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LegalAction

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RS (2006); STEPHEN COTTLE, GARDEN COURT CHAMBERS (2010); EDWARD GRIEVES, 10—11 GRAY'S INN SQUARE (2005); MARK HENDERSON, DOUGHTY STREET QC, GARDEN COURT CHAMBERS (2007); ABID MAHMOOD, NUMBER 8 CHAMBERS (2007); RABINDER SINGH QC, MATRIX (2010); MAYA SIKAND, GARDEN COURT AW FINALISTS: ANNA BARLOW, LAW FOR ALL (2003); CAROLINE GREATHEAD, MERLIN PHILLIPS (2003); NICOLA MACKINTOSH, MACKINTOSH DUNCAN (2003); BILL HELTER (2003); PETER THORNHILL, THORNHILL (2003); THALEJ VASHISHTA, BERRYMAN SHACKLOCK (2003) CRIMINAL DEFENCE FINALISTS: DR NAROTAM (BEN) KERS (2003); GREG FOXSMITH, HODGE JONES & ALLEN (2005); ZARINA GANI, GANI & CO (2008); ANDREW KEOGH, TUCKERS (2004 AND 2006); JENNIFER LAWRENCE, REY & CO (2007); GREG POWELL, POWELL SPENCER & PARTNERS (2004); STEPHEN SCULLY, IAN HENERY & CO (2005); GREG STEWART, GT STEWART (2005); KAREN DS (2006); CHRISTINA BLACKLAWS, BLACKLAWS DAVIS LLP (2010); YVONNE BROWN, YVONNE BROWN & CO (2006); SUSAN ESKINAZI, ESKINAZI & CO (2006); NINA 2004); MARK JEWELS, JJ LAW (2003); DAVID JOCKELSON, MILES & PARTNERS (2010); PHILIP KIDD, TOZERS (2003); SAMANTHA LITTLE, RUSSELL-COOKE (2008); ALL (2008); PEGGY RAY, GOODMAN RAY (2005); NEIL ROBINSON, NOWELL MELLER (2007); JENI STYRING, EWINGS & CO (2005); HELEN SYKES, KIDD & SPOOR (2003) 2006); DAVID GRAY, DAVID GRAY (2004); KATHERINE HENDERSON, BROWELL SMITH & CO (2006); AMIE HENSHALL, PARKER RHODES HICKMOTTS (2010); ENOIT LOUVEAUX, DEVON LAW CENTRE® (2010); JAWAID LUQMANI, LUQMANI THOMPSON AND PARTNERS (2008); SUSAN MARZIANO, EDWARDS DUTHIE THE RIGHTS PARTNERSHIP (2008); JACKIE PEIRCE, GLAZER DELMAR (2010); CECILE PORTA, SHEIKH & CO (2005); AMIT SACHDEV, SHEIKH & CO (2006); LOR NICHOL (2004); PHILIP TURPIN, TURPIN MILLER & HIGGINS (2004); THALEJ VASISHTA, PARAGON LAW (2005); SUE WILLMAN, PIERCE GLYNN (2007); 010); CAMBRIDGE HOUSE LAW CENTRE®, LONDON (2010); DAVIES GORE LOMAX, LEEDS (2008); JACKSON AND CANTER, LIVERPOOL (2008); JUST FOR KIDS TOPHER BINNS, SWTALSKIS (2006); JULIE BURTON, JULIE BURTON LAW (2008); SAIMO CHAHAL, BINDMAN & PARTNERS (2006); PETER EDWARDS (2007); REA SPYROU, DUNCAN LEWIS (2010); RANJIT THALIWAL, THALIWAL BRIDGE (2010) SOCIAL AND WELFARE LAWYER FINALISTS: YOGI AMIN, IRWIN MITCHELL L SERVICES (2007); JOHN HALFORD, BINDMANS (2007); YVONNE HOSSACKS, HOSSACKS (2004); CHRIS JOHNSON, COMMUNITY LAW PARTNERSHIP (2004, N MCPHERSON, FISHER MEREDITH (2008); KATHY MEADE, TOWER HAMLETS LAW CENTRE® (2010); FINOLA O'NEILL, WANDSWORTH & MERTON LAW CENTRE® FINALISTS: GREATER MANCHESTER IMMIGRATION AID UNIT (2007); PIERCE GLYNN (2007); TENDRING OUTREACH SERVICE, FISHER JONES GREENWOOD (2007) ALLEN, CRIMINAL (2006); JACKSON & CANTER, IMMIGRATION (2005 AND 2006); JAMIE RITCHIE AND PATRICK LEFEVRE, BRENT COMMUNITY LAW CENTRE® RAINEE SOLICITOR FINALISTS: ALEX FITZGERALD, EDWARD HUGHES SOLICITORS (2003); BELINDA GREENWOOD, HUGH JAMES (2003); CORRINE HIMS, JACKSON 06); MATTHEW FLETCHER, RENAISSANCE CHAMBERS (2007); ALISON GERRY, DOUGHTY STREET CHAMBERS (2007); BEN MCCORMACK, GARDEN COURT NORTH URT CHAMBERS (2007); ANDREW SKINNER, COLLEGE CHAMBERS (2006); ADAM STRAW, TOOKS CHAMBERS (2010); FELICITY THOMAS, WESTGATE CHAMBERS ISHER MEREDITH (2006); NADINE CLARKSON, OLE HANSEN & PARTNERS (2006); KATHERINE CRAIG, CHRISTIAN KHAN (2010); DEBALEENA DASGUPTA, FISHER DT, PIERCE GLYNN (2007); LAURA JANES, HOWARD LEAGUE FOR PENAL REFORM (2006); SOPHIE KEY, OVERBURYS SOLICITORS (2007); ESTMINSTER CITIZENS ADVICE BUREAU (2005); ERSUN SEYTANOGLU, SHEIKH & CO (2007); AIKA STEPHENSON, LAWRENCE & CO (2007)

LEGAL AID LAWYER OF THE YEAR AWARDS FINALIST 2011

Please see page 6 of this issue for the list of finalists

LAG

The purpose of the Legal Action Group, a national, independent charity, is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

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The fight for legal aid

Sadiq Khan MP, the Shadow Lord Chancellor and Shadow Secretary of State for Justice and Constitutional Affairs, who will be one of the speakers at LAG's social welfare law conference 'Facing the future' on 4 July, writes:

Legal aid is a central plank of our welfare state and I am proud of Labour's role in creating the system in this country. Clement Attlee's radical post-war government grasped that the state would need to contribute financially if a fundamental principle of our legal system – that equality before the law is upheld – is not restricted by an individual's financial means.

But legal aid is under threat. Along with changes to the no-win, no-fee regime, we are seeing a sustained assault on access to justice. And, as a result, Legal Action Group, as part of the Justice for All coalition, the Law Society's Sound Off For Justice campaign, MPs of all parties and a whole array of other concerned organisations and charities are fighting to protect access to justice. Since the 1940s, the needs of individuals and the legal system have changed enormously, and the taxpayer is under more pressure than ever before. However, one constant is that many still face our legal system without the necessary supporting funds, which acts as a serious barrier to protecting an individual's rights.

This coalition government is cutting £350 million from legal aid. I have gone on record to say that I agree that the government needs to make savings from the £2.1 billion legal aid budget. However, I disagree with the way this government is going about making these cuts, which is leading to some half a million people no longer being eligible for legal aid. Social welfare law will take a particular battering, taking welfare benefit issues, employment law and education law totally out of scope, yet other non-civil areas remain largely untouched. Early intervention in our legal system ultimately saves money for the taxpayer. Research by Citizens Advice has demonstrated the scale of these long-term savings: £1 spent on legal aid on housing issues saves the state £2.34, on debt the saving is £2.98, on benefits the saving is £8.80 and on employment advice the state saves £7.13. The justice minister has dismissed the Citizens Advice figures, yet has singularly failed to offer up any reasons behind his repudiation. Nor has his department offered any alternative analysis of the impact of early intervention. I am shocked that this is the case, particularly as these proposed cuts will affect some of those least able to articulate their concerns.

So, government claims of savings as a result of these cuts are both short-sighted and short-termist. It is precisely these kinds of early-intervention legal aid that the cuts will devastate. Over two-thirds of initial help and advice on legal problems – practically all debt advice and a chunk of housing law – is to be cut. Those most in need will be overwhelmed without this crucial early support. Our precious Law Centres® and Citizens Advice Bureaux face calamity with cuts of £50 million from their already stretched budgets. They will also be swamped with additional inquiries from those whom the cuts will take out of eligibility at a time when the economic conditions will result in higher demand for debt and housing advice. It is touch and go whether Law Centres and Citizens Advice Bureaux will maintain their services in the face of these cuts.

In government, while capping the overall budget for legal aid, we always strived to protect social welfare because we knew that it disproportionately supports those most in need in society. In fact, our March 2010 proposals – fully implemented – would have led to ten per cent efficiency savings from improving the way legal services are contracted from solicitors. Bizarrely, the coalition government has rejected this option, which would have generated sufficient savings to fund social welfare legal aid, particularly as this could lead to even greater savings than those proposed by the government.

We are not alone in our opposition in parliament. The cross-party Justice Select Committee stated its surprise at the government's lack of analysis on the impact on other public spending from these cuts. The committee also emphasised the widely held view that there would be an increase in litigants in person, running the risk of increased costs to the system. Claims by the government that it is committed to protecting the most vulnerable in society were questioned by the committee; the Ministry of Justice's own impact assessment shows that those with disabilities, and ethnic minorities, would be most hit by the cuts.

The legal aid budget must be contained, but this must be married to a focus on providing support in those areas which ensure that the most vulnerable are not excluded from the legal system. We had started making savings, but we disagree fundamentally with the route chosen by this Tory-led government. Decimating social welfare legal advice risks crippling a system that was created to change lives for the better.

The government has received around 5,000 consultation responses, and we await its formal response. Recently, we have seen government rethinking policy because of the pressure of public opinion. So, it is important that *Legal Action* readers, who are at the forefront of this debate, fight to protect social welfare legal aid.

LAG calls for draft legal aid bill

LAG, in a joint letter with the Law Society, has written to the Lord Chancellor and Secretary of State for Justice Kenneth Clarke calling on the government to publish its proposals for the reform of legal aid as a draft bill to be scrutinised by a special joint committee of the House of Commons and the House of Lords or the Justice Committee and other select committees with an interest in legal aid and access to justice policy.

