness, rather than on the question to which the statistics and oral arguments in this case go, of how likely it is that the persons when they become homeless will remain such.*

A person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster, is also in priority need (HA 1996 s189(1)(d)). In *Higgs v Brighton and Hove CC* [2003] EWCA Civ 895; [2003] 3 All ER 753, the single Traveller applicant had been residing in his caravan on an unauthorised encampment. The local authority obtained a possession order against the applicant. It had not yet enforced that order when, after going out one day, he returned to find that his caravan had disappeared. It was never recovered nor was it ever established what happened to the caravan. He applied to the local authority as a homeless person. He claimed that the loss of his caravan should mean that he was in priority need. The local authority found him not to be in priority need. The judge at first instance upheld this decision. On appeal, the Court of Appeal stated that the loss of one's caravan could come within the definition of 'fire, flood or other disaster'. It held that the applicant's homelessness was not as a result of this event, as he was already homeless because he had no lawful place to station his caravan (HA 1996 s175(2)(b)). He could not, therefore, be said to be in priority need in the circumstances of this case.

CONCLUSION

Over the past two years, there have been many influential reports written on Gypsy and Traveller issues, some commissioned by the government itself (and several mentioned in this article). A recurrent theme is the need to reintroduce the duty to provide or facilitate the provision of sites. The ODPM's committee that is inquiring into Gypsy and Traveller sites has recently been hearing oral submissions from experts and organisations. Many of these submissions have also called for the return of the duty.[14] The government is expected to report on the issue later this year. The Gypsy and Traveller communities are waiting anxiously to see if the duty will finally be reinstated.

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1 See, for example, 'Meadowlands, a national disgrace', *Travellers' Times*, Issue 19, Spring 2004, p1.
2 *O'Leary v Allied Domecq* (2000) 29 August (Case No CL 950275-79), Goldstein HHJ, Central London County Court (unreported). See also, Race Relations (Northern Ireland) Order 1997 SI No 869 article 5, which makes express provision for Irish Travellers.
3 Caravan Sites and Control of Development Act (CSCDA) 1960 s24(8).
4 Available at: www.odpm.gov.uk.
5 It is worth noting that a Gypsy has already challenged a local authority's use of a stop notice under Town and Country Planning Act (TCPA) 1990 s183 on the basis that the provision is incompatible with the convention – the decision is awaited.
6 The 'relevant local authority' area for these purposes is the area of the local authority within which the original encampment is located.
7 See, for example, Pat Niner, *Local authority Gypsy/Traveller sites in England*, available at: www.odpm.gov.uk.
8 In that case, the police, following a threat of legal action on the basis of the unsuitability of the pitches offered, withdrew the direction to leave.
9 In force from 27 February 2004. The guidance is available at: www.odpm.gov.uk. The guidance on the new police powers of eviction is still being finalised, but is available in draft form. The consultation process has already concluded. The Equality of Opportunity Committee of the National Assembly for Wales has also produced an important report on Gypsy and Traveller issues, including the question of unauthorised camping, *Review of service provision for Gypsies and Travellers* is available at: www.wales.gov.uk.
10 This was also emphasised in the guidance on the use of CJPOA s61 produced by the Association of Chief Police Officers (ACPO) in 2000. However, it is understood that ACPO is proposing to withdraw this guidance, and rely solely on the ODPM's new guidance.
11 Quoted in H Crawley, *Moving forward: the provision of accommodation for Travellers and Gypsies*, Institute for Public Policy Research, 2004, p11.
12 The latest ODPM Gypsy count figures, for January 2004, indicate that some 25 per cent of the Gypsy and Traveller population are homeless, ie, without a lawful stopping place.
13 Such an assessment would, in due course, link in with the new RSSs introduced by the PCPA, and also with homelessness reviews and strategies.
14 As well as the Gypsy and Traveller Law Reform Coalition, this has included Pat Niner at the University of Birmingham, a representative from the Cottenham Residents' Association (Cottenham is the scene of a current, large unlawful development) and the National Association of Gypsy and Traveller Officers.

The Travellers' Advice Team operates a Legal Services Commission funded telephone helpline for Travellers. The helpline operates from Monday to Friday, between 10 am and 1 pm and between 2 pm and 5 pm on 0845 120 2980.

CRIMINAL LAW

Anti-social Behaviour Act 2003 and Gypsies, Travellers and public gatherings

Timothy Baldwin considers the impact of the Anti-social Behaviour Act (ASBA) 2003 on Gypsies, Travellers and the law relating to public assembly. Previous articles which looked at the ASBA's provisions in relation to social housing and parental responsibility were published in February and April 2004 *Legal Action* 20 and 24 respectively. The full text of the ASBA is available at: www.hmso.gov.uk/acts.htm.

INTRODUCTION

Part 7 of the ASBA contains important, but little discussed, amendments to public order legislation, namely, the Public Order Act (POA) 1986, and the Criminal Justice and Public Order Act (CJPOA) 1994 (see box on p21). These amendments enhance police powers to impose new restrictions on assemblies of people, raves, aggravated trespass and encampments of Gypsies and Travellers on land without the landowner's permission.

Commentary on this part of the ASBA has indicated its controversial nature. When the Joint Committee on Human Rights (JCHR) scrutinised the Anti-social Behaviour Bill, its report's main conclusion was that Part 7 could risk incompatibility with the European Convention on Human Rights ('the convention') in relation to the extension of police powers to control public assemblies and for dealing with trespassers.[1] The JCHR noted that although safeguards remained in place for the exercise of these powers, it felt that the imposition of the new restrictions could provide a 'chilling effect' on freedom of expression. For instance, on the association of small groups of individuals, who are inherently less likely than larger ones to cause public disorder.

Other commentators have emphasised the ASBA's potential authoritarian and racist undertones. For example, in July 2003, Liberty commented that any situation where the police can self-authorise restrictions on the right to assemble and possibly protest should be treated with great caution. Liberty felt that it was 'incredible' that the government considered that two people could form an assembly and were unclear of the justification. Of the provisions relating to Gypsies and Travellers, Baroness Walmsley commented that:

> *The very fact that something specific on Gypsy and Traveller families has been tacked onto a bill about anti-social behaviour encourages the public to have racist attitudes to them. It suggests that the nomadic way of life, linked with the shortfall in sites, is in itself criminal behaviour.*[2]

In this article, I will provide a summary of the ASBA's main provisions and how they amend existing legislation. I will also examine the impact of the ASBA, in detail, by examining how existing public order legislation is amended and how the changes alter its effect.

A troubled history?

In the white paper, *Respect and responsibility – taking a stand against anti-social behaviour*, which was published in March 2003, there is no mention of why modification of the existing public order legislation concerning Gypsies and Travellers was considered necessary.[3]

A good deal of concern has been expressed about the manner in which the provisions in ASBA Part 7 were introduced into the Anti-social Behaviour Bill without much scrutiny by the House of Commons, or discussion about the potential serious impact that they could have on issues of civil liberties and welfare.

The ASBA is broadly defined to prohibit anti-social behaviour by the creation and expansion of criminal sanctions and the use of anti-social behaviour orders. The provisions in the ASBA aimed at Gypsies and Travellers, by implication, labels their activities as anti-social and, thus, criminal. Similarly, there was no mention in the white paper of modification of existing public order legislation as a mechanism to control anti-social behaviour. These changes may have been introduced as a mechanism to deal with some of the underlying policy issues raised by the government in the ASBA, for example control of gangs or gatherings of youths and older people. Nevertheless, it remains unclear where these proposals for modification of the Acts governing issues of public order originated.

THE IMPACT OF ANTI-SOCIAL BEHAVIOUR ACT 2003

Public Order Act 1986 revised

Assemblies and protests

POA s16 defines 'public assembly' as an 'assembly of 20 or more persons in a public place which is wholly or partly open to the air'. For example, pickets, lobbies, vigils, pop festivals, queues for buses and tickets and a group of people drinking in a pub garden.[4] The ambit includes trespassory assemblies that were introduced by the CJPOA. The meaning of public assembly is not limited to static assemblies. So, either a group of protestors who are moving around, but do not amount to a procession, or a group of people who are moving around might fall to be an assembly within the meaning of the POA.

POA s14 allows conditions to be imposed on the organisers of, and/or participants in, a public assembly by a senior police officer. The conditions imposed may include deciding the location, maximum duration or the upper limit of people who may assemble. In order to exercise this power lawfully, the officer must reasonably believe that either serious public disorder, serious damage to property or serious disruption to the life of the community might result from the assembly. Alternatively, the officer must reasonably believe that the purpose of the assembly is to intimidate other people with the view to compelling them to act in a particular way.

ASBA s57 amends the definition of an assembly in POA s16 from '20 or more persons' to 'two or more persons'. Thus, the threshold for the exercise of powers imposing conditions on public assemblies under the POA is lowered.

'Public place' is defined in POA s16. It is only in relation to public assemblies that the meaning of public place is likely to be an important factual issue, for example, whether the entrance to a shop is a public place. This amendment also alters the threshold by which an order can be sought by the police for banning trespassory assemblies under POA ss14A, 14B and 14C. A ban may now be sought for an assembly of two people, and thus the powers and punishments provided for under POA ss14B and 14C are exercised. This amendment was made despite Earl Ferrers stating that the original justification for such powers under the CJPOA was the apprehension that tens of thousands of people would turn up to such assemblies.[5]

Criminal Justice and Public Order Act 1994 revised

Aggravated trespass

These provisions are aimed specifically at anti-hunting protesters who go beyond peaceful

protest, people who disrupt horse races and anglers, and those who demonstrate on land to prevent the building of new roads.[6] These provisions were controversial inside and outside parliament. There were concerns that the provisions were drafted too widely and might catch peaceful protests and restrict freedom of access to land.

CJPOA s68(1) created the offence of aggravated trespass. The offence is committed when a person trespasses on land in the open air and, in relation to any lawful activity that persons are engaging in, or are about to engage in, on that land or adjoining land in the open air, does anything that is intended by the trespasser to have the effect of:

(a) intimidating those persons or any of them so as to deter any of them from engaging in their lawful activity; or

(b) obstructing that activity; or

(c) disrupting that activity.

The definition of 'land in the open air' in CJPOA s61(9) specifically excludes most buildings.

The police may arrest without warrant for an offence under s68. A person found guilty under this section will, on summary conviction, be liable to up to three months' imprisonment, a fine up to level 4 or both.

CJPOA s69 created powers for the removal of persons committing or participating in an aggravated trespass. CJPOA s69 provides police with a power (corresponding to that under s61) to direct people to leave the land. A senior police officer, who is present at the scene, may direct trespassers to leave the land if s/he holds the reasonable belief that:

(a) a person is committing, has committed or intends to commit the offence of aggravated trespass on land in the open air; or

(b) two or more persons are trespassing on land in the open air and are present there with the common purpose of intimidating persons so as to deter them from engaging in a lawful activity or of obstructing or disrupting a lawful activity.

Under CJPOA s69(3), a person who knows that a direction applies to him/her and fails to leave the land as soon as practicable, or having left returns as a trespasser within three months of the direction, is committing an offence and is subject to arrest and punishment as above. Under CJPOA s69, it is a defence for an accused person to show that s/he was not trespassing on the land, or had a reasonable excuse for either failing to leave it or for returning as a trespasser.

