LAG

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Cover photo: Taken at a mock jury trial highlighting environmental legislation initiated by Bradford Chamber and featuring law firm Schofield Sweeney. The photo used for the April 2003 cover should have been credited to Moviestore.

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editorial
One step forward, two steps back

It may be early days in the life of the Select Committee on the Lord Chancellor's Department (LCD) which was set up recently to examine the expenditure, policy and administration of the LCD; however, there can be little doubt that its creation is a step in the right direction. Proper parlimentary scrutiny of the role of the Lord Chancellor, and the work of his department – which has a budget in excess of £2.5 billion – is long overdue; LAG has been questioning the functions of the Lord Chancellor and his department for many years, including suggesting the formation of a new Department of Justice. In fact, in 1992, the Labour party and LAG were at one in calling for a 'Department of Legal Administration headed by a minister in the Commons who will be responsible for all the courts and tribunals in England and Wales.'

But there is a danger that the sop of the LCD select committee may entice those who have campaigned for reform in this area into a sense of security and complacency that the current situation does not justify. The formation of an effective mechanism to scrutinise the LCD's work, although welcome, must not obscure the fundamental and pragmatic issues that must be tackled, and which demand root and branch reform of the Lord Chancellor's role. For example, should an unelected lawyer head one of the largest government departments, thus also wielding political power as a cabinet minister? What reasonable and rational objections are there against the creation of a Judicial Appointments Commission? Would a Secretary of State for Justice who is answerable to the House of Commons not be more accountable than a Lord Chancellor within the current system?

A notable illustration of the conflict between the Lord Chancellor's multiple roles is that the latest attacks by David Blunkett, the Home Secretary, on judges' decisions in cases against the Home Office appear to have gone undefended by Lord Irvine, who as the current Lord Chancellor is the head of the judiciary. The executive and the judicial aspects of his post are clearly pulling in opposite directions. This must make it problematic for an influential member of the executive also to sit, albeit rarely of late, as a judge. The political aspects of the Lord Chancellor's office have also grown in recent years and include influence over major legislative and constitutional reforms. This increased influence has enforced and highlighted the need for formal judicial independence, especially as there is increased scope for judicial review of executive action and an evolving Human Rights Act (HRA). As far as judicial appointments are concerned, there is no other profession that could survive such a subjective, secretive and unaccountable recruitment system.

And, unfortunately, the press coverage that Lord Irvine has received lately has done his office few favours: a National Audit Office report admonishing his poor handling of a £300m computer scheme; the Council of Europe report attacking his dual role as a judge and politician; his initial acceptance of a £22,000 pay increase; and a Bar Council report concluding that he should be stripped of his powers to appoint High Court judges and Queen's Counsel.

It is disappointing that when Lord Irvine gave evidence to the select committee in early April, he dismissed the earlier testimony of Erik Jurgens, Rapporteur of the Council of Europe Parliamentary Assembly Legal Affairs and Human Rights Committee. Mr Jurgens had confirmed that a draft report from the council on the Lord Chancellor's constitutional position had concluded that the combined roles of cabinet minister, judge and speaker of the House of Lords breached the European Convention on Human Rights. Lord Irvine told the committee, 'we are a nation of pragmatists, not theorists, and we go quite frankly for what works ...'. When Lord Irvine's position and the function of his department are under such scrutiny, such comments beg some serious questions about how open he is to proposals for change. This apparently entrenched attitude is in contrast to his willingness to take on board major changes such as the HRA, a reshaping of courts' administration and, latterly, the idea of a unified tribunals service.

Although the LCD select committee has made a good start, it will be interesting to see how long it will take to reach an unavoidable conclusion: that the LCD's ability to carry out the huge tasks with which it is now charged is being hampered severely by lack of change to the 'top job'. The role of the Lord Chancellor has not been modified for over 800 years; it is LAG's view that this post requires significant and fundamental reform urgently and that nothing short of this will be enough.

news

Lord Chancellor defends his position to select committee

Lord Irvine, together with his permanent secretary, Sir Hayden Phillips, appeared for the first time before the newly appointed Lord Chancellor's Department (LCD) select committee to be questioned about the role of the Lord Chancellor and his department. During the hearing, Lord Irvine defended his constitutional role. He admitted that he would not 'prescribe' the office of the Lord Chancellor to emerging democracies. But for this country, he thought that it was important to look at what works – 'we have never been a nation of purists but of pragmatists'. On more than one occasion, he cited the support of the higher judiciary (while conceding that such support was not unanimous).

The committee questioned Lord Irvine closely about what are regarded by many as his conflicting roles, as head of the judiciary and a member of the cabinet. For example, how could a member of the executive sit as a judge? He answered that he would sit only in cases that did not 'engage the interest of the state directly'. Could the Lord Chancellor, as a cabinet member with collective responsibility, openly support the judiciary when it was under attack? Lord Irvine replied that he could and did. As if to prove his point, Lord Irvine went on to say that 'maturity requires that when you get court decisions you favour, you do not clap and when you get a court decision which is against you, you do not boo.'

Other issues raised by the committee dealt with subjects that are all too familiar to advisers and legal aid practitioners: Lord Irvine said that although his department was running out of cash by as much as 14 per cent this year, there are sound explanations for this shortfall and that the increases in spending are linked to the 'downstream consequences' of other LCD policies. He conceded that the Legal Services Commission has concerns about a number of immigration firms, and asked MPs to report individual cases to it. When questioned about whether there is a drift by solicitors away from legal aid work, he said that there has been some weakening of the supply base, but there is no crisis yet. The hearing ended with an announcement by the Lord Chancellor that he was intending to consult widely about the possibility of a judicial appointments commission, the continuation of the Queen's Counsel system and the reform of court dress.

A full transcript of the Lord Chancellor's evidence is available at: www.parliament.uk/parliamentary_committees/lcdcom.cfm.

New fast track immigration appeals scheme begins

Judith Farbey, a barrister at Tooks Court Chambers, writes: Asylum claimants from a number of countries are now subject to a new fast track scheme involving their detention at Harmondsworth Immigration Removal Centre, and accelerated procedures both for initial determination of their asylum claim and for appeal to the Immigration Appellate Authority.* Under the new procedure, which came into effect on 10 April 2002, the Home Office has to make a decision on the claim within three days of a claimant's arrival at Harmondsworth, and s/he then has two days to lodge an appeal to an adjudicator against a negative decision. The timetable for the exhaustion of appeal rights is tight: an appeal to an adjudicator as well as any appeal to the Immigration Appeal Tribunal must be completed within three weeks of a claimant's arrival at the removal centre. However, the Home Office should consider any reasoned request to take a case out of the fast track procedure, and the Rules provide some scope for an adjudicator to remove a case from it. Currently, asylum claims from Bangladesh, Bolivia, Botswana, China, Ghana, Ivory Coast, Kenya, Nigeria, Pakistan, South Africa, Sri Lanka and Turkey will be liable to be considered under the fast track procedure, but this list may expand.

Under a pilot scheme, solicitors selected by the Legal Services Commission (LSC) will act for fast track claimants on a duty basis. Claimants will retain the right to be represented by solicitors of their choice. It remains to be seen whether claimants subject to the fast track procedure will, in practical terms, have access to a solicitor and counsel of their choice. There was no consultation by the government about the new procedure, which ministers introduced at short notice, and appears to be the result of co-operation between the Home Office, Lord Chancellor's Department and LSC.

* Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003 SI No 801, available from TSO and at: www.legislation.hmso.gov.uk/stat.htm (see page 37 of this issue).

Liberty launches e-mail advice service

Human rights organisation Liberty has expanded its specialist support and advice service to lawyers with the introduction of a web-based form for e-mail queries. The initiative is the first specialist advice service, available in this form, to be backed by the Legal Services Commission (LSC). It allows clients to submit queries at their convenience, for example, outside the opening hours of the advice line.

In order to access the new service, lawyers and advisers can complete a 'human rights on-line query submission form'. All enquiries should be submitted using this form, as this will ensure that the information put forward is secure – the system encrypts it before transmission.

The service is funded by the LSC and is open to organisations that hold a civil or criminal contract, or have a Community Legal Service Specialist Help quality mark, and also to General Help with Casework organisations in the West Midlands.

Liberty's e-mail advice service is available at: www.liberty-human-rights.org.uk/get-advice/advice-for-lawyers-and-advisers/second-tier-online-query-form.shtml.

news

New centre to work on human rights in Russia

Philip Leach writes:
A new centre, the European Human Rights Advocacy Centre (EHRAC), has been established at London Metropolitan University to assist individuals, lawyers and non-governmental organisations (NGOs) in Russia to take human rights cases to the European Court of Human Rights (ECtHR).

EHRAC is working in partnership with the Moscow-based NGO, Memorial, one of the leading Russian human rights organisations, and will also work with other NGOs and lawyers throughout the Russian Federation, including in respect of Chechnya. The two organisations are collaborating in representing the applicants in the first six cases arising from the hostilities in Chechnya, which were declared admissible by the ECtHR in December 2002. EHRAC plans to draw on the expertise of human rights practitioners and academics both in the UK and in Europe.

The London office of EHRAC is affiliated to the Research Institute for Human Rights and Social Justice at London Metropolitan University, whose director, Professor Bill Bowring, has worked for many years on the development of human rights in Russia and the former Soviet Republics on behalf of the UK government, the Council of Europe, and other bodies. EHRAC's project manager in London is barrister, Tina Devadasan. In Russia, the project will support three lawyers in Moscow and five human rights liaison officers in the regions of Russia.

EHRAC is core-funded by the European Commission, but is actively seeking further grants or donations. Contact Philip Leach, director of EHRAC at: EHRAC@londonmet.ac.uk or tel: 020 7133 5087.

Settlement deal for South African asbestos miners

South African asbestos miners have gained a breakthrough in their long-running claim for compensation against Cape plc and Gencor (see June 2002 and October 2002 *Legal Action* 7 and 5). Settlement agreements worth over £10 million have now been signed for the benefit of the 7,500 claimants registered in the UK legal case. Of this total, Cape has agreed to pay £7.5 million and Gencor has promised £3.1 million.

In 2002, Cape failed to honour an agreement to pay £21 million over 10 years: the first instalment of £10 million was due in June 2002, and would have been paid into a trust for distribution to asbestos victims who could prove exposure to Cape's operations.

Although the new settlement figure is only about half of the previous agreement, it will be paid in one instalment, and will also be limited to claimants registered in the UK action. However, the money cannot be paid over until those victims have had their claims against Gencor severed from the South African proceedings against the company. This process is expected to be finalised by the end of June 2003.

Richard Meeran, of Leigh, Day and Co, one of the solicitors acting for the victims, commented: 'Cape's failure to deliver the 2001 settlement was obviously a blow. But we reluctantly formed the view that Cape could not afford to pay more than the present settlement; for the sake of our clients we had to be realistic.'

Family advice project expanded

Simone Hugo, project manager of Family Law and Mediation at the Legal Services Commission, writes:
The Family Advice and Information Service (FAINS) is about to enter the first phase of full pilot operation in England and Wales. The project, which was introduced by the Lord Chancellor, in March 2001, has already successfully completed a pre-pilot phase. Several new areas will join the pre-pilot areas of Cardiff, Exeter and Nottingham: Basingstoke, Hartlepool, Leeds, Lincoln, Mansfield and Stockton on Tees.

The FAINS project aims to help couples dissolve broken relationships in ways that minimise the distress both to the couple and to any children involved. It aims to promote ongoing relationships and co-operative parenting. Central to FAINS is the provision of tailored advice and information that is appropriate to clients and their situation, and helps them to access services that may assist in resolving disputes, or may help those who are trying to save their relationship. The project will also look at specialist services that are available specifically for children who are caught up in family breakdown. Currently, family solicitors supply the service. However, other service models are being considered and may be piloted at a later stage.

Contact the FAINS project team on 020 7759 0315, or for more information see: www.legalservices.gov.uk/fains

LAPG/*Independent Lawyer* legal aid lawyer of the year awards 2003

LAPG/*Independent Lawyer*

Nicola Mackintosh, partner at Mackintosh Duncan in London, has won an award for her work in community care. Nicola was nominated in the civil and social welfare law category of the first Legal Aid Lawyer of the Year awards, which were held in April.

Pictured with their awards are (left to right):
- Mark Jewels, JJ Law, Cannock (family);
- Nicola Mackintosh;
- Richard Egan, Tuckers solicitors, London (crime);
- Belinda Greenwood, Hugh James, Merthyr Tydfil (trainee); and
- Jeffrey Gordon, Attridge solicitors, London (judges' special award).

Back row: John Howard (presenter) and Michael Mansfield (special guest, presented judges' special award).

CRIMINAL JUSTICE

Hung jury?

The system of jury trials has experienced little significant reform for many years. Now the government, in the current Criminal Justice Bill, proposes that the right to trial by jury be restricted in proceedings that are likely to be lengthy or complex. It is therefore anticipated that many fraud cases would be affected by this proposal. **Anand Doobay**, a solicitor who works in the Fraud and Regulatory Department at Peters & Peters, writes about his experience of such a trial and describes why he believes that if the proposal is accepted, fraud cases will be affected adversely.

The *Wickes* case

The *Wickes* investigation commenced in November 1996, charges were brought in mid-1999 and the jury returned its verdict in November 2002 – the same month as the Criminal Justice Bill was published – at the end of a 10-month long trial. It took the jury less than eight hours to reach unanimous verdicts finding all three remaining defendants not guilty on every charge. This prosecution, which was brought by the Serious Fraud Office (SFO), is the sort of case which could well end up being tried by a judge sitting alone if the proposed reforms are enacted.

I acted for the ex-finance director of Wickes who was one of the defendants acquitted by the jury. I was able to observe the behaviour of the jury at first hand as I was in court for the whole of the trial. The conduct of this trial also benefited from the fact that the lawyers involved had a huge amount of experience in relation to previous fraud trials. This knowledge was pooled in order to adopt procedures to ease any burden that sitting on a long case might place on the jury, and also to try to ensure that the case was presented in a way which allowed it to perform its role as the arbiter of fact properly. I will seek in this article to examine the rationale behind the proposed reforms in light of this recent experience.

Proposed reforms

The Criminal Justice Bill includes provisions that would allow the prosecution to apply to a Crown Court judge to order that a case be tried without a jury (cl 37). The judge would have to make this order if s/he was satisfied that:

- the complexity and/or length of the trial would make the trial so burdensome to the jury that it would be in the interests of justice for the trial to be conducted without a jury or would place an excessive burden on the life of a typical juror (cl 37(4)); and
- the complexity and/or length of the trial would be attributable to the need to address arrangements, transactions or records of a financial or commercial nature or which relate to property (cl 37(5)).

Previous analysis

Do complex fraud cases demand a unique trial process in order to serve the interests of justice? This is not a new question. It was one of the questions posed to the Committee on Fraud Trials (the Roskill committee), chaired by Lord Roskill, which reported in 1986. The Roskill committee recommended that, for the most complex fraud cases, the jury should be removed and the case tried by a judge and two lay persons.[1] There was a powerful dissenting note by Walter Merricks, a member of the committee and now the Financial Services Ombudsman. He argued forcefully that jury trials should be retained for fraud cases, and these arguments remain sufficiently cogent to have been adopted by the Criminal Bar Association in its representations on the Criminal Justice Bill. In the event, the majority view of the Roskill committee was not implemented and, until now, successive governments have not felt that this was a pressing reform.

Even in relatively long trials, it should not be assumed that the jury is unable or unwilling to follow the evidence and grasp the issues.

The Roskill committee was, for the most part, concerned to ensure that the increasing complexity of modern commercial frauds could be understood by the tribunal of fact. Despite the fact that many cases now involve consideration of technical medical issues and other scientific evidence, no complaint has been heard about juries' ability to comprehend such trials.

The *Wickes* trial required all those involved in court, ie, lawyers, judge and jury alike, to understand detailed concepts of retail trade and accountancy with which they were initially totally unfamiliar. As happens in many other criminal proceedings, expert evidence was called to assist the jury in this case, and there was no sign of incomprehension on its part.

A judge sitting without a jury would be equally unlikely to be familiar with all of the issues arising in a fraud case. These issues would still have to be presented to make them easily comprehensible to him/her. In the end, it is the role of the defence and the prosecution to make the issues intelligible whether for a jury or a judge.

Serious Fraud Office

Another recommendation of the Roskill committee was the setting up of a multi-skilled agency which would both investigate and prosecute serious and complex frauds. The result was the SFO which was given its own budget and tasked with investigating a select number of mostly high profile cases using the combined skills of lawyers and accountants, but without a dedicated police force. With varying degrees of success it prosecuted cases such as *Guinness, Barlow Clowes*, *Blue Arrow* and *Maxwell*. This was a novel agency which received more than its fair share of publicity, and its high profile appeared to raise equally high expectations. Notwithstanding that a fair trial process will produce acquittals as well as convictions, every release of a defendant in an SFO case was portrayed as a defeat by the media.

The agency has come in for increasing amounts of unmerited criticism, and perhaps not surprisingly has been keen to point out that its conviction rate is good, but could be improved if a number of procedural safeguards, which are inherent in the trial process, were weakened or removed. Chief among the safeguards is the requirement to produce a case that can not only be understood by a defendant's lawyer, but also by the 12 members of the community who are to be his/her judges. The SFO has suggested that criticism of the length of time taken to investigate and prosecute cases, which is on average about three years, could be reduced if it could employ some forensic shorthand that would be comprehensible to a suitably qualified judge. Leaving aside the objection that this would mean that an average defendant would be unable to understand the allegations on which his/her reputation and liberty would depend, this measure would not address the main causes of delay.

The SFO's budget was effectively reduced between 1994 and 2002. It has experienced difficulty in persuading police forces to second trained officers to assist it. Its own investigative resources are strained and the SFO remains wedded to a determination to charge umbrella offences that, of necessity, involve the presentation of high volumes of evidence. This was particularly highlighted by the choice of charges preferred in *Wickes*, where the indictment spanned a four-year period (although events were relied on which extended this to a six-year period) and the scope of the criminal conduct alleged was

enormous owing to the SFO's decision to prefer a charge of fraudulent trading.

In summary, the SFO's operational performance is in line with what can be fairly expected from a well-run, accusatorial process, and if there are shortcomings in its investigation and prosecution methods, then these are largely attributable to scarcity of resources and the SFO's dedication to try to prove the full criminality of a defendant's conduct rather than selecting representative and more easily provable acts of delinquency. Certainly, the abolition of jury trials will solve neither of these problems.

Presenting evidence in a mock jury trial organised by Bradford Chamber and featuring law firm Schofield Sweeney

Length of the trial

The SFO argues frequently that it is constrained in presenting cases by the considerations of the time it may take for a case to be heard, since it wishes to present a full picture of the criminality alleged. If this is currently the position then the danger exists that, by removing juries from the process, the scope of the cases presented by the SFO will be expanded resulting in longer rather than shorter trials. Presenting a case to a jury provides a focus and incentive to simplify issues and concentrate on the central allegations. The experience of civil fraud trials, which like most civil cases are heard by a judge alone, seems to indicate that longer trials are a real danger. Another concern is that the prosecution may effectively be able to force a trial to be heard by a judge alone by simply ensuring that the facts alleged are of sufficient scope to necessitate a lengthy trial.

Even in relatively long trials, it should not be assumed that the jury is unable or unwilling to follow the evidence and grasp the issues. Although it is not possible to question a jury to determine whether its members are following the evidence, an indication is given by the questions it asks through the judge. For example, in *Wickes*, the jury remained attentive throughout asking relevant questions. On one occasion, a juror asked a question which referred back to evidence given by a previous witness some weeks before. This showed that the jury's members were not merely passive spectators, but actively sought to understand and reconcile the evidence presented to them.

Indeed, on receiving its verdicts, the judge made these remarks to the jury:

The care and attention which you have devoted to this case has been obvious to me throughout from almost the very first moment you started to try this case. Those who may hereafter criticise juries' appreciation of lengthy and complex fraud cases would have done well to see the care and attention that, as I say, you have given to this case throughout.

The protections of a jury trial

The fundamental question to be answered in most fraud cases is whether or not the defendant has been dishonest. This is a question which a jury is ideally placed to answer because the standards to be applied in assessing honesty are those of 'ordinary people'. It is an issue which the jury will readily understand and its deliberations will not be corrupted by the case-hardening experience of daily judging in the criminal courts.

The other signal attraction of jury trial for defendants is their confidence in community justice. Defendants will usually have been through a lengthy investigation process which will in all likelihood have adversely affected both their professional and personal lives. They will be accused of serious offences which may lead to lengthy custodial sentences. They may feel that they have been treated unfairly by the 'Establishment', and welcome the opportunity to present their defence to 12 members of the public rather than a single, professional judge. When considering the reforms, which are ultimately supposed to serve the interests of justice, the interests of the accused appear to have been overlooked or at least discounted.

Composition of the jury

One widely perceived benefit of a trial by jury is that it allows a defendant to be tried by 12 lay people who reflect the diversity that is found in wider society. A professional judge cannot replicate this diversity. Conversely, an often-rehearsed point about juries in fraud cases is that they are made up of an unrepresentative section of society consisting effectively of those who are not employed, and consequently are available to sit for several months on a jury.

In the *Wickes* case, a number of those who served on the jury were employed or self-employed and, as a whole, they did not seem to be unrepresentative of wider society. Certainly, a greater number than the 12 people selected indicated that they would be able to serve on the jury even though they were all aware of the potential length of the trial.

The government and the SFO seek to remove the burdens associated with sitting on long and complex trials. Indeed, this is one of the tests which a judge must apply, in the proposed reforms, when deciding whether a jury should not hear a case. The proposed method for eliminating any burden is to remove juries from these cases. I have seen little evidence that there are insufficient jurors who are willing to take on this burden (if, indeed, potential jurors view it as such).

If , for example, there is a genuine concern that jurors need to possess a certain level of numeracy or literacy in order to cope with the complexity of a case, then this can be established by the use of jury questionnaires. If these are completed by potential jurors then those members who do not have the necessary skills to serve on the jury can be excluded from the selection process. This is not a recent innovation – jury questionnaires were used successfully in the prosecution of Ian and Kevin Maxwell by the SFO in the early 1990s. This procedure was also used in *Wickes*, and is additionally useful to identify whether the potential jurors have any con-

nections with the participants in the trial which might cause them to be excused at a later stage. This process could be formalised as, at present, it is used only if one of the participants in the trial, such as the judge or legal representatives, has had previous experience of using them.

Trial management

There are features of trial management which can assist the problems encountered by potential jurors who are in employment. For example, an improvement in the arrangements for reimbursing lost earnings would certainly help to ease the burden on jurors. Also, if the court kept 'Maxwell hours', ie, it sat with the jury in the morning only, and used the afternoon for legal argument, this would allow jurors to work in the afternoons or to make suitable domestic arrangements, and it would certainly reduce the incidence of jury absenteeism.

The judge in *Wickes* was alive to the needs of the jury and thus relatively few days of the trial were lost due to jury absence. For example, when the court wished to adjourn in order for legal submissions to be prepared, this was scheduled to coincide with a business trip which a member of the jury had to make.

There are at present a number of inefficiencies in the way in which fraud trials are run. Many of these could be cured by procedural reforms. The Fraud Advisory Panel put forward well-thought out and pragmatic reforms which would overcome a great number of the difficulties encountered.[2] These included imposing time limits on counsels' speeches, ensuring that appropriately experienced judges hear fraud cases and greater clarification of the issues in dispute. It is also to be hoped that all those involved in fraud trials will make greater use of the technology which is now available to simplify the presentation of such cases. There appears to be no reason why these reforms can not be enacted while retaining the jury's involvement in complex trials.