According to sources close to the Ministry of Justice (MoJ), the bill including the legal aid changes is due to be published in the week beginning 6 June. The government's response to the consultation on its proposed legal aid reforms is due to be published either on the same day or just before it.

LAG anticipates that the bill will include provisions to abolish the Legal Services Commission and create a new body controlled directly by the MoJ to administer and make decisions on entitlement to legal aid. The bill is also expected to include the scope cuts which were outlined in the government's consultation paper, published in November last year. Much of social welfare law and non-public family law are set to go if the government sticks to its plans, though there are rumours that concessions might be made on some areas of law. It is almost certain that these will include a wider definition of domestic violence for which LAG and other organisations have called repeatedly.

'A draft bill would give the government a chance to step back from introducing changes which would decimate the provision of civil legal aid. It would allow time to hear from all those concerned about these proposals and to reach a considered view about the future of the legal aid system,' said LAG's director, Steve Hynes.

■ The full text of the letter is available at: www.lag.org.uk/policy.

Call for overhaul of adult social care law

The Law Commission has published its final report on its project to reform adult social care law. The commission believes that the recommendations in the report are 'the most far-reaching reforms of adult social care law seen for over 60 years'. It calls for a single statute to 'pave the way for a coherent social care system' and provide rules which govern what care services local councils in England and Wales will have to provide.

Professor Luke Clements, who is co-author, with Pauline Thompson, of LAG's book *Community Care and the Law*, commented: 'The Law Commission report is largely a blueprint for codification of the many statutory provisions. There is little that is "new" in terms of changing the law, but this is not a criticism: the law needs to be streamlined and the commission's proposals do just that. The suggested underpinning principles are welcome, although modest. They are generally only applicable so far as the local authority considers them to be "practicable and appropriate". By focusing on user involvement and choice, the principles fail to place obligations on the statutory authorities, for example, to ensure that support services maximise independence and do not subject individuals to indignity. The commission's paper is a good basis for reform; let us hope that the government keeps to this agenda and does not use the opportunity to undermine some of the hard rights that are currently protected.'

■ *Adult social care*, Law Com No 326, 10 May 2011, available at: www.justice.gov.uk/lawcommission/news/1461.htm.

Smoking gun in legal aid judicial review

A case with implications for defending human rights and the legal aid system was decided last month. *R (Evans) v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1146 (Admin), 12 May 2011, concerned the government's decision to change the legal aid rules in April 2010 to prevent parties without a direct interest in a case from being able to rely on legal aid to pay for representation.

Ms Evans is a civil liberties campaigner who was concerned about the plight of detainees in Afghanistan. She believed that the detainees might be at risk of torture if they were transferred from the custody of UK forces to the Afghan security services. In an earlier judicial review case brought by Ms Evans, the High Court ruled that the detainees could only be transferred if certain safeguards were met.

In the present case, Ms Evans decided to challenge the government's change to the legal aid rules, preventing public funding of any further cases brought by people concerned over human rights violations, but not directly affected by them. During the preparation of the case, the government disclosed evidence which indicated that the Ministry of Justice (MoJ) had come under pressure from the Ministry of Defence (MoD) to prevent further third-party cases being brought. Correspondence and meetings between former ministers in the MoD and the former legal aid minister, Lord Bach, in 2008, show that the government wanted to change the rules as it was unhappy with the court judgments in cases such as the one brought by Ms Evans on behalf of the Afghan detainees.

The High Court judgment is extremely critical of the government: 'For the state to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law' (para 25).

'This is a case in which there was a smoking gun which implicated the MoJ in changing the legal aid rules for illegal reasons. It acts as a shot across the bows for the government to tread carefully if it should seek to restrict access to legal aid in the future,' said LAG's director, Steve Hynes.

IN BRIEF

Tea with lords to discuss legal aid

■ LAG joined colleagues from the Justice for All campaign to brief lords on the impact of the government's proposed legal aid reforms at an afternoon tea event. Lord Newton, a former Secretary of State for Social Security under former Prime Minister Margaret Thatcher, spoke of his 'anxiety' about the proposed reforms to legal aid and stressed the need for lords to be 'kept very well informed about them'. Lord Phillips said: 'With ten–1,300 new statute laws a year, it is organised hypocrisy if the government does not give people the means to access these laws.' Baroness D'Souza, a cross-bench peer, stressed that it is 'important to organise' the effort to influence the legislation when it reaches the House of Lords.

news feature

Update on UK prisoners and the right to vote

No one can be unaware of the fact that prisoners serving a custodial sentence do not have the right to vote or that this issue continues to be contentious both in terms of the actual issues at stake, but also the wider concerns around UK parliamentary sovereignty (see December 2010 Legal Action *5). Matthew Evans, managing solicitor at the Prisoners' Advice Service, writes:*

The most recent developments

In *Tovey and Hydes and others v Ministry of Justice* [2011] EWHC 271 (QB), 18 February 2011, the High Court ruled that compensation claims from prisoners who were unable to vote in the May 2010 general election would not succeed. The court was told that claims had been launched in county courts nationwide by 583 serving prisoners, with a further 1,000 potential cases pending. Mr Justice Langstaff said:

… I hold that there are no reasonable grounds in domestic law for bringing a claim for damages or a declaration for being disenfranchised whilst a prisoner. Statute precludes it. Case-law is against it. European authority is against the payment of compensatory damages in respect of it. A claim for a declaration is not hopeless, but difficult (para 53).

A footnote to the judgment noted that the case was heard a day before parliament debated the ban on voting by prisoners:

Though the subject matter of each is the same – the enfranchisement of prisoners – the role of the courts and of the legislature are distinct. It is no part of the court's function to express any view as to the nature of legislative change, if any: merely to rule on that which the laws as currently enacted by parliament require. This judgment is to the effect that, applying those laws, including the Human Rights Act 1998, a prisoner will not succeed before a court in England and Wales in any claim for damages or a declaration based on his disenfranchisement while serving his sentence (para 71).

On 10 February 2011, a backbench debate was held in the House of Commons. The motion, which supported the continuation of the current ban, was agreed on a division by 234 votes to 22 (see *Hansard* HC Debates cols 493–586). On 1 March 2011, the government referred the latest European Court of Human Rights' (ECtHRs') ruling on the issue: *Greens and MT v UK* [2010] ECHR 1826 (23 November 2010) to the Grand Chamber of the ECtHR. This referral, in effect, appealed the decision in *Greens and MT v UK* App Nos 60041/08 and 60054/08, 23 November 2010 that the UK had six months to introduce legislation to lift the blanket ban on voting for prisoners. On 11 April 2011, the ECtHR dismissed the referral request for an appeal hearing. The court gave the UK government six months from this date 'to introduce legislative proposals to bring the disputed law/s in line with the convention … legislation within any time frame decided by the Committee of Ministers'.

The government's response to the ECtHRs' rulings: what are the options?

Most legal experts confirm that while the UK remains a member of the Council of Europe and a state party to the European Convention on Human Rights ('the convention'), it must fulfil the human rights obligations stemming from the ECtHRs' judgments. However, the ECtHR does not prescribe the remedy (beyond sums payable as 'just satisfaction' to an applicant) or how it should be applied. The fact that the ruling in *Hirst v UK (No 2)* App No 74025/01, 30 March 2004; [2004] ECHR 122 says the UK's action should be 'as it considers appropriate' does not mean that doing nothing would be an appropriate option, but neither does it necessarily mean that the coalition government must extend the franchise universally (para 60). The UK is, however, now obliged to address how prisoners' enfranchisement will take effect in some way that will receive the approval of the Committee of Ministers.

The coalition government's initial plan was to legislate and give prisoners serving a sentence of less than four years, or less than one year, the right to vote. However, this action would remain incompatible with the convention because it would still be seen as a blanket ban. This much appears to be clear from the judgment in *Frodl v Austria* App No 20201/04, 8 April 2010, where Austria had introduced legislation which meant that a prisoner who served a term of imprisonment of more than one year for an offence committed with intent was disenfranchised. The Austrian government submitted that the provisions on disenfranchisement of prisoners pursued the aims of preventing crime by punishing the conduct of convicted prisoners and of enhancing civic responsibility and respect for the rule of law. The ECtHR found no reason to regard these aims in themselves as incompatible with the convention. The court agreed that the provisions on disenfranchisement were more narrowly defined than those which had been found incompatible in the UK and the *Hirst* challenge. Nonetheless, the relevant provisions did not meet all the criteria the ECtHR had set out for a measure of disenfranchisement to be in conformity with the convention, namely, that the decision on disenfranchisement should be taken by a judge, taking into account the specific circumstances of the case, and that there must be a link between the offence committed and issues relating to elections and democratic institutions. These criteria served to establish disenfranchisement as an exception, even for convicted prisoners. The ECtHR therefore concluded, by six votes to one, that there had been a violation of article 3 of Protocol No 1 to the convention (right to free and fair elections).

Following on from *Frodl* and *Scoppola v Italy (No 3)* App No 126/05, 18 January 2011, it seems that the ECtHR would allow some prisoners to be deprived of the vote in some circumstances, particularly when it was an individual decision about an individual prisoner, related to his/her crime. The most obvious solution therefore would seem to be to allow individual judges to make a decision about the deprivation of the vote in respect of each prisoner when s/he is sentenced. The voting ban would therefore form part of the 'punishment' for his/her crime(s) and be within guidelines set down by the government.

LEGAL AID LAWYER OF THE YEAR AWARDS FINALIST 2011

The Legal Aid Practitioners Group (LAPG) has announced the finalists in this year's prestigious Legal Aid Lawyer of the Year (LALY) awards. The winners will be announced at a ceremony in central London on 28 June.

The LALYs 2011 finalists

Criminal defence lawyer

JANE HIATT
(Footner & Ewing, Southampton)

Jane qualified around ten years ago, having taken her Open University degree while working as a secretary. Since qualifying, she has never looked back. Through fierce determination, she has built up and maintains a large and loyal client following. '*Nothing ever fazes Jane*,' says one testimonial. '*She is prepared to stand up for her clients in the face of any intimidatory tactics that may be deployed.*'

RAZI SHAH
(Appleby Shaw, Windsor)

Razi is the solicitor advocate who last year acted for Munir and Tokeer Hussain in a high-profile case which highlighted the issue of how much force a homeowner can use against burglars. The pair were initially sentenced to prison, but released after a successful appeal. Razi also acted for a defence solicitor who had been the target of a police undercover operation, and in a money laundering case – where his was the only one of the 26 defendants not to receive a custodial sentence.