Anti-social Behaviour Act 2003 amendments

Aggravated trespass

ASBA s59 amends CJPOA ss68 and 69 to extend the provisions relating to the offence of aggravated trespass to cover trespass into buildings and in the open air. The offence of aggravated trespass will be constituted where a person trespassing, either in a building or the open air, does anything that is intended to intimidate or deter persons from engaging in a lawful activity, or to obstruct or disrupt that activity.

ASBA s59(2) amends CJPOA s68(1) by removing the words 'in the open air'. Therefore, the offence under CJPOA s68 becomes aggravated trespass on land.

ASBA s59(3) amends CJPOA s69(1) by removing the words 'in the open air'. Where a senior police officer reasonably believes that a person is committing or participating in an aggravated trespass, s/he has the power to direct that person to leave the land. Land is defined in the Interpretation Act 1978 to include buildings.

In the explanatory notes to the Anti-social Behaviour Bill, the government speculated that these provisions might be used, for example, in respect of animal rights activists who invade a company's offices with the intention of conducting an intimidating or disruptive protest.

Trespassory assemblies

Trespassory assemblies are redefined by the ASBA through modification of the operation of POA s14. CJPOA ss70 and 71 amend the POA by inserting ss14A, 14B and 14C. Respectively, these sections provide a general statutory power for an assembly in open air, and if such an assembly is trespassory, various offences in relation to the contravention of the prohibition, and a power to stop people progressing to a banned assembly.

CJPOA ss70 and 71 provided for the perceived need to protect communities from serious disruption caused by trespassory assemblies, and to protect ancient monuments. Previously, only the common law power of the prevention of an apprehended breach of the peace applied. This power extended to the prevention of a meeting (*Duncan v Jones* [1936] 1 KB 218), but not to the anticipated situations within POA s14A.

POA s14A creates a new power for the relevant chief police officer to apply to the local council for an order prohibiting, for a specified period, the holding of all trespassory assemblies in specified areas. The grant of such an order by a council requires the consent of the Home Secretary. The officer may apply for an order if s/he reasonably believes that an assembly of 20 or more persons is intended to be held on land in the open air to which the public has no, or a limited right of access, and that it:

(a) is likely to be held without the permission of the occupier of the land or to conduct itself in such a way as to exceed the limits of any permission of his or the limits of the public's right of access, and

(b) may result— (i) in serious disruption to the life of the community, or (ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument.

If an order is made, it must not prohibit the holding of such an assembly for more than four days, or prohibit it from being held outside an area which is within five miles of a specified centre (s14A(6)). Apart from judicial review, there is no route of appeal from a decision to ban a trespassory assembly.

POA s14B creates three new offences for persons who either organise or take part in, or incite others to take part in, trespassory assemblies. All three offences are summary and arrestable without warrant. The offences of organising or inciting a trespassory assembly are punishable by up to three months' imprisonment, a fine up to level 4 or both (s14B(5)). Trespassory assembly is punishable in the same way. Taking part in a trespassory assembly is punishable by a fine not more than level 3 (s14B(6)).

POA s14C was created by CJPOA s71. The power created parallels that for raves in CJPOA s65. This section provides a uniformed police officer, who reasonably believes that a person is on his/her way to a trespassory assembly which is subject to a s14A order, with the power to stop that person and redirect him/her away from the assembly. This power may be exercised within a five-mile radius of the assembly.[7]

Conclusions and problems

At the Anti-social Behaviour Bill's House of Lords report stage, Lord Lester thought that it was odd to speak of two people as a 'public assembly' because the POA was designed to combat serious threats to public disorder. He repeated the view expressed by the JCHR of the 'chilling effect' of such a provision on basic freedoms and that the clause was introduced into the bill without debate. Lords Lester, Monson and Avebury, asked the minister for

Summary	Amended legislation	Amendment
Public assemblies (ASBA s57)	Public Order Act (POA) 1986 s16	Lowered threshold to two from 20 people to constitute 'assembly' for police to exercise powers
Raves (ASBA s58)	Criminal Justice and Public Order Act (CJPOA) 1994 s63. Impacts on ss64–67	Redefined rave to comprise 20 or more people. Makes unlicensed indoor and outdoor raves illegal
Aggravated trespass (ASBA s59)	CJPOA s68(1): aggravated trespass. CJPOA s69 provided police with power corresponding to that under s61 to direct people to leave land	Penalties for aggravated trespass in CJPOA now apply to buildings and land in open air
Power to remove trespassers: alternative site (ASBA s60)	CJPOA s61	Creates new power for police to give directions to leave land combined with consideration of availability of new sites for Travellers
Failure to comply with direction: offences (ASBA s61)	CJPOA s62	Creates new offence for failing to comply with direction under ASBA s60
Failure to comply with direction: seizure (ASBA s62)	CJPOA s62: supplementary powers of seizure	Creates power for seizure of vehicles and property for failing to comply with direction under s60 above
Common land: modifications (ASBA s63)	CJPOA ss62A–62C introduces s62D	Necessary modifications to apply CJPOA to common land
Interpretation (ASBA s64)	CJPOA s62 introduces s62E	Interpretation of terms used in Part 7

an explanation of the mischief that this clause was aimed at. Lord Lester further noted that the Protection from Harassment Act 1997 could be used to deal with threats from animal rights extremists or others. In response, Baroness Scotland stressed the problems faced by police because of individuals who know the law and protest in groups of 19 or less. She stated that while there were powers to deal with intimidating individuals, there were none to deal with the collective behaviour of an intimidating group.[8]

The obvious problem with this change to the definition of a public assembly is the small number of people who are now required to be a gathering, and can therefore attract police powers to deal with unlawful and trespassory assemblies. These changes may have been 'piggy-backed' on to the changes presented in ASBA Part 4 to deal with the dispersal of groups of children. It may have been that the government saw problems with identifying groups as containing only children under 16 for the exercise of these powers. However, the powers provided in Part 4 were also subject to criticism by Baroness Linklater in the House of Lords debates as being in potential breach of basic civil liberties and the rights of the child.

In addition, the ASBA may create policing problems. Baroness Linklater noted that there had not been an enthusiastic reaction to this reform from police forces. Its provisions may create problems for the police in terms of increased litigation through judicial review of their actions in dispersing groups. It may also increase civil claims against the police if their actions under this provision are held to be unlawful. The police response may be to not intervene in circumstances where it is necessary. The counterpoint to this argument may be that judicial review provides inadequate supervision of the exercise of this power. This can lead to major problems where a community's trust in the police is further eroded especially among ethnic minorities. In the extreme, this power could result in a 'militaristic' style of policing which could, in turn, precipitate rioting. Also, the policy behind the ASBA is to reduce crime and disorder in deprived and vulnerable communities. If, in the exercise of these provisions, community relations with the police are damaged, then people who should benefit from this legislation may, in fact, be harmed further if they remain victims of crime and disorder.

Criminal Justice and Public Order Act 1994 revised

Gypsies and Travellers

Central to the operation of the CJPOA are those provisions in Part 5 related to public order. In an article in the *Times*, in March 1994, Peter Thornton, chair of the Civil Liberties Trust, argued that the public order provisions of CJPOA extended the law 'to a point not far short of a straight law of criminal trespass'. In the debate on the CJPO Bill's second reading, Peter Butler MP expressed the hope that they would lead to a full law of criminal trespass. On the other hand, John Gunnell MP was sure that '... the clauses on trespass will create a new class of law breakers. The time and resources that the police will devote to dealing with them will therefore detract from the current use of police resources'.[9]

One of the most controversial areas concerned the repeal of the provisions in the Caravan Sites Act 1968, which had imposed a duty on local authorities to provide sites for Gypsy encampments under CJPOA s80. The duty was replaced by a power, but this led to the concern that this change meant that the police would be employed merely to confront and move on Gypsies who have no designated alternative site available to them.

Seizure of vehicles and property

CJPOA s62 created supplementary powers of seizure as a result of directions given under CJPOA s61. Where a s61 direction had been given and any person to whom it applied had either failed to leave or remove vehicles or property in his/her possession or control, or had been arrested for an offence, the police, after a reasonable period, may seize and remove the vehicle.

The power in CJPOA s61 provided police with new powers to remove trespassers from land. The government had in mind groups such as new age Travellers.[10] David Maclean MP stated that 'new age Travellers are the main offenders' against whom these provisions were directed, but that 'there may be others'.[11]

CJPOA s61 provided that where a senior police officer at the scene reasonably believes that two or more people are trespassing on land, are there with the common purpose of residence for any period, and that reasonable steps have been taken by the occupier to ask them to leave and:

(a) that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

(b) that those persons have between them six or more vehicles on the land

the officer, or an officer acting on his/her behalf, may direct the persons to leave the land and remove their vehicles and property. The definition of land in the CJPOA includes common land as defined in Commons Registration Act 1965 s22, and is extended to cover certain forms of tracks.

Police powers to remove trespassers

ASBA s60 inserts CJPOA s62A to create a new power for a senior police officer to direct a person to leave the land and remove any vehicle or other property with him/her on that land. This power relates to a senior police officer who is present at the scene, and holds a reasonable belief that the following conditions (as set out in s60(2)) are satisfied in relation to the person on the land:

(a) that the person and one or more others ('the trespassers') are trespassing on the land;

(b) that the trespassers have between them at least one vehicle on the land;

(c) that the trespassers are present on the land with the common purpose of residing there for any period;

(d) if it appears to the officer that the person has one or more caravans in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans;

(e) that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land.

ASBA s60(3) permits a s60(1) direction given by a senior police officer to be communicated to the person who is the subject of the direction by a police constable at the scene.

ASBA s60(4) provides that s60(5) applies if the senior police officer proposes to give a s60(1) direction, and it appears to him/her that the person who is the subject of the direction has one or more caravans in his/her possession or under his/her control on the land in question.

Following satisfaction of the conditions in s60(4), s60(5) provides that the police officer issuing a s60(1) direction must consult with every local authority in the area of the land with the caravan(s) on it, to establish whether there is an alternative suitable pitch on a relevant site in the local authority's area. Section 60(6) provides a series of definitions of terms used specifically in this section.

Offences

ASBA s61 inserts CJPOA s62B. A person commits an offence if s/he fails to comply with a direction under CJPOA s62A to leave the land as soon as is reasonably practicable, or if, within three months of the direction, s/he returns to any land in the relevant local authority's area as a trespasser with the intention of living on the land. A person found guilty of this offence is liable to up to six months' imprisonment, a fine not more than level 4 or both.

CJPOA s62B(4) provides a uniformed constable with a power of arrest without a warrant of a person that s/he reasonably suspects is committing this offence.

ASBA s62B provides a defence to the offence if the accused person was not a trespasser, or had a reasonable excuse for either failing to leave or returning to the land, or was under 18 and living with his/her parents or guardian when the direction was given.

Failure to comply with direction: seizure

ASBA s62 inserts CJPOA s62C. This section provides a power for any constable, whether in uniform or not, to seize and remove vehicles, if s/he reasonably suspects that the person who owns or controls them has committed an offence under CJPOA s63B, and the offence relates to the particular vehicle.