One resource which assists both the lawyers and the judge in a long case is the use of transcripts allowing evidence to be re-read once it has been given, and to be compared with evidence given subsequently, or submissions which are made on behalf of the defence or the prosecution. Although we applied in *Wickes* for the jury to be allowed to have access to these transcripts when it retired to consider its verdicts, the judge refused this application. It does not seem sensible for the jury to be denied access to this facility which all others involved in the trial found to be of great assistance. Is a jury not to be trusted with a written record of the evidence that it has heard and is, ultimately, required to make findings on when it retires to consider its verdict?

It appears that these reforms are not aimed at ensuring that the overall interests of justice are served, but rather that the most expedient method should be adopted in order to reduce the length of trials and the associated costs.

Public perception

There is also the question of the public perception of these reforms. Fraud cases would be seen to be in a different category from other criminal cases, and it might be felt in some quarters that being tried by a judge alone was of benefit to a defendant. It appears that these reforms are not aimed at ensuring that the overall interests of justice are served, but rather that the most expedient method should be adopted in order to reduce the length of trials and the associated costs.

If 12 randomly selected members of the public try the case, justice is seen to be done. The type of cases which are likely to be affected by these reforms will be high profile, and where defendants might be well known. Every defendant, regardless of wealth or influence, should be judged by a cross section of the public. There needs to be compelling arguments for defendants who are accused of fraud offences to be treated differently from those who are not; none have been put forward to date.

Conclusion

There is no detailed research which establishes that the criticisms of the jury trial are well founded and, therefore, justifies the fundamental reform proposed in the Criminal Justice Bill. If these criticisms of jury trials in lengthy and complex cases are legitimate then the appropriate step is to conduct an empirical study – currently there is no such evidence as the Contempt of Court Act 1981 precludes any investigation into the deliberations of a jury – and remove the legislative restriction on questioning jurors to allow research to be undertaken. Interestingly, the Select Committee on Home Affairs has recommended the removal of the legislative restriction to permit this research.

Serious concerns about this reform have, been raised by a number of organisations including the Legal Action Group, the Law Society, Justice and Liberty. It is hoped that these groups' disquiet will be taken seriously by the government and that it is able adequately to justify these radical proposals while they are being considered by parliament.

1 *Report of the Committee on Fraud Trials*, 1986, recommendation 82.

2 'Proposals for procedural reform in cases of serious fraud', Monty Raphal, Jonathan Fisher, Gervase McGregor, NLJ 17 March 2000, p398 and 24 March 2000, p435.

An Early Day Motion (EDM) is the term used to describe notices of motions given by MPs that are not generally expected to be debated. Effectively, the tabling of an EDM is a device to draw attention to an issue, and to elicit support for it by the means of inviting other MPs to add their signatures to the motion.

EDM 951 – Jury trial was tabled in response to the proposal in the current Criminal Justice Bill to restrict the right to trial by jury. It states:

That this House reaffirms its faith in jury trial for serious criminal cases as an essential cornerstone of British liberty; recognises that it provides a unique example of the responsibilities of citizenship; rejects the unfounded and unsubstantiated allegation that jurymen and women cannot comprehend complex factual issues; and recognises that procedures and powers already exist to distil issues and shorten trials in serious fraud cases and to guard against rare attempts to tamper with juries.

At the time of writing, this EDM had 58 signatures.

LEGAL SERVICES

Devon Law Bus

Are rural legal services still being eclipsed by 'inner-city infatuation' and the legal problems of urban citizens? As an important seminar meets to discuss the provision of legal services in rural Devon in June, **Kim Economides**, Professor of Legal Ethics and Head of the School of Law, University of Exeter,* reviews policy options for the future delivery of publicly funded legal services to rural communities, including the introduction of mobile services such as the Devon Law Bus.

Background

An awareness of the specific legal needs of rural communities has been around for well over two decades. The Royal Commission on Legal Services, chaired by Sir Henry Benson, noted, in 1979, that: 'Needs for legal services exist not only in the big cities ... They are also prevalent in rural areas, among a more widely scattered population' (para 8.38) and, in 1983, the Legal Aid Advisory Committee supported the establishment of an experimental law centre while drawing attention to a proposal to set up an Exeter based law centre serving about 40 per cent of Devon's population.[1] As most law centres were supported by urban aid, such a proposal, with its heavy emphasis on meeting rural needs, was perhaps doomed to fail even though ahead of its time.

Yet, research into private and public rural legal service provision conducted throughout the 1980s and published in the early 1990s indicated that real problems of access to justice, despite their relative invisibility, remained.[2] The National Consumer Council even issued guidelines entitled, *Good advice for all* setting targets for provision: 'In rural areas, other than those that are very sparsely populated, no one should need to travel more than two miles to consult a generalist advice worker, nor more than five miles to consult a specialist advice worker.'[3]

The Devon Law Centre which is based in Plymouth, but serves the whole county, was finally launched with funding from the Legal Services Commission (LSC) in 2001 (see January 2002 *Legal Action* 8). It is now actively considering how it may best deliver legal services to Devon's rural population, for example, by investigating the potential of mobile outreach services such as the nascent Devon Law Bus.

Peripatetic legal services and information outreach

Mobile services in the form of a converted bus or van have been used with varying degrees of success to reach scattered and isolated populations in both rural and urban areas. Apart from dispensing information and advice to remote communities, mobile services have an important symbolic value in advertising outreach legal services and policy makers' commitment to provide the same. Library and general advice agencies such as Citizens Advice Bureaux (CAB) have previously teamed up to meet the general – and specific legal – information needs of rural communities, and several examples of positive collaborative effort exist in Devon, England, Wales and Scotland.

Foreign models also suggest novel means to enhance social inclusion and overcome the barrier of physical distance. In Oslo, for example, law students initially carried out individual legal advice sessions from the juss buss, or 'law bus' (a travelling mobile trailer), but then moved on to address the legal problems of particular groups of people, including those who were foreigners to the country, Gypsies, tenants, people with disabilities and prisoners.[4] Within the UK, the Carlisle Law Centre, which is based in Cumbria, pioneered the concept of partnership both at the level of funding and rural legal service delivery. A network of local funders – drawn mainly from the Community Legal Service Partnership (CLSP) – which includes local authorities, the LSC, the National Lottery Charities Board and other sources, joined forces to invest in imaginative plans for a mobile community service. This service developed a mobile office covering 30,250 kilometres a year taking legal services directly to local communities in Carlisle, Copeland and Allerdale.[5] Telephone outreach offers another way to contact communities or groups such as Travellers who may experience difficulty in receiving legal advice and assistance.[6]

A fruitful collaboration was struck up, in 2000, between the Humberside Law Centre and the North Lincolnshire CLSP to establish Rural Communities Information Points (RCIP). The idea is that the RCIP will train staff in local organisations so that they can become LSC quality mark information points, utilising both telephone and on-line assistance to deliver legal services to rural communities, but also, potentially, to urban ethnic minorities and young people. These initiatives suggest that CLSPs and other stakeholders should continue to collaborate to tackle these unmet needs in rural areas. But what exactly are these needs?

Unmet legal need in rural areas

The experience of the Devon Law Centre confirms previous research findings that vulnerable groups in rural areas continue to suffer from social and legal exclusion. More recent research also suggests that rural areas continue to harbour social injustice and that, despite the surrounding physical beauty of the countryside, real deprivation persists. In a survey carried out by the West Devon Environmental Network for West Devon Borough Council under the Invest to Save budget in 2002, results showed that as the distance from Plymouth increased, rural communities were less able to travel to Plymouth to use Devon Law Centre, but were increasingly likely to use the law centre if its services were available locally.

The attraction of the Devon Law Bus is that it would open access to remote communities and facilitate the targeting of legal needs to particular communities.

This 'friction of distance' phenomenon is quite familiar to geographers who have noted the effect of distance on the use of other public services. Other more recent research, based on fieldwork in North Norfolk, also suggests that the case for mobile services remains a strong one and that the development of on-line services, while valuable, are likely to be a poor substitute.[7] In order to heighten awareness of legal problems in rural areas, and of how these may be evolving along with changes in rural society, it may help to refer to some anonymised case studies from the Devon law centre. One case where early advice could have made a difference concerned immigration, which may be considered an atypical problem in rural Devon:

The client came to the law centre after his application for asylum had been dismissed. He wished to appeal against this decision. He was advised, however, that his appeal was unlikely to be successful as he lacked sufficient grounds for pursuing his further right of appeal. His original application had been dismissed because the adjudicator did not think that the client's claim was credible, and also because there was no reason to think that he would be persecuted if he were returned to Kurdistan as this area was controlled by the Patriotic Union of Kurdistan, of which his father had been an

active member. The appeal was subsequently dismissed.

In another case concerning housing, where, again, early advice could no doubt have influenced the client's chances of remaining a council tenant, his remote location clearly exacerbated the problem:

The client previously had a secure tenancy with the council but had vacated the premises some time ago, shortly before he was due to be evicted as a result of having accrued rent arrears. The council then took possession of the property and destroyed the client's belongings that remained in the property. The client wanted to resolve the matter of rent arrears so as not to jeopardise his future right to housing. He was advised that the matter of arrears could easily be resolved simply by starting to make payments. However, he was also advised that if he applied for housing in the future, he would likely be deemed to have made himself intentionally homeless as a result of having been evicted due to rent arrears.

The inconclusive, if not unsatisfactory, outcome of the following case concerning education further illustrates the difficulty of advising clients in remote areas.

The client was unhappy with the way her daughter's school had dealt with her bullying problems and she wanted to remove her from the school. The law centre contacted the CAB in Barnstaple which wrote to the school's board of governors. They replied saying that the bullying incidents had never been reported to the school and so they were unable to do anything about it. Also, there was no other school in the area for her daughter to attend instead. The client ceased to give further instructions but contacted the law centre to let them know that a new head teacher had been appointed at the school and she intended to speak to him about the problem.

The Devon Law Bus

Mobile services are sometimes criticised because they are said to deter clients when located in conspicuous public places such as on the village green. In close-knit communities, people may fear gossip and be reluctant to be seen taking a problem to a place where their confidentiality and privacy could be compromised. Quick and effective access to quality legal information may also have been absent in the past, and in the winter months adequate heating was also a problem. But with advances in communications technology and the development of transport facilities in the field of mobile homes several of these concerns have today become far less serious. Internet access to remote databases, coupled with the ubiquity of mobile phones and fax machines, mean that it is now possible to stay readily in touch with central administrative systems while on the move.

The proposed Devon Law Bus would be a trailer based somewhere in central Devon, to be towed to different locations around the county. Inside the bus, there would be waiting and interviewing areas. The trailer would be equipped with a satellite link to allow fast phone, internet and e-mail access via laptop computers. Advisers and lawyers from the law centre would staff the bus and, if appropriate, other agencies and law students would also be involved. Following a mapping exercise, the trailer would call at predetermined rural, village and small town locations where there is currently an absence of providers of social welfare legal services, and where there is good evidence of a need for such services. The trailer would typically be situated in a public car park for half a day on a regular basis. Clients could be seen by appointment and/or on a 'drop-in' basis.

The project would also work with local groups such as parish councils, village halls, and youth groups to promote the potential of social welfare law by community education. The project would need at least one, new, full-time paid job to enable it to function; perhaps best described as an administrator/driver. Although those currently employed at the law centre could, in part undertake this work, to make the project fully effective it would be necessary to create a further adviser/community educator post. We would expect the project to work very closely with 'rural' local authorities, and that the trailer would display the names and logos of all the local authorities to indicate their sponsorship of the project, together with the CLS logo and sponsorship statement.

The attraction of the Devon Law Bus is that it would open access to remote communities and facilitate the targeting of legal needs to particular communities. Over time, wider coverage could be planned systematically in the light of proven needs and, perhaps one of the strongest points in its favour, is that local service providers would be working together to plan and organise legal services. At a time when CLSPs are under review, this project could give fresh impetus to the concept of partnership by permitting grass-roots' initiatives to inform central policy-making. The bus could also bring together the voluntary sector at county and district levels while indirectly stimulating the demand for private legal services. Assuming that researchers monitored the bus, policy-makers at national level should be able to develop and draw comparisons with the work of the Carlisle Law Centre. These experiences may well inform international debates on legal service provision, especially in the developing world.

* Although the author is currently a member of Devon Law Centre's management committee, and the Civil Justice Council's Access to Justice Committee, and was co-director of the Access to Justice in Rural Britain Project (1984–87), he writes in a purely personal capacity.

1 *Thirty-third legal aid annual report* (1982–83), Lord Chancellor's Department, para 184.
2 *Justice outside the city. Access to legal services in rural Britain*, 1991, M Blacksell, K Economides and C Watkins; *Legal provision in the rural environment: legal services and welfare provision in rural areas*, 1994, C Harding and J Williams (eds).
3 National Consumer Council, 1986, paras 2.36–3.6.
4 *Neighborhood Law Firms for the Poor*, 127, 1980, B Garth.
5 See *Justice for generations: a community legal service for Cumbria. Annual report for 1999/2000*. The Carlisle Law Centre received 10,000 enquiries resulting in awards for clients of almost £150,000.
6 See Telephone Legal Advice Service for Travellers, based at Cardiff Law School and funded by the Joseph Rowntree Charitable Trust. See also, 'The invisibility of Gypsy and other Travellers', 21 (4) *Journal of Social Welfare and Family Law* (1999) 3999, R Morris.
7 See *Access to justice: The geography of legal service provision in rural environments*, University of Manchester, 2002, 62–63, F Napier.

The seminar on the 'Provision of legal services in rural Devon' will take place on Thursday 12 June 2003, between 2 pm and 4.30 pm, at the Centre for Rural Research, University of Exeter, Lafrowda House, St German's Road, Exeter EX4 6TL. Contact the administrator, Marilyn Wells, tel: 01392 263836.

law & practice

PUBLIC LAW

Recent developments in public law


Kate Markus and **Martin Westgate** continue their six-monthly series surveying recent developments in public law which may be of more general interest to *Legal Action* readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or which have been settled.

RECENT CASES

Article 6 and judicial review

There have been a number of recent cases concerning the role of judicial review in securing compliance with the requirements of article 6(1) of the European Convention on Human Rights ('the convention'), mainly concerning administrative decision-making in social welfare schemes. These decisions have continued the general trend that, while article 6 is treated as having a broad reach, challenges ultimately fail on the ground that even where the initial decision-maker is not independent and impartial, the court is. There is a sufficient review by a court of full jurisdiction even if the appeal is on a point of law only or the court's only power is to intervene on judicial review principles. Just how limited this type of review can be, at least in cases not involving substantive fundamental rights, is illustrated by other cases noted below. The Court of Appeal has held that *Wednesbury* is still effective (see *The Association of British Civilian Internees* case below), while Collins J in *Patel v Secretary of State for Transport, Local Government and the Regions* (see below) makes clear again that the Administrative Court will not usually grapple directly with issues of fact except in the most obvious cases.

■ **R (Cumpsty) v Rent Service**

[2002] EWHC 2526 Admin, 8 November 2002

The maximum rent payable by housing benefit (HB) is fixed by a rent officer's determination of the local reference rent. An applicant for HB has the right to apply for a redetermination of an officer's initial decision which, in practice (although not required by law), would be carried out by a different rent officer. The claimant challenged a redetermination on the ground that it did not comply with the requirements of article 6(1).

Pitchford J held that the decision involved a determination of a civil right within article 6(1): the right to HB was a civil one, and an officer's redetermination was decisive in defining that right. However, an officer did satisfy the requirements of article 6(1), ie, s/he is an independent and impartial tribunal, being autonomous of, and having no allegiance to, a local authority. In any event, the exercise of an officer's powers satisfies the requirements of a fair and public hearing. Although an officer does not conduct any hearing, provided that at the redetermination stage a tenant is provided with the reasons for the original decision so that s/he can make informed representations, the process is fair because the redetermination officer is required to consider those representations. Moreover, an officer applies a statutory formula to produce the local reference rent, which involves expert judgment of the application of comparables based on a database prepared by the Rent Service. There is little scope for challenge to this exercise: there is no consideration of a claimant's conduct, needs, or priorities. It is the policy of the statutory process that the determination rests on a rent officer's expertise. The availability of judicial review rather than a full rehearing of the facts secures compliance with article 6(1).

■ **Secretary of State for Health v PR of Christopher Beeson**

[2002] EWCA Civ 1812, 18 December 2002

The claimant had successfully challenged a decision of Dorset CC that he had deprived himself of property deliberately so that it should be taken into account in assessing his ability to pay for residential accommodation provided under the National Assistance Act 1948. Richards J at first instance had held that the decision-making process failed to comply with the requirements of article 6(1). The appeal was brought by the Secretary of State for Health, as an interested party. The Court of Appeal allowed the appeal, holding that the complaints procedure review under the Local Authority Social Services Act 1970, coupled with the availability of judicial reivew, secured compliance of the decision-making process with article 6(1). Article 6(1) is engaged, because the decision was concerned with the questions what premises the claimant would occupy as his home and on what terms.

Laws LJ said that, where a statutory scheme was established for the distribution of public bounty or the imposition of burdens on the citizen, the will of parliament in providing for particular decision-making mechanisms should be given considerable weight, and successful challenges in such cases on the ground of insufficiency of judicial review would be relatively infrequent. In cases such as the present, the officials concerned were exercising discretion in the allocation of scarce public resources and their decisions would, very often and sometimes systematically, affect the interests of third parties (other claimants) who were not before the decision-maker. The evaluation of such matters was closer to the function of an administrator than a judge. The more that any given statutory scheme was likely to give rise to fact-laden issues, the more article 6 would require independent adjudication on the facts, but the discretionary or judgmental elements in the scheme as a whole (rather than in any particular case) were considerable. Moreover, there was no reason in this case to question the objective integrity of the panel even though it included two council members. The House of Lords has refused leave to appeal.

■ **Runa Begum v Tower Hamlets LBC**

[2003] UKHL 5, [2003] 1 All ER 731

The House of Lords upheld the decision of the Court of Appeal in this case (see May 2002 *Legal Action* 24). The decision continues the judicial process, as illustrated by the above cases, of according considerable deference to the will of parliament in establishing administrative schemes for the distribution of public benefits. The court was inclined to the view that article 6(1) was engaged, without finally deciding the point, noting that Strasbourg case-law has extended the scope of article 6 incrementally with regard to administrative decisions, particularly those regarding the distribution of welfare benefits or social security, and that the process has not yet finished.

Although the case-law has not yet gone so far as to extend the scope to determinations of benefits in kind, which involve different types of decision-making because they involve distributing a finite resource between competing applicants, it is nonetheless desirable that such decisions, which clearly involve a person's legal rights, should be within article 6(1): otherwise there would be no obligation on the state to provide any form of legal redress against adverse decisions. However, allowing a generous or flexible reach to article 6 requires an equally adaptable approach to its

requirements, in the interests of efficient administration, so as not to frustrate parliament's intention in setting up such statutory schemes. Thus, although there was no difficulty in accepting that a reviewing officer was not independent of a local authority, it was held that statutory review, coupled with the right of appeal on a point of law to the Court of Appeal, (which was akin to judicial review) did satisfy the requirements of article 6.

Lord Bingham said that, where a local authority has to make factual findings in the course of a review, this is only a staging post to the much broader judgments which it has to make. The regulations relating to reviews provide safeguards that they will be conducted fairly and preclude unreasoned decision-making by an unknown and unaccountable bureaucrat whom an applicant has no chance to influence.

Lord Hoffman stated that his own remarks in *Alconbury*, ie, that the evaluation of facts requires a full appeal on such facts, were incautious and that what is required also depends on the impact of the fact-finding involved. For example, a decision which binds a person with regard to future behaviour, with possible criminal sanctions, or which regulates private rights, is very different from decisions in the exercise of regulatory functions or administration of social welfare schemes. He said that parliament is entitled to take the view that it is not in the public interest that an excessive proportion of funds available for welfare schemes should be consumed in administration and legal disputes.

With regard to the intensity of review required, there is a distinction between those cases in which human rights (other than article 6) were engaged and those where they were not. Lord Hoffman said that, where one is dealing with a welfare scheme which does not engage human rights, then the intensity of the review required must depend upon what one considers to be the most consistent with the statutory scheme, but that article 6 does not mandate a more intensive approach to questions of fact in judicial review.

■ **R (Q and others) v Secretary of State for the Home Department**

[2003] EWCA Civ 364, 18 March 2003

This case concerned the legality of refusal of support to asylum-seekers who were found not to have claimed asylum as soon as reasonably practicable. The Court of Appeal considered whether the decision-making process adopted by the Home Office complied with article 6(1). The Home Secretary accepted that the decision-makers were not independent, and the court assumed that the right to asylum support was a civil one that engaged article 6.

Following the decision in *Runa Begum*, the Court of Appeal accepted that judicial review was sufficient to satisfy the requirements of article 6 with regard to an asylum-seeker who has been denied support. The court stated that, it would have some difficulty in holding that it was sufficient if it was not for the amplitude of modern judicial review, given the gravity of the implications of a refusal of support for the individual concerned (referring to the ability of the court to adopt a more intensive scrutiny of the rationality of a decision where human rights are involved – see *R v MOD ex p Smith* [1996] QB 517). The court also stated that the requirement for a more intensive review applied where not only convention rights are involved, but also other human rights.

The Court of Appeal had identified a number of grave defects in the decision-making processes in refusing asylum support. Since judicial review can only satisfy article 6 where the process as a whole is capable of determining fairly the civil rights that are in play, in the cases in question article 6 was not complied with. The inadequacies in the decision-making process meant that it was impossible for the Home Office officials to come to an informed determination of important matters and so it was equally impossible for the court on judicial review to do so. However, if the Home Secretary was to remedy the procedural defects, then it would be possible for his decision-making processes, coupled with judicial review, to satisfy the requirements of article 6.

Comment: This decision highlights the importance of having regard to the procedural fairness of the first stage decision. If that is incapable of reaching a fair decision, it is difficult, if not impossible, for the court on judicial review to achieve the required level of scrutiny. This must be particularly pertinent where, as in the present case, the primary decision-making process could not identify sufficient or even necessarily correct information in order to make a fair decision. The reviewing court is not a fact-finding body and so cannot remedy such a defect.

Proportionality

■ **The Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence**

[2003] EWCA Civ 473

The claimants were former Japanese internees during the Second World War. They were refused ex gratia payments because neither they, their parents nor grandparents were born in the UK as required by the non-statutory scheme governing such payments. The claimants argued that these limitations in the scheme were disproportionate, and that proportionality now formed a ground for review in English administrative law, even where there was no convention element. The Court of Appeal was not prepared to take this step, holding that it would be inconsistent with House of Lords authority (principally, *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696) to do so. Although the judgment shows little enthusiasm for *Wednesbury* unreasonableness, the Court of Appeal concluded that it was not for the court to perform that principle's burial rites. Only the House of Lords can do this. The Court of Appeal proceeded to reject a challenge to the scheme's criteria based on irrationality (see also below).

Amenability to judicial review

■ **R (Beer) v Hampshire Farmers Markets Limited**

[2002] EWHC 2559 Admin

Hampshire Farmers Markets Limited (HFML), a private company set up by, but independent of, the local council to manage and regulate farmers' markets in the county, was both amenable to judicial review and a public authority in deciding to exclude a particular farmer from participation in the markets. Field J held that, although HFML was a private body with no statutory underpinning and was not woven into any system of governmental control: it was a not for profit organisation engaged in promoting the public interest by facilitating access to trading outlets, HFML acquired the goodwill and assets of the business from the county council for no charge, the markets were held on public sites owned by local councils which gave permission for such use, so that the company was engaged in running what were in substance public markets to which the public have a common law right of access. The regulation and organisation of that right was a public function. HFML had stepped into the county council's shoes. Thus, HFML was both amenable to judicial review and a public body within Human Rights Act (HRA) 1998 s6(1)(b).