SARAH WILLIAMS
(Watkins & Gunn, Pontypool)

Sarah heads the firm's criminal department and, through dedication and strong management, has succeeded in increasing the department's criminal legal aid cases by 240 per cent. She works long hours and is dedicated to ensuring the best possible outcome for her clients, and acts as a mentor to newer members of the profession.

Family legal aid lawyer

LORNA CSERVENKA
(Hanne & Co, London)

Lorna's characteristic determination to achieve justice was shown in her groundbreaking child custody case against the London Borough of Richmond, where she challenged hair strand testing evidence which purported to show that her client had started drinking again. By sheer doggedness, Lorna showed that the result was wrong and the ensuing judgment has led to major laboratories changing their procedures.

MICHAEL GEORGE
(Ridley & Hall, Huddersfield)

Michael is praised for his ability to develop a rapport with often young and distressed clients, which means he is able to get the best out of highly difficult situations. One client of 20 years' standing says: '*Despite my background which, to be frank, is quite colourful, he has always made me feel comfortable and important, which means a lot to me.*'

KULJIT LALLY
(Adams Moore, Luton)

Kuljit specialises in domestic violence and children cases. She ensured that the firm's 24-hour emergency line was staffed in four different Asian languages (of which she speaks three) and works hard to ensure that language is no barrier to vulnerable women and their children receiving protection. She does a large amount of outreach work and is praised by women's aid organisations for her patience and professionalism.

Immigration lawyer

SMITA BAJARIA
(Birnberg Peirce, London)

Smita has carved out a niche acting in some of the most challenging and high-profile immigration cases. Whatever the case and whoever the client, she is always prepared to go the extra mile – literally in some cases, travelling to Italy and France to interview witnesses – and on occasion has paid from her own pocket for essential items for clients who have no financial support.

CHRIS EADES
(Asylum Aid, London)

Chris is passionate about his work protecting the young and vulnerable and has a unique ability to connect with his clients. He is a member of the Immigration Law Practitioners' Association children subcommittee and the Refugee Children's Consortium. '*His clients are invariably vulnerable and frightened and for them he is a calming, friendly influence*,' says one of his testimonials.

BRYONY REST
(David Gray Solicitors, Newcastle)

Bryony's role in a recent successful appeal on behalf of an Iranian Christian asylum-seeker is described as 'outstanding' by the Labour peer and former Oxfam director Frank Judd. '*Her tireless, calm, steady, forensic and effective work was exactly what was needed in an emotionally charged situation. She refused to be browbeaten or steamrollered by officialdom.*' The client at the heart of the case says simply: '*We owe our safety to Bryony's unheard of determination.*'

Legal aid barrister

JUSTIN AGEROS
(4 Paper Buildings, London)

Justin is a family barrister, praised as a '*true unsung hero of the publicly funded Bar*'. HHJ Carol Atkinson describes him as 'dogged and tenacious' in the protection of his clients' interests. One client, who had her daughter returned after a five-day trial, says: '*I owe all that to the hard work put in by Justin at court. I hope he will go on to help others like me fight for their children.*'

JOHN NICHOLSON
(Kenworthy's Chambers, Manchester)

John is credited with having kept South Manchester Law Centre® open by successfully challenging the Legal Services Commission (LSC) over the number of immigration matter starts allocated. As an immigration specialist, he is described as fearless on behalf of his clients and an exceptional advocate. He set up and chairs an immigration liaison group, which meets regularly to exchange ideas and information.

MARC WILLERS
(Garden Court Chambers, London)

Marc specialises in social and welfare law, in particular acting for Gypsies and Travellers. He is co-editor of the leading textbook on this complex area of practice and is praised for his enthusiasm and dedication. Last year, he acted for a number of legal aid firms which sought to challenge the LSC over being denied contracts.

Legal aid firm/ not for profit agency

COMMUNITY LAW PARTNERSHIP
(Birmingham)

Community Law Partnership (CLP) has a peerless reputation in its chosen area of specialisation: homelessness and Gypsy and Traveller law. It runs a Travellers Advice Team, which provides advice and representation throughout the country and is highly valued by its users. As a measure of the firm's commitment, it even maintains a hardship fund to pay for bed and breakfast accommodation for clients who are refused housing and where an immediate injunction is not possible. In a first for the LALY awards, CLP's nomination is supported by a testimonial from a police inspector, who praises CLP as an excellent source of advice.

NATIONAL YOUTH ADVOCACY SERVICE
(Wirral)

The National Youth Advocacy Service acts for young people who are facing unimaginable hardship, such as a 17-year-old boy sleeping in an outside toilet, who was being refused support by social services, and a mother of children aged five and two, who were sleeping rough having been refused help by several different London boroughs. The service is praised for going beyond the call of duty to protect the rights of the most vulnerable.

PRISONERS' ADVICE SERVICE
(London)

The Prisoners' Advice Service is praised for combining technical legal skills with tremendously valuable outreach work, and the organisation has been at the heart of the development of prisoners' rights in this country. As well as undertaking groundbreaking litigation, it has also served to promote high standards among other lawyers doing the work, such as by providing regular legal updates. Former clients of the service say that it provided them with a lifeline while they were incarcerated.

PUBLIC INTEREST LAWYERS
(Birmingham)

Public Interest Lawyers has demonstrated exceptional courage and commitment, litigating to protect human rights not just across the UK, but all over the world. Its cases are often high profile and controversial, and invariably hard fought by the government bodies on the receiving end. Its work has served to highlight and challenge some of the most serious human rights abuses imaginable.

Mental health lawyer

RHEIAN DAVIES
(DH Law, London)

Rheian is a former mental health nurse, who has now found her niche in the legal profession, bringing her clinical background to bear when representing clients in front of mental health tribunals. Her work is complex and difficult, but her dedication to her clients is absolute. One of them says she is the *'most potent and legally astute solicitor I was ever blessed to come across in my 31 years in the mental health system'*.

KATE LUSCOMBE
(Duncan Lewis, London)

Kate's groundbreaking case of *AH v West London Mental Health Trust* last year led to a patient who had been detained for more than two decades having his tribunal hearing held in public. The case is praised for providing mental health patients with *'a voice to the wider world, beyond the secure walls of the hospitals'*. She is joint head of the firm's department and sets high standards for the rest of her team.

DAVID MCLAUGHLIN
(Edwards Duthie, London)

David is nominated by the mental health charity Mind in Tower Hamlets and Newham. He is praised for giving often distraught clients a sense of assurance and calm. He treats them like 'royalty' and his unswerving commitment gives 'a voice to the voiceless'.

Social and welfare lawyer

CHARLOTTE COLLINS
(Anthony Gold, London)

Charlotte is an exceptional housing lawyer. In 2010, she won a landmark victory in the Supreme Court in the case of *Austin v London Borough of Southwark*, ensuring greater rights for successor tenancies. It is a dedication and attention to detail she brings to all her cases. One client writes: *'She made me feel that, regardless of my financial situation or background, justice belongs to everyone … she is a great role model, not only to me, but also to my daughter.'*

MATHIEU CULVERHOUSE
(Irwin Mitchell, Manchester)

Mathieu's determination to use the law as a tool to challenge decisions that affect health and social policy is second to none. He had a string of successful cases last year, mainly acting for clients with learning and other disabilities. Ian Wise QC says: *'His commitment and tenacity mark him out as most worthy of this award.'*

DAVID THOMAS
(GT Stewart Solicitors, London)

David's persistence in the long-running case of *Kay v UK* is credited with being the catalyst for a fundamental change in the law in this country, and leading ultimately to the acceptance that article 8 of the European Convention on Human Rights applies to possession proceedings. One supporter says: *'He has taught us that there are few cases that are truly hopeless. His creative thinking has provided solutions to problems that at first glance seem intractable.'*

Young legal aid barrister

STEVE BROACH
(Doughty Street Chambers, London)

In the short time that he has been a barrister, Steve has achieved an enormous amount, acting mainly for disabled children and adults, including acting as junior in two Supreme Court cases last year. He has co-authored two books about the legal rights of children and is chairperson of the School Exclusions Project, which provides free representation to families at exclusion appeal panels.

CHRIS BUTTLER
(4–5 Gray's Inn Square, London)

Chris has already been involved with a raft of key cases, including a challenge to the Royal Borough of Kensington and Chelsea over local authority use of personal budgets. As a result of the case, authorities must now give reasons for the level of payment provided, which is likely to benefit huge numbers of vulnerable people. His advice is described as 'careful and insightful'.

ADAM SANDELL
(Matrix, London)

Adam is praised for his ability to *'turn bleak situations around'*. A GP before he requalified as a barrister, Adam continues to use his medical knowledge for the benefit of his legal clients, bringing an exceptional degree of understanding about the relationship between their legal and health-related problems. He is an active member of the Young Legal Aid Lawyers (YLAL).

Young legal aid solicitor

SARA LOMRI
(Bindmans, London)

Sara is both a dedicated solicitor and an active legal aid campaigner. She has managed to combine developing a stunning range of public law cases with being an energetic member of the YLAL, in particular, co-ordinating its social mobility sub-group. Hugh Southey QC says: *'She is exceptionally good at identifying difficult and novel points.'*

BALJEET SANDHU
(Refugee Children's Rights Project (Islington Law Centre), London)

Baljeet joined Islington Law Centre after the unexpected demise of Refugee and Migrant Justice (RMJ), turning up with 70 boxes of files she had rescued when RMJ was forced to close its doors. Despite the disruption, Baljeet did not miss a beat in terms of ensuring that her mostly children clients' cases were fought properly. She is described as inspirational and her achievements as remarkable.

POLLY SWEENEY
(Irwin Mitchell, Birmingham)

Since qualifying in 2009, Polly has set up Irwin Mitchell's public law team in Birmingham and been involved in a large number of important and sensitive cases. She acted for one of the claimants in the successful landmark case against Birmingham City Council, challenging its decision to cut adult social care provision by around £30m, a victory likely to benefit around 4,000 local residents.

The LALY awards are organised by LAPG as a unique celebration of the often unsung work of those in the public sector. For more information, e-mail LAPG's director at: carol.storer@lapg.co.uk.

Jane Backhurst from the Law Centres Federation and Gail Emerson from Citizens Advice, two founding members of the Justice for All (JfA) campaign, discuss its aims and objectives in securing access to justice for all and the plans to help achieve those aims.