CONCLUSIONS

Although the Local Government Association has welcomed these changes in relation to Gypsies and Travellers, the main questions raised by the ASBA's provisions concern whether these groups are being excessively criminalised for their way of life by the creation of new offences. Although the ASBA introduces the consideration of Travellers' and Gypsies' dispersal to alternative sites by the police, the problem of the availability of such local authority sites remains. The government has promised more investment in such sites. However, it is likely that making the necessary funding available will remain a low priority both nationally and locally. In order to avoid excessive and repeated confrontation, and the potential expansion of anti-social behaviour, this issue may be fertile ground for political lobbying of both central and local government.

The key impact of these provisions on Gypsies and Travellers is to impose an onerous deterrent from camping anywhere without a landowner's permission. The risks for Gypsies and Travellers are heavy fines and/or imprisonment, seizure of their property and the splitting up of their families.

Although only the rather restricted remedy of judicial review of the exercise of the police powers is available, the operation of the Human Rights Act (HRA) 1998 will import the concept of proportionality into the exercise of discretion by the police. This may open up a ground of challenge of police officers' decisions in judicial review under articles 8, 10, 14 and article 1 of Protocol 1 of the convention. Thus, the use and exercise of these police powers may disproportionately interfere with the right to privacy, freedom of expression and enjoyment and ownership of property in a discriminatory manner.

This may mean that various police forces and local authorities (particularly under their joint crime prevention strategies) are required to develop clear policies and guidance to deal with these issues. A failure to develop such policies may lead to legal challenges if the police act to exercise the bare legislation. Also, this may lead to the development of alternative, and less confrontational, local strategies (see below). The fact that the ASBA, as raised in parliamentary debates, appears to take a different approach to rehousing evicted Travellers than other householders, combined with the lack of homelessness strategies, may provide fertile ground for novel challenges under the 'wild card' of article 14 of the convention.[12]

Although the policy considerations behind the ASBA's reforms of public order legislation concerning trespass and public gatherings may have considerable merit, there are concerns about the enforcement of these new provisions. The concerns are about the use and targets of these provisions by the police. In particular, the enforcement of these powers against groups of people in public places and those engaging in peaceful protest. As with the provisions concerning Gypsies and Travellers, the exercise of these powers may be vulnerable to judicial review challenges under the HRA combined with the use of the doctrine of proportionality as described above. Moreover, these provisions may backfire if used in certain communities where it is vital that anti-social activity is dealt with effectively, for example, the dispersal of groups or gatherings of ethnic minorities in communities with high rates of crime and anti-social behaviour. If this is the case, the ASBA could result in greater distrust of the police and lessen vital local co-operation with them. If this happens, the ASBA will be self-defeating as these vulnerable communities could be exposed to greater levels of anti-social behaviour than before. Similarly, these provisions may lead to an inappropriate or disproportionate erosion of traditional liberties, and may be open to abuse by authorities. If this happens, there is a risk that violent disorder may ensue.

On the other hand, the police may be reluctant to use these new powers, especially where other strategies that they have developed might prove more effective in dealing with the issues confronted by this part of the ASBA.[13] If this is the case, practitioners ought to be aware of these alternative strategies, for example, efforts by the police and local communities to engage with Traveller communities rather than confront them. A failure by the police or local authorities to develop such alternative strategies may also provide a means for legal challenge in relation to the reasonableness requirements in the exercise of these new powers. Also, it may provide an opportunity for legal practitioners, who are familiar with working with Gypsies and Travellers, to think outside the traditional 'legal box' on these issues. They could engage with the police and local authorities and encourage effective policies to deal with these issues without the police having to resort to the exercise of their powers under the ASBA. This might also lead to the development of forums, other than the court, for dealing with resolution of such disputes.

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1 *Scrutiny of bills and draft bills: further progess report. Fifteenth report of session 2002–03*, TSO, £9 and available at: www.parliament.uk.
2 *Hansard* HL debates col 1113, 18 July 2003.
3 Available at: www.homeoffice.gov.uk/docs2/asb_Respect_and_Responsibility.pdf.
4 However, see Trade Union and Labour Relations (Consolidation) Act 1992 s220.
5 *Hansard* HL Debates col 1489, 7 July 1994.
6 *Hansard* HC Debates col 29, 11 January 1994.
7 *Hansard* HL Debates col 1489, 7 July 1994. In defending this position, Earl Ferrers said that they were considering assemblies that may attract tens of thousands of people.
8 *Hansard* HL Debates cols 581–587, 3 November 2003.
9 *Hansard* HC Debates cols 87 and 131, 11 January 1994.
10 Martin Wasik and Richard Taylor, *Blackstone's guide to the Criminal Justice and Public Order Act 1994*, 1995, p82.
11 *Hansard* HC Debates col 296, 13 April 1994.
12 See Helen Carr, 'Discrimination, rented housing and the law', NLJ 26 March 2004.
13 See 'Praise for Elmbridge work with Traveller community', Home Office press release, 9 January 2004, available at: www.homeoffice.gov.uk. See also *Gypsy Travellers: a policing strategy, 'Why don't you just move them on?'*, Inspector Ian Taggart, Grampian police, available at: www.homeoffice.gov.uk/docs/gypsytravellers.pdf.

DISCRIMINATION

Discrimination law update

The aim of this six-monthly update is to highlight proposed legislative changes and key case-law developments and to offer some practical guidance to advisers and practitioners on the implications of any such changes to everyday practice. **Catherine Rayner** also gives practical guidance on how judgments may impact on casework and representation. Comments from readers are welcomed and advisers are encouraged to submit details of cases for inclusion.

POLICY AND LEGISLATION

Gender Recognition Act 2004

In *Goodwin v UK* [2002] ECtHR 28957/95 and *I v UK* [2002] ECtHR 25680/94, 11 July 2002, the European Court of Human Rights found the UK to have breached the rights of two transsexual people under article 8 (right to respect for private life) and article 12 (right to marry) of the European Convention on Human Rights ('the convention'). Following these decisions, the Gender Recognition Act (GRA) 2004 received royal assent, on 1 July 2004. The GRA applies to the UK.[1]

The GRA provides for the establishment of Gender Recognition Panels, which will deal with applications from transgender and transsexual people for legal recognition of their acquired gender. Successful applicants will be issued with gender recognition certificates and will have the right, from the date of recognition, to marry in their acquired gender and be given birth certificates that recognise the acquired gender. Transsexual and transgender people will be able to obtain benefits and a state pension just like anyone else of that gender.

Proposals for a single equality body

The government white paper, *Fairness for all: a new Commission for Equality and Human Rights*, setting out proposals for a single equality body to replace the existing Commission for Racial Equality (CRE), Equal Opportunities Commission (EOC) and Disability Rights Commission (DRC), was published on 12 May 2004.[2] The body, which will not be fully operational before the end of 2006, will be called the Commission for Equality and Human Rights (CEHR) and will eventually take over the functions of all three existing bodies, as well as taking on responsibility for new areas of equality including religion and sexual orientation. The CEHR will have responsibility for encouraging awareness of good practice in equality and diversity. It will work for the elimination of unlawful discrimination and promoting understanding.

However, the CEHR will not be given powers to take class actions for individuals, or to clarify points of law. In the author's view, this is a major omission in a highly complex and fast developing field. The government's support for a single equality commission contrasts with its consistent failure to heed calls for a Single Equality Act to simplify and ensure a level of consistency in this complex area. See also July 2004 *Legal Action* 9.

Race equality in employment code

In May 2004, the CRE published a new draft *Statutory code of practice on racial equality in employment*. It replaces the existing one that was drafted in 1984. The new code takes account of recent changes in the law, including the Race Relations (Amendment) Act 2000 and the Race Relations Act (RRA) 1976 (Amendment) Regulations 2003, which incorporated the EU Race Discrimination Directive 2000/43/EC into UK law. The code is far longer than its predecessor, and is filled with practical examples and guidance on various matters from what constitutes harassment to how to take positive action in the workplace. The consultation ends on 6 August 2004.[3]

Employment equality regulations guidance

The Advisory, Conciliation and Arbitration Service (ACAS) has published *A guide for employers and employees – sexual orientation and the workplace* and *A guide for employers and employees – religion or belief in the workplace* on the employment equality regulations (Employment Equality (Sexual Orientation) Regulations (EE(SO) Regs) 2003 SI No 1661 and Employment Equality (Religion or Belief) Regulations 2003 SI No 1660).[4]

CASE-LAW

Sexual orientation

In **R (Amicus – Msf section) and others v Secretary of State for Trade and Industry and others** [2004] EWHC 860 (Admin), IRLR 430, Richards J rejected the trade union challenge to parts of the EE(SO) Regs. The trade unions sought judicial review of certain regulations which they argued were incompatible with the EU Employment Directive 2000/78/EC and the convention.

The first part of the challenge concerned regulation 7(2), which provides an exception to discrimination where a person's sexual orientation is a genuine and determining occupational requirement. An employer does not have to take the word of the prospective employee regarding their sexual orientation, however, but can form its own view, and will be entitled to discriminate on this basis as long as its view is reasonable. There are real concerns that this move away from self-definition of sexual orientation will lead to the use of negative stereotypes. However, Richards J is of the view that the requirement of reasonableness provides an adequate safeguard to what he considers to be a sensible provision. It would not always be appropriate, he said, for an employer to have to accept a person's statement as to his/her own orientation at face value.

One of the most controversial regulations is 7(3), which allows discrimination where employment is for the purposes of an organised religion. What constitutes an organised religion is not defined in the regulations, and there are concerns that some employers could argue that bookshops or schools are within the exception, allowing them to refuse to employ, or to dismiss, gay or bisexual people. The trade union challenged the basis of this exception.

While Richards J was not prepared to uphold the challenge, which was that the regulation was wholly wrong, he did determine that a very narrow interpretation should be given to the words, ruling that there is a clear distinction to be made between employment for the purposes of an organised religion, to which the exception will apply, and employment for a religious organisation itself, which will not fall within the exception. In practice this will mean that employment in a religious school, or a bookshop selling religious books, will not be employment for the purposes of a religious organisation, and thus employees in such organisations will be protected from discrimination because of their sexual orientation. In contrast, those employed in a pastoral role may not be protected.

However, advisers should also bear in mind that the exception will only apply where all the conditions in the regulations are met. This means that the criterion of a specified sexual orientation must be applied either to comply with a doctrine of religion or 'because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.

Both criteria were examined by the High Court. When looking at the doctrines of the religion, Richards J again ruled that this must be narrowly interpreted, the regulations requiring an objective assessment of what the doctrines are in fact, not a subjective view of the employer.

Furthermore, when looking at the second alternative, ' … careful examination of the precise nature of the employment' will be required. Richards J considered this would also require an objective, and not a subjective, test.

The third part of the challenge

was to the exceptions that exclude discrimination in respect of any benefit based on marital status from the regulations. The practical effect of the regulations is that same-sex partners of employees are excluded from entitlement to benefits such as travel concessions, or succession to pensions, which married partners of employees enjoy. Richards J upheld the legality of the regulations. While the effect of this part of the decision will be cushioned by the introduction of the Civil Partnership Bill, which provides rights for same-sex couples to register their relationship, and gain benefits such as exemption for inheritance tax and the right to access a partner's pension, at the point of writing the bill has been subject to a wrecking amendment in the House of Lords, leading to further delays in the implementation of basic equality.