Comment: This decision illustrates a more flexible and pragmatic approach to the definition of public authority within HRA s6(1)(b) than in previous cases (see November 2001 and May 2002 *Legal Action* 26 and 22) in which the Court of Appeal has taken the approach that there will generally be a public function where:

- there is statutory authority for what is done;
- such responsibility is imposed on the body in question in respect of the core functions;

■ there is true delegation, or sharing of powers or functions by a public body; and

■ there is close proximity between the body in question and the public body, including a degree of control over the functions of the body in question by the public body.

In the present case, Field J acknowledged these basic principles, but applied them in a way that might be considered to reflect more truly the character of HFML. However, the line of cases holding that licensing decisions by local authorities regulating public markets were civic functions that were amenable to judicial review significantly influenced the decision. Thus, his conclusion that the activity in the hands of HFML was also a public one was hard to avoid.*

■ **R (Molinaro) v Kensington & Chelsea RLBC**

[2001] EWHC Admin 896, [2002] LGR 336

The claimant sought judicial review of a decision by the council not to consent to a change of use of premises that it leased to him. The council took the decision to refuse the application in order to give effect to its planning objectives. The application failed on the merits, but one of the arguments raised by the council was that the decision was not open to judicial review. Elias J rejected this decision as unsustainable, holding that the council was not simply acting as a private body when it sought to give effect to its planning policy through the contract, and in refusing a change of use. However, he also went further and departed from observations made by Keene J in *R v Bolsover DC v Pepper* [2001] LGR 43, where he had held that the mere fact that the authority exercised a statutory power was not sufficient to inject a public law element. Elias J disagreed: 'the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused'. He also rejected as illogical the suggestion, made in some of the cases, that a decision made under a policy would be reviewable whereas one made on a specific occasion would not be. He recognised that, in many cases where an authority exercised a power to contract, no public law issues suitable for judicial review would arise. However, authorities are not in the same position as other contracting parties because they have a duty to exercise their powers in the public interest. Crucially, Elias J recognised:

the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.

Comment: This approach is plainly sound in principle. The court never loses the power to restrain abuse by a public authority. The insistence in many of the cases on identifying a separate 'public function' before judicial review can lie may pose the question the wrong way around. What is complained of must be identified in order to know if there is a sufficient 'public element' to make judicial review appropriate. This is in contrast to the approach of the Court of Appeal in *Tucker* (below), which defends a distinction between disciplinary proceedings that were reviewable, and operational decisions that were not.

■ **R (Tucker) v Director-General of the National Crime Squad**

[2003] EWCA Civ 57

In November 2002 *Legal Action* 14, the authors reported the decision of Harrison J at first instance, holding that, although the defendant's decision to terminate a police detective's secondment to the National Crime Squad (NCS) was amenable to judicial review, it did not require reasons or prior notice of any allegations giving rise to the decision. The claimant appealed and the defendant cross-appealed.

Scott Baker LJ, giving the judgment of the court, said that whether or not a decision was susceptible to judicial review depended on the nature and consequences of the decision, and not on the personality or individual circumstances of the decision-maker. In deciding that the decision in question was not amenable to judicial review, he took into account the following factors:

■ Although the claimant had no contract of employment or private law remedy, there was nothing compulsory about his secondment to the NCS, and it was an express condition of the temporary transfer to another position that it could be terminated without notice.

■ The termination of the secondment involved no change in the claimant's status as a police officer, no financial loss to him and had no disciplinary consequences.

■ The decision – which the defendant was entitled to take without the court's intervention – was an operational one because the defendant had lost confidence in the claimant's ability to carry out his duties. It was an example of the numerous 'run-of-the-mill management decisions involving deployment of staff or running the force', which are taken on a daily basis up and down the country.

Fairness did not require that reasons should be given for the decision. The sensitive nature of the information involved meant that, even though issues of national security might not have been involved, the defendant was not required to provide more information than he felt that he could.

Legitimate expectation

■ **R (Thompson and another) v Fletcher (Inspector of Taxes)**

[2002] EWHC 1448 (Admin), [2002] STC 1149

This was a claim that it was an abuse of power to withdraw investment tax relief which had been granted in previous years. The main argument was that withdrawal of tax relief in the circumstances that applied (ie, a benefit had been received by the taxpayer, but for full consideration given by him) was contrary to an Inland Revenue (IR) manual and to an IR guidance form, IR 95. The judge identified the relevant principle as follows:

First, a decision of the Revenue is open to judicial review if it is so unfair as to amount to an abuse of power … When the general principle is applied to statements of the Revenue, in assessing the meaning, weight and effect reasonably to be given to them, the factual context, including the position of the Revenue itself, is all important.

If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed, it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it; but the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification.

The taxpayer could not claim an expectation based on the manual because he did not rely on it. He could not rely on IR 95 because, although it did not suggest that the relief could be withdrawn in these circumstances, the form also made clear that it was not a comprehensive guide. It followed that there was no statement of sufficient clarity to found an expectation.

The taxpayer also alleged that it was an abuse of power to withdraw relief when it had been granted in previous years, and the relevant information had been known to the defendant because the inspector came into possession of the information when dealing with the taxpayer in a different capacity for the IR (he corresponded with the inspector when he worked in the IR's pay as you earn (PAYE) section). This, too, was rejected.

Among other things the judge held that the knowledge of an official dealing with the claimant in connection with PAYE could not be imputed to this section of the IR. The claimants had not, in fact, suffered any loss because there was nothing to show they would have made a different investment decision had they been told that the IR would withdraw relief. Overall, there was nothing 'which remotely approaches the standards of irrationality or conspicuous unfairness or abuse of power'.

■ **The Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence**

[2003] EWCA Civ 473

This case (see above) also addressed legitimate expectation. An earlier statement had said that payments would be available to 'British civilians who were interned'. Requirements relating to nationality at the time of internment and of birth in the UK (ie, of either the claimant or his/her parent or grandparent) were introduced later. The claimants argued that this frustrated a legitimate expectation created by the earlier statement. In contrast to the approach in *Fletcher* (above), the court does not appear to have required subjective awareness of the terms of the statement on the part of any person seeking to rely on it (although this was not directly in issue). The court asked how, on a fair reading, it would 'reasonably have been understood by those to whom it was directed'. Read as a whole, it did not amount to a clear and unequivocal representation that all those civilians who were British subjects at the time of internment would be eligible.

The Court of Appeal accepted that in some cases a legitimate expectation might succeed even where there was no clear and unequivocal representation (applying *R v Inland Revenue Commissioners ex p Unilever PLC* [1996] STC 681). However, this would be in exceptional cases only. This is because 'it will only be in a rare case where, absent such a representation, it can be said that a decision-maker will have acted with conspicuous unfairness such as to amount to an abuse of power'. In this respect, *Unilever* had been an exceptional case where the taxpayer had been 'lulled into a false sense of security' causing him to act to his detriment. In the present case, the court did not feel able to treat the case as so exceptional that a clear representation could be dispensed with.

■ **R (Royal Borough of Windsor and Maidenhead) v Dewar and others**

[2003] EWHC 154 Admin, 6 February 2003

The defendants were members of a police authority's joint committee and represented nine local authorities. The Police Act 1996 required the committee to appoint members so far as possible to reflect the balance of the political parties prevailing among the councillors of the relevant councils. The applicants' representative had been a Liberal Democrat councillor who lost his seat in local elections. This resulted in Conservative councillors taking control of the council.

Subsequently, these Conservative councillors nominated one of their members to the police authority, but the joint committee rejected the nominee and appointed a Liberal Democrat instead. The chair of the committee wrote to the claimant authority stating that, when next the allocation of seats came to be reconsidered, he try to persuade his colleagues that, should the committee be unable to accommodate all the authorities' preferences within the political balance constraints, an authority other than the claimant should be invited to nominate a member who was not a Conservative. Subsequently, however, this did not happen, and the claimant was again required to nominate a Liberal Democrat council member to the joint committee. The claimant argued that the committee's refusal to appoint its Conservative nominee was a breach of its legitimate expectation.

Maurice Kay J said that the legitimate expectation raised by the claimant was to a substantive benefit and the principles in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 applied: the court will in a proper case decide whether to frustrate the expectation is so unfair as to amount to an abuse of power; once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. The promise or practice relied on must be 'a clear and unambiguous representation upon which it was reasonable to rely' (*R v Devon CC ex p Baker* [1995] 1 All ER 73, Simon Brown LJ at 88).

The judge held that the letter, on which everything turned, did not contain a clear and unambiguous representation to the effect that, if the claimant was to nominate a minority Liberal Democrat councillor in 2000, the joint committee would appoint a majority Conservative councillor to represent the claimant authority in 2002. There was no more than a personal commitment of the committee's chair to do all he could to bring that about, and this implied that it was not yet a matter of certainty. It was clear that no other authority had yet been persuaded to co-operate to bring about that result. It was neither clear that the chair had authority to bind the committee nor that a legitimate expectation could be raised without such authority. It was unreasonable for the claimant to rely on the letter as a source of legal entitlement: not only did it fail to satisfy the 'clear and unambiguous' test, but it was not reasonable for a public authority to assume without more that a member, albeit the chair, of another public authority with which it is connected is in a position to obligate that other public body in circumstances such as those prevailing in this case.

Most successful legitimate expectation cases involve a representation to a member of the public or a private interest. Even then, the question arises whether the representee knows or ought to have known that the person making the representation had no power to bind the authority. Even assuming that one public authority may be able to raise legitimate expectation against another (which the judge did not resolve), it is more difficult for a public authority to resist the suggestion that it ought to have known that the person making the representation had no power to bind his/her principal.

Consultation

■ **R (Maureen Smith) v East Kent Hospital NHS Trust and Kent and Medway Health Authority**

[2002] EWHC 2640 (Admin), 4 December 2002

The claimant sought to quash a decision of the defendants about the reorganisation of health services. The proposals had been set out in a document containing four options which were put out for public consultation in December 2001. There was little positive support for any proposal and, in March 2002, a proposal was adopted that included elements of two of the earlier four options, as well as some additional features that were not included in any of the alternatives.

The parties agreed that the duty to consult in this case was a strong one, and was given particular emphasis by Department of Health guidance. The claimant complained that the consultation was inadequate, mainly on the ground that the proposal in March 2002 was so different from those contained in the consultation paper that there should have been a fresh discussion

about it before being adopted. Silber J approved the approach of Megarry J in *Legg v ILEA* [1972] 1 WLR 1245, in which he said 'For one proposal to be fairly regarded as a modification of another, one must be able to perceive enough in it of that other to recognise it as still being that other proposal, even though changed … it does not seem to me that the abstraction of a mere part of a proposal can, unless it is at least a very substantial part, be regarded as being the same proposal with modifications.' In addition, those with a right to be consulted must be given an adequate opportunity to express their views and influence the decision-maker. Thus, a crucial question is the nature and extent of the difference between the final and the original proposals. The importance of the need for decisions to be taken that affect the running of the Health Service means that there should only be re-consultation if there is a fundamental difference between the two sets of proposals. Applying this test to the facts of the case, reconsultation was not required. Furthermore, there is no obligation on a decision-maker to adopt a proposal that was arrived at only as a result of the public consultation, let alone one which enjoys consensus or the agreement of the consultees.

Error of fact

■ **Patel v Secretary of State for Transport, Local Government and the Regions**

[2003] JPL 342,
2 September 2002, QBD

P applied for planning permission. This was refused and he appealed. The inspector allowed the appeal and P did so. P's main complaint was that the inspector applied the wrong edition of local guidance, and asserted that if he had applied the right version the inspector may not have reached the same decision. This was an error of fact because the local guidance was a document produced by one party to the appeal, and was not a matter of law or a public document otherwise known to the secretary of state. The secretary of state argued that fresh evidence could not be admitted. If such evidence was not before the inspector that was the fault of P or his representatives, and this was not sufficient to give rise to an error of law (*Al Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876). Collins J accepted the authority of *Al Mehdawi*. However, he applied *R v Criminal Injuries Compensation Board ex p A* [1999] 2 AC 330. In that case, the board had not had before it a police medical report, and that was a breach of fairness given the special position occupied by the police in assisting the board.

In this case, the judge held that the authority was in a similar position to the police in a case involving criminal injury compensation. The authority had a duty to ensure that all relevant planning documents were before the inspector. This was so even if the other party also knew of them. Indeed, Collins J did not investigate in this case whether P also knew about the documents. He concluded:

Adopting the approach of A, it was unfair to the interested party, in this case Mr Patel, that the inspector considered the case without having regard to the proper SPG 5. That was a matter which was the fault of the local planning authority, and accordingly the inspector's decision is erroneous in law.

Comment: It is questionable whether it can now be maintained as a general proposition that the default of a party's advisers necessarily excludes a later challenge in respect of a point of evidence which could have been, but was not established in the court below. The HRA may sometimes require the court to be more proactive. In *R (Haile) v Immigration Appeal Tribunal* (IAT) (below), Simon Brown LJ expressly said that *Al Mehdawi* may have to be revisited in the light of *ex p A*, and in any event may not apply to an asylum case (it involved student leave).

Collins J also disassociated himself from some of the comments in *ex p A* to the effect that a material error of fact may in itself be a ground for review, despite the fact that in that case Lord Slynn stated that for his part there was jurisdiction to quash on that ground. In any event, any jurisdiction to quash for error of fact (or because failure to consider a particular act has created unfairness – as here) could, he said, only be exercised where it could 'be clearly established and there is no dispute that such an error existed'. Usually it would be inappropriate for the Administrative Court to investigate a disputed question of fact. This seems to confine the power to intervene to cases where the error cannot be contested. For example, where, as here, the decision-maker has failed to have regard to a particular document.

Material considerations

■ **R (Kides) v South Cambridgeshire DC**

[2002] EWCA Civ 1370,
9 October 2002

The Court of Appeal upheld the decision of Ouseley J ([2001] EWHC Admin 839, [2003] 1 P&CR 4. The defendant council resolved to grant planning permission for a substantial development on green field land subject to completion of a satisfactory planning agreement. The agreement took several years to complete and planning permission was not granted until October 2000. It was accepted that this was the decisive act and until then the council could change its mind. In the meantime, planning guidance changed and further information arose about the availability of another site. The claimant argued that the council ought to reconsider its decision in the light of the new material at a full committee meeting. Otherwise, she argued, all relevant material had not been properly considered as part of the planning process. The statutory duty (under Town and Country Planning Act 1990 s70) was to 'have regard to … material considerations'. This did not require a formal committee meeting.

The Court of Appeal held that the duty to have regard to material considerations was not to be elevated into a formal requirement that in every case any new material had to go back to a full committee. It was enough if the authority has considered all material considerations and has done so with the application in mind, albeit that the claim was not specifically placed before it for reconsideration. Where a committee makes a decision in principle, and a material consideration then arises before a delegated officer formally signs off the finding, s/he ought to refer the matter back for reconsideration in the light of that new issue.

The case also a raised a question about standing. It was argued that although the claimant might have standing in respect of some issues, she did not have such status in respect of one argument (ie, about affordable housing). The Court of Appeal rejected this. So long as a claimant had a 'real and a genuine interest' in challenging the decision s/he was entitled to do so on all available grounds even though s/he may have no personal interest in those grounds.

Comment: Although this case was decided in a specific planning context, the same issue often arises elsewhere where a decision is made against a moving target of changing factual circumstances and submissions. The important point is that the eventual decision must involve a consideration of all factors as part of the decision-making process: it is not enough for the decision-maker to have been generally aware of those factors. In a passage not expressly referred to in the Court of Appeal, but consistent with it, the judge at first instance said 'general awareness of new factors is not enough and that those factors have to be considered in the context of the application'.

Procedure – new evidence

■ **R (Haile) v Immigration Appeal Tribunal**

[2001] EWCA Civ 663, [2002] INLR 283

This case concerns the power to adduce new evidence on appeal in judicial review proceedings. The claimant alleged that the adjudicator had misrecorded evidence given by him at his immigration hearing. The version of the evidence relied on by the adjudicator was used as part of the basis for not believing the claimant's account. The error did not become apparent until the claimant's appeal to the Court of Appeal, the point not having been taken at the IAT, or initially on an application for judicial review. The claimant had noticed the point, but did not appreciate its significance and so did not tell his then solicitors. He sought to put in new evidence in the Court of Appeal. The defendant objected on the ground that the information had been available earlier and had not been adduced. The principles in *Ladd v Marshall* [1954] 1 WLR 1489, would obviously prevent the use of the new material, ie:

- that the fresh evidence could not have been obtained with reasonable diligence for use at the trial;
- that if given, it probably would have had an important influence on the result; and
- that it is apparently credible.

The Court of Appeal allowed the new information to be presented. Simon Brown LJ held that *Ladd v Marshall* principles had never strictly applied in public law or judicial review. These principles and that of finality in litigation are applicable subject to the court's power to depart from them 'if the wider interests of justice so require'.

Alternative remedy

■ **R (M) v Bromley LBC**

[2002] EWCA Civ 1113, [2002] 2 FLR 802

The claimant had been placed on a list of persons who are unsuitable to work with children following a report by the defendant which concluded that he had sexually abused children in his care. The decision to place him on the list was made by the secretary of state and he had a right of appeal against that decision to a Care Standards Tribunal. Instead, he applied for judicial review to quash the report of the authority that had led to the secretary of state's decision. The Court of Appeal upheld the judge's decision to refuse relief. Although there were arguable procedural deficiencies in the process leading to the report, relief should be refused as a matter of discretion. The judge's decision could only be interfered with if it was plainly wrong and that was not the case. There were three main strands to this reasoning:

- First, if the report was quashed on what were essentially procedural grounds, it would prevent a decision on the merits on a matter of public importance. Judicial review could only consider whether he was treated unfairly, but that did not mean that the conclusion about him was wrong (see para 26). The tribunal could consider the position in the round, and confirm the decision despite procedural failings if that were the right thing to do.
- Second, the Administrative Court was not as well-equipped to assess the force of the complaints the claimant made. Some of the complaints involved assessment of processes of investigation undertaken with people with learning disabilities. It was unrealistic to think that these could be addressed properly without cross-examination and detailed assessment of evidence. The tribunal was the appropriate forum for this.
- Third, a determination by the tribunal better served M. If the report was quashed on procedural grounds alone then the underlying questions would remain.

The court emphasised that this did not mean that a report like this could never be subject to judicial review. However, this power should be exercised only 'with the greatest circumspection' (see Judge LJ at para 43). Examples might be where the inquiry was motivated by spite, or malice, or conducted in bad faith (although how this would be proved in judicial review proceedings was not addressed), or where there was not a scintilla of evidence, or where the investigation was incompetent.

■ **R (Wilkinson) v Chief Constable of West Yorkshire**

[2002] EWHC 2353 Admin, 22 October 2002

The claimants, who were serving police officers and members of a serious crime squad, were the subjects of various complaints by prisoners relating to the supply of drugs and inducements for confessions. Disciplinary proceedings were brought and the claimants sought at a preliminary hearing before the chief constable to have the charges dismissed on grounds of delay and vagueness. The chief constable dismissed some of the charges, but a number remained. The claimants sought judicial review, and the chief constable argued at the permission hearing before Stanley Burnton J that the court should not accept jurisdiction because there was an alternative remedy open to the claimants (namely, an appeal to a tribunal after the substantive determination of the charges). Nonetheless, permission was granted. The chief constable sought to persuade the judge at the substantive hearing to decline jurisdiction on grounds of alternative remedy.

Davis J said that the issue of alternative remedy was not in truth a jurisdictional one. The principle is that the power to grant judicial review will not ordinarily be exercised where alternative remedies are available unless there are exceptional circumstances. Stanley Burnton J had decided that there were exceptional circumstances and there is no appeal from that decision. It is true that a judge is not generally fettered by the reasons of the judge granting permission, because at that stage s/he is only indicating that a point is arguable. However, certain decisions at the permission stage are dispositive of the point: eg, about delay and extension of time. This was the position here: the judge noted that there may be circumstances in which the court could reopen a decision in an alternative remedy case, as it has always had power to recall and reopen orders and decisions in cases of fraud or mistake, or exceptionally for further argument because of inadvertent oversight, or a conclusive statutory provision or legal authority, but in those circumstances the original judge ought to be invited to recall the decision and order. Furthermore, even where permission has been granted in an alternative remedy case, the argument might again be deployed at the substantive hearing with regard to relief.

Davis J also confirmed that this was a proper case in which to grant permission despite the alternative remedy available. The decision to have the preliminary hearing in the disciplinary proceedings was the chief constable's and, if the ruling on the preliminary point should properly be set aside, it seems wholly unjustified that there should be, in the interim, the cost (which would be very considerable), uncertainty, delay and stress of a contested substantive hearing at very great length before the correctness of the preliminary ruling could be a challenge on appeal to the appeals tribunal.

Pre-emptive costs

■ **R (Campaign for Nuclear Disarmament) v Prime Minister and others**

[2002] EWHC 2712 Admin, 5 December 2002, Div Court

The Campaign for Nuclear Disarmament (CND) applied for an advisory declaration that UN Resolution 1441 does not authorise the use of force in Iraq. The campaign obtained an order that its costs liability, in the event that it failed, would not exceed a set amount. Simon Brown LJ applied the principles first set out by Dyson J in *R v Lord Chancellor's Department ex p CPAG*

[1999] 1 WLR 347, and subsequently approved in later cases by the High Court and by the Court of Appeal after the advent of the Civil Procedure Rules as follows:

- that the issues raised are of general importance;
- the court has a sufficient appreciation of the merits of the claim that it can conclude it is in the public interest to make the order; and
- having regard to the financial resources of the parties and the amount of costs likely to be in issue, that the respondent clearly has a superior capacity to bear the costs than the applicant and, unless the order is made, the applicant would probably discontinue the proceedings and would be acting reasonably in doing so.

That such an order would be made in exceptional circumstances only is illustrated by the fact that the CND case appears to be the only one to date in which such an order has been made. The court was persuaded, in particular, by the fact that CND has modest resources and would go into liquidation or find its activities severely curtailed if it faced a large costs order, that the campaign would not be able to proceed with the challenge without a costs cap. Moreover, the short time frame for the challenge meant that CND had no opportunity to fund raise for it. The court was to deal with a preliminary point which would determine whether, as the government contended, the decision was non-justiciable, and the costs cap sought would be sufficient to meet the defendant's costs for that hearing in any event. Maurice Kay J added that, if such an order is sought, the earliest notice of it should be given, preferably in the claim form.

Permission

■ R (Opoku) v Principal of Southwark College

[2003] 1 All ER 272

The claimant applied for judicial review on two grounds. Permission was granted on one ground at an oral hearing, and the claimant did not appeal against the refusal of permission on the other. The substantive judicial review application was dismissed, and the claimant then sought permission again on the second ground. Lightman J refused permission. He said that, while the High Court can grant permission on a ground which has previously been refused, such jurisdiction should be exercised cautiously and only where there has been a significant change of circumstances, or a claimant became aware of significant new facts which s/he could not reasonably have known or discovered on a previous application, or where the law has changed since the original refusal. Otherwise, permission should be refused as an abuse of process.

■ Kate Markus and Martin Westgate are barristers at Doughty Street Chambers, London WC1.

* For a critical review of the case-law generally, see 'Leonard Cheshire Foundation: what is a public function?', Kate Markus, [2003] EHRLR 92.

EMPLOYMENT

Employment law update

Tamara Lewis and **Philip Tsamados** continue their six-monthly update on employment and discrimination law, designed to keep practitioners informed of all the latest developments. Readers are invited to send in innovative unreported cases, information on significant cases in which appeals have been lodged and examples of the use of new legislation.