Taking action for justice

Building an inclusive national campaign

The JfA campaign has come a long way since a small meeting in September last year: three parliamentary debates; over 100 MPs signing an early day motion; robust support from the Labour shadow ministerial team (see also page 3 of this issue); the Justice Committee's Access to Justice inquiry; the Cabinet Office's advice summit; Lord Chancellor and Secretary of State for Justice Kenneth Clarke receiving over 4,000 Valentine's e-cards and over 5,000 responses to the Ministry of Justice consultation on legal aid (1,000 of which used JfA templates). This has all given the government serious pause for thought about the proposals to decimate legal aid on civil matters, at a time when all funding for free legal advice is under threat.

Three thousand plus organisations and individuals have played a part in making this happen. The founding members of JfA knew that what was needed was an umbrella under which to campaign and a call to action to inspire people across the country to express their passion for access to justice and concern about the devastating effects of a serious demise in access to free legal advice would have on the people who rely on it.

Supporters have joined the campaign from a range of perspectives. These include seeing the legal aid reforms in the context of international human rights and concern over their disproportionate equalities impact, in particular on women and children. This campaign has been remarkable in the breadth and depth of support from across the civil and criminal legal aid sector and the broader voluntary sector, and in engaging civil society as a whole to fight for the rule of law in the UK. Many view free legal advice as a vital part of the welfare state and know the important role it plays in protecting the most vulnerable. It is a deeply held commitment to ensuring that equality before the law is a reality which has inspired many more to take action. Whatever concern brought people to JfA, the campaign offers a chance to understand all angles of the value of free legal advice.

From the high media profile of the Law Society's 'Sound Off For Justice' work (see page 9 of this issue) to a disabled man who called one of the authors to say that he had written to the editor of the *South Wales Echo* in support of JfA, all campaigners are playing their part in raising awareness of the issues. The campaign has even gone international: one of the campaign members met human rights organisations from across Europe when they gathered in Vienna recently. They were happy to support the campaign while speaking out jointly against the demise of access to justice in the UK. An attack on access to justice in one EU member state is an attack on access to justice in all states.

Strength of local campaigns

However, the challenge is a big one: government is making savings quickly, and campaigns to preserve services and support are many and varied. The perception of inflated costs and waste in the legal aid system is strong. In addition, there is relatively little awareness of the value of free legal advice among the public and even MPs.

We believe that it is backbench MPs who will provide the most influential route to persuading the government that free legal advice must be prioritised. Their support can only be won by raising their awareness of the devastating impact which the proposed legal aid reforms would have on their constituents. This is where the JfA campaign can be strongest, through campaigners in constituencies across England and Wales using their local knowledge and expertise to show MPs this is the wrong cut at the wrong time. JfA's day of action on 3 June provided an opportunity to co-ordinate this community-based lobbying.

The campaign's steering group called for the day of action, but the passion, creativity and commitment of JfA campaigners made it a success. From Hastings to Liverpool, groups of JfA campaigners took action for justice. Seafront marches, high street petitions, town hall rallies, street advice sessions, drama performances and round table meetings under the Chatham House Rule were just some of the events to which MPs were invited across England and Wales.

However, the day of action is not the end of campaigning activity. Keeping up dialogue with MPs at local level remains vital, and JfA members will have a presence at the party conferences in the autumn. The forests found half a million supporters; JfA needs to move wisely, but with active campaigners in all communities we can protect access to justice through free legal advice. What will you do to take action for justice?

■ To join JfA and find resources for your actions for justice, visit: www.justice-for-all.org.uk or contact: campaign@justice-for-all.org.uk.

The Law Society builds the case for defending legal aid and encourages all those interested in access to justice to join its Sound Off For Justice campaign.

Sound Off For Justice

Does society value legal aid?

As readers will be well aware, the Ministry of Justice is planning to cut the legal aid budget by £350m a year by 2014/15. Unfortunately, estimates suggest that each year, as a result, some 650,000 people in the UK facing real legal issues will be left without access to justice.

Over the past 62 years, legal aid has been instrumental in legal challenges against the use of torture, the scope of the DNA database and the clampdown on the right to protest. Furthermore, it was responsible for winning compensation for the miners in the 1960s–70s, helped the Thalidomide children in the 1970s and, more recently, enabled the Ghurkas to win the right to live in the UK.

Now with the government's proposed cuts taking away key areas from the legal aid budget, including medical negligence, education, and family issues (such as divorce, housing and child contact cases), the most vulnerable in our society will be hit the hardest. By 'vulnerable', we mean women who are trying to escape abusive marriages, fathers who want access to their children, children who are the victims of clinical negligence and those who have been unlawfully fired from their jobs.

Campaign for access to justice

In light of this, the Law Society has launched Sound Off For Justice, a campaign which is galvanising public support to challenge the proposed cuts. As with most things, there is a right way to go about the cuts, and a wrong way. The Law Society has therefore proposed an alternative reforms package which advocates cuts in excess of the government's proposed £350m to help protect the most vulnerable members of society.[1]

As the government reviews the amazing 5,000 plus responses received during the consultation period, we should be asserting that individuals, whatever their financial circumstances, should have the right to challenge the government, the rich and powerful, and big business. Will the government's proposed cuts make access to justice the preserve of the rich again? Furthermore, given legal aid's successful history, how will the cuts affect the UK's civil liberties agenda in the coming years?

These are all important questions to ponder, but we at Sound Off For Justice believe that access to justice is a fundamental human right which should be protected. As the unrecognised fourth pillar of the welfare state, we should protect legal aid or risk undermining our democratic system as access to justice becomes a theoretical right beyond the reach of ordinary people.

It might come as some surprise to know that just six per cent of lawyers do work which is funded by legal aid. These are individuals who have invested a great deal of time and effort in training to become a lawyer to represent some of the most disenfranchised members of our society. And with an average salary of £25,000, legal aid lawyers certainly do not live up to the stereotype of 'fat cat lawyers'.

Currently standing at £2.1bn, the annual legal aid budget is undeniably high when compared with that of other Western European nations, but they have very different justice systems. However, when put in the context of our welfare system, the figure is not quite so startling. For instance, the legal aid budget would only be able to keep the NHS running for one week.

Get involved

Although the legal aid system is in need of reform, it is difficult to put a price on such fundamental human rights as the rights to access justice and to have a fair trial. We at Sound Off For Justice are urging people to visit our website and sign the petition to fight the cuts.[2] We have already reached over 14,000 'sound offs', all of which will be sent to Kenneth Clarke, Lord Chancellor and Secretary of State for Justice.

Furthermore, we have launched the first ever voicemail protest where members of the public, solicitors, MPs and organisations set to be affected by the cuts are being encouraged to voice their discontent by leaving a message on Kenneth Clarke's voicemail, which is voiced by impressionist Alistair McGowan. All messages left will be sent to the caller's local MP and Kenneth Clarke himself, so that he can hear first-hand the public's opinion.

As a final note, the government should remember that cuts made in haste will likely cost more in the long run. Pushing people towards self-representation will flood the courts, not to mention MPs' surgeries. The resulting inefficiency and downstream costs would not be helpful for a government looking to cope with a deficit.

So, let us not deny people their fundamental right of access to justice and let us create a justice system fit for the 21st century. Please Sound Off For Justice.

1 *Green paper proposals for the reform of legal aid in England and Wales. Law Society response*, February 2011, available at: www.lawsociety.org.uk/ influencinglaw/policyinresponse/view=article.law?DOCUMENTID=434634.

2 Visit: www.soundoffforjustice.org.

Recent developments in education law – Part 1

Angela Jackman and **Eleanor Wright** continue this twice-yearly series of articles considering changes and developments in the law relating to education. This article summarises the provisions in the current Education Bill and the proposals in the latest green paper on special educational needs (SEN) and disability. The authors also discuss the implications of the legal aid proposals as they affect education. Part 2 of this article will be published in July 2011 *Legal Action*.

POLICY AND LEGISLATION

Education Bill

The Education Bill implements proposals set out in *The importance of teaching. The schools white paper 2010*.[1] The bill also implements proposals from the Department for Business, Innovation and Skills. At the time of going to press, the bill's first reading in the House of Lords had taken place, and the second reading is scheduled for 14 June 2011.

The principles underlying the schools white paper include the following:

- Increasing powers of head teachers and staff in disciplinary issues.
- Removing a number of regulatory functions from quangos and transferring them to the Department for Education (DfE).
- Implementing steps to assist expansion of the government's academies programme, as laid out in the Academies Act 2010.

In summary, the bill introduces the following measures:

- Significant amendments to rights of appeal in respect of exclusion from maintained schools in England (clause 4).
- Repeals the requirement of schools to give notice of detentions to parents in England (clause 5).
- Increases the power of staff to search pupils (clause 2).
- Increases the power of staff at further education institutions to search students (clause 3).
- Provides for future abolition of a number of current quangos (clauses 14, 18, 23 and 64).
- Repeals the duty to enter into behaviour and attendance partnerships (clause 6).
- Introduces restrictions on reporting alleged offences by teachers (clause 13).

School discipline

Exclusions from maintained schools in England

Currently Education Act (EA) 2002 s52 provides the primary legislative framework in relation to exclusion from maintained schools in England. Now clause 4 of the bill inserts a new section 51A into the EA 2002 specifically for England. In summary, it provides that the head teacher of a maintained school may exclude a pupil for a fixed period or permanently; similarly, a teacher in charge of a pupil referral unit in England may exclude a pupil from the unit for a fixed term or permanently. Clause 4 provides that regulations will make provision regarding prescribed information which is to be provided for prescribed persons, or requiring a responsible body in specified cases to consider whether or not the pupil should be reinstated. It is anticipated that the responsible body will be the current governing body which reviews decisions made by a head teacher or, in the case of a pupil referral unit, the management committee.

Section 51A also provides that local authorities are required to make arrangements to enable prescribed persons to apply to a review panel for a review of prescribed decisions of the responsible body not to reinstate a pupil. Regulations will also stipulate requirements for the constitution of review panels and the review procedure. It is unclear how much these regulations will depart from the current secondary legislation which determines procedures for exclusions from maintained schools and pupil referral units.

The limited powers of the review panel are, however, notable. It can make one of the following three decisions:

- Uphold the decision of the responsible body.
- Recommend that the responsible body reconsiders the matter.
- Where it considers the responsible body's decision to be flawed 'in the light of the principles applicable on an application for judicial review', the review panel can quash the decision of the responsible body and direct it to reconsider the matter.