Comment: While the decision is disappointing in many respects, it does provide some useful guidance on interpretation of the regulations to Employment Tribunals (ETs) which will be of assistance to advisers. In addition, it is worth noting that the court placed emphasis on the parliamentary debates on the regulations when considering the purpose of the regulations, and the exceptions in particular. Advisers may consider taking a lead from this, referring ETs to those same debates.

Disability discrimination

Reasonable adjustments

The [Disability Discrimination Act (DDA)] 1995 ... does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question for us is when that obligation arises and how far it goes.

So said Baroness Hale, giving judgment in **Archibald v Fife Council** [2004] UKHL 32, in which the House of Lords overruled the Scottish Court of Session (see May 2004 *Legal Action* 31). The Lords ruled that the duty to make reasonable adjustments can include transferring an employee to another post at a higher grade or level of pay, without a competitive interview, if that would remove the disadvantage the disabled person would otherwise face.

Under DDA s6(1), if the arrangements for work or the physical features of the workplace place a disabled person at a substantial disadvantage, an employer has a duty 'to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect'.

In this case, the applicant was employed as a road sweeper. As a result of medical treatment, she became unable to walk and could no longer do her job. However, her disability did not mean that she would not be able to work at all. She sought alternative work within the council. The council considered transferring her to other jobs at lower grades or salaries, but where available jobs existed at a higher grade she was obliged to go through a competitive interview process. She was unsuccessful. Ms Archibald argued that it would have been a reasonable adjustment to transfer her to another post without competitive interview. The council disagreed.

The House of Lords gave careful consideration to the purpose of the legislation. It pointed out that because Ms Archibald became disabled during the course of her employment, she risked being dismissed because of her disability. Other employees did not. If she were transferred to a job that did not require her to walk, that risk would disappear.

Lord Hope explained the duty which rested on the council under s6(1):

The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies.

... The result is that a disabled person can lawfully be transferred to a post which she is physically able to do without being at risk of dismissal due to her disability, provided the taking of this step is a reasonable thing for the employer to do in all the circumstances.

Provisions for transfer to an existing post are specifically mentioned in DDA s6(3)(c). Baroness Hale pointed out that the section refers to 'an existing vacancy'. It does not qualify this by any words such as 'at the same or a lower grade'.

Comment: The decision is a victory for common sense and a purposive approach to adjustments in disability cases. It gives clear and practical guidance to advisers considering what employers must do to satisfy the statutory duty to adjust.

Advisers should ensure that full examination of all the possibilities for adjustments are canvassed at an early stage. Consideration should not only be given to the physical environment, but to all aspects of the work itself, and the abilities of the disabled person. Employers will be expected to have taken proactive and positive steps to ensure that disadvantages faced only by the disabled person are removed, so far as it is reasonable and possible.

Justification

The DDA provides that both treatment which is direct discrimination (s5(1)), and discrimination by a failure to make a reasonable adjustment (s5(2)) can be justified by an employer 'if, but only if, the reason for [the treatment] is both material to the circumstances of the particular case and substantial' (ss5(3) and 5(4)).

In the context of direct discrimination, the Court of Appeal, in **Jones v Post Office** [2001] EWCA Civ 558, IRLR 384, considered that the question of what was material and what was substantial was for the employer to decide, the tribunal's only power being to decide whether the decision made by the employer fell within the range of reasonable responses to the known facts. In this case the court did not consider justification in the context of reasonable adjustments. However, the Court of Appeal in **Collins v Royal National Theatre Board Ltd** [2004] EWCA Civ 144, IRLR 395, has now done so.

The National Theatre (NT) employed Mr Collins as a carpenter's labourer. In February 2000 he lost part of his right ring finger when using a powered bench saw. While his hand healed, it remained painful, and left him clumsy and far slower than previously.

The NT set up a series of controlled tasks to assess Mr Collins's capability, with particular regard to safe working. These led to what were found by the ET to be 'genuine and appropriate concerns' that Mr Collins could no longer work efficiently or safely. Medical advisers suggested that surgery had a strong chance of improving his hand, but Mr Collins refused. Following a further meeting under the theatre's long-term sickness procedure, it was concluded that, without surgery, there was no job that he could return to, and Mr Collins was dismissed.

The ET found that the dismissal was unfair and discriminatory. The NT's focus had been on what Mr Collins could not do, and it 'could have done significantly more in the direction of seeing what adjustments could be made to accommodate' him and enable him to 'grow back into the job'. The Employment Appeal Tribunal (EAT) overturned the decision, finding that the ET was bound by the decision of the court in *Jones* (see above).

The difference between the two types of discrimination raises a

question as to whether the words of the two sections, although the same, should be given the same meaning. Where discrimination because of a failure to make a reasonable adjustment arises, the ET must consider whether there was an adjustment to be made and, if so, whether it would have been reasonable for an employer to make that adjustment. The ET must take into account a range of factors in considering the reasonableness of making any adjustment at all. An employer is obliged to address whether there is an adjustment, and whether it is reasonable. The court asked the question:

[*In the context of subsection (4)*] *can an employer resurrect as a justification for his non-compliance a ground for not accommodating his disabled employee which the tribunal have already rejected as unreasonable?* (Sedley LJ)

The court says no. Because the DDA s6 test of reasonableness is an objective one, the ET has already considered the employer's failure to make the adjustment, and found that it is objectively unreasonable, before considering the question of justification. Therefore the court decided that this could not be correct and that the only workable construction of DDA s5(4), is that:

... it does not permit justification of a breach of s6 to be established by reference to factors properly relevant to the establishment of a duty under s6. In other words, the meaning of the closely similar words in the two adjacent subsections is materially different. (Sedley LJ)

Comment: While amended legislation that comes into force later this year will remove the defence of justification in failure to make reasonable adjustment cases, there may well be a longer term impact of this decision. *Collins* concerns only s5(4) and not s5(3) justification, and did not therefore impact directly on the decision in *Jones*. The question of the meaning and application of s5(4) was not itself considered in *Jones*, and there may be room for further deliberation of the test in direct discrimination in the light of *Collins*.

The decision of the EAT in **Paul v National Probation Service** [2004] IRLR 190, which also had to consider the duty of reasonable adjustment, is a useful contrasting approach. Here A suffered from chronic depression. A job offer was made, but subsequently withdrawn, following an enquiry from the occupational health adviser to A's GP. Occupational health considered that the employment might prove too stressful. A complained that the requirement of approval by occupational health placed him, as a disabled person, at a disadvantage. The EAT did not agree, pointing out that many disabled people's general health is not affected by their disability. It considered that rather than focusing on whether a requirement that all employment was subject to occupational health was an arrangement which should be adjusted, the tribunal should have looked to see what steps the employer might have taken to ensure that A was not placed at a disadvantage. This could have included obtaining a specialist report about his suitability for the post, or considering whether the post could be adjusted.

Maternity rights

During the initial period of maternity leave, a woman's contractual entitlements continue, with the exception of the right to receive her contractual pay. Instead, she is entitled to maternity pay, which in the absence of contractual maternity pay, will be statutory maternity pay (SMP). The calculation of SMP is based, for the first six weeks, on a woman's basic weekly pay during a certain week before her leave starts. If the woman is awarded a pay rise, which is not backdated to the week taken for the purpose of the calculation, she will not gain the benefit of that pay rise until after her return from maternity leave.

This discrepancy is clear discrimination, said the European Court of Justice (ECJ) in **Alabaster v Woolwich plc and Secretary of State for Social Security** [2004] IRLR 486. A woman must gain the benefit of any pay rise that takes effect before or during the course of her salary-determined maternity pay period, during that period. This is an important clarification and one on which women can rely immediately. However, amendments to the Statutory Maternity Pay (General) Regulations 1986 SI No 1960 will be required.

Women absent on maternity leave have special protection, which includes the right to continue to benefit from opportunities that may arise in the workplace. In **Visa International Service Association v Paul** [2004] IRLR 42, the employer failed to inform Ms Paul, who was absent on maternity leave, about a vacancy which she might have wanted to apply for. While Ms Paul did not apparently have the qualifications that would have led to her being shortlisted, she was entitled to be told about the vacancy. Her resignation on the basis that this failure was a fundamental breach of contract which she could rely on. Her constructive dismissal was upheld by the EAT. Advisers will find this a useful decision to remind employers that women on maternity leave are still employees with entitlements, and in respect of whom employers have continuing obligations.

A second ECJ decision gives useful guidance on the relationship between statutory holiday entitlement and maternity leave. In **Merino Gómez v Continental Industrias del Caucho** [2004] IRLR 407, a Spanish case, the ECJ points out that the purposes of annual leave under the Working Time Directive (Council directive 93/104/EC) and maternity leave are different, and that a woman cannot be obliged to take her annual leave during the course of maternity leave. This is the case even if the timing of annual leave is fixed by a collective agreement, which falls during the period of a woman's maternity leave. She must be given the opportunity to take her leave at another time.

Comment: This ruling will be of particular interest to women in the teaching profession and some manufacturing industries, where annual leave is fixed. Women must now be able to take leave outside the maternity leave period, either before the start, or at the end, of their leave.

Damages for discrimination

Discrimination causes enormous distress to victims, often affecting their self-confidence and ability to work. It can also lead to depression and profound and long-term damage to health. While awards for injury to feeling can reflect this damage to some extent, serious psychiatric illness may merit a far higher award than those currently the norm following the Court of Appeal's ruling in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102.

Tribunals have the power to award damages in respect of psychiatric illness as part of a personal injury award but the question is, when? In personal injury cases, the test of liability is based on whether the injury is a reasonably foreseeable consequence of the actions. In contrast, in discrimination cases the question asked has been, is the discrimination the cause of the injury? If it is, the employer is liable for loss, so far as the tribunal considers it just and equitable. This approach has now been confirmed by the court in **Essa v Laing Ltd** [2004] EWCA Civ 02, IRLR 313, albeit in rather vague terms.

Mr Essa worked as a construction worker in Cardiff. He is Welsh, and of black Somalian origin. While working, the foreman abused and insulted him to other workers, causing him extreme distress. Mr Essa complained, but considered that his complaints were not taken seriously. Subsequently, Mr Essa was taunted by fellow workers. About a week after the initial insults, Mr Essa left work. He became ill from depression and did not

seek other work. He brought a claim of discrimination to the ET and was successful. He was awarded £5,000 injury to feelings, but only £519.76 loss of earnings. The ET declined to make any further award, on the basis that the psychiatric illness was not foreseeable and the employer could not be held liable for it. The EAT disagreed, as did the majority of the court. The matter has been remitted to the tribunal.

The majority of the court, Pill LJ and Clarke LJ, ruled that an applicant should be compensated for loss arising naturally and directly from the wrong done. The good sense of the ET could be relied on to establish whether, in each case, there is a causal link. However, Pill LJ also considered that different types of discrimination might require different considerations. However, Rix LJ disagreed. He stated that foreseeability and remoteness are the proper tests to apply in personal injury cases, and that nothing in the discrimination statutes suggested different considerations should apply to them.