LEGISLATION

Statutes

Employment Act 2002

The Employment Act 2002 introduces major new rights over a wide range of employment law, mainly in the form of enabling provisions to be fleshed out by regulations during 2003 and 2004. The regulations will be set out in future articles as they come into force.

Below are those relating to the right to request flexible working, and maternity, paternity and adoption leave and pay, which came into force on 6 April 2003. The provisions relating to the introduction of compulsory disciplinary and grievance procedures by employers have been put back until at least April 2004.

Regulations

Maternity and Parental Leave (Amendment) Regulations 2002 SI No 2789

These amend rules on maternity leave set out in the Maternity and Parental Leave, etc Regulations 1999 SI No 3312. The changes apply to women whose expected week of childbirth (EWC) began on or after 6 April 2003. Ordinary maternity leave (OML), available to all employees, is extended from 18 to 26 weeks in total. Additional maternity leave (AML) adds a further 26 weeks to OML, ie, 52 weeks in total. AML is available to employees employed for at least 26 weeks at the start of the 14th week before the EWC. There are some changes in the notification requirements and advisers should consult the regulations. In brief, a woman must give notice no later than the end of the 15th week before her EWC of her pregnancy, the EWC and the date she wants to begin leave (SI No 1999/3312 reg 4 (as amended)). She can subsequently vary the date by giving 28 days' notice (reg 4(1A)). An employer must, in turn, notify a woman of her return date, ie, the end of the OML or AML period, as applicable (reg 7). If a woman wants to return early, she must give 28 days' notice (reg 11). OML can now be triggered by a pregnancy related absence in the last four weeks (no longer six weeks) before the EWC. For further information see the feature in 727 *IDS Brief* 16 and September 2002 *Legal Action* 23.

Amount and extent of Statutory Maternity Pay

By reference to Social Security Contributions and Benefits Act 1992 s166 and the Social Security, Statutory Maternity Pay and Statutory Sick Pay (Miscellaneous Amendments) Regulations 2002 SI No 2690, changes are made to the amount and extent of Statutory Maternity Pay (SMP). From 6 April 2003, a woman is entitled to receive 26 weeks' SMP during the OML period, the first six weeks of which are paid at 90 per cent of her average pay and the remaining 20 weeks at £100 per week or 90 per cent of pay, whichever is the lower. A woman must have 26 weeks' service by the start of the 14th week before the EWC and her average earnings must be at least the equivalent of the lower earnings limit for National Insurance of £77 per week.

Paternity and Adoption Leave Regulations 2002 SI No 2788

These came into force on 8 December 2002. The Employment Rights Act (ERA) 1996 ss75A and 75B gives employees a right to adoption leave, which is set out in the regulations. Adoption leave applies in relation to children placed for adoption or

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notified as matched with a person on or after 6 April 2003 (SI No 2788 reg 3(2)). The regulations are similar to those for maternity leave with a few key exceptions. The main difference is that there is no right until an employee has been continuously employed for at least 26 weeks. Statutory adoption pay is available.

ERA ss80A–80E give a new right to paternity leave in relation to children born on or after 6 April 2003 or whose expected week of birth is on or after that date. Employees with 26 weeks' service are entitled to leave if they are the father, or married to, or the partner (including same-sex partner) of the mother (regs 2 and 4). Leave can only be taken as a single one week block or a two week block (reg 5). An employee must give the correct notifications (reg 6). Statutory paternity pay is also available.

Statutory paternity and adoption pay

Both Social Security Contributions and Benefits Act 1992 ss171ZE and 171ZN and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002 SI No 2818, set out changes to the entitlement to, and rates of, statutory paternity pay (SPP) and statutory adoption pay (SAP). From 6 April 2003, SPP and SAP are paid at £100 per week or 90 per cent of pay, whichever is the lower.

Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI No 3236 and Flexible Working (Procedural Requirements) Regulations 2002 SI No 3207

Both sets of regulations came into force on 6 April 2003. They expand the law in ERA ss80F–80I and set out a specific procedure whereby a qualifying employee can have a request for flexible working formally considered. There is no legal right under this procedure to have the request granted, but an employee may be able to use the information for other legal claims, eg, for indirect sex discrimination under the Sex Discrimination Act (SDA) 1975. To be eligible for this right, a worker must be an employee with at least 26 weeks' continuous service, who is either the parent (including adopted or foster parent) or guardian of the child, or his/her partner or spouse, with responsibility for the child's upbringing.

An employee can request a change in his/her terms and conditions of employment for the purpose of caring for a child aged under six or if disabled, under 18. Caring for a child can include collecting him/her from school or simply spending more time with him/her. An employee can only ask for changes to hours or workplace under this procedure. Only one request can be made in a period of 12 months. An employer may only refuse the request on one of a number of specified grounds, which cover almost everything.

There is a set procedure to be followed. Standard forms, which need not be used, are available on the Department of Trade and Industry (DTI) website. There is also a useful DTI guide (though it has no legal status) on the site.[1]

ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 SI No 694

From 6 April 2003, the order provides for an arbitration scheme in England and Wales as a voluntary alternative to application to the Employment Tribunal (ET) for the resolution of claims arising out of an application for flexible working made under ERA s80F(1) where both parties agree. The scheme provides for arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an ET arising out of a contravention or alleged contravention of ERA ss80G(1) or 80H(1)(b).

Disability Discrimination (Blind and Partially Sighted Persons) Regulations SI No 712

These came into force on 14 April 2003. They provide that a worker who is registered with a local authority or certified by a consultant ophthalmologist as blind or partially sighted will be deemed disabled under the Disability Discrimination Act (DDA) 1995. This means that s/he need not prove his/her impairment has a substantial adverse effect on his/her day-to-day activities. A certificate signed by the certifying consultant ophthalmologist or issued by a local authority will suffice.

Employment Rights (Increase in Limits) (No 2) Order 2002 SI No 2927

From 1 February 2003, the limits on awards which can be made by ETs were increased. These include: the compensatory award for unfair dismissal, increased from £52,600 to £53,500, and the maximum figure of a week's pay for the purposes of, among others, the basic award for unfair dismissal and redundancy payments, increased from £250 to £260.

Equal Pay (Questions and Replies) Order 2003 SI No 722

This order came into force on 6 April 2003, implementing Equal Pay Act (EqPA) 1970 s7B by providing for a questionnaire procedure in equal pay cases. The order sets out a form of questionnaire which may be used and mirrors the provisions relating to questionnaires under the race, sex and disability discrimination legislation.

The questionnaire provides for a process by which a complainant can ask questions of an employer to determine whether s/he has a claim under the EqPA about terms and conditions of employment, including pay, and if so, how best to formulate it. The main difference is that an employer must reply within eight weeks of service of the questionnaire, after which time the ET can draw the appropriate inferences from the failure to do so. A copy of the questionnaire is available at: www.womenandequalityunit.gov.uk. See also page 30 of this issue.

EU Directives

Equal Treatment Amendment Directive (2002/73/EC)

This was passed on 23 September 2002 and must be implemented by 5 October 2005. Some amendments to the SDA will be needed to comply with the Directive. Many of these changes are already anticipated in the draft amendments published for consultation by the DTI (see below).[2]

Proposed legislation

The DTI has published draft consultation documents and proposed amendments in the rapidly expanding area of discrimination law. The changes are largely to meet the requirements of the EU Race Discrimination Directive 2002/43/EC and General Framework Directive 2000/78/EC. There are proposed changes to the existing Race Relations Act (RRA) 1976, SDA, DDA and EqPA, plus drafts of new law prohibiting discrimination on grounds of sexual orientation and religion. Full drafts can be downloaded from the DTI website.

EMPLOYMENT TRIBUNAL PROCEDURE

Adjournments

It is notoriously difficult for applicants to get cases adjourned. Under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 SI No 1171 Sch 1 rule 15(7), ETs can postpone hearings. The appeal courts are usually reluctant to overturn decisions based on a discretion power. However, such discretion has to be exercised judicially and not used arbitrarily. In addition, article 6 of the European Convention on Human Rights ('the convention') states that everyone is entitled to a fair and public hearing and as a result of the Human Rights Act (HRA) 1998, courts and tribunals must act in a way which is compatible with the convention. This case highlights the situation where an ET refused a request for an adjournment without apparent proper consideration of the grounds of the request.

■ **Robinson v Home Office**
EAT/0533/01,
3 May 2002,
720 IDS Brief 13
Mr Robinson had brought claims of race and sex discrimination against the Home Office. The hearing was set for 22 February 2001. On 19 February 2001, he faxed a letter to the ET requesting that his hearing be adjourned on medical grounds and he enclosed a medical certificate covering 13 to 21 February 2001. He stated that he would need to take frequent breaks because of his medical condition. The matter was put before Mr Warren, an ET chair sitting at London South. The chair refused the request stating that such breaks would be allowed where necessary. Mr Robinson sent a further fax letter on 21 February 2001 and a new medical certificate which the subsequent ET decision recorded as being 'purportedly' issued by the same medical centre on the same day as the previous certificate, but signed by a different doctor and 'purported' to cover a period up to 24 February 2001. The chair again refused the request stating that he was not satisfied by the medical evidence. Mr Robinson did not attend the hearing. The ET hearing the case further considered the request, but was not satisfied by the medical evidence and refused it. It then dismissed Mr Robinson's application on the basis that he had failed to make out a prima facie case. Mr Robinson appealed to the Employment Appeal Tribunal (EAT) and the Home Office did not oppose his appeal.

The EAT found that the ET had before it a medical certificate, indicating on its face that Mr Robinson was medically unfit to attend on the day of the hearing. The EAT held that the ET did not exercise its discretion judicially for several reasons: the ET had used the word 'purported' twice in its decision and it had reached its conclusion on an unstated basis; in particular, it had made no reference to the reasons why it had dismissed or discounted the letter of 21 February (which had set out comprehensibly the details of Mr Robinson's current medical difficulties) or why it had concluded that it was not satisfied about the medical evidence. The EAT decided that this was an error of law, that the ET had formed its conclusion on an unstated basis, and had deprived Mr Robinson of his right to a fair trial under article 6 of the convention. The case was remitted to a differently constituted ET.

Reserve judgments

Occasionally ETs can take considerable time between hearing a case and issuing their decision. This can be because of the complexity of the matters under consideration, or the practical problems of all of the members of the tribunal arranging to meet again, or administrative difficulties in producing written decisions. In the following case, the EAT considered the impact of such a delay on the safety of the decision.

■ **Barker and others v Home Office**
EAT/804/01,
7 August 2002,
721 IDS Brief 10
The ET took over 12 months to issue its written decision in a complex equal pay case involving 16 employees. After the decision was sent to the parties, the ET invited them to make representations about the appropriate remedy. The employees replied that the ET had failed to set out its order or to make all the findings necessary to enable them to make proper representations. The ET subsequently met again over four days and issued a second decision setting out the precise terms of the order to be made, tidying up some aspects of its first decision and adding new findings in recognition of the failings in its first decision. By this time both parties had already appealed against the first decision.

The EAT held that the second decision was invalid. The ET had no general power to recall a decision once it had been promulgated and entered on the register. The EAT further held that the delay was in breach of the right to a fair trial under article 6 of the convention (incorporated into domestic law under the HRA) in that it guaranteed the right for parties in court proceedings not to suffer excessive delays. On this basis, the EAT decided that the decision was unsafe and remitted the case to be heard by a differently constituted ET. The EAT stressed that the danger of such a delay is that the ET will have forgotten the impression created by the witnesses, and that there were several examples in the decision which indicated that the ET had not been entirely on top of the facts.

Costs

Under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 SI No 1171 ('the 2001 Regulations') Sch 1 rule 14, ETs have the power to award costs against a party where s/he has acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived. The ET can award costs of up to £10,000, or an amount as agreed by the parties, or can refer the matter to the county court for assessment if the sum is greater than £10,000. Regulation 2(1) defines 'misconceived' as including 'having no reasonable prospect of success'. Under Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 SI No 2687 ('the 1993 Regulations), costs could be awarded if a party acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably, and costs could only be awarded up to £500 without assessment. The *ET services annual report 2001/2002* indicated that costs were awarded in 636 cases as compared with 247 in the previous year.

Although in the following case, the Court of Appeal (CA) considered a costs order made against an applicant under the 1993 Regulations, it is of importance given the observations about the practice of ETs in giving costs warnings particularly to litigants in person, and the increasing number of costs orders which are now being made.

■ **Gee v Shell UK Ltd**
[2002] EWCA Civ 1479,
[2003] IRLR 82,
IDS Brief 3
Mrs Gee, an unrepresented applicant, brought a claim of unfair dismissal against Shell. Two preliminary points arose:
■ whether she was an employee; and
■ whether she had sufficient qualifying service to bring her claim.

After hearing legal arguments, the ET warned Mrs Gee that it had considerable doubt that she had sufficient service, and that she was at risk of a substantial costs award if she continued with her claim. Concerned that her house might be at risk, Mrs Gee withdrew her claim. She subsequently appealed to the EAT and it allowed her appeal on the basis that the ET had acted unfairly and oppressively in issuing the costs warning, and had left Mrs Gee with no alternative but to withdraw her claim. Shell appealed to the CA.

The CA held that the ET had put unfair pressure on Mrs Gee, which had caused her to withdraw. It observed that an ET should only make a costs warning where there was a real risk that an order for costs would be made against an unsuccessful party at the end of a hearing. It stated that costs orders are very much an exception rather than the rule, and that the danger – where an ET makes or presses a costs warning that is not justified – is that an applicant will be denied a fair hearing by being deprived of a hearing at all. It said the critical question is whether the risk of a costs order being made was sufficiently high to justify an ET putting pressure on a party to withdraw, and that an ET must be particularly careful not to do so to a litigant in person.

Comment: Although the CA stated that the 1993 Regulations set a high threshold in terms of the circumstances in which a costs order could be made, it is hoped that ETs will be reminded that, even under the wider scope of the 2001 Regulations, where an applicant has an arguable case it is undesirable to issue a warning which has the effect of deterring that party from continuing. It would be far better for ETs to exercise better case management to prevent patently hopeless cases reaching a full hearing. Importantly, ETs should remember that a case is not misconceived simply because it does not win.

DISCRIMINATION

Time limits for ET applications

Under discrimination law, an ET claim must be brought within three months of the act complained of (SDA s76; RRA s68; DDA Sch 3 para 3). Where an act of discrimination extends over a period of time, the three months can be counted from the end of that period. This is sometimes known colloquially as 'continuing discrimination'. The difficulty is in knowing when a series of discriminatory actions can amount to a single continuing act as opposed to separate incidents. In *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574, the EAT said a succession of specific instances can indicate the existence of a continuing discriminatory practice, depending on the evidence. The following helpful case clarifies what needs to be proved.

■ **Hendricks v Commissioner of Police of the Metropolis**
[2002] EWCA Civ 1686,
[2003] IRLR 96,
725 IDS Brief 6

In March 2000, Ms Hendricks, a black woman serving in the Metropolitan Police, brought an ET case claiming race and sex discrimination throughout her 11 years' service. None of the nearly 100 allegations occurred in the three months before the claim was lodged. She claimed her treatment amounted to discrimination which was still continuing. The CA confirmed that the ET was entitled to hear the claim on this basis. The best way to put it was that Ms Hendricks would need to prove that the individual incidents were evidence of a continuing discriminatory state of affairs. Concepts such as 'institutionalised racism' and 'climate' or 'culture' of racism were not legally precise. On the other hand, Ms Hendricks need not be restricted to proving a discriminatory policy, rule, regime or practice.

Race discrimination

Although the following is a race discrimination case, it has more current relevance for sexual harassment cases, because the relevant section of the RRA has since been amended by the Race Relations (Amendment) Act 2000 with effect from 2 April 2001. However, the equivalent section in the SDA has not been amended, though arguably it may breach European law.

■ **Chief Constable of Bedfordshire Police v Liversidge**
[2002] EWCA Civ 894,
[2002] IRLR 651,
109 EOR 29

The CA stated that due to the wording of RRA s16, a chief constable was not vicariously liable for an act of discrimination carried out by one constable against another. So, a police officer suffering racial harassment at work by another police officer could not claim under the RRA. The House of Lords (HL) has refused leave to appeal.

Comment: An officer can still claim against a chief constable for his/her own discriminatory actions, for example, as in *Hendricks v Commissioner of Police of the Metropolis* (above).

Sex discrimination

Direct sex discrimination occurs where an employer treats a woman on grounds of her sex less favourably than it treats or would treat a man. Under SDA s5(3), the actual or hypothetical comparison can only be made where the relevant circumstances of a man's and woman's cases are the same or not materially different. In the following case, the HL looked at the equivalent wording in the Sex Discrimination (Northern Ireland) Order 1976 NI 15.

■ **Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)**
[2003] UKHL 11,
27 February 2003

Chief Inspector Shamoon worked in the Urban Traffic Division of the Royal Ulster Constabulary (RUC). She claimed sex discrimination when Superintendent Laird, the head of her division, removed her appraisal responsibilities. This followed complaints, by certain constables and the Police Federation, about the way she had carried out appraisals. The ET accepted as actual comparators two male colleagues in other RUC divisions, who had not had their responsibilities removed. The ET considered this was less favourable treatment and went on to infer that it was on grounds of sex.

The HL overturned the decision, saying that the two men were not valid comparators because their circumstances were materially different, first, because no complaints had been made about them, and second, because they worked in a different division and Superintendent Laird had no line responsibility for them. The HL observed that Ms Shamoon did not have to use actual comparators and could have asked the ET to make a hypothetical comparison, ie, whether a man working in her division and who had complaints made against him would have had his appraisal responsibilities removed. Various kinds of evidence could be considered when making a hypothetical comparison and from a purely evidential viewpoint, the treatment of less precise comparators could be taken into account. The HL approved the approach of the EAT in the useful case of *Chief Constable of West Yorkshire v Vento* [2001] IRLR 124, November 2000 *Legal Action* 25.

Comment: ETs often put pressure on applicants to identify actual comparators. This case is a reminder that a hypothetical comparator is acceptable. Indeed, even where actual comparators can be identified, it is wise to argue a hypothetical comparison in the alternative. Remember, also, that the treatment of a loosely similar comparator may still be relevant for evidential purposes in helping to prove how a hypothetical comparator would be treated.

Disability discrimination

Definition

The first part of the definition of disability requires a worker to prove s/he has a mental or physical impairment (DDA s1(1)). What happens where a worker has clear physical symptoms, but no underlying physical impairment can be identified?

■ **McNicol v Balfour Beatty Rail Maintenance Ltd**
[2002] EWCA Civ 1074,
[2002] IRLR 711

Mr McNicol claimed that his employers failed to make reasonable adjustment to enable him to work having regard to neck and spine pain following an accident. After examining Mr McNicol, a consultant spinal surgeon found no physical impairment. He suggested the severe symptoms could be the result of psychological problems. This is known as 'functional overlay'. The ET found no physical or mental impairment.

The EAT rejected Mr McNicol's appeal, saying he had no physical impairment because his symptoms appeared to be the result of his psychological condition. Nor had he proved that he had any mental impairment amounting to a clinically well-recognised illness.

The CA disagreed with the EAT's approach, which looked purely at whether the impairment itself was physical or mental, as opposed to whether a physical or mental activity was affected. The CA said that an 'impairment' may result from an illness or consist of an illness. However, on the particular facts of this case, it confirmed the ET's decision that Mr McNicol had no disability.

To fall within the definition of disability, a worker's impairment must have a substantial adverse effect on his/her ability to carry out 'normal' day-to-day activities as opposed to hobbies. It is therefore important to put the relevant evidence to the ET.

■ **Coca-Cola Enterprises Ltd v Shergill**
(2003) 727 IDS Brief 13, EAT
Mr Shergill had a degenerative spinal disease. He gave evidence that due to this, he could not play snooker, keep goal at football or cycle for any distance. The ET considered these were normal activities for someone of Mr Shergill's age (29) and found him disabled. The employers appealed.

The EAT said the ET was wrong because it disregarded *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (brought into force by SI No 1996/1996) which specifically excludes the effect on games or sports. However, the EAT did accept there may well have been material before the ET on which it could have found 'normal day-to-day' activities, eg, driving or sitting, were affected. The EAT allowed the appeal and remitted the case to a new ET.

Reasonable adjustment

■ **Tuck v Fish Brothers**
(2002) 719 IDS Brief 14, EAT
In deciding whether the duty of reasonable adjustment has arisen, employers cannot simply say they did not know an employee suffered from a disability. If an employer could reasonably have been expected to know, then the duty arises. In this case, the employers should have realised the possibility from the fact that the employee had had long absences, continued to have physical problems and had been referred to a specialist.

Justification

It is open to employers to justify a decision not to recruit disabled workers because at the time they were acting on medical advice. In *Jones v Post Office* [2001] EWCA Civ 558, [2001] IRLR 384, the CA said it is sufficient justification if an employer makes a reasonable decision based on a rational and properly conducted risk assessment. The ET is not permitted to reach its own decision based on the latest medical evidence. However, as the following case clarifies, this does not mean that medical evidence, produced for the ET case and subsequent to an employer's decision, is irrelevant.

■ **Surrey Police v Marshall**
[2002] IRLR 843, EAT
The police offered Ms Marshall a post, subject to medical clearance. The offer was withdrawn on the advice of the police's medical officer, Dr Cahill. Dr Cahill obtained a report from Ms Marshall's GP practice before reaching a conclusion. The ET listened to evidence from a consultant psychiatrist, Dr Lipsedge, which supported Dr Cahill's conclusions. However, the ET decided not to take account of Dr Lipsedge's evidence, because it had not been available to the employer at the time.

Overturning the ET's decision, the EAT said there was nothing in *Jones* which said that an ET could not take account of medical evidence obtained after the event. The evidence should not be used to decide whether Dr Cahill was in fact correct, but it could legitimately be used to help decide whether Dr Cahill's conclusions were rational and within a reasonable range at the time.

Remedies

Awards for injury to feelings with its various sub-headings (aggravated damages, psychiatric damage, etc) are notoriously hard to predict. In the following case, there is, at last, guidance from the CA, although unfortunately it does bring down the level of the highest awards.

■ **Vento v Chief Constable of West Yorkshire Police (No 2)**
[2002] EWCA Civ 1871,
[2003] IRLR 102,
114 EOR 27,
726 IDS Brief 4
Ms Vento, a probationer police officer, complained of bullying at work and then dismissal, after her marriage broke down, leaving her as a single parent. Upholding her sex discrimination complaint, the ET found the police had made unwarranted or unfairly exaggerated attempts to portray her actions as dishonest or incompetent. The bullying over a long period had contributed to her clinical depression. The ET awarded £165,829 for future loss of earnings on the basis there was a 75 per cent chance that Ms Vento would have completed a full police career had she not been discriminated against. It also awarded £50,000 for injury to feelings plus £15,000 aggravated damages and £9,000 for personal injury. The police appealed.

The EAT reduced the award for future loss of earnings because it felt the evidence did not support a 75 per cent likelihood of Ms Vento completing her career. It also reduced the overall award of £74,000 for injury to feelings to a total of £39,000 (see May 2002 *Legal Action* 11).

The CA reinstituted the ET's award for future loss. The ET was entitled to take account of the fact that new family-friendly policies meant women officers were likely to stay longer in the police force in future. However, the total for injury to feelings was excessive and an error of law. It was seriously out of line with the majority of awards, with guidelines compiled by the Judicial Studies Board and with personal injuries cases. A fair total here would be £32,000, ie, £18,000 for injury to feelings, £5,000 aggravated damages and £9,000 for psychiatric damage. The CA identified three broad bands of compensation for injury to feelings (as distinct from psychiatric damage):

■ a top band of £15,000–£25,000, to be exceeded only in the most exceptional cases;
■ a middle band of £5,000–£15,000; and
■ a lower band of £500–£5,000 for less serious cases where the act of discrimination is an isolated occurrence.