Exclusions from maintained schools in Wales

EA 2002 s52 will be amended to specify that the provision is applicable to Wales.

Comment: It is concerning that the review panel can merely 'recommend' that the responsible body reconsider the matter, as this appears to place no obligation on the responsible body to do so. Attempts to limit the basis on which the review panel can quash a decision to circumstances equivalent to a judicial review claim are also wholly unsuitable on a number of counts. The authors question whether review panels should be required to conduct proceedings as if they were effectively judicial review proceedings and be restricted to quashing decisions which would only succeed on judicial review grounds. The proposed framework makes the role of the review panel extremely technical and legalistic. They also detract from the fact that there are many circumstances in which it may be reasonable to overturn a decision of a governing body which do not equate to circumstances justifying judicial review.

The new provision deliberately does not give power to the review panel to direct reinstatement, but merely to direct the responsible body to reconsider the matter. Therefore, one must question the extent to which the review panel can provide a fully effective remedy if it reaches a view and conclusion that is not implemented by the subsequent decision of the responsible body. Inevitably, situations will arise where the review panel decides that a decision is sufficiently flawed or unreasonable to justify reinstatement, yet the body whose decision is reviewed is under no obligation to reinstate. Judicial review challenges are likely, either against the governing body or the head teacher's original decision.

Notice of detention

Clause 5 of the bill amends Education and Inspections Act 2006 s92 by removing the requirement for a head teacher to provide 24 hours' notice to a pupil's parent of an intended detention.

Powers to search pupils and students

Clause 2 of the bill amends EA 1996 Part 10 chapter 2 by inserting a provision in EA 1996 s550ZA which extends the power of members

of staff to search pupils for prohibited items. The definition of prohibited items is now extended to include an article that the member of staff reasonably suspects has been, or is likely to be, used to commit an offence, or to cause personal injury to, or damage to the property of, any person. The definition also extends to any other item that the school rules identify as an item for which a search may be made.

Clause 2(3) of the bill will amend EA 1996 s550ZB to provide that the search can take place if the person carrying out the search reasonably believes that there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency. EA 1996 s550ZB(6A) provides that the search can take place where, in the time available, it is not reasonably practicable for the search to be carried out by a person of the same sex as the pupil or in the presence of another member of staff of the same sex.

Furthermore, section 550ZB(7A) provides that the search can take place where, in the time available, the person carrying out the search believes there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency and in the time available it is not reasonably practicable for the search to be carried out in the presence of another member of staff.

Clause 2(4) of the bill will amend EA 1996 s550ZC to provide that in relation to the power to seize an item that is prohibited on the grounds that the member of staff reasonably suspects that the item will be used for commission of an offence, or to cause personal injury or damage to property, the person seizing the item must either deliver the item to a police constable as soon as reasonably practicable, return the item to its owner, retain the item or dispose of it. Clause 2(4) of the bill also provides that where an item is seized on the ground that the item is contrary to the school rules, the item must be returned to its owner, retained or disposed of. In deciding what to do with an item that has been seized under the provisions in clause 2(4), the person who seized the item must have regard to guidance issued by the secretary of state for this purpose. Clause 3 of the bill makes similar provisions to those in clause 2(4) in respect of the power of members of staff to search students in the context of further education institutions.

Regulatory amendments

Clause 7 of the bill provides for the abolition of the General Teaching Council for England. Clause 8 of the bill transfers the council's regulatory functions to the secretary of state.

Clause 14 of the bill provides for the abolition of the Training and Development Agency for Schools. Clause 15 of the bill gives power to the secretary of state to carry out the agency's functions.

Clause 18 of the bill provides for the abolition of the School Support Staff Negotiating Body. Clause 23 of the bill provides for the abolition of the Qualifications and Curriculum Development Agency, previously known as the Qualifications and Curriculum Authority.

Clause 64 of the bill provides for the abolition of the recently formed Young People's Learning Agency (YPLA) for England. YPLA will be absorbed into the DfE and renamed the Education Funding Agency, which will have similar functions to those of the YPLA.

Academies

Part 6 of the bill introduces a number of provisions in relation to current restrictions on academies and requirements. These include the following:

- Removal of the requirement for academies to have a specialism.
- A new power for the secretary of state to enter into arrangements with new providers other than those making primary or secondary provision.

The following two new categories of academy are also created:

- Alternative provision academies for compulsory school age pupils out of school in circumstances equivalent to those envisaged by EA 1996 s19.
- 16 to 19 academies with the purpose of providing full-time or part-time educational provision for pupils over compulsory school age but under 19.

School closures and the Local Government Ombudsman

Clause 43 of the bill makes provision to increase the powers of the secretary of state to close schools. These powers extend to closing schools that are not in special measures, but which fail to meet government performance standards or safety warning notices. This clause also introduces a new power for the secretary of state to direct local authorities to serve performance standards and safety warning notices on schools. Clause 44 of the bill terminates the Local Government Ombudsman's jurisdiction to deal with complaints about maintained schools from parents and pupils.

Office for Standards in Education, Children's Services and Skills

Clause 39 of the bill enables the secretary of state to exempt prescribed schools, including outstanding schools, from an Office for Standards in Education, Children's Services and Skills (Ofsted) inspection. Those schools that are exempt from inspection can now be charged by Ofsted if they request an inspection. Clause 41 of the bill transports similar provisions into arrangements for further education institutions.

General provisions

Clause 30 of the bill repeals the duties of co-operation between schools and local authorities.

Clause 31 of the bill repeals the duties of schools and local authorities to have regard to children and young people's plans.

- Clause 32 of the bill removes the obligation on maintained schools to prepare and publish a school profile.
- Clause 33 of the bill removes the requirement on local authorities to appoint a school improvement partner for each maintained school.
- Clause 34 of the bill abolishes admissions forums and reduces the role of the schools adjudicator.
- Clause 35 of the bill sets out that no profit is to be made on school milk and meals provision, which will be restricted to cost price only.
- Clause 36 of the bill sets out that the secretary of state will have an enhanced role in deciding on the types of new schools, in place of local authorities' power to make these decisions. There is a new obligation on local authorities to invite academy proposals where a new school is suggested.
- Clause 37 of the bill removes a requirement to have staff and local authority governors in maintained schools: the focus is now on parent governors.

Special educational needs and disability green paper

In March 2011 the DfE issued its green paper, *Support and aspiration: a new approach to special educational needs and disability. A consultation.*[2] The SEND green paper was based in part on the outcome of a widespread consultation carried out last year among numerous interest groups.

The SEND green paper's introduction sets out a number of propositions by way of background, including the following:

- Children with disabilities or SEN have disproportionately poor outcomes, but proper support is extremely variable. Lack of effective support undermines family life and children in this situation are isolated.
- Parents find systems for securing support 'bureaucratic, bewildering and adversarial', and may themselves be struggling with ill health or difficult family circumstances.
- There has been a marked increase in the

number of pupils in schools with SEN but without statements, and in some categories of SEN, notably behavioural, emotional and social difficulties (BESD), communication difficulties and autistic spectrum disorders (ASD).

- In 2008/09, 64 per cent of all permanently excluded pupils had SEN without a statement and eight per cent had statements. Young people with SEN are more than twice as likely as others to be out of education, employment or training. This situation has major financial implications, including the fact that young people with SEN statements form a disproportionately large number of young offenders.
- Health difficulties for parents of disabled children would diminish, and costs would be saved, if the stress involved in caring were eradicated.

The SEND green paper sets out its proposals under five headings:

- Early identification and assessment;
- Giving parents control;
- Learning and achieving;
- Preparing for adulthood; and
- Services working together for families.

Early identification and assessment

To try to identify problems at the earliest possible stage, there will be expanded health visiting services. Families will be offered a health and development review for children aged between two and two and a half years. The health visitor service should then provide any support required in conjunction with GPs, midwives, Sure Start Children's Centres and other organisations. Paediatricians and other health professionals, including school nurses, should be involved in identifying and assessing problems.

There should be good quality early years provision and an extended free entitlement of 15 hours of early education for disadvantaged two year olds. The early intervention grant will give local authorities greater control over resources for early years training. Local authorities are in a 'unique position' to commission appropriate services and already have a duty under the Childcare Act 2006 to ensure sufficient care for disabled children and advice for their parents (para 1.28). Sure Start Children's Centres will be retained to ensure that they deliver proven early intervention programmes. However, media reports have indicated that following the abolition of ring fencing for Sure Start funding, such services are in difficulties and many centres are being closed or making redundancies.

Statutory assessment

By 2014 there should be a single statutory assessment process for children and young people leading to an education, health and care plan (EHCP) from birth to 25. All services on which families and disabled children rely would work together to agree the plan. The EHCP should reflect the child's ambitions for the present and for the future and be clear about which body, organisation or person is responsible for what services.

The EHCP should be like a statement of SEN, in that it should specify in detail the child's needs and support, but it should also set out the learning and life outcomes sought. In addition, the plan should be transparent about funding. The process leading to an EHCP should be 20 weeks, as opposed to the current 26 weeks for a statement. EHCPs would be enforceable in the same way as statements, and there would be a right of appeal to the Health, Education and Social Care Tribunal.

The voluntary and community sector could co-ordinate assessments. Targeted funding will be provided to voluntary and community groups with a 'strong track record of delivering high quality services and the confidence of families and local communities' (para 5.55).

No figures are given in the green paper for the proposed funding which, it is suggested, would need to be substantial and fully safeguarded as the relevant groups are already under massive financial pressure and would need to employ staff, and indeed secure office space, in order to deliver this service. It is not clear whether or not such organisations would be subjected to statutory duties to comply with the relevant time limits for assessment, but it is difficult to see how such duties could be imposed on voluntary groups.

The DfE proposes to use various pilot tests with 'pathfinders' working with local authorities and their local partners (para 1.46). A revised and shortened SEN Code of Practice will be produced, which will make it clear what obligations are placed on local authorities in relation to social care provision for families with disabled children.

Giving parents control

Voluntary and community sector organisations will be funded to maintain existing early support resources and to recruit and train key workers from a wider range of professionals. This proposal presupposes a wide range of expertise and staff in the voluntary sector which may not necessarily be available, even with extra funding.

Local authorities will be required to set out a local offer of support available for children with SEN and disabilities and their families, which should describe what additional or different provision schools make for children with SEN. The SEND tribunal would be able to take account of the local offer in order to ensure that it is an offer on which parents can rely.