Comment: For advisers, there are a number of key points to note. First, in any case of harassment or abuse where psychiatric illness is a factor, this case is clear authority for causation as the only correct test. Second, the ET will have to make findings of fact, so good medical evidence indicating the reason for the illness will be of central importance. Third, advisers should be aware that if the illness is the result of discrimination that arises from a cause other than harassment, such as a failure to appoint, for example, respondents may seek to distinguish *Essa* and argue that foreseeability is still the correct test.

In a second case dealing with damages for discrimination, the Court of Appeal has considered the impact of an employer's treatment of an alleged discriminator on an award of aggravated damage.

In **British Telecommunications plc v Reid** [2004] IRLR 327, Mr Reid complained that he had been racially abused. The investigation into his complaint took 14 months to resolve. During this time, the respondent promoted his harasser. The ET found that the racial abuse had occurred. It took the view that the promotion of the harasser before the resolution of the complaint was an aggravating factor, which it was entitled to take into account when deciding the award of injury to feelings. It awarded an additional £2,000. The court upheld this award and approved the ET's approach. The employer's behaviour had been high-handed, the court said.

Comment: Advisers should use the questionnaire to consider whether there has been a promotion, a bonus paid or another advantage given that may be considered an aggravating factor.

Sex discrimination

The question of dress codes for men and women continues to provide food for thought for discrimination lawyers and the courts. In **Department for Work and Pensions v Thompson** [2004] IRLR 348, Mr Thompson, who did not have direct contact with the public, objected to a dress code that required smart dress for women, but specified that men should wear a tie. He claimed that this was sex discrimination. The EAT did not agree. It made a broad comparison between the treatment of men and women, and found that there was a similar requirement for smart dress. The requirement for a tie to be worn by men was simply a reflection of the standard of acceptable dress for men.

Comment: This is an odd decision, if a strict comparator approach is taken, since it is clear that the policy of smart dress was applied differently to Mr Thompson and any woman. Women have a choice of what is smart, and men do not. A woman wearing a round necked T-shirt under a dark trouser suit would presumably be considered to be smartly dressed, whereas a man would not. However, for advisers, the message remains that dress codes specifying particular items for one gender or other are acceptable to the appeal courts, if not to employees.

Race discrimination

Discrimination occurs when a person is treated less favourably on racial grounds, than another person in the same, or not materially different, circumstances. The comparison is at the heart of race, sex, religious and sexual orientation discrimination law and the choice of the wrong comparator can be fatal to a claim. In **Carter v Ahsan** (23 April 2004) UKEAT/0907/03/(2)/DM, the EAT considered how to deal with actual comparators, and whether racial grounds can include the racial factors external to the applicant.

Mr Ahsan brought a claim of race discrimination against Mr Carter and other Labour Party officials when he was not selected to a short list for the prospective parliamentary candidate for the Birmingham ward that he had represented as a councillor. Mr Ahsan is Pakistani and Muslim, and compared himself with a white man, Ian Jamieson, who was selected for the shortlist. He succeeded before the ET and the respondents appealed. They claimed that the ET had used the wrong comparator, that race was not a factor and that the standards applied by the ET to the selection procedure were those of an employer and wrong in law in this context. The EAT upheld the ET's finding of discrimination and dismissed the appeal.

The EAT had to look in some detail at the history of this situation. It concluded that at the time of the selection, there were three factors, the Pakistani Muslim factors, which applied to Mr Ahsan, but not to others. These factors all arose from his work as a councillor, in which he had become specifically associated with the Pakistani Muslim community.

Mr Ahsan represented the Sparkhill ward. The Sparkhill branch of the Labour Party had been suspended, with others, when the national press ran a story about queue jumping by tenants over housing regeneration grants. Mr Ahsan had been involved with supporting and assisting constituents to make claims, and encouraging them to ignore measures put in place by the council to manage the flow of claims. Nothing that he did was unlawful, but it was embarrassing and irritating for the local and national party. However, when suspension of other local branches was lifted, the suspension on Sparkhill was not. The ET found that there was a close correlation between those branches that remained suspended, and the areas where there was a significant Pakistani population.

The practical result was that selection for the parliamentary candidates in the suspended wards was carried out by a panel drawn from the West Midlands executive committee. Mr Ahsan applied and was interviewed but did not make the final short list of eight people. However, three other Pakistani Muslims were shortlisted. The ET examined the procedure used and found that there were no notes kept, that the Labour party had been evasive in response to the questionnaire, which it took 27 months to respond to, and that the people conducting the shortlisting were unclear what the criteria were, and what the scores for various factors were.

The EAT considered that the comparator used and relied on was correct. The EAT set out four stages that an ET must go through when considering an actual comparator:

- It must assess what the relevant circumstances are in the particular case.
- It must identify the specific person, and consider whether the relevant circumstances also apply to him/her.
- It must ask whether A had been treated less favourably than the comparator.
- It must ask why any less favourable treatment has occurred.

Furthermore, the ET must ensure that racial factors are

factored out of any comparison. Here, it was clear that Mr Ahsan had been damned because of his association with a particular community, which was a racial consideration and should not be part of the material circumstances.

The EAT also gave short shrift to the suggestion that, because some Asians had been selected, there was no discrimination. The question for the ET was not whether there were some Asian people who were not discriminated against, but whether this Asian man had been.

Finally, the EAT reiterated the comments of Browne-Wilkinson J in *Showboat Entertainment Centre Limited v Owens* [1984] ICR 65 EAT, that:

... Section 1(1)(a) covers all cases of discrimination on racial grounds whether the racial characteristics in question are those of the person treated less favourably or some other person. The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations.

The EAT found that it was entirely appropriate for the three Pakistani Muslim factors to be considered as racial considerations.

It would be strange if our law did not consider as a case of selection on 'racial grounds' or for 'reason[s] ... based on race' a situation in which the selector chose one white person in preference to another white person merely because that other unsuccessful white person had association with members of a different racial group. (Silber J)

Ealing LBC v Rihal [2004] EWCA Civ 623, unreported, raises some interesting points about how race discrimination occurring over a period of time should be handled by the courts. Mr Rihal works as a surveyor for Ealing. Over a number of years, he was passed over for promotion or acting up, while other white colleagues were given opportunities to enhance their skills. When the department was reorganised, Mr Rihal fared badly, partly because he had never been given an opportunity to develop and, as the ET put it, 'to shine'. His claim that his treatment across several years and by various managers was racially motivated was upheld by the ET, the EAT and the Court of Appeal.

The court made a number of useful and practical points that arise in many claims for institutional-style discrimination:

- It noted that an employer will continue to be responsible for a racially discriminatory arrangement even if the manager changes. Unless an employer claims to have taken all necessary steps to prevent discrimination, it remains liable. In this case the court noted that the employer, and not the individual, had been sued and that it had not relied on a RRA s32(3)) defence.
- The court accepted that discriminatory conduct at an early stage in the period considered could, and did in this case, continue to have an effect right up to, and during, an apparently neutral competitive interview. Events could not be treated in isolation from one another.
- The court placed great emphasis on the statistics available in this case. The ET had found that a glass ceiling existed within the housing department and this had not been challenged. Sedley LJ noted with concern the division between black and minority ethnic staff and white staff, who made up the management team, with only one exception. He said:

... this in a borough 40 per cent of whose population is from ethnic minorities, and in a local authority whose other departmental senior management teams typically contain about 25 per cent from ethnic minorities. These figures in themselves rightly put the tribunal on inquiry, because they suggested a clear possibility that there was a culture of white elitism in the upper echelon of the housing department. Such a culture, as the tribunal will have been well aware, can exercise a potent influence on individual decision-makers, of which they themselves may be aware faintly or not at all.

Comment: The reality of race discrimination for many employees is of a series of failures to be promoted or selected over a number of years. The only way to address the overall effect of such discrimination is to look at the whole picture across the relevant time frame. Where the ethnic breakdown of staffing within an organisation is as stark as in this case, advisers will want to place great emphasis on it, and will look to the employer respondent for non-discriminatory explanations.

The burden of proof

The burden of proof in all discrimination cases rests with the applicant. However, if the applicant is able to prove facts based on which an ET could make findings of discrimination unless the respondent adequately explains them, the respondent then has the burden of proving that the treatment is for a non-discriminatory reason. In the absence of a satisfactory explanation from the respondent, the tribunal must make a finding of discrimination (see *Barton v Investec* [2003] IRLR 332 and RRA s54A, for example).

The practical question for advisers is what sort of findings of fact can amount to a prima facie case, which causes the burden of proof to shift to the respondent? How far will unreasonable treatment by a respondent be of use in establishing a prima facie case?

Advisers will be aware that, as a matter of law, unreasonable treatment without more will not amount to discrimination. However, it is also accepted that unreasonable treatment will require an explanation from an employer and, if there is no explanation, racial bias may be inferred (see *The Law Society v Bahl* [2003] IRLR 640, February 2004 *Legal Action* 28)

In **IGEN Ltd v Wong** (2004) UKEAT/0944/03/RN, unreported, the EAT, led by McMullen HHJ, considered whether the ET had correctly found race discrimination, in the absence of a reasonable explanation by the respondents for what was, it found as fact, unreasonable treatment of the applicant. The EAT approved the approach of the ET and upheld the decision.

Ms Wong is African-Caribbean and was employed as an assistant careers adviser. The ET found that the respondents had subjected her to unfair and racially discriminatory disciplinary action. Action had been taken against her when she had refused to sign what she considered to be an unduly harsh performance review, and made a complaint of harassment and victimisation.

Instead of investigating her complaints, the ET found that three white managers employed by the respondent employer had threatened Ms Wong with disciplinary action. The three managers closed ranks against Ms Wong, and took an unduly confrontational approach towards her. Following a meeting, allegations of misconduct were made against Ms Wong, but when she attended a hearing with her union representative, there was a dispute about his presence. The hearing went ahead in Ms Wong's and her representative's absence. A finding was made against her. Ms Wong was told to withdraw her allegation of discrimination or face further disciplinary action. She appealed, but became ill with work-related stress, a situation that continued to the date of the hearing.

The ET found that no explanation was given either for the way that Ms Wong was treated by her employer, or for the lack of any proactive attempts to investigate her allegations of harassment and victimisation. Neither could the confrontational attitude towards Ms Wong's representative be explained.

While aware that findings of unreasonable treatment might be insufficient to support the finding of discrimination, the EAT points to clear findings of primary fact in this case, to support the finding that a prima facie case was made out. These included the findings of fact that:

- all three managers were white;
- Ms Wong is African-Caribbean and had complained about race discrimination;
- the white managers had closed ranks against her;
- the white managers resented Ms Wong's challenge to their authority; and
- pressure had been placed on Ms Wong to withdraw her complaint.

These findings, said the EAT, give a clear basis on which to decide that the treatment could be on the basis of Ms Wong's ethnic origin, and thus discriminatory. This is a prima facie case, and in the absence of an explanation, the ET was right to draw the conclusion that it did.

Comment: The important point for advisers is the focus on the racial difference of the managers and the applicant, and their attitude towards him/her. The ET should always be asked to make findings of fact on such matters, where the treatment is alleged to be unreasonable. Advisers should also consider whether existing procedures have been followed, and how other employees are treated.