EQUAL PAY

In *Ratcliffe v North Yorkshire County Council* (1993) 496 IDS Brief 2, EAT, the council's female catering assistants were able to bring an equal value claim comparing themselves with male council workers such as road sweepers and refuse collectors. The catering assistants were employed by the council's Direct Services Organisation (DSO) established to submit an in-house tender for the work. Subsequently, the work was contracted out to private companies. The question was whether the women could still compare their pay with male council employees. The CA referred the case to the European Court of Justice (ECJ) to interpret the effect of article 141 of the Treaty of Rome in this situation.

■ **Lawrence and others v Regent Office Care Ltd and others**
[2002] IRLR 822,
110 EOR 27,
719 IDS Brief 3, ECJ
The ECJ said that article 141 is not limited to situations where men and women worked for the same employer. For example, comparisons can be made:

■ where statutory rules apply to pay and conditions in more than one undertaking, establishment or service, eg, nursing salaries within a national health service;
■ where several undertakings or establishments are covered by a collective works agreement; and
■ where terms and conditions are laid down centrally for more than one organisation or business within a holding company or conglomerate.

However, article 141 does not apply in situations such as this case, where the differences in pay cannot be attributed to a single source. This is because there is no single body which is responsible for the inequality and which could restore equal treatment. If

the women were still employed by the DSO, they would succeed in their claims.

■ **Robertson and others v Department for Environment, Food and Rural Affairs**
(2003) 727 IDS Brief 9, ET
In this interesting case, an ET decided that employees of one government department could compare their pay with those of another. All civil servants were in the employ of the Crown, even though working in different departments. Proposed changes to terms and conditions including pay, though locally negotiated, had to be put to the Treasury for consideration. The Treasury, on behalf of the Crown, had ultimate control of pay and also had power to remedy inequality. Therefore, all government departments and agencies were in a single establishment or service within the meaning of article 141.

Comment: This case is only at ET level and is likely to be appealed.

EMPLOYMENT RIGHTS

Settlements

When settling claims, whether by way of a COT3 agreement, compromise agreement or otherwise, it is very important to consider the effect of wording for a full and final settlement where it purports to settle all or any claims. The following case considered the effect of a settlement on an employee's ability to pursue a claim which came into existence after the date of settlement.

■ **Royal National Orthopaedic Hospital Trust v Howard**
[2002] IRLR 849,
720 IDS Brief 5, EAT
Mrs Howard brought a claim of victimisation under the SDA against her former employers. The hospital argued that the terms of the COT3 agreement which compromised her previous claim of sex discrimination precluded her from so doing.

The EAT held that an agreement in full and final settlement of an employee's sex discrimination claim and all other claims she might have did not prevent her from bringing a victimisation claim where her former employer subsequently refused to allow her to return for one day's work.

It found that, as a matter of public policy, there was no reason why a party should not be allowed to contract out of some future claim under a settlement agreement. However, the question in each case was whether, looking at the agreement objectively, that was the intention of the parties or whether, to correspond with their intentions, some restriction has to be placed on the scope of the release. If the parties seek to release claims of which they have and can have no knowledge, whether those claims have already come into existence or not, they must do so in language which is absolutely clear and leaves no room for doubt.

Unlawful deductions and annual leave under the Working Time Regulations 1998

The following case dealt with the issue of whether a claim for paid annual leave should be brought under the Working Time Regulations 1998 SI No 1833 (WT Regs) or as an unlawful deduction from wages under ERA Part II. This was because of the time limit involved.

Under WT Regs reg 13, workers are entitled to four weeks' paid leave each holiday year. Regulation 16 states that for each week of annual leave a worker takes, s/he is entitled to receive a week's pay. Regulation 30 provides that a worker who does not receive holiday pay can bring a claim to an ET within three months of the date on which the payment should have been made. However, under ERA Part II a worker can bring a claim of unlawful deduction from wages within three months of the date of the last unlawful deduction in a series of deductions (s23).

■ **List Design Group Ltd v Douglas and others; List Design Group Ltd v Catley**
[2003] IRLR 14,
726 IDS Brief 7,
706 IRLB 14, EAT
The employees in these cases were originally employed on the basis that they would be paid only for hours worked and were not entitled to holiday pay. Following the implementation of the WT Regs, the employees were sent letters stating that their existing contractual rate included an allowance to cover provision of holiday and that, accordingly, they should set aside 8.33 per cent of their pay for holiday funds.

In January and October 2000, the two sets of employees presented applications to two different ETs claiming that they had not been given paid leave under the WT Regs for any holiday year since October 1998. The ET held that the employees had not been paid in respect of their holidays. The employer was not entitled to treat the payment of holiday as rolled up within the wages paid to its employees. The ET found that the letters referring to 8.33 per cent had not varied, and could not vary, the original terms of the contract of employment that the hourly rates did not include an allowance for holidays. It said the letter was at best disingenuous and at worst a transparent attempt to circumvent the WT Regs. The employer also argued that the claims had been brought outside the time limit under the WT Regs. However, the ET found that the claims were in time under ERA Part II. The employer appealed on the grounds that the claims should not have been considered under ERA Part II, but under the WT Regs and, as such, they were out of time.

The EAT upheld the ET decisions. The claims for holiday pay in previous years could be presented under ERA Part II as they were for wages, which include holiday pay and sums payable by way of contract or otherwise, ie, by statute (s27(1)(a)). The sums formed part of a series of unlawful deductions from wages and, under s23, as long as the claim is made within three months of the last deduction, it is in time.

Rolled-up holiday pay under WT Regs

Sometimes, employers attempt to avoid paying the annual leave entitlement under WT Regs by alleging that workers' pay includes an element for holiday pay rolled up within existing pay or the hourly rate of pay. In November 2002 *Legal Action* 20, the authors reported the two cases of *MPB Structure Ltd v Munro* [2002] IRLR 601, EAT and *Blackburn & others v Gridquest Ltd* [2002] IRLR 604, CA. These dealt with the issue of rolled-up holiday pay, which was also at the heart of the *List* case (see above), although not challenged on appeal.

The Court of Session (CS) (the Scottish equivalent of the Court of Appeal) has now decided *MPB Structure Ltd v Munro CS* 1 April 2003. There was thought to be some anomaly between the two cases. However, the CA in *Gridquest* did not address whether rolled-up holiday pay was lawful, but said that, in any event, it would need to form an express term of the contract of employment to be effective. The CS in *MPB Structure Ltd* has confirmed the EAT decision that rolled-up holiday pay is unlawful and defeats the purpose of the WT Regs.

UNFAIR DISMISSAL

Continuity of employment

The following case considered the position of a woman absent from work under a child break scheme. Under ERA s212, continuity of employment can be preserved, either in circumstances where the contract of employment continues albeit that an employee is not actually at work (s212(1)) or, in the absence of a contractual relationship, where an employee is absent from work in such circumstances that by arrangement or custom s/he is regarded as continuing in employment for any purpose (s212(3)(c)).

■ **Curr v Marks & Spencer plc**
[2002] EWCA Civ 1852,
[2003] IRLR 74,
726 IDS Brief 12
Marks & Spencer operated a child break scheme which allowed mothers to take a long break from work in order to enjoy time with their children. Mrs Curr took

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Other

***Making tribunals accessible to disabled people: Guidance on applying the Disability Discrimination Act*, Council on the Tribunals and DRC, November 2002. Available on the council's website: www.council-on-tribunals.gov.uk.**

advantage of this scheme. She was required to resign from her job to go on her child break. She was given her P45, required to repay her house purchase loan, all her staff benefits ceased and her pension was frozen. At the end of the break, she had the option to return to a post similar to the one she had held before she resigned. During the break, she was required to maintain her level of experience by working a minimum of two weeks per year and could not work for anyone else without prior consultation. She returned to work after four years and when she was subsequently made redundant, her redundancy payment was only calculated by Marks & Spencer on the basis of her years of service from the date of return rather than when she first commenced her employment.

Mrs Curr presented a claim of unlawful deduction from wages in respect of the shortfall in her statutory redundancy payment. The ET dismissed her claim on the basis that continuity of employment had been broken by the child break, under ERA ss212(1) and 212(3). The EAT allowed her subsequent appeal on the basis that the child break constituted an arrangement under s212(3)(c). Marks & Spencer appealed to the CA.

The CA held that, on the facts, Mrs Curr's contract of employment did not continue during her absence from work under her employer's child break scheme. Although she was required to work for a minimum of two weeks in each year of her child break, there was no agreement about when or where she would work and how much she would be paid, and although the time and pattern of hours had to be convenient to both parties, there was no provision to deal with what would happen if the parties could not agree. The CA further held that the scheme did not fall under s212(3)(c) because there was no recognition by either party that Mrs Curr, by arrangement or custom, continued in the employment of Marks & Spencer. The CA held that none of the features of the scheme indicated that she was mutually regarded as continuing in employment.

Comment: This case indicates that employers should expressly warn employees about the potential effects of such schemes on continuity of employment or stipulate the circumstances in which both parties regard an employee as continuing in employment.

Conduct dismissals

In a conduct dismissal, the ET should assess the reasonableness of the dismissal in accordance with the principles set out in ERA s98(4). ETs should apply the 'band of reasonable responses' test (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, EAT) and follow the three stage test in *British Home Stores Ltd v Burchell* [1978] IRLR 379, EAT. Unfortunately, the law was subsequently thrown into confusion by the cases of *Post Office v Foley* and *HSBC Bank plc v Madden*. However, when these cases came before the CA ([2000] IRLR 827), it confirmed that an ET is not allowed to substitute its own view of what is reasonable for that of an employer, and that the band of reasonable responses test still applied; also that the *Burchell* test formed part of the test of reasonableness.

- **Sainsbury's Supermarkets Ltd v Hitt**

[2002] EWCA Civ 1588, [2003] IRLR 23, 723 IDS Brief 11

Mr Hitt was dismissed after a box of razor blades taken from the health and beauty aisle was found in his locker. He claimed that they had been planted there and named other employees who had keys to his locker. Sainsbury's carried out an investigation, and found that only one other keyholder was in the store at the time and did not have the opportunity to steal the razor blades. Mr Hitt brought a claim of unfair dismissal and the ET found in his favour, saying that Sainsbury's should have carried out a more thorough investigation into his claim that the razor blades had been planted in his locker, eg, by interviewing more people.

The CA held that the band of reasonable responses test applies equally to the conduct of a disciplinary investigation as much as it does to the substantive and procedural aspects of the decision to dismiss an employee for misconduct. It is not for the ET to substitute its own subjective view about the extent of the investigation which it would have carried out.

Comment: This case clearly states that ETs must judge an employer's investigation by what was reasonable in the objective circumstances of the case and, if dismissal falls within a range of options for dealing with the situation, then it will be fair.

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1 *Flexible working: The right to request and the duty to consider: A guide for employers and employees (PL520)*, DTI, February 2003. Available at: www.dti.gov.uk.
2 See 699 IRLB 2 and 702 IRLB 2 for full details of the Directive.

IMMIGRATION

Statutory review under the Nationality, Immigration and Asylum Act 2002

Jawaid Luqmani details the new immigration statutory review appeal procedure under Nationality, Immigration and Asylum Act (NIAA) 2002 s101. Guidance on public funding of statutory review (which aims to be more straightforward and efficient than judicial review) will be included in the next update to volume 3 of the Legal Services Commission's manual.

The Civil Procedure (Amendment) Rules 2003 SI No 364 came into force on 1 April 2003 to coincide with the implementation of NIAA Part 5 which introduces the concept of statutory review. These Rules amend the Civil Procedure Rules 1998 by inserting a new section II of Part 54, containing guidelines about applications to the High Court under NIAA s101(2). That section provides that a party to an application to the Immigration Appeal Tribunal (IAT) for permission to appeal against an adjudicator's determination may apply to the High Court for a review of the IAT's decision on the ground that it made an error of law.

Under Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003 SI No 754, the appeal procedure changes in NIAA Part 5 apply only where a notice in respect of an immigration decision (as defined in NIAA s82(2), see below) is served on or after 1 April 2003 and the anxiety of many practitioners that the procedures would take effect retrospectively has proved unfounded. Practitioners should note that the appeal rights contained in the Immigration Act 1971, the Asylum and Immigration Appeals Act 1993 and the Immigration and Asylum Act 1999 continue to apply to decisions taken before 1 April 2003. Other aspects of the Order, which brings several provisions of the NIAA into force on 1 April 2003, will be reported in the next recent developments in immigration article in July 2003 *Legal Action*.

Application for review

An application for statutory review is made by filing an application notice with the Administrative Court not later than 14 days from the date of deemed receipt of the IAT's determination. The applicant must also file the following:

- a copy of the original immigration decision, ie, a decision within the meaning of NIAA s82(2), or a decision to reject an asylum claim to which NIAA s83 applies, and any document giving reasons for it;
- the grounds of appeal to the adjudicator;
- the adjudicator's determination;
- the grounds of appeal to the IAT and any accompanying documents sent to it;
- the IAT's decision on the application for permission to appeal; and
- any other material documents which were before the adjudicator.

This list looks remarkably similar to the documents that would be presented in support of a claim for judicial review.

Together with the application notice, the applicant must also file written submissions specifying the grounds relied on to show that the IAT's decision was wrong in law and the reasons in support of those grounds.

Service

Copies of the application notice and written submissions should also be served on the IAT and (where the application is for review of the IAT's decision to grant permission to appeal) on the other party to the appeal as soon as practicable. The latter must also be served with the other documents sent with the application.

Time limit

The court retains discretion, which is to be used in exceptional circumstances only, to extend applications submitted outside the 14-day time limit. Such applications must be made in the application notice and supported by written evidence explaining the reasons for the delay.

Deciding the application

A single judge will determine the application by reference solely to the documents before him/her. If the applicant has relied on documents not provided to the IAT or adjudicator then, in the absence of good reasons, the court will not consider that material either.

The court will reverse the IAT's decision to refuse leave to appeal only if it is satisfied that the tribunal made an error of law, and either the appeal would have a real prospect of success or there is some other compelling reason why it should be heard. The court will only reverse the IAT's decision to grant leave to appeal if it is satisfied that the appeal would have no reasonable prospect of success, and there is no other compelling reason why it should be heard. If the court reverses a decision to refuse leave to appeal, then that order will constitute the grant of leave to appeal to the tribunal, and such leave may be limited to specific appeal grounds.

Service of order

Where an application relates to an asylum claim and the IAT refused leave to appeal and, subsequently, the court affirms that decision, copies of the order will be sent to the tribunal and the Home Secretary, and s/he must serve it on the applicant. In all other cases, the court will serve copies of its decision on the applicant, IAT and all parties to the appeal directly. If a 'no merits' certificate is issued by the court under NIAA s101(3)(d), then it will send copies of the certificate and order to the Legal Services Commission when the applicant is legally aided.

Costs

The court may reserve the costs of the application to be determined by the IAT.

Conclusion

Practitioners will undoubtedly be concerned by what might appear to be the pragmatic approach, contended by some IAT chairs and judges in the past, that relief should only be granted if it would make a material difference to the outcome of the application. There has always been a residual discretion to refuse relief in judicial review, but in general terms such relief is refused rarely. The number of cases in which relief may be refused under the new procedures is likely to be higher.

It is also of note that the opportunity to apply for statutory review will exist to enable challenges to be brought to the grant, rather than just the refusal, of permission by the IAT.

In the statutory review scheme there is no permission stage. This makes it essential for all points to be set out strongly in the application as there will only be one possible opportunity to quash a refusal of leave to appeal.

It will also be of dismay to many practitioners to see that the final negative decision in an asylum claim will be sent to the Home Office for service and not to all of the parties at the same time. This gives the impression that the court is there to serve principally the Home Secretary and not applicants.

Many commentators suspect that the decision of the LSC to remove devolved powers for the grant of emergency funding in immigration cases from 1 April 2003 (see *Focus 41* March 2003, p2), will lead to less recourse to this new remedy than was the case with judicial review, particularly when coupled with the fear of the repercussions of the court's power to issue 'no merits' certificates under NIAA s101(3)(d) (see above). However, at a meeting of the Administrative Court Users Group in March 2003, the view expressed by several of the judges in attendance was that the finality involved in their decision making process – being the very last stage before removal – might lead to an increase in the number of applications. Time will tell which viewpoint will prove to be correct.

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HUMAN RIGHTS

Recent developments in UK human rights law

In a new series to appear each May and November, **Nicholas De Marco** reviews recent cases involving human rights law in domestic courts. This article covers the period from October 2002 to March 2003.

CASE-LAW

Prohibition of ill-treatment (article 3)

Level of damages for breach of claimant's human rights

■ **R (Bernard) v Enfield LBC**

(see below, 'Right to respect for private and family life')

Removal of asylum-seekers support unfair

■ **R (Q and others) v Secretary of State for the Home Department**

[2003] EWCA Civ 364, (2003) Times 19 March 18 March 2003

The Home Secretary appealed from the decision of Collins J that Nationality, Immigration and Asylum Act (NIAA) 2002 s55 and the scheme adopted under it breached the claimants' human rights. The section prevented the Home Secretary from providing support to an asylum-seeker where he is not satisfied that person's claim for asylum was made as soon as reasonably practicable after his/her arrival in the UK. However, NIAA s55(5) required the Home Secretary, when faced with an asylum-seeker's request for support, to decide if such support should be provided to avoid a breach of his/her rights under the European Convention on Human Rights ('the convention').

The Court of Appeal (CA) rejected the Home Secretary's appeal for a number of reasons, focusing on the defects in the process used for determining whether an asylum-seeker applied for asylum as soon as reasonably practicable, and whether his/her rights might be breached. In doing so, a number of important findings were made in relation to human rights. The CA held that failure to provide support can constitute subjecting an asylum-seeker to inhuman or degrading treatment for the purposes of article 3. While failure to provide shelter is not by itself inhuman or degrading treatment, in a case of sufficiently acute individual need a positive obligation can arise, in such cases a breach of article 3 can occur where a positive act of the state will result, indirectly, in inhuman or degrading consequences for the individual (*D v UK* (1997) 24 EHRR 423). The regime imposed on asylum-seekers denied support by NIAA s55(1) constitutes treatment for the purposes of article 3.

The CA did not consider that the fact there was a real risk an asylum-seeker will be reduced to a state of degradation, by itself, engages article 3. It is only unlawful for the Home Secretary to decline to provide support if it is clear that charitable support has not been provided and an individual is incapable of fending for him/herself. However, the Home Secretary must be prepared to entertain further applications from those to whom he has refused support who are not able to find charitable support or other lawful means of fending for themselves. Article 8 (right to respect for private and family life) did not add anything and was not considered in detail.

In terms of the process relied on to determine whether or not an asylum-seeker was entitled to support under NIAA s55, the CA found there were flaws in the system that amounted to unfairness to such a person. In particular, an interviewer and a decision-maker should be properly instructed about what is meant by 'reasonably practicable' in NIAA 55(1). An interviewer must try to ascertain the precise reason that an applicant did not claim asylum on arrival. A more flexible approach than simply completing a standard form questionnaire was needed. Neither did the process have sufficient regard to human rights issues. In relation to the specific appeals, the CA held that the interviewing process was substantially flawed and unfair, and the appeals in each case were dismissed.

The CA further considered whether the bar on an appeal against a decision to refuse support in NIAA s55(10), combined with the fact that the officers making the determination were not 'independent', breached article 6 (right to a fair trial). An asylum-seeker had access to judicial review of the decision and this should be enough: while judicial review was not merits review, the gap between the two had narrowed, and when an individual's fundamental rights are involved, a court will adopt a higher level of scrutiny. However, because of the procedural flaws in the system for determining whether to refuse support under s55, it was impossible for the Home Secretary, or a court conducting judicial review, to make an informed decision about an asylum-seeker's civil rights. The requirements of article 6 were thus not satisfied.

Comment: Perhaps one of the most controversial and important human rights decisions since the HRA came into force. The decisions of the court below that NIAA s55 breached asylum-seekers' human rights prompted an outburst from the Home Secretary saying he was 'fed up' with judges interfering with legislation. While the CA's decision did not go as far as the decision below (in particular, in relation to the threshold at which article 3 is engaged) the government's appeals were dismissed, and the process for determining whether or not asylum-seekers should have their support withdrawn was criticised substantially. The government has promised to overhaul its procedures to make them compatible with the judgment.

The case should be studied by all those practising in the asylum field, but beyond that it is of general importance in relation to a number of issues. The finding that the refusal of the state, in certain circumstances, to provide support to a person can amount to treatment for the purposes of article 3, is the most significant part of the judgment. This is of interest to all those working in social security, welfare, housing, education and local government law. In following the controversial decision in *D v UK*, the CA may be seen to open the door to 'economic rights' claims that the HRA creates.

However, the judgment needs to be treated with caution. The particular circumstances that made it possible for article 3 to be engaged included the fact that the category of asylum-seekers involved are not allowed to work or receive any benefit. They are thus in an exceptional position. Even then, the CA set a high threshold for engaging article 3: it was necessary to show an asylum-seeker could not receive any charitable assistance, for instance. Courts are likely to continue to set a high threshold for article 3 as, unlike many of the other articles, a public authority cannot justify a breach of it.

The other point of general interest concerns article 6 and judicial review. This is not the first case to say the requirements of article 6 can be satisfied, in the absence of a right being determined by an independent tribunal, where there is recourse to judicial review. What is interesting is that the CA emphasised that judicial review has developed in a more proactive direction, and will employ a high level of scrutiny where human rights issues are involved. This can mean that where the process for determination of a right is insufficient (as here) even the right to judicial review may not satisfy the requirements of article 6.

Statutory review under NIA Act 2002
IMMIGRATION
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HUMAN RIGHTS

Right to liberty (article 5)

Indefinite detention without trial of foreign nationals

■ **A and others v Secretary of State for the Home Department** (see below, 'Prohibition of discrimination')

Automatic detention of asylum-seekers

■ **R (Saadi and others) v Secretary of State for the Home Department**

[2002] UKHL 41,
[2002] 1 WLR 3131,
31 October 2002

Four asylum-seekers detained at Oakington Reception Centre while their claims were determined, successfully claimed judicial review of their detention on the grounds that it violated article 5(1) of the European Convention on Human Rights ('the convention'). The CA found their detention was lawful and fell within the exceptions set out in article 5(1)(f). The appellants appealed.

The court held that the power to detain was used to prevent persons effecting unauthorised entry, one of the permitted situations for detention under article 5(1)(f). It was a long-established principle of international law that sovereign states can regulate the entry of aliens into their territory, subject to any treaty obligation of a state. The UK had the right to control entry and continued presence of aliens in its territory. Until the state has 'authorised' entry, entry is unauthorised. The state has the power to detain without violating article 5(1) until the application has been considered and entry authorised – otherwise there would be no power to arrest or detain a person even for a short period while arrangements were made for the consideration of his/her request for asylum. It is not necessary to show an applicant is seeking to enter by evading immigration control in order for detention to be justified under article 5(1). Oakington provided reasonable conditions for individuals and families and the period of detention was short, the detention procedure was therefore proportionate and reasonable.

Comment: A controversial decision, but one consistent with a number of recent CA decisions on immigration and asylum. The House of Lords (HL) endorsed the CA's finding that the convention does not create obligations on a state in terms of its immigration policy. While proportionality was not a relevant factor in terms of the reason for detention (ie, it was not necessary to prove the measures were proportionate to the risk of absconding), the HL nevertheless did consider it in relation to the conditions and duration of detention. The appellants were only detained for a few days. The decision cannot therefore be interpreted as ruling out all future challenges to the detention of asylum-seekers.