Personalised budgets

There would be an optional personal budget for families to enable them to control funding and to design their own tailored package of support once their children's needs have been assessed. Legal powers would allow parents to request that they should have control of the funding for the support identified in the EHCP; these powers would be backed by a parallel duty for local authorities and NHS commissioners to offer such families a personal budget. Key workers will be trained to assist parents in this regard. Details of the entitlement will be published after the evaluation of personal health budget pilots, which is due in October 2012.

Current funding cuts give rise to realistic concerns about whether budgets will be set at a level which is of practical use, particularly given that, in many areas, cuts are being made to various services which usually parents would be able to access. This process will be accelerated as more schools convert to academies, independent of local authorities. This would mean that families would have to access services on a private basis and potentially at greater expense and inconvenience.

School choice

Parents of children with EHCPs will have rights to express a preference for any state funded school, including academies and free schools. However, it is difficult to see how this differs much from current provision.

When there are plans to close schools, including special schools, groups of parents and others will have the option of applying to establish a free school. However, this option may be of little assistance to parents of disabled children, who may well not have the resources or time to take it up.

Appeals and mediation

Mediation before an appeal can be registered with the tribunal may become compulsory. It is difficult to understand what benefit this will offer given that the process leading to an EHCP will itself have involved 20 weeks of negotiations. There would be considerable concern if mediation leads to delay in securing proper provision for a child through the tribunal.

Learning and achieving

Current teacher training for SEN is limited, therefore additional funding will be provided

to secure more placements for trainee teachers in special schools, with development of SEN and disability training for college teachers. Usefully, the green paper sets out in paragraph 3.26 that, too often, the most vulnerable pupils are supported almost exclusively by teaching assistants, and that this should never be a substitute for teaching from a qualified teacher, which children with SEN need even more than other children. Regrettably, the green paper does not contain any specific provision to deal with this problem, such as the imposition of a statutory requirement or directives to those drawing up EHCPs, but this could be a useful passage to cite in appeals to the Special Educational Needs and Disability Tribunal ('the SENDIST'), whatever the outcome of the current proposals.

Removing school action and school action plus

There are radical proposals to replace these categories with a new single school-based SEN category. The justification for these proposals is that this would help professionals to differentiate between children who need additional support to catch up with their peers and those who need a tailored approach to address SEN. This would mean that fewer children are identified as having SEN, and would deter a 'low expectations culture' (para 3.44).

Again, this justification is questionable and is not supported by evidence. The current structure has some benefits in that, under the SEN Code of Practice, it requires a school regularly to consider whether or not the support under the earlier stages is in fact resulting in the child making progress, and, if not, whether s/he should move up to the next stage in the process. This trigger would not necessarily be present under the green paper's proposals.

Behavioural, emotional and social difficulties

The green paper contains an interesting section on behavioural problems. It is recognised that children with disabilities and SEN are more vulnerable to bullying and bad behaviour in school, but that they are also more likely to be excluded. There is a hint in the green paper that some diagnoses of BESD are inappropriate and that some children with this label may have underlying communication problems which result in frustration leading to behaviour difficulties. It would be helpful if the green paper recognised the all too common tendency for local authorities and schools to assume that where ASD leads to behavioural problems, the children concerned can be placed in BESD schools despite the fact that the strategies used by such schools are recognised to be near useless for ASD.

Reference is made to separate proposals in the Education Bill to deal with excluded pupils. Guidance will be issued requiring children who are in danger of exclusion to be the subject of multi-agency assessment for any underlying causal factors. The new exclusions approach would consider the needs of, and impact on, disabled children and children with SEN. However, given the Education Bill's current proposal to remove the right of reinstatement for pupils wrongly excluded where there has been a failure to assess and provide for SEN resulting in the behaviour leading to the exclusion, this is of limited assistance and likely to be highly significant given the large number of excluded children with SEN.

School accountability

There will be new indicators in performance tables under which schools will have to account for the progress of the lowest attaining 20 per cent of pupils. Schools where there are causes for concern in this regard will receive help, but failing schools may be converted into academies. Given the emphasis of current league tables on achievement at the higher levels of ability, the focus on the lowest attaining pupils is welcome. However, schools in areas with very high proportions of pupils with SEN will feel that this imposes major pressures on them.

Preparing for adulthood

Young people with SEN and disabilities should be able to access education and training so that, at each stage of their education, they can progress by building on what has gone before. There should be greater focus on outcomes, particularly employment. It is claimed that there is funding for sufficient places in education and training for all young people to participate. Vocational and work-related learning options for young people aged 14 to 25 with SEN and disabilities will be improved, possibly including supported internships and working with employers to offer constructive work experience and job opportunities.

There should be a more co-ordinated transition to adult health services for young people aged 16 to 25 and further support to help young people with SEN and disabilities live independently, plans for which should become a standard and early part of the transition process from education. For those who may not be able to live independently, there are aspirational statements in the SEND green paper about ensuring the best quality of life with support, which are cross-referenced to separate proposals: *Recognised, valued and supported: next steps for the carers strategy* and *A vision for adult social care: capable communities and active citizens*.[3] Both documents were published by the Department of Health in November 2010.

Services working together for families

This chapter deals with the co-ordinated support which would be required under EHCPs. Local authorities will continue to play a vital role in identifying and assessing SEN and ensuring that children and young people receive the full range of services that they need, in co-ordination with new local health and wellbeing boards which are already proposed.

Reference is made to removing bureaucratic burdens on professionals, which echoes complaints voiced frequently by local authorities in relation to the statementing process. It is proposed to simplify and improve the statutory guidance for all professionals working with children and young people with SEN and disabilities so that it is clear, accessible and helpful. There will be less emphasis on individual education plans, and schools will be encouraged to continue to explore other approaches, such as individual profiles and provision mapping, and involving pupils in setting their own targets.

There should be greater collaboration between front-line professionals involved with children with disabilities, in particular, so that schools can draw easily on advice and guidance. However, again, the proposals rely on the voluntary sector, with particular reference to support for the work of the Communication Trust, the Dyslexia Trust and the Autism Trust. The DfE says that it has requested organisations from the voluntary and community sector to help to improve the availability of specialist advice for parents and teachers in relation to specific impairments. It is to be hoped that the department has also consulted qualified professionals in this connection.

There should be greater collaboration between local areas to plan, commission and deliver services, which would certainly assist with some current shortages in specialist areas, such as speech and language, and occupational therapy. There are vague references in the SEND green paper to a community budget approach to improve the delivery of service and encourage more effective pooling and alignment of funding for health, social care and education; however, the proposals are short on detail in this regard, and the government seems to be inviting consultees to give it ideas. A further national SEN and disabilities voluntary and community sector organisations prospectus is

promised shortly. This will set out key areas in which funding will be made available. In addition, there would be a national banded framework for funding provision for children and young people with SEN and disabilities to improve transparency.

Comment: In many respects, the proposals are welcome and show a refreshing realism about the problems suffered by children with SEN and disabilities and their families, and the defects in the current system. For some time it has been a matter of considerable concern that health, education and social care operate in separate compartments, despite the emphasis in the Children Act 2004 on holistic working. It has always been a frustrating aspect of the current SENDIST that its jurisdiction is restricted to education. Increasingly this has become artificial, particularly in relation to children with the most serious disabilities. Therefore, it makes a great deal of sense for the tribunal to be able to consider education, health and social care issues together, particularly in relation to issues such as placements in residential schools. However, inevitably this will mean that tribunal hearings will take longer and will be more complex. Such hearings may also be more daunting for parents when they are in effect faced with professionals from three disciplines rather than one.

The main concerns which arise from these proposals are that they are short on detail and whether, in reality, the government, local authorities and the NHS are going to be able to deliver the proposals given the current funding cuts. It is difficult to understand how the co-ordinated assessments proposed will be carried out, particularly in the shorter time frame envisaged, or what realistic guarantee the government can offer that services will be delivered in these circumstances.

Much depends on the outcome of the various trials and pathway experiments being run by the DfE currently. Probably it would have been more satisfactory if these proposals had come out once those trials had gone through. However, clearly it is important that all those involved in working in this area respond fully to the consultation.

Legal aid green paper

No doubt readers will be familiar with the Ministry of Justice's (MoJ's) green paper, *Proposals for the reform of legal aid in England and Wales*, and, in particular, with the fact that it proposes that education law, apart from disability discrimination claims, should be removed from scope.[4] There would still be funding for judicial review, but not for appeals from the SENDIST to the Upper Tribunal on the somewhat extraordinary basis that although such appeals can only be brought on a matter of law, unrepresented parents are able to identify relevant points of law, draft grounds of appeal and argue these points without legal help.

The reasons for removing education law from scope are set out in paragraphs 4.180 to 4.187 of the legal aid green paper and can be summarised as follows:

- Education cases are not as important as cases involving an immediate threat to life or safety, or liberty.

Comment: It is not clear why an immediate threat is considered more serious than a longer term threat, and this will come as a surprise to professionals who have regularly dealt with cases involving serious bullying and children who become suicidal or who self-harm because of educational problems.

- Some cases, such as exclusion appeals, involve an element of personal life choices by the children themselves and do not merit funding.

Comment: This of course wholly discounts the possibility that excluded children may be completely innocent of the offence with which they are accused, and ignores the fact, which is fully recognised in the SEND green paper, that a disproportionately large number of excluded children have SEN. The assertion also ignores the fact that adults who are accused of criminal offences are rather more likely to be exercising life choices, and that is not viewed as a reason for removing criminal legal aid.

- Parents bringing education cases on behalf of children are not particularly vulnerable and should be able to present their own cases before the tribunal or courts.

Comment: This claim presents an interesting contrast to the approach of the SEND green paper, which lays some emphasis on the major difficulties suffered by the families of children with SEN and disabilities and recognises that many parents of such children are themselves disabled.

- The SENDIST is designed to be accessible to individuals without legal assistance. Parents should be able to present the facts, leaving the law to be dealt with by the judge.

Comment: This statement displays an extraordinary ignorance of the fact that appeals to the SENDIST are really not viable without supporting, independent expert evidence which families on low incomes cannot hope to access, and that the tribunal deals regularly with complex legal issues on which, clearly, it would be wholly unjust if the tribunal only heard argument from local authorities.

- There are alternative sources of basic help for education issues, such as parent partnership workers, Independent Parental Special Education Advice (IPSEA) and the Advisory Centre for Education (ACE).