Post-employment discrimination

It is now clear, both from case-law and from new regulations and amendments that a claim for discrimination can lie against a former employer, in respect of acts which occur after the employment relationship has terminated. A common example would be an employer who gave an adverse reference for a former employee, because s/he had made a complaint about discrimination. However, it is not uncommon for informal and even unsolicited adverse comments to be made by former employers, sometimes many months after employment has ceased.

The EAT, chaired by Burton J (president), has considered whether there are limits of time, or substance, on post-employment claims in **Metropolitan Police Service v Mr C Shoebridge** (2004) UKEAT/0234/03/TM, unreported.

Mr Shoebridge's employment with the Metropolitan Police had terminated 14 months before the treatment of which he complained. He complained that he had been providing services to Sky Television, and that his contract was suddenly terminated. He alleged that the reason for this termination was that the Metropolitan Police had made an unsolicited statement to his employers about him, because of his former complaints about sex discrimination and that their action was capable of being discriminatory. The employers contended that an employer's liability for post-employment discrimination was limited in time. An employee's expectation of protection could only extend to the first occasion on which a reference was requested.

The EAT considered the decision of the House of Lords in *Rhys-Harper v Relaxion Group Plc and other cases* [2000] ICR 867, and concluded that:

... there cannot be any limitation on the basis of discrimination or victimisation only being available in respect of a first reference for a first employer immediately after employment; but that ... a complaint of discriminatory or victimisatory conduct, in relation to the giving or refusal of a reference, would lie, at any rate prima facie, against employers for years to come, and not simply in respect of the immediate aftermath of an employment.

Furthermore, the EAT ruled that there is no difference between 'the act of an employer in spoiling a subsequent employment on an unsolicited basis and the act of an employer in giving or refusing a formal reference'. In both cases, it said, the employee had an expectation of non-discriminatory conduct by the ex employer.

Employment status for discrimination claims

The class of persons who can bring themselves within the term 'employment' for the purposes of discrimination legislation is broader than that in the Employment Rights Act 1996, and covers job applicants, apprentices, contract workers and former workers, among others. Employment means 'employment under a contract of service or of apprenticeship or a contract personally to do any work ...' (see RRA s78(1), Sex Discrimination Act 1975 s82(1) and DDA s68(1)). What this means in practice has been considered in the following three cases.

In **North Essex Health Authority v Dr David-John** [2004] ICR 112, the Court of Appeal found that the health services provided by a GP to the local authority arose from statute, and that the contract between them was one which required the GP to take full responsibility for the patients. There was no personal service provided by the GP to the respondent authority, and thus, when he resigned during the course of a dispute, he was not able to bring an action for either race discrimination or unfair dismissal.

In **Mingeley v Pennock & Ivory, t/a Amber Cars** [2004] IRLR 373, CA, the would-be applicant was a self-employed taxi driver. He had a contract with the taxi firm, but the main purpose of this was to ensure that he made payment to the respondents for access to, and use of, computer radio systems. His contract for the work was with the passengers themselves, and thus he too was outside the definition and could bring no discrimination claim.

In **South East Sheffield Citizens Advice Bureau v Grayson** [2004] IRLR 353, the EAT considered whether volunteers at a citizens advice bureau are covered by the DDA under this definition. Here, it was important for the applicant to argue that volunteers were within the definition, because otherwise the small employer exemption would mean that the ET had no jurisdiction to hear her claim. The EAT decided that, on the facts of this case, the volunteers were not within the definition of employee. Although there was a volunteer agreement imposing a certain weekly time commitment on individuals, the contract did not place an obligation on the CAB to provide work to the individual. Without this, there was no contract of service.

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1 Copies of the GRA, and notes, will be available over the next few months at: www.dca.gov.uk/constitution/transsex/index.htm.
2 *Fairness for all* is available at: www.dca.gov.uk/publications.htm.
3 Copies are available at: www.cre.gov.uk/employmentcode.
4 Available at: www.acas.org.uk.

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

Anti-social Behaviour Act 2003

The housing provisions in Anti-social Behaviour Act (ASBA) 2003 Part 2 were brought into force, in England, on 30 June 2004 (Anti-social Behaviour Act 2003 (Commencement No 3 and Savings) Order 2004 SI No 1502). These include the new-style anti-social behaviour injunctions, and provisions for demotion of secure and assured tenancies (see 'Just plain anti-social', LS Gaz, 27 May 2004, p21). The Order contains 'saving' provisions that disapply the changes from proceedings started before 30 June 2004.

In parallel, the 35th set of amendments to the CPR introduced, on 30 June 2004, a new Part 65 (Proceedings relating to anti-social behaviour and harassment). A related Practice Direction (PD65) sets out the procedure to be followed on applications for demoted tenancies and injunctions.

On 28 August 1997, the then Lord Chancellor issued a Practice Direction in relation to injunctions under Housing Act (HA) 1996 ss152-156. Because of the new Part 65, the 1997 PD is now obsolete. A press release from the Department for Constitutional Affairs (DCA) has confirmed that it has been revoked with effect from 30 June. The new court forms include:

- N6 Claim form for demotion of tenancy;
- N7D Notes for defendant to a demotion claim;
- N122 Particulars of claim for demotion order;
- N11D Defence form to a claim for a demotion order; and
- a modified N11B Defence form for demoted assured shorthold tenants facing possession after service of a HA 1988 s21 notice.

A landlord seeking a demotion order against a secure tenant must first serve a 'notice before proceedings for a demotion order' in the prescribed form, unless the court decides that it is just and equitable to dispense with that requirement (ASBA s14). The prescribed form is in the Secure Tenancies (Notices) (Amendment) (England) Regulations 2004 SI No 1627, which came into force on 19 July 2004. There is no prescribed form if notice of intention to seek a demotion order is being given to an assured tenant (HA 1988 s6A).

Where a demotion order has been obtained against a former secure tenant, and the landlord serves a notice of intention to initiate possession proceedings, the demoted tenant has the right to a review (HA 1996 s143F). The form of the review is set out in the Demoted Tenancies (Review of Decisions) (England) Regulations 2004 SI No 1679, which came into force on 30 July 2004. Demoted assured tenants do not have an equivalent right to a review.

A new 'Housing Court'

The DCA has invited the Law Commission to report on the law and procedure for landlord and tenant dispute resolution ('Housing disputes under the spotlight', DCA news release, 28 June 2004). The commission will review the case for a specialist housing court or tribunal for England and Wales. It is expected to report by May 2007. This work will complement the commission's recent proposals on the reform of substantive housing law. See also page 4 of this issue.

Accommodating asylum-seekers

Government amendments to the Asylum and Immigration (Treatment of Claimants, etc) Bill have been introduced to reverse the effect of *Al-Ameri v Kensington & Chelsea RLBC* and *Osmani v Harrow LBC* [2004] UKHL 4, March 2004 *Legal Action* 26. The bill's new clause 11 would modify the 'local connection' provisions in HA 1996 Part 7. It would also enable homeless refugees to be referred back to areas to which they were once dispersed as asylum-seekers (see 'Blunkett plans to force refugees to stay in North', *Housing Today*, 4 June 2004, p7). The bill was recommitted by the House of Lords on 16 June 2004.

The accommodation scheme for asylum-seekers presently run by the National Asylum Support Service (NASS) seems to be in some difficulty, with some 25,000 units of contracted housing unoccupied (see 'Asylum housing contract terminated', *Inside Housing*, 2 July 2004, p2). Meanwhile, asylum-seekers who would otherwise have been excluded by Nationality, Immigration and Asylum Act 2002 s55 are to be provided with NASS accommodation (see '14,000 asylum-seekers win housing reprieve', *Inside Housing*, 25 June 2004, p7). London authorities are still continuing to accommodate 4,847 families under the pre-NASS 'interim provisions' scheme (see 'Blunkett's bungled amnesty', *Housing Today*, 2 July 2004, p8).

Housing and the ombudsman service

The Local Government Ombudsman's annual report 2003/2004 was published in July 2004. It shows that 'housing' continues to dominate complaints against local authorities. Together with 'housing benefit', they represented 35 per cent of ombudsman complaints. The report contains a breakdown of housing complaints by subject matter and local authority, and indicates that the ombudsman service will deal with complaints against the new Arms Length Management Organisations (see p11). The report is available at: www.lgo.org.uk.

Succession rights

The Civil Partnerships Bill now contains a substantial Schedule 9 dedicated to eliminating discrimination between spouses and other civil partners in respect of housing rights and tenancies. It would amend the succession provisions for statutory, secure, assured, introductory and demoted tenancies (see also *Ghaidan v Godin-Mendoza* [2004] UKHL 30 below). The bill will be considered in the House of Commons in the autumn.

Homelessness

On 2 July 2004, the House of Commons Committee on the Office of the Deputy Prime Minister (ODPM), which scrutinises the ODPM's work, announced an inquiry into homelessness. It will consider, among other matters:

- the implementation of the Homelessness Act 2002;
- priority for the homeless in the allocation of social housing; and
- the success of policies to meet the needs of single people and intentionally homeless families. (The latter group has become a particular concern of Sally Keeble MP (see 'Invisible children', *Inside Housing*, 28 May 2004, p14)).

The committee has invited evidence by 17 September 2004. The contact details are at: www.parliament.uk.

Meanwhile, the ODPM's Homelessness and Housing Support Directorate has published its Policy briefing 8: *Homelessness statistics March 2004 and improving the quality of hostels and other forms of temporary accommodation*. The briefing analyses the homelessness figures for the quarter ending March 2004 (which show a nine per cent annual increase – to 97,290 – in the number of homeless households in temporary accommodation). It also foreshadows the revised statutory code of guidance on minimum standards for temporary accommodation for the homeless.

In Scotland, statutory provision for the homeless has been further enhanced by implementation of parts of its recent homelessness legislation (see Homelessness etc (Scotland) Act 2003 (Commencement No 2) Order 2004 SI No 288).

Housing appeals

The 35th tranche of amendments to the CPR has substantially amended the provisions of PD52 (Appeals) from 30 June 2004. Any housing practitioner bringing an appeal to a civil court (for example, under HA 1996 s204), or from one level of civil court to another, must urgently become familiar with the new provisions. On 29 June 2004, the Court of Appeal took the opportunity to warn the profession of the dire consequences of non-compliance (*Scribes West Ltd v Relsa Anstalt (No 1)* [2004] EWCA Civ 835).

Home loss payments

From 1 September 2004, the prescribed amount of a home loss payment for a displaced tenant who loses his/her home on, or after, that date increases to £3,400 (Home Loss Payments (Prescribed Amounts) (England) Regulations 2004 SI No 1631).

PUBLIC SECTOR

Secure tenancies

Exceptions to security

■ **Godsmark v Greenwich LBC**
[2004] EWHC 1286 (Ch), 10 June 2004

Mr Godsmark was employed, from 1990, at a local authority residential special school. His conditions of employment required him to live in accommodation (P1) on the school site for the better performance of his duties. In 1993 and 1995, he moved to other properties also owned by the local authority on the school site. In January 2003, a trust company took over the running of the school from the local authority. Mr Godsmark's employment was transferred to the trust. It went into occupation of the school, and Mr Godsmark's rent was paid to the trust. In April 2003, Mr Godsmark issued proceedings. He claimed that he had the right to buy the accommodation as a secure tenant. The local authority denied that he was a secure tenant. It relied on the exception in HA 1985 Sch 1, para 2.