Right to fair trial (article 6)

Delay in allowing person in custody access to legal advice

■ **Kennedy v CPS**

[2002] EWHC 2297 (Admin),
[2003] Crim LR 120,
6 November 2002

K appealed from a decision of the justices that he had failed, without reasonable excuse, to provide specimens of breath for investigation into offences under Road Traffic Act (RTA) 1988 ss3A or 5. K was arrested and taken to a police station where he refused to give his details and was uncooperative. K requested a solicitor. The custody sergeant began the procedure for taking breath specimens, warning K that a failure to provide them would render him liable for prosecution. K refused to give specimens. K said in court that he had been unco-operative because he had been waiting for a solicitor, but there was no evidence that he made the police aware of this at the time, or that he requested the procedure for taking breath specimens be delayed. The justices found that there had been a breach of Police and Criminal Evidence Act (PACE) 1984 s58 in that a solicitor was not contacted immediately, but that this did not mean the breath test procedure should be delayed. The police contacted a solicitor at the earliest possible moment, and the delay in making contact did not prejudice K. With respect to article 6 of the convention, the justices found that there had been a restriction to K's right to legal advice, but that there was good cause for such a restriction – the protection of the public – and that the restriction was proportionate.

The court decided that K's right to legal advice under PACE s58 was not excluded. Those rights could not delay the procedures required by the RTA. Breath specimens had to be obtained as soon as possible and the type of decisions a person needs to make about giving specimens do not require legal advice. Regarding article 6, the court was unaware of any Strasbourg authority on the right to legal advice where what is being sought by police is not an interview but simply the provision of specimens which the law requires a subject to provide. However, PACE s58 fully satisfied the requirements of article 6. An accused person had a right to consult a solicitor 'as soon as practicable', and the custody officer should act 'without delay', to secure the provision of legal advice. It was a question of fact in any given case whether the custody officer had acted without delay. It was in the public interest that offences under RTA s5 required that the taking of breath specimens should not be delayed to any significant extent. There was no breach of article 6.

Comment: The case demonstrates the pragmatic approach the courts will take with regard to article 6 and certain kinds of criminal offences, particularly road traffic offences (see *Brown v Stott* [2001] 2 WLR 817, finding the privilege against self-incrimination was not absolute and that RTA s172 was a justifiable and proportionate restriction of the privilege). However, *Kennedy* should not be interpreted as watering down the right to legal advice significantly. The case turned on a number of specific facts:

■ the seriousness of drink driving and the specific necessity of obtaining breath specimens without delay;

■ the fact that providing breath specimens is not particularly complicated and should not require legal advice; and

■ the fact the arrest was in the early hours of the morning when obtaining legal advice would take longer than otherwise. The court found that if a solicitor had been available in the charge office at the time, the suspect should have been allowed to see him/her before the specimen procedure began.

Retrospectivity of the Human Rights Act 1998/Privilege against self-incrimination

■ **R v Lyons, Parnes, Ronson and Saunders**

[2002] UKHL 44,
[2002] 3 WLR 1562,
14 November 2002

Appeals against the refusal of the CA to quash convictions for various offences arising out of the 'Guinness trial', following the decision of the European Court of Human Rights (ECtHR) that the admission of evidence of answers to inspectors with statutory powers to compel answers was in breach of their right not to incriminate themselves under article 6 of the convention (*Saunders v UK* (1997) 23 EHRR 313).

The trial took place before 2 October 2000 when the Human Rights Act (HRA) 1998 came into force, and the HRA did not have retrospective effect. The convention was an international treaty which did not form part of English law at the time of the convictions. The HL said that while courts should interpret English law in a way that did not place the UK in breach of an international obligation if possible, the first duty was to apply the law plainly laid down by parliament. There was no absolute 'right to silence' in English law. Parliament had allowed inspectors to compel answers under Companies Act 1985 s434(5) and this, therefore, overrode international obligations under the convention.

Comment: Not a particularly controversial decision, since it simply demonstrates that acts that took place before the HRA came into force cannot be retro-

spectively challenged under the HRA. It was the position before the HRA that national law would override the convention, and that remains the position now for challenges against acts that took place before the convention came into force. One of the cases summarised below (*Anderson*) demonstrates the difference for post-HRA acts.

Reverse burden of proof

■ **S v Havering LBC**

[2002] EWCA Crim 2558, (2002) Times 2 December, 20 November 2002

S appealed from a ruling made during criminal proceedings against him that Trade Marks Act (TMA) 1994 s92(5) imposed a legal burden on him to prove he believed, or had reasonable grounds to believe, that goods in his possession in the course of business that were found to be counterfeit were not using signs in an manner that infringed the trade mark. S argued that if a legal burden was imposed on him it was incompatible with article 6 of the convention and thus, according to HRA s3 and *R v Lambert* [2001] UKHL 37, TMA s92(5) had to be read down so that it was construed as only imposing an evidential burden.

The court dismissed the appeal. Whereas it is a general principle of English law that the legal burden of proof in criminal proceedings is imposed on the prosecution, it is also a principle that parliament can impose the burden on the accused in exceptional circumstances. Section 92(5) used sufficiently clear language to impose the burden on the accused. While it was possible, under HRA s3 and following the principles in *Lambert*, to read down the provisions of TMA s92(5) to impose an evidential, rather than a legal, burden, this was not an appropriate case for reading down. The reverse burden in s92(5) was necessary, justified and proportionate, and thus compatible with article 6 of the convention for a number of reasons:

- consumers and proprietors were protected;
- the subject-matter of s92(5) was peculiarly within the knowledge of the accused;
- a workable regime could not depend on proof by the prosecution of a trader's absence of belief, the offence is a regulatory offence;
- the prosecution must still prove important matters;
- the maximum term of imprisonment under s92 was ten years, contrasted with life in *Lambert*;
- enormous obstacles would be placed in the way of trading standard departments if s92(5) only imposed an evidential burden.

Comment: Like the case of *Kennedy* (above), this is another good example of the courts adopting a pragmatic example to fair trial rights. Essentially, the court was saying that the only way to operate an effective trademark protection system was to place the burden on a defendant, and since the offence was relatively minor, and a regulatory one, the interference in an individual's rights was proportionate. It also demonstrates that, despite the fact that article 6 contains no explicit balancing between rights protected and justifications for interfering with those rights, the courts will indeed apply a proportionality approach. The more necessary the measure for prevention of crime, and the less interference with a person's rights under article 6, the more likely what might otherwise appear to be a breach of the article will be permitted. This has also been the approach of the Strasbourg court. As always, the difficulty is where one draws the line. The presumption of innocence remains a fundamental principle, but it is a principle that may give way to others in certain, narrowly defined, circumstances. Practitioners in this area should therefore be prepared to distinguish this case on its very specific facts.

Whether Home Secretary fixing convicted murderers' tariffs compatible with article 6

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

[2002] UKHL 46, [2002] 4 All ER 1089, 25 November 2002

A appealed against the Home Secretary's power to set minimum tariffs for mandatory life prisoners under Crime (Sentences) Act (C(S)A) 1997 s29. A claimed such power was in breach of article 6 of the convention, since the Home Secretary was not an independent and impartial tribunal.

The HL held that article 6(1) provided a criminal defendant with a right to a fair trial by an independent and impartial tribunal. Sentencing was part of the trial and it was not possible to distinguish in law the fixing of a tariff from the sentence. An independent and impartial tribunal must therefore set any tariff, and it was accepted that the Home Secretary was not an independent and impartial tribunal. The Home Secretary should not fix or play any part in fixing the tariff for a convicted murderer. His continued role in doing so was hard to reconcile with the concept of the separation of powers. Applying article 6, one of the most important rights protected by the convention, the HL followed the decision of the ECtHR in *Stafford v UK* (2002) 35 EHRR 32 (see July 2002 *Legal Action* 34); while HRA s2(1)(a) only imposes a duty on the HL to take into account Strasbourg jurisprudence, the HL will not depart from the principles laid down by the court sitting as a Grand Chamber without good reason. The HL issued a declaration of incompatibility in respect of C(S)A s29.

Comment: A particularly significant decision of the HL further demonstrating the impact the HRA has had on domestic law. Those who have argued that national law already adequately protects civil liberties, such as the right to a fair trial, will have difficulty reconciling this decision. In an area where judges feel a particular competence to challenge the executive, the regulation of trials and sentencing, it is perhaps not surprising that the HL produced a unanimous decision of seven law lords for a declaration of incompatibility. The Home Secretary indicated that the government would change the law following the decision. Any future plans to fix mandatory guidelines for life sentences, for the murder of children for instance, may be vulnerable as a result of this decision, though it should be noted that on the same day, the HL decided that a mandatory life sentence for murder was not, in itself, unlawful (*R v Lichniak* [2002] UKHL 47).

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

Level of damages for breach of claimant's human rights

■ **R (Bernard) v Enfield LBC**

[2002] EWHC 2282 Admin, (2002) Times 8 November, 25 October 2002

The claimants were a severely disabled woman and her husband-carer. They were housed by the defendant local authority, but complained that the accommodation did not meet the woman's needs. Assessments carried out by the local authority confirmed the housing was unsuitable. Despite this, the local authority failed, for a period of two years and without explanation, to rehouse the claimants. The claimants brought proceedings for damages under HRA s8 alleging the local authority had acted in breach of their rights under articles 3 and 8 of the convention.

The court held that the conditions in which the claimants lived did not meet the threshold to engage article 3. However, the local authority's failure to act without any explanation showed a singular lack of respect for the claimants' private and family life and was thus in breach of article

8. If, once a problem had been drawn to the attention of a public body, steps were taken to resolve the problem, it might be the case that nothing more would be required in order to afford just satisfaction. However, no steps were taken in this case. An award of damages was necessary to give the claimants just satisfaction. Damages under the HRA should generally be comparable to tortious awards, but here there was no comparable tort. Awards recommended by the local government ombudsman were of great assistance. The award set should not be minimal because that would diminish respect for the HRA. Damages of £10,000 were awarded.

Comment: A very important case for anyone practising in local government/housing/social welfare law. Two things are clear. First, the HRA can be used as an instrument to bring a claim for damages where it would otherwise be impossible because of the lack of a comparable tort or other cause of action. Second, the level of damages will be comparable to an equivalent tort. Article 8 is likely to be the most frequently used article in this respect, particularly in relation to housing and social welfare, but article 6, and the right to possessions and to education under articles 1 and 2 of Protocol 1 respectively, are also be likely to be relied on. Those working in local government should take note of the dicta in the case that action by the authority may be enough to give just satisfaction – this may be the best way to avoid damages claims.

Discrimination on grounds of sexual orientation

■ **Mendoza v Ghaidan**

(see below, 'Prohibition of discrimination')

Freedom of expression (article 10); Freedom of assembly (article 11)

Whether the offence of possessing literature for the purposes of terrorism was compatible with freedom of expression

■ **O'Driscoll v Secretary of State for the Home Department and Metropolitan Police Commissioner**

[2002] EWHC 2477 (Admin), 22 November 2002

O claimed judicial review of decisions to arrest, search and detain him and to confiscate Turkish language literature and videos from him. O was arrested under Terrorism Act (TA) 2000 ss16 and 41 because he was suspected of being in possession of 'property for the use of terrorism'. O possessed videos, CDs and documents relating to human rights abuses in Turkey published by the proscribed Turkish organisation, DHKP-C. The police believed the organisation raised money for terrorist purposes from the sale of such material. O claimed the offence created under the TA was incompatible with articles 10 and 11 of the convention.

The court held that TA s16 created an offence that was proscribed by law. The offence did not relate to the contents of the material in question, but the use of the proceeds of sale from the material for terrorist purposes. The section required specific intent: a person was only guilty where s/he intended the property in his/her possession to be used, or had reasonable cause to suspect it would be used, for terrorist purposes. The offence was not concerned with freedom of expression, but with knowingly providing money to support a proscribed organisation and could not therefore be described as disproportionate. There could be no criticism of the police for the arrest and confiscation of material in order to examine it for use as evidence.

Comment: While the decision may appear a worrying one from the standpoint of freedom of expression, a closer examination reveals that it is of more limited effect. Mere possession of material, even if the material is published by a proscribed terrorist organisation, does not constitute an offence. The prosecution has the burden of proving that a person possessing the material intended for it to be used, or had reasonable cause to suspect that it would be used, for the purposes of terrorism. Time will demonstrate how difficult it will be for the prosecution to discharge this burden. The more disturbing side effect may be the use of the powers under the TA to arrest, detain, confiscate the material from and possibly prosecute individuals possessing literature from proscribed organisations, whether or not such individuals did so to assist terrorist purposes. This will have to be challenged on a case-by-case basis.

Prohibition of discrimination (article 14)

Indefinite detention without trial of foreign nationals

■ **A and others v Secretary of State for the Home Department**

[2002] EWCA Civ 1502, [2002] HRLR 45, 25 October 2002

The government appealed against the decision of the Special Immigration Appeals Commission (SIAC) that, while the UK's partial derogation from article 5 of the convention and its legislative measures authorising the indefinite detention without trial of foreign nationals suspected of being international terrorists was otherwise lawful, it was illegal in that it was contrary to article 14 as it discriminated, irrationally, between suspected international terrorists who were foreign nationals and those who were British nationals (who could not be detained under the provisions).

The court allowed the government's appeal holding that the provisions permitting the detention were not discriminatory for the following reasons.

First, British nationals were not in the same position as foreign nationals since British nationals could not be removed from the country, whereas foreign nationals could only not be removed where there were fears for their safety. Such foreign nationals had no right to remain in the country, but only had a right not to be removed for their own safety.

Second, many other instances of international law allow the state to distinguish between nationals and non-nationals. Immigration law was based on discrimination on grounds of nationality, and it was obviously not arguable that immigration controls were in themselves contrary to article 14. Discrimination between nationals and non-nationals was even more common during an emergency.

Third, by article 15, parliament was entitled to limit anti-terrorist measures to affect only foreign nationals suspected of terrorist links: the derogation from article 5 could only permit derogation from the rights protected under that article so far as was strictly required by the exigencies of the situation. Parliament was entitled to decide that only the indefinite detention of foreign nationals suspected of involvement in international terrorism was strictly required, and that the extension of the measures to British nationals went beyond what was required.

Finally, while the court had a responsibility to scrutinise government legislation under the HRA, in times of a public emergency, the executive is in a better position than the court to determine what measures are necessary and it should thus be allowed a relatively wide margin of appreciation.

Comment: The decision confirms that the UK government is entitled to detain, indefinitely and without trial, those certified by the Home Secretary as being suspected international terrorists. SIAC had already found the detentions could be justified and article 5 derogated from, as the UK was in a state of public emergency since the terrorist attacks of 11 September 2001. The sticking point was that SIAC

found the measures were unjustifiable discrimination on grounds of nationality. The CA overturned that finding on the basis that insofar as the measures did discriminate on grounds of nationality, it was justifiable to do so. The fundamental reasoning, that non-nationals can be discriminated against because they have no right to be here, is open to criticism. It could be said that the discrimination is relied on to justify itself.

The court's rather conservative stance can be contrasted with its decision in *Mendoza* (below). The decision is in line with a number of other recent ones since 11 September 2001 on immigration and terrorism (eg, *Rehman* [2001] UKHL 47, [2001] 3 WLR 877; *Saadi* (above); *Farrakhan* [2002] EWCA Civ 606, [2002] QB 1391) that allow the executive a large measure of deference. However, it is important for those working in this field to note that both the CA and SIAC made clear that the detention is only lawful in respect of suspected terrorists with links to Al-Qa'ida; the Home Secretary cannot rely on the decision to detain other individuals s/he certifies as having involvement in suspected international terrorism who are not connected with that group.

Discrimination on grounds of sexual orientation

■ **Mendoza v Ghaidan**
[2002] EWCA Civ 1533, [2002] 4 All ER 1162, 5 November 2002

M, the homosexual partner of the deceased tenant of a flat, appealed from a decision of a court that he could only be awarded an assured tenancy and not a statutory tenancy under the Rent Act (RA) 1977, following the decision of the HL in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, that while a surviving homosexual partner could qualify as a member of a tenant's 'family' under the RA (and thus be entitled to an assured tenancy), he could not qualify as a 'spouse' under the Act (and thus receive the greater protection available from a statutory tenancy). The decision meant that an unmarried heterosexual partner of a deceased tenant had greater protection than a homosexual partner in the same position. M appealed to the CA.

The court held that, in cases involving article 14 of the convention, four questions must be asked:

- do the facts fall within the ambit of one or more of the substantive rights under the convention?
- if so, was there different treatment as respects that right between a complainant and other persons put forward for comparison ('the chosen comparators')?
- were the chosen comparators in an analogous situation to the complainant's situation?
- if so, did the difference have an objective and reasonable justification – did it pursue a legitimate aim and bear a reasonable relationship of proportionality to the aim sought to be achieved?

Discrimination was a question of high constitutional importance, courts will apply a wide ambit when considering whether a matter falls within article 14. Taken with article 8, article 14 applies. Deference to parliament has a minor role to play where issues of constitutional importance, such as discrimination, arise. There was no reasonable justification for the discriminatory policy. Discrimination on grounds of sexual orientation was now an impermissible ground, on the same level as any others listed in article 14. Applying the rules of interpretation under HRA s3, the court held that words must be read into the provision in the RA to make it convention compliant. The words defining spouse 'as his or her wife or husband' should be read to mean 'as if they were his or her wife or husband'.

Comment: A bold and well-reasoned decision of the court. The case establishes, beyond doubt, that discrimination on grounds of sexual orientation is prima facie unlawful under the HRA. The decision could potentially be relied on in a number of other spheres (eg, social welfare, adoption) to challenge discrimination on grounds of sexuality. In contrast to *A*, above, the decision restricts the deference that should be afforded to parliament and the executive where matters engaging discrimination arise. This contrast perhaps demonstrates the greater difficulty judges have in challenging politicians on national security issues than on other social issues. The case is also interesting for its use of HRA s3, following the HL in *R v A* [2001] 2 WLR 1546, to read words into a statute that appear to involve a quite substantial re-writing, in order to make the statute compatible with the convention.

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Correction

In April 2003 *Legal Action* 38, in the article entitled, 'Tax credit reforms', there was a summary of the new tax credit rules. The author referred briefly to the transitional arrangements for income support (IS) and income based job seeker's allowance (IBJSA) in respect of child tax credit (CTC). The reference was incorrect, as amending regulations and guidance apply, ie, Social Security (Working Tax Credit and Child Tax Credit) (Consequential Amendments) Regulations 2003 SI No 455, and see also Decision Makers Guide memos JSA/IS 34 available at: www.dwp.gov.uk/publications/dwp/dmg.

There are two alternatives for IS and IBJSA claims made before 6 April 2004 (including claims made between April 2003 and April 2004):

- **Claim IS or IBJSA in the usual way, including child allowances and related premiums, and child benefit (CB) will be deducted as income. No CTC claim is made. Between April 2004 and April 2005, this option will be phased out with IS and IBJSA losing the child elements and the family premium. CTC will be payable for children. CTC and CB will then be disregarded as income.**
- **Claim IS/IBJSA and also make a claim for CTC before April 2004. In this case, CTC counts as income. This could lead to claimants being 'floated off' IS and IBJSA because they have other income as well. Claimants may be better off if they cease to claim IS or IBJSA completely, or for a short time. But once claimed the CTC counts as income against IS and IBJSA. Claimants should get advice from the Department for Work and Pensions or an independent advice agency before claiming the CTC. Those claimants who are receiving IS or IBJSA and are already receiving CTC will, at some date after 6 April 2004, lose the child elements of IS and IBJSA and the family premium. From that point, the CTC and CB will be disregarded as income.**

It will not be possible to make separate claims for IS or IBJSA for adults only, or for CTC for children until the end of these transitional arrangements. New, unlinked claims for IS or IBJSA made after 6 April 2004 are based on adults only. CTC and CB will be available to assist with the cost of any children.

■ **Steve Johnson, the author of 'Tax credit reforms' wishes to thank Beth Lakhani at CPAG for her assistance.**

EMPLOYMENT

Equal pay update

The Equal Pay Act (EqPA) 1970 has been in force since 1975, yet women's average hourly earnings are still only around 82 per cent of men's. The pay gap between female and male part-time workers – 80 per cent of whom are women – is considerably greater. Recently, however, there have been efforts to work out why and what needs to be done to narrow the pay gap. In this article, **Tess Gill** considers the new initiatives to assist equal pay claimants, ie, the EqPA questionnaire, and amendments to the EqPA to encourage employers to investigate the extent of discrimination in their pay practices.

Equal pay reviews

The Equal Pay Task Force, set up by the Equal Opportunities Commission (EOC), reported in February 2001, and among a series of proposals to speed up and simplify cases before the Employment Tribunal (ET), it recommended the imposition of a statutory duty on employers to carry out pay reviews. The reviews would be designed to identify gender pay gaps in the work force, and their results would be published to enable employees and their trade unions or other representatives to work with employers to eradicate pay discrimination. It also recommended that employers be required to provide the identity of comparable male employees to avoid any difficulty in this respect. The Kingsmill report, which was commissioned by the government and reported in 2001, also focused on the need for information about pay disparity to be available to the women concerned.

The government rejected the core proposal of the task force that pay reviews be compulsory, and instead committed itself to supporting voluntary reviews and carrying out its own pay reviews in its various departments. Those reviews should be completed by the end of April 2003, though when and if the results will be published is not yet clear. Whether many employers outside government have carried out pay reviews is doubtful. The Trades Union Congress has been training its representatives in equal pay issues including the need for, and the practicalities of, carrying out pay reviews. In the absence of mandatory pay reviews, the results of which are available to trade unions and the work force, it is likely that the essential information required to identify pay discrimination and pursue a claim before the ET will not be available.

The EOC has produced an Equal Pay Review Kit and guidance notes to carrying out such reviews (see: www.eoc.org.uk). The commission has also revised its Code of Practice on Equal Pay, and following consultation is hoping to receive parliamentary approval for the new code this summer. The new code focuses on reviews as being good practice and it contains a model equal pay policy.

The government has made two modest, but necessary reforms. First, it has introduced a questionnaire procedure into the EqPA. Second, it has published Equal Pay (Amendments) Regulations 2003, which will come into force in July 2003 to extend the two-year time limit on back pay to six years following *Coote v Granada Hospitality Ltd,* 185/97, [1998] ECRI-5199, [1998] IRLR 656, and to remove the 'no reasonable grounds' defence.

Equal Pay Act 1970 – the questionnaire

Section 7B of EqPA provides that a person ('a complainant') is entitled to write to her employer and ask for information that will her establish whether she is receiving equal pay and if not, what are the reasons. Equal Pay (Questions and Replies) Order 2003 SI No 722, which prescribes the pay questionnaire, came into force on 6 April 2003. The equal pay questionnaire entitled: *Equal Pay Act 1970: the questionnaire*, is available at: www.womenandequalityunit.gov.uk. A questionnaire may be served prior to a claim being brought or within 21 days of making a complaint to an ET. There is an eight weeks' time limit for employers to respond to an equal pay questionnaire and the ET is able to draw an adverse inference, if it is not returned within that time.

The questionnaire provides for a complainant to give her details and set out why she believes she has not received equal pay in accordance with the EqPA. A complainant must also identify her comparator(s) – this is, of course, the heart of an equal pay claim. Unlike a claim under the Sex Discrimination Act (SDA) 1975 or the Race Relations Act (RRA) 1976 where, in the absence of an actual comparator in similar circumstances, a complainant may seek to prove discrimination on the basis that a person of a different gender or racial group would have been treated more favourably in the same situation, a complainant in an equal pay claim must identify an actual comparator(s). Such comparators must work for the same or associated employer(s), and be engaged in work which is the same or broadly similar, or is rated as equivalent under a job evaluation scheme, or is of equal value.