Comment: This observation comes as a surprise to IPSEA and ACE. Both national charities have confirmed that they were not consulted on their ability to fill the gaps if legal aid for education was withdrawn and that they would not in fact be able to do so. Also, parent partnership workers are not seen as independent because they are employed frequently by local authorities.

It is recognised in the legal aid green paper that there may be excluded cases where exceptional funding will still be appropriate, and a scheme to permit this will be put in place. However, to date no details have been given about how the considerable amount of work involved in submitting applications for exceptional funding will itself be paid for; there will simply be little or no incentive for solicitors to put forward such applications unless this is in place.

The deadline for responses to the legal aid green paper is of course well past, but arguably the consultation process has been vitiated by the fact that those responding to it had no knowledge of the proposals in the SEND green paper. The proposals for co-ordinated EHCPs mean that they will be even more difficult to wrestle with for parents with disabled children and who are on low incomes, and appeals involving EHCPs will be even more complex than current SEN appeals. The converse is that presumably organisations with community care contracts will be able to assist with such appeals; however, bodies which are also able to offer the necessary education expertise are relatively few.

The SEND green paper makes reference to the legal aid proposals and states that the DfE is working with the MoJ. This is surprising given the discrepancies identified above. Sensibly, the SEND green paper also points out the substantial economic benefits of ensuring that children with SEN and disabilities receive proper education, health and social care provision, while the MoJ has indicated that the savings to be made from withdrawing legal aid for education cases are under £1 million. It is to be hoped that even if major issues of access to justice do not appeal to the MoJ, simple economics will lead it to withdraw the proposals in relation to education cases.

1 Available at: www.education.gov.uk/publications/standard/publicationdetail/Page1/CM%207980#downloadableparts.
2 Available at: www.education.gov.uk/publications/eOrderingDownload/Green-Paper-SEN.pdf. The consultation period ends on 30 June 2011.
3 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_122393.pdf and www.dh.gov.uk/

prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_121971.pdf respectively.

4 Available at: www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf. The consultation paper closed on 14 February 2011.

Angela Jackman and Eleanor Wright are partners at Maxwell Gillott Solicitors in London. Readers are invited to send in unreported cases of interest and information relating to current events in education law and practice.

Support for migrants update – Part 1

Sue Willman and **Sasha Rozansky** continue the series of updates on welfare provision for asylum-seekers and other migrants, supplementing the third edition of LAG's handbook, *Support for Asylum-seekers and other Migrants*, 2009. The last update appeared in December 2010 *Legal Action* 10. Part 2 of this article will be published in July 2011 *Legal Action* and will cover EU right to reside case-law.

POLICY AND LEGISLATION

Children

Age assessment judicial reviews in the Upper Tribunal

Article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI No 2655 extends the Administrative Court's jurisdiction over age assessment judicial reviews by minors from abroad to allow the Immigration and Asylum Chamber of the Upper Tribunal to consider such applications. The Upper Tribunal has the power to grant the relief mentioned in Tribunals, Courts and Enforcement Act 2007 s15(1), including a mandatory order, a prohibiting order, a quashing order, a declaration and an injunction. The Order came into force on 29 November 2010. At the time of writing, age assessment judicial reviews still need to be issued at the Administrative Court, together with the relevant fee, where a decision will be made on whether or not to transfer the application to the Upper Tribunal. However, it is anticipated that most cases will be transferred.

Detention of children

Pilot scheme for returning families with children

On 28 February 2011, the government announced that it is piloting a new way of returning former asylum-seeking families with children to their country of origin, without the use of detention.[1] The four-stage process will involve:

- decision-making by specialist family case-owners within the UK Border Agency (UKBA), which will include the development of pilots to test new ways of working with families and work with the Office of the UN High Commissioner for Refugees (UNHCR) to test and improve the quality of decision-making;
- 'assisted returns', including family conferences to discuss the family's return home, welfare and medical concerns and the availability of tailored assisted voluntary return packages to help families resettle on their return;
- 'required returns' for families who fail to take up assistance packages, allowing them to remain in the community, but giving two weeks' notice to board their flight home and allowing self check-in without the need for enforcement action; and
- 'ensured returns', as a last resort for families who refuse to depart the UK. The new Family Returns Panel will advise the UKBA on return plans to ensure the welfare of the child is taken properly into account. Options will include a form of limited notice removal, the use of open accommodation and, where families fail to comply, 'family friendly, pre-departure accommodation'.

The children's charity Barnardo's will provide welfare, safeguarding and support services at the new pre-departure family accommodation.[2] The immigration minister further announced on 23 March 2011 that families will enter:

> *... open accommodation on a voluntary basis and will be entirely free to come and go during their stay. Families will only enter open accommodation where their return can be delivered within 72 hours of the family's arrival there, or within five working days for Third Country Unit or Non Suspensive Appeal cases.*[3] *If the return fails, the family may remain in open accommodation, but their stay will not exceed a maximum of 28 days* (*Hansard* HC Written Answers cols 1164W–1165W, 23 March 2011).[4]

Asylum support developments

Asylum support increases

On 23 March 2011, the immigration minister introduced the Asylum Support (Amendment)

Regulations 2011 SI No 907, amending the Asylum Support Regulations 2000 SI No 704, to increase the support payable to asylum-seekers under the Immigration and Asylum Act (IAA) 1999 s95. The explanatory memorandum to the regulations states that the government is applying a 3.1 per cent increase to the level of support, in line with the practice established in 2008 and based on the Consumer Price Index for September 2010. From 18 April 2011, the rates are as follows:

- Qualifying couple: £72.52
- Lone parent aged 18 or over: £43.94
- Single person aged 25 or over (where the decision to grant support was made prior to 5 October 2009 and the person reached age 25 prior to that date): £42.62
- Any other single person aged 18 or over: £36.62
- Person aged at least 16 but under 18 (except a member of a qualifying couple): £39.80
- Person aged under 16: £52.96

Readers should note that the increase does not apply to the over 25 rate, which was closed to new applicants in 2009 and will be frozen until the cases of its remaining recipients are concluded. The table does not show additional amounts payable to pregnant women and for a child up to the age of five.

Withdrawal of asylum support appeals before the hearing

Following a number of asylum support appeals being withdrawn by the Home Secretary before the appeal hearing, often leaving the appellant without any support, the Asylum Support Appeals Project (ASAP) wrote to the principal judge of the First-tier Tribunal (Asylum Support) to express its concerns. In a letter to the ASAP, dated 11 November 2010, the principal judge set out details of a new procedure which the Home Secretary must follow if she wishes to withdraw an asylum support appeal on the day of the hearing (this procedure does not apply if the withdrawal request is made before the day of the hearing).[5] The letter states that the withdrawal application can only be made in person in an open court. The request will only be granted if:

- the UKBA confirms in writing that the decision under appeal is being withdrawn and the appellant will be granted support immediately; or
- the decision to be withdrawn is substituted immediately with a new decision which is available for service at the hearing and both parties are agreed that the hearing can proceed against the new decision; or
- the new decision is available for service at the hearing, but where the appellant or his/her representative is not ready to proceed, the respondent consents to an adjournment of the appeal hearing against the new decision and confirms in writing that support will continue until the appeal has been finally determined; or
- where the UKBA wishes to replace the decision under appeal with a new decision that is yet to be made, the UKBA provides written confirmation that the appellant will be supported until such time as the new decision is served on the appellant against which s/he will have a fresh right of appeal, and that appeal has been finally determined.

UK Border Agency

Legacy update

On 9 November 2010, the Home Affairs Committee heard evidence for its report, *The work of the UK Border Agency*, fourth report of session 2010–11 (HC 587–I, 11 January 2011), that the UKBA is on target for clearing the backlog of between 400,000 and 450,000 unresolved asylum cases, known as 'legacy' cases, by July 2011 (legacy cases are those where there is an unresolved asylum claim that is not being dealt with by a case-owner under the New Asylum Model, which has dealt with all first asylum claims made on or after 5 March 2007).[6] The committee also heard that ministers had approved revised guidance allowing UKBA case-workers to consider granting permission to stay to applicants who had been in the UK for six to eight years, rather than the 10 to 12 years that applied at the start of the backlog-clearing process, and that this decision increased significantly the number of cases which officials might conclude quickly by grant of settlement, rather than being contested. In addition, the committee heard that there are likely to be a minimum of 61,000 cases concluded on the basis that the UKBA has been unable to trace the applicant.

Home Office statistics

The Home Office published *Control of immigration: quarterly statistical summary, United Kingdom. Quarter 4 2010 (October-December)* in February 2011.[7]

EU accession nationals

The number of applications to the Worker Registration Scheme (WRS) from nationals of eight countries that in 2004 acceded to the EU (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia ('A8 nationals')) increased in 2010 to 122,625, up six per cent from 115,760 in 2009. This increase reverses the trend of year-on-year decreases in initial applicants for the WRS since 2006. There were 24,789 applications for income-related social security benefits from A8 nationals in 2010, compared with 25,860 received in 2009. The majority of applications, 17,097 (69 per cent), were refused on the basis that the applicants did not have the right to reside or were not habitually resident in the UK.

Detention of children

Twenty-seven children were detained in the fourth quarter of 2010, 91 per cent lower than in the fourth quarter of 2009 (295). According to the report, as at 31 December 2010, there were no people detained solely under Immigration Act powers recorded as being less than 18 years of age.

Asylum-seekers

The number of asylum applications, excluding dependants, was 27 per cent lower in 2010 (17,790) compared with 2009 (24,485). This represents the lowest number of applications since a peak in 2002 (84,130). In 2010, the number of fresh claims for asylum, excluding dependants, was 1,555. Of those claims, 250 were in the last quarter of 2010. It appears that these statistics relate to fresh claims actually recorded by the Home Secretary, rather than those submitted. During 2010, 17 per cent of initial asylum decisions resulted in a grant of asylum, similar to 2009. In 2010, eight per cent of initial asylum decisions resulted in a grant of humanitarian protection or discretionary leave (down from 11 per cent in 2009). Twenty-seven per cent of asylum appeals were allowed in 2010.

The total number of asylum-seekers receiving IAA s95 support on 31 December 2010 (22,690) was 22 per cent lower than on 31 December 2009 (29,150). In the fourth quarter of 2010, the number of applications for support under section 95 was 3,100, 21 per cent lower than in the fourth quarter of 2009 (3,940). Of those applications, 2,420 (78 per cent of the total) were from single adults and 680 (22 per cent of the total) were from family groups. In the fourth quarter of 2010, there were 1,440 decisions to grant support under IAA s4, no change from the fourth quarter of 2009. However, there was a significant drop (69 per cent) in the number of people, excluding dependants, actually receiving section 4 support on 31 December 2010 (3,560), compared with the number at 31 December 2009 (11,655).