HHJ Welchman held that:

- the requirement for Mr Godsmark to live in a property at the school was not a sham;
- there had been an implied variation of his employment to require him to move to the specified accommodation in 1993 and 1995; and
- although Mr Godsmark had ceased to be employed by the local authority after the transfer, his occupation of the accommodation was still referable to his employment so that he remained within the exception.

Hart J dismissed Mr Godsmark's appeal. When he moved, there was a consensual variation of the terms of his employment contract. The requirement that he live in the first accommodation plainly did not remain following his move. 'Slender as the evidence appears to have been', the judge was entitled to draw the inference that the variation was not to expunge completely the requirement to live in the first accommodation: the offer was to substitute the new property in the existing terms of employment. Furthermore, Mr Godsmark's occupation of the property at the date that he issued his proceedings was still referable to his former employment by the local authority. As a result, the exception in Sch 1, para 2 continued to apply. Mr Godsmark was not a secure tenant. He was not entitled to exercise the right to buy.

Possession claims

■ **Haringey LBC v Williams**
18 May 2004, Clerkenwell County Court[1]

Mr Williams was a secure tenant of Haringey. He had significant mental health difficulties, and had spent periods in a psychiatric hospital. Haringey decided that he had spent time living away from his home. It sought to recover overpaid housing benefit by deductions from current housing benefit payments. When Mr Williams fell into rent arrears, it sought possession.

At the possession hearing, it was clear that Mr Williams had no realistic prospect of resolving the housing benefit difficulties without assistance. It was argued, on his behalf, that the council was in breach of its duty to assess his community care needs under National Health Service and Community Care Act 1990.

District Judge Stary stayed the possession claim and directed that the stay should not be lifted until a statement was filed confirming that an assessment had been undertaken and setting out the steps taken to meet Mr Williams's needs.

Possession claims and Disability Discrimination Act 1995

■ **Manchester CC v Romano**
[2004] EWCA (Civ) 834, 29 June 2004

Possession orders were made against two secure tenants under HA 1985 Sch 2, para 2 (nuisance or annoyance). One order was suspended, but after further allegations of nuisance, a district judge refused an application to suspend a warrant. The tenant appealed relying on the Disability Discrimination Act (DDA) 1995. HHJ Armitage dismissed the appeal. He was satisfied, having regard to expert evidence, that the tenant's mental impairment (depression) did not have a substantial effect on her ability to carry out any day-to-day activities, and that she did not therefore have a disability for the purposes of DDA s1(1). The other order, also made by HHJ Armitage after finding that the defendant was not disabled and considering reasonableness, was an outright order. The tenants appealed.

The Court of Appeal, in a very thorough review of the legislation, stated that when a court considers the DDA in the context of possession proceedings, it must consider a number of matters:

- Whether the person who complains about disability discrimination is a 'disabled person' within the meaning of DDA ss1–3, Sch 1, the Disability Discrimination (Meaning of Disability) Regulations 1996 SI No 1455 and the *Guidance on matters to be taking into account in determining questions relating to the definition of disability*, which has been issued by the secretary of state.
- Whether or not there has been discrimination, ie, treating a disabled person less favourably for a reason which relates to his/her disability.
- Whether the landlord's treatment of the tenant is justified. It is only justified if, in the landlord's opinion, the treatment (namely, the decision to set in motion proceedings for possession) is necessary in order not to endanger the health or safety of any of the people living in neighbouring houses, and it is reasonable, in all the circumstances, for the landlord to hold that opinion. The landlord must prove that if it does not take this action, a person's health or safety would be endangered. It does not have to prove that that person's health or safety has actually been damaged.

The DDA does not explicitly provide a defence for disabled persons who wish to assert that the reason why their landlord brought possession proceedings related to disability. It is though open to such disabled persons to counterclaim for a declaration that they have been unlawfully discriminated against and/or to counterclaim for injunctive relief. Furthermore, if tenants can prove that the landlord's conduct amounts to unlawful discrimination, this is bound to be a relevant factor when the court is deciding whether it is reasonable to make a possession order.

The Court of Appeal stated that it is preferable, in cases involving a secure or an assured tenancy, for tenants to assert that it is unreasonable for the court to make a possession order, rather than to complicate the proceedings by adding a formalistic counterclaim for a declaration or an injunction. Landlords whose tenants hold secure or assured tenancies must consider the position carefully before they

decide to serve a notice seeking possession or to embark on possession proceedings against a tenant who is, or might be, mentally impaired. They should liaise closely with local social services authorities at an early stage.

The first appeal was dismissed because the neighbour's evidence that he was stressed and tired due to noise nuisance led properly to a conclusion that his health was endangered by his frequent loss of sleep. In any event, it was difficult to relate some of the nuisance (loud hammering during DIY work and loud music played by the tenant's sons) to the tenant's mental impairment. In the light of those conclusions, it was not necessary to decide whether the judge was wrong to conclude that the tenant was not a disabled person within the meaning of the DDA.

The second appeal was also dismissed. In view of a neighbour's evidence that she was at the end of her tether and felt that she could no longer cope with the defendant's and her family's behaviour, the judge was entitled to conclude that the council held the opinion that the continuation of eviction proceedings was justified in order not to endanger the neighbour's health. It was also reasonable, in all the circumstances, for the council to hold that opinion. The Court of Appeal called for parliament to review the legislation at an early date.

Injunctions against tenants

■ **Enfield LBC v Mack**

1 April 2004,

Willesden County Court[2]

Enfield obtained an injunction against Mr Mack with a HA 1996 s153 power of arrest. He was allegedly in breach of the injunction, and was arrested, on 20 January 2004, at 10.05 am. He was initially held in police custody. He was presented at court on 21 January. At 10.18 am, HHJ Krikler remanded him in custody pending committal proceedings. On 22 January, the court granted him conditional bail and, on the following day, he was released from prison.

At the subsequent committal hearing, HHJ Latham held that an application to extend a power of arrest can be made under s157(2) on a 'without notice' basis. The terms of s155(2)(a), however, were not satisfied by having the arrested person within the court building. 'Brought before the relevant judge' meant being in his/her physical presence and being dealt with by that judge. Consequently, Mr Mack had not been brought before the relevant judge within the 24-hour period beginning at the time of his arrest. Therefore, his subsequent remand in custody was unlawful. HHJ Latham, nevertheless, found that Mr Mack had breached the injunction. He imposed a sentence of one day's custody which Mr Mack had already served.

Ombudsman complaint

■ **Cambridge CC**

Complaint nos 02/B/13214 and 02/B/13215

Two council tenants complained that Cambridge unreasonably delayed dealing with neighbour nuisance, breaches of tenancy conditions, extremely anti-social behaviour (noise and abuse, dogs roaming and defecating and visitors urinating in common parts), harassment and drug dealing by a neighbouring tenant. They lived in 'intolerable conditions' for nearly two years. During that time, they experienced daily intimidation. One tenant suffered from ill health, and had to take time off work.

The local government ombudsman found that there was maladministration, including a failure to keep records of complaints or to visit affected tenants. He recommended that the council make ex gratia payments of £2,000 to both complainants, and review the way in which it responds to neighbour nuisance complaints in future.

PRIVATE SECTOR

Rent Act 1977

Succession by same-sex partner

■ **Ghaidan v Godin-Mendoza**

[2004] UKHL 30,

(2004) Times 24 June

Mr Mendoza and Mr Walwyn-Jones lived together in a same-sex relationship from 1972. There was overwhelming evidence that it was a loving and monogamous relationship. Mr Walwyn-Jones was granted a Rent Act tenancy in April 1983. Apart from the fact that the relationship was between two persons of the same sex, Mr Mendoza and Mr Walwyn-Jones were living together in the same way as spouses. They continued living together in the premises until Mr Walwyn-Jones's death. If the relationship between Mr Mendoza and Mr Walwyn-Jones had been a heterosexual one, he would have been eligible to succeed to the statutory tenancy under Rent Act 1977 Sch 1, para 2(2). It provides that 'for the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant'. At first instance, the judge found that there was no succession to a statutory tenant, although the conditions for succession to an assured tenancy were satisfied. He was not persuaded that the construction of para 2 given in *Fitzpatrick v Sterling HA* [2001] 1 AC 27, HL, which precluded a person in a same-sex relationship with a deceased tenant from succeeding to a statutory tenancy, had to be reconsidered in the light of the Human Rights Act 1998. Mr Mendoza appealed successfully to the Court of Appeal.

The House of Lords (Lord Millett dissenting) dismissed the landlord's further appeal. A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. There is no rational or fair ground for distinguishing one couple from the other. The difference in treatment flowing from the *Fitzpatrick* interpretation of para 2(2) infringed article 14 of the European Convention on Human Rights read in conjunction with article 8: the distinction on the ground of sexual orientation had no legitimate aim, and was made without good reason. The social policy underlying the 1988 extension of security of tenure to the survivor of couples living together as husband and wife was equally applicable to the survivor of homosexual couples living together in a close and stable relationship. Applying Human Rights Act 1998 s3, para 2 is to be read and given effect as though the survivor of such a homosexual couple is the surviving spouse of the original tenant. Reading para 2 in that way has the result that cohabiting heterosexual and homosexual couples are treated alike for the purpose of succession as a statutory tenant.

RIGHT TO BUY

■ **Hanoman v Southwark LBC**

22 June 2004

On 14 November 1999, Southwark received a right to buy application form signed by Mr Hanoman. On 17 January 2000, it wrote to him asking for further identification. He telephoned and asked for its housing officers to confirm his identity. He was told that an officer would revert to him. He heard nothing further. The council wrote to him giving a further seven days to provide the necessary documentation, otherwise it would withdraw the application. Mr Hanoman did not receive the letter, and so did not reply. The council treated the application as withdrawn and closed its file. Mr Hanoman applied for relief under HA 1985 Part V against the decision. That application was refused at first instance. He appealed.

Peter Smith J allowed the appeal. Under HA 1985 s124(2), the council was obliged to provide a decision on the application within four weeks of receiving it, ie, by 12 December 1999. It first communicated with Mr Hanoman on 17 January 2000. The council's failure to reach a decision was a breach of its statutory duty. There was no duty on Mr Hano-

man other than to await the council's response to his notice. The council had no power under the statutory provisions to treat an application as withdrawn because an applicant failed to provide information within a short period that it had unilaterally imposed. Mr Hanoman had not withdrawn his application. Where a council breached its statutory duty, it was unfair to penalise an applicant because s/he failed to remind it that s/he was expecting a decision in discharge of that duty. The council could not waive its statutory duties.

Ombudsman complaint

■ **Leeds CC**

Investigation 03/C/12234, 1 July 2004

A secure tenant submitted a right to buy application on 10 June 2002. The council took 22 weeks to admit her right (despite a statutory time limit of four weeks). The council then took 34 weeks to make an offer of purchase (despite a statutory time limit of eight weeks). Before the transaction could be completed, the tenant died. The local ombudsman found that the delays were maladministration that had caused injustice to the tenant and the members of her family who would have inherited her home. She recommended that the council allow the family to buy the home at its 2002 market value.