Recent cases before the European Court of Justice (ECJ) have re-affirmed that unless discrimination arises from legislation, in the absence of a comparator the claim will not be allowed to proceed, see *Lawrence v Regent Office Care Ltd* [2000] IRLR 608, now confirmed by the Advocate-General's opinion in *Allonby v Accrington & Rossendale College* [2001] IRLR 364. Therefore, any complainant needs information to identify a comparator and the terms and conditions which it is claimed are less favourable.

It must be remembered that the EqPA covers not just pay but all employees' contractual terms and conditions such as sick pay, holidays, and pension provisions. Equal pay claims in respect of pensions are governed by the equal treatment provisions in Pensions Act (PA) 1995 ss62–66, and the Occupational Pensions Schemes (Equal Treatment) Regulations 1995 SI No 3183. The provisions of the PA and EqPA are to be read as one so that the questionnaire procedure will also be available for those claims.

It is not always the case that a complainant knows a comparator's identity. The claim may be of one or more women claiming against a man or men they know and work alongside. However, the claim may be on behalf of a group of women who consider that they are underpaid compared with a predominantly male group doing work of a similar skill or level of responsibility. This group of claimants may not know a suitable comparator's identity, or precise terms and conditions of an employment contract or whether the work is likely to be considered of equal value or has already been assessed under a job evaluation study. These are all issues on which the questionnaire should help.

The questions

The format of the questionnaire is similar to that provided for the SDA and the RRA: A complainant enters her name and address and then there is space for a short statement saying why she believes she has not received equal pay. The next question is asks for information about comparators.

Identifying relevant comparators (question 2(A))

'I am claiming equal pay with the following comparator(s)'. In a straightforward case, where a complainant knows the identify of her comparator(s), this is an easy question to answer by identifying the same. There is often a good reason for naming more than one comparator. The EqPA does not limit the number of comparator(s) to be named for each claim, though if there is an unreasonable number and the case proceeds to the ET, a complainant may have difficulty justifying putting an employer to the expense and trouble of obtaining and providing information on several comparators. However, even in a relatively straightforward claim, it is often sensible to have two or three comparators because they may be doing differ-

ent jobs with variations between their and a complainant's duties, or have distinct responsibilities, or dissimilar pay. As a result, a complainant may be entitled to equal pay with one but not all of her chosen comparators, and starting out with more than one is likely to increase her chances of success. The greater the number of complainants, the more comparators may be needed. In large scale equal pay claims covering whole job categories, there may be a fairly significant number of comparators.

The notes for question 2(A) are not unhelpful if a comparator's identify is not known. It states: 'Please give the name(s), or, if not known, the job title(s) of the person or persons with whom equal pay is being claimed.' In these circumstances, as well as giving the job title(s), it may be helpful to identify a comparator in respect of pay, or the term and condition being claimed. For example, comparators with the shortest and longest service – where a service-related benefit is at issue, or to obtain a range of comparators in respect of their pay using those identified – by job title – with the lowest and highest annual salary.

The recognition of particular comparators in the questionnaire does not limit or restrict a complainant – if a claim is made at a later date – from identifying or referring to other or different comparators. Even if a claim has been presented to the ET and singles out certain comparators, a complainant may seek to amend her claim and add or change comparators prior to the hearing. Usually, such an amendment will be granted if there is good reason. However, such changes are unlikely to be granted immediately prior to the hearing, and therefore should be made at the earliest opportunity since, as a result, an employer will be required to provide further information and probably amend its defence.

Terms and conditions (question 2(B))

'Do you agree that I have received less pay than my comparator(s)?' As with other questions the guidance notes are of assistance and indicate the various terms and conditions, including pensions, that may be identified. The notes draw a helpful distinction between contractual arrangements and benefits, which are governed by the EqPA, and non-contractual benefits such as travel concessions which, although also a monetary benefit, must be claimed under the SDA. Bonus schemes and commission payments can give rise to uncertainty in this respect because some are contractual, but others are not. An employer may reserve the right to vary and withdraw such payments at any time. If there is uncertainty about the contractual status of a benefit, a question could be added under 2(B) about whether the payment concerned is contractual or not.

Question 2(B), in all but a very straightforward case, needs to be supplemented by a complainant specifying the matters in which it is said that her contract is less favourable than that of a comparator(s). Where there is a composite annual salary comprising a basic salary and additional payments, for example, by way of commission, bonus or payments arising from a merit appraisal, it may be important to ask that these different elements are identified separately in the reply.

Of course, what a complainant needs to understand in order to recognise that there is genuine cause for a grievance which, if it is not resolved, may lead to a tribunal claim, is precise information about a comparators' terms and conditions in respect of a disputed matter. It is here that there is a significant and perhaps crucial flaw in the questionnaire procedure. The guidance notes at paragraph 5, under the heading, 'What if the employer is asked to identify confidential information?' states:

> *The questionnaire does not alter the common law duty of confidence that all employers have towards their employees. Certain information about individuals is protected by the common law of confidence and the Data Protection Act (DPA) 1998. Where information is confidential, an employer would only be able to disclose the information if he had the consent of the individual in question, where he had a legal obligation to do so, or where there was a strong public interest requirement. For advice on specific issues relating to data protection an employer may wish to refer to the Information Commissioner.*

The danger is that employers will avoid providing information on the terms and conditions of a comparator and rely on this guidance as a justification. If so, the questionnaire is likely to be of little use in many cases, as a means of obtaining information prior to proceeding to an ET or trying to dispose of the matter without litigation. As the questionnaire points out; 'if the case proceeds to a tribunal complaint, tribunals may order disclosure of relevant information if they believe it is in the interests of justice to do so'. In the author's experience, ETs will order disclosure of this information if necessary, although to date it has not been usual for employers to resist providing information about a comparators' terms and conditions. The worry is that now that the questionnaire has been published in this form employers, far from being more forthcoming with the essential information so that complainants may see if they have an equal pay complaint, will hide behind the confidentiality tag to obscure the real issues in a case. It is doubtful whether the information requested would be confidential except in rare and unusual circumstances. Where employees' terms and conditions are governed by collective agreements or employers' pay structures, there can be nothing confidential about a term or condition received by a comparator applying those publicly available procedures.

While the DPA will apply to the information concerned, disclosure is likely to be permissible in response to a questionnaire as there would be a legitimate basis for doing so. In the DPA Code relating to employment practices published in August 2002, Part 2 deals with employment records. In it, the Data Commissioner indicates that details of a worker's salary and bank account, which are held on an organisation's computer system or a manual filing system are likely to be personal data covered by the DPA. Conversely, information on the entire work forces' salary structure, given by grade, where individuals are not named or identifiable, is unlikely to constitute personal data under the DPA.

However, in respect of disclosure, the code states that, as well as being permitted to disclose such information if under a legal obligation, which would apply if the ET made an order for disclosure, such disclosure may also be made where there is a legitimate basis for doing so. An example of a legitimate basis is: 'where the disclosure is needed for legal proceedings or prospective proceedings or for obtaining legal advice'. This would appear to cover answers provided to the EqPA questionnaire. It is to be hoped that if the questionnaire's present guidance does give rise to significant difficulties, it will be amended to more closely reflect the guidance given in the code.

Less pay: the reasons (question 2(C))

'If you agree that I have received less pay, please explain the reasons for this difference. Here, again, it is evident that an employer is not asked to specify what differences there are between the terms and conditions of any comparators and a complainant which is plainly what a complainant requires. If a complainant has information, by reason of negotiations or discussions with the employer about purported reasons with which she disagrees, this could be set

out so that an employer can deal, in terms, with each issue.

Equal work (questions 3(A) and 3(B))

'Do you agree that my work is equal to that of my comparator(s)?' and **'If you do not think I am doing equal work, please give your reasons'.** The guidance note reminds complainants that their work covers the same or broadly similar work (known as 'like work') work rated as equivalent under a job evaluation study, or work of equal value. If there has been, or may have been, a job evaluation study applied to a complainant's job and that of her comparators, under which her job has been rated as of equal value to their own, she will want to rely on the findings of that study. Very often, a complainant even when supported by her trade union may not have the necessary information about the study. Also if, as a result of the questionnaire, an admission can be obtained from an employer that a complainant's job has been rated as equivalent to her comparator(s) under a study, that will simplify greatly any further proceedings, and may encourage an employer to settle the claim.

Unfortunately, the questionnaire does not assist in indicating what questions should be asked under this head. However, a complainant should, in such cases, ask questions about whether her job and that of her comparators has been assessed under a job evaluation study, if so, when and what was her rating compared with that of her comparators. An employer could also be asked whether it admits that her work has been rated as equivalent to that of her comparators under the study. If there has been no job evaluation study and a complainant is relying on a claim of work of equal value, questions can be asked about whether an employer admits her work is of equal value and, if not, in what respect it considers a comparator's work to be of a higher value. An employer can also be asked what evidence it relies on to substantiate an assertion that the jobs are not of equal value: in the author's experience, very often there will be none.

Any relevant questions (question 4)

'Any other relevant questions you may want to ask'. A complainant's response to this question will depend on the nature of the case. One important matter is whether this is a case where there is indirect discrimination. For example, if a claim is by part-time workers who are predominately female and assert that their payment system, or other terms and conditions are less favourable than that of full-time workers, it is likely that they will be able to show indirect discrimination as the statistics show that a proportionately higher number of women than men will be adversely affected by this pay practice. In such circumstances, an employer would need to show an objective justification for the pay practice concerned. This is touched on in the guidance notes at paragraph 4. In such cases, a complainant may wish to ask for the gender make-up of the workers occupying the jobs or grades concerned in order to establish that there is indirect discrimination. An employer could also be asked directly about whether or not it accepts that the pay practice concerned indirectly discriminates against women workers. If so, is it an employer's case that the pay practice is justified objectively? And, if it is, on what grounds, and on what evidence?

Questions could also be asked about whether or not an employer has carried out a pay review and, if so, with what results. The notes to the questions suggest that enquiries could be made about whether the organisation has an equal opportunities policy, and what steps have been taken to implement the EOC's Code of Practice on Equal Pay. As indicated above, a new code of practice has now been drafted and awaits the government's approval. This is well worth studying and is a useful document on which other questions could be based (see: www.eoc.gov.uk).

Use of the questionnaire

There is no obligation on an employer to answer the questionnaire, as with the SDA and RRA questionnaires. However, as the guidance notes set out, failure to reply within eight weeks of receipt, or an ET's finding that a specific reply is evasive or ambiguous, may be taken into account, and the employer's position may be affected adversely. It may be that, having used the questionnaire procedure, a complainant will be satisfied that there is no valid equal pay claim, or alternatively, with the assistance of her trade union, she may be able to negotiate a satisfactory settlement. Failing such steps, a claim, of course, may be presented to the ET. It may be that the questions provided give rise to further points, in which case, if proceedings have started, leave can be obtained to serve a further questionnaire, or alternatively, the question procedure under the ET rules of procedure may be used to obtain further information.

Equal Pay (Amendment) Regulations 2003

These Regulations bring the EqPA in line with the ECJ's decision in *Levez v T H Jennings (Harlow Pools) Ltd* C-326/96, and *Preston v Wolverhampton Healthcare NHS Trust Ltd* C-78/98. The Regulations extend the maximum period of time for which arrears of pay can be awarded to six years following *Levez*. And they also amend the time limit within which proceedings can be brought following *Preston*, so that where there has been a stable employment relationship between a woman and her employers, a six months' time limit runs from the date on which the stable employment relationship ended, not after each contract of employment. This is to cover, in particular, employees who may be on a series of fixed term contracts with one employer. Furthermore, should the claim have been concealed deliberately from a woman by her employer, the six months' period runs from the date on which she discovered the concealment (or could with reasonable diligence have discovered it). Provision is also made for a woman under a disability, in which case the qualifying date is six months after the date on which the woman ceased to be disabled.

Lastly, the Regulations amend the 'no reasonable grounds' defence. This applies where there has been a job evaluation study, and the work of a woman and man in question have been given different values. The new provision provides that the ET shall determine that the work of a woman and a man are not of equal value unless the material before it causes a tribunal to have a reasonable suspicion that the evaluation either, was made on a system which discriminates on the ground of sex, or is otherwise unsuitable to be relied on. This replaces the current provision, which requires a woman to establish that the study discriminates on the grounds of gender. The new Regulations provide that the ET can either determine that question, or require an independent expert to prepare a report. These amendments are all to be welcomed and will come into force in July 2003 (available at: www.dti.gov.uk).

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HOUSING

Recent developments in housing law

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

POLITICS AND LEGISLATION

Housing Bill

On 31 March 2003, the Office of the Deputy Prime Minister (ODPM) published a draft Housing Bill (Cm Paper 5793) for consultation. It contains proposals (outlined in January 2003 *Legal Action* 20) for:

- home information packs for each house conveyancing transaction (formerly the 'seller's pack');
- a system for selective licensing of private landlords;
- a licensing scheme for houses in multiple occupation (HMOs);
- replacement of the current fitness standard with a new hazards rating system;

and further new proposals for:

- the curtailment of the right to buy; and
- a Social Housing Ombudsman for Wales.

Housing Bill – consultation on draft legislation (the consultation document) is available at: www.housing.odpm.gov.uk. The consultation ends on 9 June 2003. There are prospects that the bill may feature in the government's legislative programme to be announced in the autumn.

Anti-social Behaviour Bill

This government bill was published on 27 March 2003, and had its House of Commons second reading on 8 April 2003. Part 2 of the bill contains a raft of housing provisions. These include:

- a new form of 'demoted' tenancy for former secure, assured and assured shorthold tenants responsible for anti-social behaviour or other immoral or 'unlawful' use of their homes;
- a wide new 'anti-social behaviour injunction' (replacing Housing Act (HA) 1996 ss152–153);
- a statutory requirement for social landlords to prepare and publish policies and procedures for tackling anti-social behaviour; and
- a requirement for judges considering nuisance possession claims to take into account the impact of the tenant's conduct.

Sch 1 makes the necessary detailed arrangements for termination, succession, assignment, etc, in relation to 'demoted' tenancies.

Meanwhile, the latest anti-social behaviour provisions affecting the county court (see April 2003 *Legal Action* 25) were introduced on 1 April 2003 by the Police Reform Act 2002 (Commencement No 4) Order 2003 SI No 808.

Northern Ireland (Housing) Order 2003 SI No 412

This Order was made on 27 February 2003. It recasts housing law in Northern Ireland (NI) dramatically. Its main provisions featured in the Housing Bill (NI), which fell when the assembly was most recently dissolved (see October 2002 *Legal Action* 26).

County Court Fees (Amendment) Order 2003 SI No 648

The court fees for county court possession proceedings increased on 1 April 2003. The fees are now £130 (up from £120) for issue of a claim for possession, and £90 (£80) for a request for a warrant of possession.

Eligibility for HA 1996 Parts 6 (Allocation) and 7 (Homelessness)

On 1 April 2003, 'humanitarian protection' and 'discretionary leave' were introduced to replace the 'exceptional leave to enter' provisions in immigration law. On 25 March 2003, the ODPM wrote to all local housing authorities with guidance on the impact of this change on eligibility for assistance under the HA 1996. A copy of the letter is available at: www.housing.odpm.gov.uk/local/allocation/categories/index.htm.

Homelessness

In March 2003, the ODPM's Homelessness Directorate published its *Policy briefing no 3* (available at: www.homelessness.odpm.gov.uk) covering the latest developments in the move to end the use of bed and breakfast accommodation for homeless families. The briefing also reviews the latest *Homelessness statistics for fourth quarter 2002 (October–December)*. The full data is available in *Statutory homelessness: England*: ODPM statistical release SH-Q4. Also, see generally: ODPM news release 38/2003, 13 March 2003.

Right to buy

Restrictions on the right to buy were announced earlier this year (see March 2003 *Legal Action* 28) and introduced from 27 March 2003 in England, and 2 April 2003 in Wales (see, respectively, Housing (Right to Buy) (Limits on Discount) (Amendment) Order 2003 SI No 498 and Housing (Right to Buy) (Limits on Discount) (Amendment) (Wales) Order 2003 SI No 803. The government added some local authorities to the list covered by the English Order and excluded others: ODPM news release 34, 6 March 2003. The Regulatory Reform (Schemes under s129 of the Housing Act 1988) (England) Order 2003 SI No 986 removes the need for ministerial consent for cash incentive schemes to encourage council tenants to buy homes in the private sector.

Local Government Ombudsman

The Commission for Local Administration in England has updated and re-issued its *Guidance on good practice guide no 6: remedies*. The booklet concentrates on remedies in housing cases (repairs, nuisance, council housing management and housing benefit) and suggests a range of £500 to £2,000 per annum for monetary compensation.

Management of council housing

From 28 March 2003, a new HA 1988 s27 (the appointment of managers for council housing) has been substituted by the Regulatory Reform (Housing Management Agreements) Order 2003 SI No 940 (see October 2002 *Legal Action* 26).

Domestic violence and housing

In December 2002, the ODPM published a series of guides dealing with domestic violence issues in homelessness and housing. All the publications are available at: www.housing.odpm.gov.uk/information/domestic/index.htm.

PUBLIC SECTOR

Allocation

- **R (Sleith) v Camden LBC**

[2003] EWCA Civ 347, 26 February 2003

A secure tenant died and no one qualified to succeed him. Mr Sleith asked the council to allocate the tenancy to him because he had been the tenant's carer, but his request was refused. Roderick Evans J dismissed an application for judicial review: see January 2003 *Legal Action* 20. The Court of Appeal refused Mr Sleith permission to appeal. The proposed appeal had no reasonable prospect of success. There was no basis on which a court could conclude that the council had erred in law or acted irrationally. It had applied its 'carer's policy' and had exercised its discretion on the evidence before it.

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HOUSING

Secure tenancies

Non-tenant occupants and the European Convention on Human Rights

■ **Kensington and Chelsea RLBC v O'Sullivan**

[2003] EWCA Civ 371, (2003) Times 27 March

In 1970, Mr O'Sullivan was granted a sole weekly tenancy of a five-bedroom house. It became a secure tenancy under HA 1985. In 2001, he served a notice to quit on the landlord council and moved into sheltered accommodation. He informed the council that his marriage had broken down and that he had been living in the property on his own. In fact, his wife and one of her grandchildren had also been living with him. The council brought possession proceedings against her. She defended, contending that (a) the grant of a sole tenancy to Mr O'Sullivan was an act of discrimination contrary to European Convention on Human Rights ('the convention') article 14, and (b) she was entitled to relief under article 8. HHJ Green QC made an order for possession, finding that article 14 was not engaged.

Mrs O'Sullivan's appeal was dismissed. There was no discrimination contrary to article 14. It was an important part of the council's housing allocation policy only to grant one tenancy on the termination of a joint tenancy – either of the property in which the former tenant remained, or if that property was not of the right size, by transfer to another property. It was contrary to the policy to grant two tenancies because that would enable one of the previous occupiers to jump the housing queue. There was no breach of the convention, either when the original tenancy was granted in 1970, because the property was not then Mrs O'Sullivan's home, or between 1983 and 1991 when she could have been made a joint tenant without objection from Mr O'Sullivan, because there was no positive obligation on the council to make her a joint tenant. Second, the possession order did not violate any of Mrs O'Sullivan's rights under article 8. Its decision was not vulnerable to successful challenge by way of judicial review on public law grounds. It was not open to Mrs O'Sullivan to argue that there was some defence to the possession proceedings based on an assertion that, although the council was otherwise entitled to possession, a possession order was not necessary for the protection of the rights and freedoms of others (see *Sheffield City Council v Smart* (2002) HLR 639 and *Michalak v Wandsworth LBC* (2002) HLR 721).

■ **R (Mays) v Brent LBC**

[2003] EWHC 481 Admin, 3 March 2003

The claimant's mother was a secure tenant, but breached the terms of a suspended possession order. She continued to live in the house until her death on 14 April 2002. The claimant wished to succeed to her mother's tenancy, but was informed by letter of 10 June 2002 that, in view of HA 1985 s87, there was no secure tenancy at the date of her mother's death because of the breach. The council served a notice to quit (even though this was unnecessary since the earlier tenancy had terminated on breach of the suspended order) and began possession proceedings. The claimant sought judicial review alleging breaches of article 8 of the convention (see January 2003 *Legal Action* 20).

Collins J refused the application. The council had not breached the claimant's rights under article 8. Where, as in the present case, there is an unqualified legal right to possession, seeking the same can be justified within article 8(2). It would frustrate the purpose of the statutory scheme if, in every case where a person fell outside the category of a successor to a statutory tenancy, consideration had to be given to his/her individual circumstances and a balance struck between that person's interests and the many others on the housing list. There could be circumstances where a decision might not be proportionate, such as where there was no pressure on the housing list, but that was not the situation in the present case.

Suspension of warrants

■ **Westfield HA v Delin**

21 February 2003, Carlisle County Court[1]

The defendant was convicted of two public order offences and for possession of a blade. His son was accused of general disturbances and nuisance in the locality. On 6 December 2002, the claimant obtained an outright possession order on the ground of nuisance. An application to suspend a warrant was dismissed on 31 January 2003. A further application was made, but a district judge struck it out on the papers as an abuse of the court process because it was a repeat application.

HHJ Forrester allowed an appeal. Applying *Vandermolen v Toma* (1981) 9 HLR 91, more than one application to suspend may be made under HA 1988 s9(2). There had been a change of circumstances between the two applications as further medical evidence was being adduced in relation to the defendant's behaviour.

PRIVATE SECTOR

Assured tenancies

Rent arrears – Ground 8

■ **Day v Coltrane**

[2003] EWCA Civ 342, 14 March 2003

In February 2001, the defendant was granted an assured tenancy of a flat in London. He paid his rent by cheque, posted the day before it was due, to the landlord in Daventry. However, he failed to pay his rent, from May 2002, due to housing benefit problems. When 11 weeks' rent was outstanding, the landlord served a notice under HA 1988 s8, and began proceedings relying on Ground 8. When housing benefit was finally paid, the tenant's advisers sought details of the landlord's bank account so that rent could be paid into it directly. No reply was received, and so, five days before the hearing, the tenant's cheque was sent via the document exchange system to the landlord's solicitors. It was not dealt with immediately by the solicitors, but on the day of the hearing the landlord was handed the cheque for the full amount of the arrears by his solicitor advocate. The landlord accepted the cheque and it was paid on first presentation.

At the hearing, the landlord said that, since the cheque had not cleared, the district judge hearing the case had no power to adjourn the proceedings (s9(1) and (6)). The district judge did adjourn to give the cheque time to clear, but gave the landlord permission to appeal. A circuit judge held that the rent was unpaid on the day of the hearing and made an order for possession. The tenant appealed.

The Court of Appeal allowed the appeal. Delivery of a cheque is a conditional payment. If it is agreed (either expressly or through a course of dealing) that payment may be made by cheque, 'where a cheque is offered in payment it amounts to a conditional payment ... from the time when the cheque was delivered' provided that it clears (*Homes v Smith* (2000) Lloyd's Law Rep Banking 139). That principle applies to Ground 8. If the cheque cleared on presentation, the debt was paid when the cheque was delivered. An uncleared cheque delivered to the landlord at, or before, the hearing and that was accepted by him, or which he was bound by an earlier agreement to accept, is to be treated as payment on the date of delivery provided it was subsequently paid on first presentation. At the date of the hearing, therefore, the district judge had jurisdiction to adjourn the claim to see whether the cheque would be paid. The circuit judge was wrong to make a possession order and it was set aside.