LONG LEASES

Forfeiture of leases

■ **Courtney Lodge Management Ltd v Blake**

(2004) Times 15 July, 30 June 2004

The claimant landlord leased a flat to Mr Blake. The lease contained a covenant on Mr Blake's part not to cause a nuisance to the landlord or any other residents in the block. Mr Blake granted an under lease for use of the flat as temporary accommodation. The under lessee granted a sub-under lease to a local housing authority, which granted a non-secure tenancy. Neither the under lease nor the sub-under lease contained covenants similar to those contained in the head lease preventing nuisance. From March 2003, there were complaints of nuisance caused by the tenants of the flat. On 2 September 2003, the landlord served a Law of Property Act 1925 s146 notice on Mr Blake. On 8 September 2003, Mr Blake instructed the under lessee to terminate the non-secure tenancy agreement with the tenants. As a result, a notice to quit was subsequently served. The claimant landlord issued proceedings, on 2 October 2003, seeking forfeiture and damages based on the disturbances by the tenants. In the county court, a judge found that Mr Blake had been in breach of the terms of the head lease since his inaction amounted to 'suffering' a nuisance to continue. The claimant was, therefore, entitled to forfeiture. Mr Blake appealed that decision.

The Court of Appeal allowed his appeal. A covenantee cannot suffer (ie, allow) what cannot be prevented. However, the evidence in this case showed that Mr Blake had power to influence an abatement of the nuisance. Furthermore, a lessee, bound by covenants contained within a head lease to prevent a nuisance, is not entitled to rely on his/her inability to prevent a sub-lessee from causing a nuisance where s/he failed to mirror the provisions of the head lease in the sub-lease. Accordingly, the judge's finding that Mr Blake had been in breach of the covenant could not be challenged. However, the order for forfeiture should be set aside. As the s146 notice had been served on 2 September, and Mr Blake had taken action to abate the nuisance on 8 September, he had not been allowed enough time to respond and remedy the breach. Four working days is not a reasonable period to respond to a s146 notice.

Collective enfranchisement

■ **Slamon v Planchon**

[2004] EWCA Civ 799, 25 June 2004

The Slamons were long lessees of two flats in a house. They sought to acquire the freehold of the house, which was owned by Ms Planchon, under the Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993. The house had been in Ms Planchon's family since 1980. For much of the time, she had, at most, only a beneficial interest on trust. By the date of the Slamons' notice under the LRHUDA, she was sole legal and beneficial owner of the house. She sought to resist collective enfranchisement of the house by relying on the occupation of a third flat by her mother over the year before the Slamons' notice, together with her own interest in the freehold of the house. The issue before the court was whether Ms Planchon had continuity of interest either under s10(1) as freeholder or under s10(4) as a person with an interest under a trust.

In the county court, a judge decided that as the LRHUDA took property away from an owner, it should be read in a way that favoured the landlord. Sections 10(1) and 10(4) should be read together. In s10(4), the words 'where the freehold is held on trust' mean 'was at any time held on trust'.

The Court of Appeal allowed the Slamons' appeal. The judge's approach did not reflect what the statute said or could fairly be made to say. Whatever interest is relied on has to be continuous. There is no indication that the interests can be mixed with each other to result in a continuous whole. There has to be continuity on the part of the freeholder or, if the freehold was held on trust, on the part of the person who had an interest under the trust. In the present case, there was continuity of neither kind.

HOMELESSNESS

Fresh applications

■ **Minhas v Wandsworth LBC**

[2004] EWCA Civ 856, 17 June 2004

In February 2003, the claimant rejected an offer of accommodation made under HA 1996 s193. The defendant council had treated its duty towards her as discharged. In June 2003, she unsuccessfully applied for a review out of time. In September 2003, she made a 'fresh application' (HA 1996 s193(9)) relying on medical evidence that the council had already seen and considered. The council declined to entertain the 'new application'. Sullivan J dismissed claims for judicial review both of that refusal and of the earlier decision not to extend time for a review (*R (Minhas) v Wandsworth LBC* [2004] EWHC 805 (Admin), June 2004 *Legal Action* 32). The claimant sought to make a second appeal (CRR 52.13).

Kennedy LJ refused the application on the papers, and Scott Baker LJ dismissed a renewed application describing it as 'wholly misconceived'. He said that where 'a fresh application is nothing more than a re-run on the same facts as a previous application that has been rejected, the council is entitled to refuse to entertain it' (para 3).

■ Jan Luba QC is a barrister at Two Garden Court Chambers, London EC4 and a recorder. Nic Madge is a circuit judge. They are grateful to the following colleagues for supplying transcripts or notes of judgments:

1 David Roberts, solicitor, Shelter.
2 B Hecht & Co, solicitors, London, and Michael Paget, barrister, London.

updater

LEGISLATION UPDATER

CRIME

Criminal Justice Act 2003 (Commencement No 4 and Saving Provisions) Order 2004 SI No 1629

This Order brings into force the provisions of the Criminal Justice Act 2003, listed in articles 2 and 3, on 3 July 2004 and 1 September 2004 respectively.

Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2004 SI No 1683

This Order brings into force the code of practice made under Criminal Justice Act (CJA) 2003 s25(1) in relation to conditional cautions.

CJA s22 permits an authorised person to give a conditional caution to a person aged 18 or over, if the conditions set out in CJA s23 are met. In force 3 July 2004.

HOUSING

Anti-social Behaviour Act 2003 (Commencement No 3 and Savings) Order 2004 SI No 1502

This Order brings into force, on 30 June 2004, in relation to England, Anti-social Behaviour Act (ASBA) 2003 Part 2 (housing) and s91 and the repeals in ASBA Sch 3 to related to Part 2.

In Part 2:

- Section 12 introduces a new duty on social landlords to prepare and publish policies on anti-social behaviour, and to make them available to the public;
- Section 13 replaces Housing Act (HA) 1996 ss152 and 153 with new provisions allowing local authorities, registered social landlords and housing action trusts (HAT) to apply for injunctions to prohibit anti-social behaviour which relates to, or affects, management of their stock;
- Sections 14 and 15 allow social landlords to apply for demotion orders in cases of anti-social behaviour. The demotion order ends the tenant's existing secure or assured tenancy and replaces it with a new form of demoted tenancy with less security of tenure;
- Section 16 amends the court's discretion when considering claims for possession of a residential house, let on an assured or secure tenancy, brought on the ground of anti-social behaviour, to ensure that sufficient weight is given to the effects of any anti-social behaviour;
- Section 17 ensures that all functions of the secretary of state arising from the amendments to the HAs mentioned are, so far as exercisable in relation to Wales, to be carried out by the National Assembly for Wales; and
- Schedule 1 concerns demoted tenancies where the landlord is a local housing authority or HAT.

ASBA s91 allows a local authority to request a power of arrest to be attached to any provision of an injunction obtained under Local Government Act 1972 s222, where the injunction is to prohibit anti-social behaviour.

This Order also brings into force, on 30 July 2004, in England and Wales, ASBA s90. This provides that a court remanding a young person aged 10 or 11 on bail may require a local authority to provide a report about where the person would be likely to be placed or maintained, if s/he was remanded to local authority accommodation.

Secure Tenancies (Notices) (Amendment) (England) Regulations 2004 SI No 1627

These regulations amend the Secure Tenancies (Notices) Regulations 1987 SI No 755, as they apply in England, to detail the form of notice which should be served on a secure tenant before a landlord begins proceedings for a demotion order under Housing Act (HA) 1985 s82A.

Anti-social Behaviour Act (ASBA) 2003 s14 amended HA 1985 Part 4 to allow a secure tenancy to be brought to an end and replaced with a less secure demoted tenancy by a county court demotion order.

HA 1985 s83, as amended by ASBA s14, provides that a court may not entertain proceedings for a demotion order unless either a notice in the prescribed form and containing certain specified information has been served on the secure tenant, or the court considers it just and equitable to dispense with such a notice. In force 19 July 2004.

Demoted Tenancies (Review of Decisions) (England) Regulations 2004 SI No 1679

Anti-social Behaviour Act (ASBA) 2003 s14 amended HA 1985 Part 4 to allow a secure tenancy of a local housing authority, a housing action trust or a registered social landlord to be brought to an end and replaced with a less secure demoted tenancy by a county court demotion order. ASBA Sch 1 inserted further provisions regarding demoted tenancies as a new HA 1996 Part 5 Chapter 1A.

If a landlord wishes to end a demoted tenancy, it must serve the tenant with a notice stating that it has decided to apply to the court for a possession order, setting out the reasons for that decision and informing the tenant of his/her right to request a review of the decision. These regulations make provision about the procedure to be followed in such a review. In force 30 July 2004.

HUMAN RIGHTS

Human Rights Act 1998 (Amendment) Order 2004 SI No 1574

This Order is made following ratification by the UK of the Thirteenth Protocol to the European Convention on Human Rights (the convention) on 10 October 2003. The Thirteenth Protocol abolishes the death penalty in all circumstances. It supersedes the Sixth Protocol to the convention, which abolished the death penalty in most circumstances, but permitted states to make provision in their law for the death penalty in respect of acts committed in time of war or imminent threat of war.

This Order amends the Human Rights Act (HRA) 1998 by substituting Thirteenth Protocol article 1 for Sixth Protocol articles 1 and 2 in HRA Sch 1 Part 3, which gives Sixth Protocol articles 1 and 2 the status of 'convention rights', protected by the HRA. Thirteenth Protocol article 1 is in identical terms to Sixth Protocol article 1, but omits the exception allowing the death penalty in time of war previously contained in Sixth Protocol article 2. In force 22 June 2004.

IMMIGRATION

Nationality, Immigration and Asylum Act 2002 (Commencement No 8) Order 2004 SI No 1707

This Order brought into force Nationality, Immigration and Asylum Act (NIAA) 2002 s1(3) and (4) on 6 July 2004, and NIAA s2 on 28 July 2004.

British Nationality (General) (Amendment) Regulations 2004 SI No 1726

These regulations amend the British Nationality (General) Regulations 2003, with effect from 28 July 2004, to make provision for deciding whether a person has sufficient knowledge of the English language for the purpose of an application for naturalisation as a British citizen under British Nationality Act 1981 s6.

POLICE

Police and Criminal Evidence Act (PACE) 1984 (Remote Reviews of Detention) (Specified Police Stations) (Revocation) Regulations 2004 SI No 1503

These regulations revoke the Police and Criminal Evidence Act (PACE) 1984 (Remote Reviews of Detention) (Specified Police Stations) Regulations 2003, with effect from 1 July 2004. Reviews of detention of persons arrested, but not charged, are required by PACE s40(1)(b). An officer with at least the rank of inspector must conduct the reviews. From 1 July 2004, such reviews cannot be conducted by way of video-conferencing facilities. Reviews of detention will be carried out either in person or by telephone.

The use of video-conferencing facilities was being piloted at Alton and Winchester (North Walls) police stations in Hampshire. The pilot has concluded and will now be evaluated.

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