Rent increases

■ **R (Lester) v London Rent Assessment Committee**

[2003] EWCA Civ 319, (2003) Times 25 March

Ms Lester's landlord served a notice under HA 1988 s13 proposing a new rent which was due

to take effect on 20 March 2002. She claimed that she sent an application referring the notice to the Rent Assessment Committee (RAC) by first class post on 18 March 2002. It was common ground that the notice arrived at the RAC's office on 20 March 2002. The RAC took the view that the word 'refers' in s13 meant 'receive', and that it, accordingly, had no jurisdiction to hear an application referring the notice because it was received out of time. Ms Lester sought judicial review.

Sir Richard Tucker dismissed her application for judicial review (see January 2003 *Legal Action* 21). The Court of Appeal dismissed her appeal. The RAC was right to hold that, in the context, 'refer to' connotes 'receipt by'. Dictionary definitions tend to support that natural meaning where the question is one of referring a matter for adjudication. It would be highly inconvenient if the RAC had to consider whether it had jurisdiction over disputes about which it had no notice. The fact that there was no discretion to extend time and no 'escape clause' for a tenant, did not lead to the conclusion that 'refer' means 'send'. The subsidiary legislation prescribing the form of a tenant's application could not be used as an aid to interpretation. The RAC has no jurisdiction to consider a tenant's application to determine the rent, if it is not received before the date specified in a landlord's notice.

Assured shorthold tenancies

Possession claims under s21

■ **Gloucestershire HA v Phelps**
10 February 2003,
Gloucester County Court[2]
The claimant granted the defendant an assured shorthold tenancy, on 4 February 2002, for a fixed term of 12 months. It was described as a 'starter tenancy', and included a clause that it would cease to be an assured shorthold after 12 months, conditional on no possession proceedings having been brought. On 4 September 2002, the claimant served a s21 notice, but cited rent arrears and anti-social behaviour although no such behaviour was specified. The claimant brought a possession claim under the accelerated possession procedure. A possession order was made by a district judge without a hearing on 11 December 2002.

The tenant appealed successfully because the possession order had become effective before the 12 months' fixed term tenancy had ended. HHJ Hutton stated that s21 specifically provides that possession may only be granted if the assured shorthold tenancy has actually come to an end at the time of the order. In this case, it had not come to an end. The application and the possession order were premature. Although anti-social behaviour was raised in the claim, this was irrelevant because this action was not commenced under HA 1988 s8.

HOMELESSNESS

Homelessness defined

■ **R (O'Donoghue) v Brighton & Hove City Council**
[2003] EWCA Civ 459,
17 March 2003[3]
The claimant and her family were living in a caravan. Her 30 days temporary permission to occupy a site on council land had expired. Jackson J dismissed her application for judicial review of the council's decision not to provide her with HA 1996 s188 interim accommodation: see April 2003 *Legal Action* 27. The Court of Appeal refused her renewed oral application, made without formal notice, for permission to appeal.

The court was satisfied that the judge had exercised his discretion correctly in refusing judicial review at a time when the applicant was not facing imminent or actual eviction, and would not itself exercise the discretion as the applicant had since left the site and moved to another area. The question whether the judge had decided correctly that the applicant was not homeless at all (because she was, in his view, 'permitted' to remain in occupation for the purposes of s175(2)(b)) would otherwise have required at least further argument.

Local connection

■ **Hackney LBC v Sareen**
[2003] EWCA Civ 351,
19 March 2003
Mr Sareen applied to Hackney as a homeless person. Hackney decided that it owed him the full duty under HA 1996 s193(2). Mr Sareen sought a s202 review of a decision not to refer his application to Ealing under s198 on the grounds that he had relatives in Ealing, and needed to be near, or part of, a Sikh community there. Hackney said that there was no right to review a decision not to refer an application to another authority. He appealed from that refusal to review. HHJ Cotran held that there was a right to review a decision not to refer, and that he had jurisdiction to entertain an appeal under s204. He held that the decision was flawed and should be quashed. Hackney appealed.

Its appeal was allowed. There is no statutory right of review of an authority's decision *not* to refer an application under s198. Accordingly, there is no right of appeal to a county court on that issue under s204. The judge had no jurisdiction. The council had no duty – only a discretion under s184(2) – to investigate local connection.

Accommodation pending appeal

■ **Francis v Kensington & Chelsea RLBC**
[2003] EWCA Civ 443,
19 March 2003
Mr Francis applied to Kensington & Chelsea as a homeless person. The council provided him with interim accommodation under s188. The council decided later that he did not have a priority need. Mr Francis sought a s202 review, but the council affirmed its decision. In November 2002, he appealed to a county court under s204. In February 2003, the council terminated the temporary accommodation. Mr Francis appealed against that decision under s204A. HHJ Walker held that he was unable to interfere as the council had not refused to consider exercising its discretion, and that it was not open to him to address the correctness of the discretion by reference to the merits of the case under appeal.

Mr Francis's appeal to the Court of Appeal was dismissed. There is no question of the county court embarking, under s204A, on an assessment of the merits of the appeal under s204. Parliament intended, by enacting s204A, simply to transfer to the county court the very limited power of intervention which existed on judicial review applications. The Court of Appeal was bound by the decision in *R v Brighton & Hove Council ex p Nacion* (1999) 31 HLR 1095, CA. The county court should follow the very tight limits set out in *Nacion* unless it decided that the local authority did not direct itself in accordance with *R v Camden LBC ex p Mohammed* (1998) 30 HLR 315, QBD. In that exceptional case, it should quash the decision and decide whether it should itself exercise the s204A(5) power to order the authority to provide temporary accommodation. The power under s204A(5) is unusual because, ordinarily, the court on an application for judicial review can do no more than quash the decision under review.

■ Jan Luba QC is a barrister at 2 Garden Court Chambers, London EC4. Nic Madge is a district judge. Both are recorders. They are grateful to the following colleagues for supplying transcripts or notes of judgments:

1 Elaine Robinson, Carlisle Community Law Centre, Adam Fullwood, barrister, Manchester.
2 Christopher Lowry, Shelter Housing Aid Centre, Gloucester.
3 Marc Willers, barrister, London, and Sharon Baxter, solicitor, Community Law Partnership, Birmingham.

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LEGISLATION UPDATER

CHILDREN

Adoption (Amendment) Rules 2003 SI No 183

Amend the Adoption Rules 1984 SI No 265 following the implementation of the Adoption (Intercountry Aspects) Act 1999 and the ratification of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. In conjunction with the Intercountry Adoption (Hague Convention) Regulations 2003 SI No 118, these rules implement that convention. Amendments apply to convention proceedings commenced on or after 1 June 2003.

Adoption (Intercountry Aspects) Act 1999 (Commencement No 8) Order 2003 SI No 189

Brings into force on 23 January 2003 as respects England and Wales Adoption (Intercountry Aspects) Act 1999 ss1, 3 and 12 and for connected purposes s8. The coming into force of ss1, 3 and 12 enable regulations to be made which give effect to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption which was concluded at the Hague on 29 May 1993.

Also brings into force on 1 June 2003 as respects England and Wales ss2(1), (2) and (4) and 3, 4, 6, 8, 12 and 17; Sch 2 paras 1, 3 and 5 and s15 in so far as it relates to those paras; and Sch 3 and s15 in so far as it relates to Sch 3 to give effect to the convention. It is the intention that the UK will ratify the convention on 1 June 2003.

Adoption (Intercountry Aspects) Act 1999 (Commencement No 9) Order 2003 SI No 362

Brings into force on 1 June 2003:

- Adoption (Intercountry Aspects) Act (A(IA)A) 1999 s7, which amends the British Nationality Act 1981 in respect of the acquisition of British citizenship by convention adoptions;
- A(IA)A Sch 2 para 2 and s15, in so far as it relates to that paragraph. Sch 2 makes amendments to Immigration Act 1971.
- Enables full effect to be given to the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption, which was concluded at the Hague on 29 May 1993. It is the intention that the UK will ratify the Convention on 1 June 2003.

Adoption and Children Act 2002 (Commencement No 3) Order 2003 SI No 366

Brings into force on different dates and for particular purposes various provisions of Adoption and Children Act 2002 concerning:

- registration of voluntary adoption agencies;
- adoption support services;
- bringing children into the UK;
- exclusion of convention adoptions from definition of 'overseas adoptions';
- criminal records as respects adoption and fostering;
- adoptions with a foreign element; and
- publication of an advertisement by electronic means.

CRIME

Police and Criminal Evidence Act 1984 (Codes of Practice) (Codes B to E) (No 2) Order 2003 SI No 703

Appoints 1 April 2003 as the date on which revised codes of practice under Police and Criminal Evidence Act (PACE) 1984 ss60(1)(a) and 66(1)(b), (c) and (d) will come into operation, superseding codes of practice which have been in operation since 10 April 1995. The revised codes of practice are:

- Code of Practice for the searching of premises by police officers and the seizure of property found by police officers on persons or premises;
- Code of Practice for the detention, treatment and questioning of persons by police officers;
- Code of Practice for the identification of persons by police officers; and
- Code of Practice on tape recording of interviews with suspects.

Also revokes the orders which, together, brought the current codes of practice under PACE ss60(1)(a) and 66(1)(a), (b), (c) and (d) into operation. A revised code of practice under s66(1)(a) (Code of Practice for the exercise by police officers of statutory powers of stop and search) comes into operation on 1 April 2003 (SI No 2002/3075). In force 1 April 2003.

Police and Criminal Evidence Act 1984 (Codes of Practice) (Modifications to Codes C and D) (Certain Police Areas) Order 2003 SI No 704

Revokes, with effect from 1 April 2003, the orders listed in article 4 which made modifications to Code C and Code D of the codes of practice issued under Police and Criminal Evidence Act (PACE) 1984 s67. The modifications were either temporary or applied only in certain police areas where the provisions of PACE s63B (testing for presence of Class A drugs) were being piloted.

Fully revised versions of those Codes C and D are to be brought into force on 1 April 2003 by PACE (Codes of Practice) (Codes B to E) (No 2) Order 2003 SI No 703. The modifications set out in the Schedule to this order will apply to Codes C and D in the police areas specified in article 3 where the piloting will continue. The modifications are in substantially the same form as those revoked by this order.

Police and Criminal Evidence Act 1984 (Codes of Practice) (Code E) Order 2003 SI No 705

Requires police officers to carry out tape-recording of interviews at police stations in England and Wales for persons suspected of the commission of indictable offences subject to an exception in relation to those detained under Terrorism Act (TA) 2000 s41 or Sch 7. Police officers are required to make a tape recording of interviews of those detained under TA s41 or Sch 7 by TA (Code of Practice on Audio Recording of Interviews) (No 2) Order 2001 SI No 189. This order revokes and consolidates the orders listed in article 4 and updates the references to the terrorism legislation. In force 1 April 2003.

HOUSING

National Assistance (Assessment of Resources) (Amendment) (England) Regulations 2003 SI No 627

Make further amendments to the National Assistance (Assessment of Resources) Regulations 1992 SI No 2977, which concern the assessment of the ability of a person to pay for accommodation arranged by local authorities under National Assistance Act (NAA) 1948 Part 3.

National Assistance (Sums for Personal Requirements) (England) Regulations 2003 SI No 628

Set out the weekly sum which local authorities in England are to assume, in the absence of special circumstances, that residents in accommodation arranged under NAA Part 3 will need for their personal requirements and revoke National Assistance (Sums for Personal Requirements) (England) Regulations 2002 SI No 411. From 7 April 2003, all residents will be assumed to need £17.50 per week for their personal requirements.

National Assistance (Sums for Personal Requirements) (Wales) Regulations 2003 SI No 892

Set out the weekly sum (£17.80) which local authorities in Wales are to assume, in the absence of special circumstances, that residents in accommodation arranged under National Assistance Act 1948 Part III will need for their personal requirements. Revoke National Assistance (Sums for Personal Requirements) (Wales) Regulations 2002 SI No 815. In force 7 April 2003.

IMMIGRATION

Immigration Appeals (Family Visitor) Regulations 2003 SI No 518

Define who is to be regarded as a member of the applicant's family for the purposes of Nationality, Immigration and Asylum Act 2002 s90, which gives a person who seeks to enter the UK as a visitor, the right

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of appeal against a refusal of entry clearance only if the application for entry clearance was made for the purpose of visiting a member of his/her family. In force 1 April 2003.

Immigration (European Economic Area) (Amendment) Regulations 2003 SI No 549
Amend the Immigration (European Economic Area) Regulations 2000 SI No 2326 ('the 2000 Regulations'). Extend the definition of 'family member' for the purpose of the 2000 Regulations and replace Part VII and Sch 2, which deal with appeals, to take account of changes made by the Nationality, Immigration and Asylum Act 2002. In force 1 April 2003.

Immigration and Asylum Appeals (Procedure) Rules 2003 SI No 652
Prescribe the procedure to be followed for appeals and applications to an adjudicator and to the Immigration Appeal Tribunal under Nationality, Immigration and Asylum Act (NIAA) 2002 Part 5, which came into force on 1 April 2003, and under British Nationality Act 1981 s40A (as inserted by NIAA s4). The rules also prescribe the procedure to be followed for applications to an adjudicator or the tribunal for bail. In force 1 April 2003.

Asylum Support (Amendment) (No 2) Regulations 2003 SI No 755
Replace the table in Asylum Support Regulations 2000 SI No 704 reg 10(2) (as substituted by Asylum Support (Amendment) Regulations 2002 SI No 472 and subsequently amended by Asylum Support (Amendment) (No 2) Regulations 2002 SI No 2619). Increase the total value, for any week, of asylum support in the form of vouchers redeemable for cash, or a cash payment, which may generally be expected to be provided under Immigration and Asylum Act 1999 s95 in respect of the essential living needs of a person or qualifying couple. Also revoke Asylum Support (Amendment) (No 2) Regulations 2002. In force 7 April 2003.

Asylum (Designated States) Order 2003 SI No 970
Nationality, Immigration and Asylum Act 2002 ss94 (Appeal from within UK: unfounded human rights or asylum claim) and 115 (Appeal from within UK: unfounded human rights or asylum claim: transitional provision) concern appeal rights for unfounded human rights or asylum claims. This order adds the Republic of Albania, Serbia and Montenegro, Jamaica, Macedonia, the Republic of Moldova and Romania to the list of states in those sections.

LEGAL AID
Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2003 SI No 643
Amend the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001 SI No 856 to provide for an increase in the maximum annual income to be disregarded in deciding whether to make a recovery of defence costs order against a defendant. In force 7 April 2003.

Criminal Defence Service (General) (No 2) (Amendment) Regulations 2003 SI No 644
Amend the Criminal Defence Service (General) (No 2) Regulations 2001 SI No 1437 to provide for an increase in the financial eligibility limits for advice and assistance, and to take account of change made to the system of tax credits under the Tax Credits Act 2002.

Community Legal Service (Costs) (Amendment) Regulations 2003 SI No 649
Provide for amendments to be made to the Community Legal Service (Costs) Regulations 2000 SI No 441:
- Change the definition of a statement of resources to allow a declaration to be made about whether or not a party has deliberately foregone or deprived him/herself of resources or expectations.
- Provide for protection of a litigation friend of an individual who receives funded services and who is either a child or a patient.
- Provide that when making a request for a hearing to determine the costs payable to him/her under a costs order, the receiving party only has to make a statement of resources when s/he has to show financial hardship for the purposes of Community Legal Service (Costs Protection) Regulations 2000 SI No 824 reg 5(3)(c) (order for costs against the Legal Services Commission in a court of first instance).

In force 7 April 2003.

Community Legal Service (Financial)(Amendment) Regulations 2003 SI No 650
Amend the Community Legal Service (Financial) Regulations 2000 SI No 516 ('the 2000 Regulations'):
- Make provision for persons in receipt of a guarantee state pension credit under the State Pension Credit Act 2002 to be taken as automatically satisfying the financial eligibility determination under the 2000 Regulations.
- Amend the income limits for the purposes of determining eligibility for services provided by the Legal Services Commission (LSC) as part of the Community Legal Service.
- Amend the 2000 Regulations so that the LSC may waive eligibility limits in relation to specific issues in multi-party actions and so that as well as test cases, it may waive contributions in respect of specific issues in multi-party actions.
- Make an amendment to provide that where Legal Help is given as part of the family advice and information networks pilot, a funded party's liability is limited to the charge which would have been incurred under the Legal Help remuneration, and is not affected by any increased remuneration which may be applicable under that pilot.

Community Legal Service (Funding) (Amendment) Order 2003 SI No 651
Amends the Community Legal Services (Funding) Order 2000 SI No 627:
- Disapplies the Legal Help remuneration rates for the family advice and information networks pilot.
- Sets the remuneration rates payable in respect of Crown Court and magistrates' court cases under the Proceeds of Crime Act 2002.
- Removes the date on which the obligation of the court to carry out an assessment of costs in legal aid cases comes to an end.

In force 1 April 2003.

Community Legal Service (Funding) (Amendment No 2) Order 2003 SI No 851
Amends the Community Legal Service (Funding) Order 2000 SI No 627 so as to disapply the Legal Help remuneration rates for the fast track asylum decision and appeals process pilot, which relates to appeals under Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003 SI No 801. In force 15 April 2003 (see page 4 of this issue).

SOCIAL SECURITY
Social Security Benefits Up-rating Regulations 2003 SI No 601
Provide that where a question has arisen about the effect of the Social Security Benefits Up-rating Order 2003 SI No 526 ('the Up-rating Order') on a benefit already in payment, the altered rates will not apply until that question is determined by the secretary of state, an appeal tribunal or a commissioner. Also apply the provisions of Social Security Benefit (Persons Abroad) Regulations 1975 SI No 563 reg 5 so as to restrict the application of the increases specified in the Up-rating Order in cases where the beneficiary lives abroad.

Raise from £155 to £160 one of the earnings limits for child dependency increases payable with a carer's allowance (formerly invalid care allowance) and revoke the Social Security Benefits Up-rating Regulations 2002 SI No 684 except for regs 1 and 5, the effect of which is to continue in force the increase in one of the earnings limits for child dependency payable with a carer's allowance introduced on 9 April 2001. In force 7 April 2003.

Tax Credits (Immigration) Regulations 2003 SI No 653
Provides for a general exclusion of persons subject to immigration control from entitlement to tax credits, subject to excepted cases, and modifies the provisions of Tax Credits Act (TCA) 2002 Part 1 for refugees whose asylum claims have been accepted. In force 6 April 2003.

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Tax Credits (Residence) Regulations 2003 SI No 654
Prescribe circumstances in which a person is to be treated for the purposes of TCA Part 1 as being, or as not being, in the UK. In force 6 April 2003.

Workmen's Compensation (Supplementation) (Amendment) Scheme 2003 SI No 656
This scheme amends the Workmen's Compensation (Supplementation) Scheme 1982 by making adjustments to the rate of lesser incapacity allowance, such adjustments being consequential on the increase in the maximum rate of that allowance made by the Social Security Benefits Up-rating Order 2003 SI No 526. In force 9 April 2003.

Social Security (Maternity Allowance) (Earnings) (Amendment) Regulations 2003 SI No 659
Amend the Social Security (Maternity Allowance) (Earnings) Regulations 2000 SI No 688, which provides for payments which are, or are to be treated as, earnings for the purpose of determining entitlement to maternity allowance under the Social Security Contributions and Benefits Act (SSCBA) 1992. Substitutes new definition of the specified period for the purposes of SSCBA s35A(4) and (5) and amends provision concerning determination of average weekly amount of specified payments. In force 6 April 2003.

Tax Credits (Official Error) Regulations 2003 SI No 691
A decision under the TCA may be revised in favour of the claimant or claimants if it is incorrect by reason of official error. These regulations contain definition of 'official error' similar to that which applies in social security under the Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991. Also provide for the revision of incorrect decisions, and give a time limit of 5 years after the end of the tax year to which the decision relates. In force 6 April 2003.

Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regulations 2003 SI No 701
Amend Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 SI No 2005. In force 6 April 2003.

Working Tax Credit (Payment by Employers) (Amendment) Regulations 2003 SI No 715
Amend Working Tax Credit (Payment by Employers) Regulations 2002 SI No 2172 with effect in relation to payments of working tax credit for periods beginning on or after 6 April 2003.

Tax Credits (Claims and Notifications and Payments by the Board) (Amendment) Regulations 2003 SI No 723
Amend Tax Credits (Claims and Notifications) Regulations 2002 SI No 2014 and Tax Credits (Payments by the Board) Regulations 2002 SI No 2173). In force 6 April 2003.

Tax Credits (Definition and Calculation of Income) (Amendment) Regulations 2003 SI No 732
Amend Tax Credits (Definition and Calculation of Income) Regulations 2002 SI No 2006, mainly as a consequence of the enactment of the Income Tax (Earnings and Pensions) Act 2003, which replaces the provisions of the Income and Corporation Taxes Act 1988 on the taxation of employment income, pension income and social security income. In force 6 April 2003.

Child Tax Credit (Amendment) Regulations 2003 SI No 738
Make technical amendments to Child Tax Credit Regulations 2002 SI No 2007. In particular, amend the test whether a person under 18 who has left full-time education and is registered for work or training is treated for a period of 20 weeks as a qualifying young person for child tax credit. In force 6 April 2003.

Income-related Benefits and Jobseeker's Allowance (Working Tax Credit and Child Tax Credit) (Amendment) Regulations 2003 SI No 770
Amend Income-related Benefits and Jobseeker's Allowance (Working Tax Credit and Child Tax Credit) (Amendment) Regulations 2002 SI No 2402 in connection with the introduction of child tax credit and working tax credit by the TCA. Provide for a specific income disregard of up to £11.90 in the Housing Benefit (General) Regulations 1987 SI No 1971 and the Council Tax Benefit (General) Regulations 1992 SI No 1814. In force 6 April 2003.

Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulations 2003 SI No 916
Make provision in relation to the administration of child benefit and guardian's allowance which is to be transferred from the Department for Work and Pensions (in Northern Ireland, the Department for Social Development) to the Commissioners of Inland Revenue by Tax Credits Act 2002 Part 2 with effect from 1 April 2003. In force 7 April 2003.

Welfare Reform and Pensions Act 1999 (Commencement No 16) Order 2003 SI No 936
Appoints 6 April 2003 as the date for the coming into force of Welfare Reform and Pensions Act 1999 Sch 8 para 34 (administration of benefits).

Social Security (Working Tax Credit and Child Tax Credit) (Consequential Amendments) (No 2) Regulations 2003 SI No 937
Make amendments consequential, both on abolition of payment of certain increases in respect of certain children in certain benefits and introduction of child tax credit by the Tax Credits Act 2002.

Tax Credits Act 2002 (Commencement No 3 and Transitional Provisions and Savings) Order 2003 SI No 938
Provides for the coming into force of Tax Credits Act 2002 ss1(3)(e), 60 and Sch 6 insofar as bring into force repeal of specified provisions of the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992, which relate to the payment of certain increases in respect of children in certain contributory benefits.

Saves the repealed provisions in certain circumstances. Makes transitional provision relating to entitlement to widowed mother's allowance and widowed parent's allowance for saved cases and makes transitional provision relating to the setting of the rates for those increases that continue to be paid under the savings provision.

Tax Credits Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003 SI No 962
Brings into force the remaining provisions of the TCA, subject to transitional provisions and savings which mainly relate to existing recipients of the benefits and other payments mentioned in TCA s1(3).

State Pension Credit Act 2002 (Commencement No 4) Order 2003 SI No 966
Appoints 7 April 2003 for the coming into force of State Pension Credit Act (SPCA) 2002 s11 (in so far as it is not already in force) in relation to SPCA Sch 1 paras 1–7, 10 and 12 (amendments to the Social Security Administration Act 1992 and the Social Security Act (SSA) 1998 which make provision for claims for, and decisions relating to, state pension credit). Also appoints that day for the coming into force of SPCA s21 and Sch 3 in so far as it relates to certain repeals which are consequential on the coming into force of the amendments to the SSA.

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