The number of people granted indefinite leave to remain (ILR) on a discretionary basis (and where the category of grant is unknown) increased from 38,245 in 2009 to 83,090 in 2010. As stated in 'Support for migrants update', December 2010 *Legal Action* 12, the significantly reduced number of people getting section 4 support may be explained in part by

the policy changes referred to in 'Support for migrants update', June 2010 *Legal Action* 9 and 10, as well as a result of the UKBA granting leave to remain to many of those in the legacy caseload (see above), often before considering the section 4 application.

Health care

Department of Health proposals

The Department of Health (DoH) has published proposals following a consultation paper issued in February 2010, reviewing access to the NHS by foreign nationals.[8] The government plans to amend and consolidate the National Health Service (Charges to Overseas Visitors) Regulations 1989 SI No 306:

- to exempt refused asylum-seekers who are receiving support under IAA s4 and unaccompanied asylum-seeking children in local authority care from charges for NHS hospital treatment; and
- to clarify that the 'easement clause' applies to anyone who has begun a course of treatment free of charge, so that they will continue with that particular course of treatment free of charge until they leave the country, even if their exempt status changes (the paper explains that a child who becomes an adult during treatment or who leaves the care of the local authority will continue to benefit from the 'easement clause' for a particular course of treatment).

New guidance will be issued to accompany the consolidated regulations:

- to clarify the ordinary residence test; and
- to clarify the rule in the existing guidance, which suggests that 'immediately necessary' treatment should be provided if the patient's estimated return home date is in six months, to state that a longer estimate of return may be appropriate in some cases.

The government has decided to conduct a further consultation on:

- the qualifying residence criteria and other criteria which currently provide exemptions from charges for secondary treatment;
- whether or not to extend charges to other NHS services such as GP and other primary care services;
- establishing more effective processes across the NHS to screen for eligibility and to make and recover charges; and
- whether or not to introduce a requirement for health insurance tied to visas, and provisions for improved debt recovery.

In addition, new regulations, directions and guidance will be introduced to require an overseas visitor receiving chargeable NHS treatment to provide personal information at the outset of his/her treatment to aid subsequent recovery of charges. NHS organisations will be required to provide information relating to outstanding debt for NHS treatment to the DoH or an appointed agency. The NHS Counter Fraud Service will be empowered to transfer the data to the UKBA to assist with implementation of the immigration sanctions referred to below.

Home Office proposals

The UKBA conducted a consultation exercise tied to the NHS consultation referred to above. The UKBA published its proposals, which include amending the Immigration Rules in autumn 2011 so that the UKBA has discretion to apply immigration sanctions (ie, refusing permission to enter or remain in the UK) to those with outstanding NHS charges of £1,000 or more, to be implemented gradually during 2011 and 2012.[9]

Research

Asylum-seekers and destitution

ASAP's report, *No credibility: UKBA decision making and section 4 support* (April 2011), highlights 'the flawed nature of the UKBA's decision-making on applications for support provided under IAA 1999 s4'.[10] The report found that 82 per cent of asylum-seekers who were refused IAA s4 support on the ground that they were not destitute had the decision appealed successfully to the First-tier Tribunal (Asylum Support). The report also scrutinises the quality of the UKBA decision-making process and details the shortcomings of the application and understanding of the legal tests for destitution, treatment of evidence and assessment of credibility by case-workers.

Oxfam's report, *Coping with destitution: survival and livelihood strategies of refused asylum seekers living in the UK* (February 2011), describes how thousands of destitute asylum-seekers manage to survive without legitimate means of securing a livelihood, and the impact their destitution has on their lives.[11] The report's recommendations in respect of both asylum-seekers and refused asylum-seekers include that:

- the UKBA should improve the quality of asylum decision-making;
- protection should be provided to those in need who cannot be returned to their country of origin;
- there should be access to free legal advice and representation to facilitate an appeal, or fresh claim, if appropriate;
- the right to work should be granted;
- there should be reintegration into the mainstream benefits system;
- welfare support should continue until the point of return; and
- access to primary and secondary health care should be offered.

Unaccompanied asylum-seeking children in Europe

The Council of Europe's Parliamentary Assembly, Committee on Migration, Refugees and Population, published its report, *Unaccompanied children in Europe: issues of arrival, stay and return*, in March 2011.[12] The report notes that it is thought that there may be up to 100,000 unaccompanied migrant children in Europe. The committee reported that these children's treatment once in Europe varies from country to country and that they face abuse and neglect in many or become victims of trafficking, despite the commitments made by all Council of Europe member states, including under the UN Convention on the Rights of the Child. The report discusses the discrepancies between EU member states with regard to age assessments. It supports the recommendation of the UNHCR Bureau for Europe's Working Group on Unaccompanied and Separated Children to fill the gap and draft minimum standards for safeguards in age-assessment procedures. It also welcomes the EU project, under the Action Plan, to issue best practice guidelines in collaboration with scientific and legal experts and in co-operation with the European Asylum Support Office.

There have been a number of other reports and guidance regarding migrant children, including:

- *Landing in Kent: the experience of unaccompanied children arriving in the UK*, Office of the Children's Commissioner, February 2011.[13]
- *Lives in the balance: The quality of immigration legal advice given to separated children seeking asylum*, Refugee Council, February 2011.[14]
- *London safeguarding trafficked children guidance and London safeguarding trafficked children toolkit*, London Safeguarding Children Board, February 2011.[15]

EU law

End of worker registration scheme

On 1 May 2011, the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 SI No 544 came into force. These regulations had the effect of ending the WRS, so that A8 nationals are no longer subject to the requirement to register their employment. They will be subject to the same eligibility criteria as other EU nationals when claiming welfare benefits and housing assistance. A significant change is that A8 nationals may now receive jobseeker's allowance without having to complete 12 months' registered work, providing they meet the other conditions of entitlement.

These regulations revoked in part the

Accession (Immigration and Worker Registration) Regulations (A(IWR) Regs) 2004 SI No 1219. Regulation 8 of the A(IWR) Regs continues for one year, with an amendment, to 30 April 2012, to enable the Home Secretary to continue to process worker registration applications made by an A8 national requiring registration on 30 April 2011 who was working for a relevant employer at the date of application. The explanatory memorandum to the regulations states that this is necessary because an A8 national may need a document to evidence that s/he was registered properly under the A(IWR) Regs. This could be used, for example, to show lawful periods of residence for the purposes of being eligible for permanent residence or retaining worker status.

Government to opt in to EU Directive on human trafficking

The UK has previously ratified the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No: 197). On 22 March 2011, the government issued a written ministerial statement that the UK intends to opt in to EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.[16] The Directive entered into force on 15 April 2011.[17]

On 9 May 2011, the House of Commons resolved to support this intention and the immigration minister stated that the government is applying to the European Commission to opt in. The commission will have four months to decide whether or not to let the UK opt in and, if so, will determine the period by which any primary legislative changes will need to be made to transpose the Directive.

Article 11 of the Directive provides that assistance and support, including safe accommodation and medical treatment, shall be provided for victims of trafficking. Article 14 provides that in cases where a child has no one with parental responsibility advocating for him/her, a guardian or representative should be appointed from the moment a trafficked child is identified by the authorities.

CASE-LAW

Immigration

Conditions of asylum-seeker in Greece breach article 3

■ MSS v Belgium and Greece

App No 30696/09, 21 January 2011, [2011] ECHR 108

MSS was an Afghan asylum-seeker who had entered the EU through Greece. He had his fingerprints taken there but did not claim asylum. He subsequently claimed asylum in Belgium, but since the Belgian authorities discovered that he had been in Greece, they requested that the Greek authorities deal with the asylum application and took steps to deport him. MSS appealed the decision to deport to the Belgian Aliens Appeals Board, on the ground that he risked arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. He also relied on the deficiencies in the asylum procedure in Greece, the lack of adequate reception facilities for asylum-seekers in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

MSS's challenges were unsuccessful and he was returned to Greece. He applied to the European Court of Human Rights (ECtHR) to have his removal suspended under Rule 39, but the court refused to intervene. It stated that it was confident that Greece would honour its obligations under the convention and comply with EU legislation on asylum. On his arrival in Greece, MSS was immediately placed in detention, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor. Once he was released he had no means of subsistence, and was forced to sleep on the street. MSS then lodged an application with the ECtHR, alleging that the Belgian authorities, by returning him to Greece, had violated articles 2 and 3 of the convention and that the Greek authorities had violated article 3 of the convention.

The ECtHR held that there had been a violation by Greece of article 3 of the convention because of MSS's conditions of detention, his living conditions and the deficiencies in the asylum procedure were a violation of article 13 in conjunction with article 3. The ECtHR also held that there had been a violation by Belgium of article 3 of the convention by sending MSS back to Greece, since this exposed him to risks linked to the deficiencies in the asylum procedure in Greece and exposed him to detention and living conditions that were in breach of article 3.

Comment: The effect of this decision is that states seeking to return asylum-seekers to Greece may not simply rely on assurances from the Greek authorities about their treatment, and are themselves responsible in damages for ensuing foreseeable violations of the convention.

No entitlement to damages for wrongful denial of permission to work

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

[2011] EWHC 386 (Admin), 4 March 2011[18]

N was an asylum-seeker whose asylum claim had been exhausted in March 2006. In December 2007, he made further representations amounting to a fresh asylum claim. In October 2008, he asked the Home Secretary for permission to work and in December 2009 issued a claim against the Home Secretary for failing to grant him permission to work, as his further representations had been outstanding for over 12 months. He relied on article 11 of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers (known as the 'Reception Directive'), which provides that asylum-seekers must be granted permission to work if they have been waiting for a decision on their claim for over 12 months and the delay is not their fault. He also based his claim on *R (ZO (Somalia) and MM (Burma)) v Secretary of State for the Home Department*; *R (DT (Eritrea)) v Secretary of State for the Home Department* [2009] EWCA Civ 442, 20 May 2009 (see 'Support for migrants update', June 2010 *Legal Action* 10), where it was held that article 11 applied to first and fresh claims. In March 2010, N was granted ILR in the UK and his claim continued to proceed in respect of his claim for damages resulting from his unlawful exclusion from access to employment only. N's claim was heard as a test case to decide whether, in principle, such damages can be awarded.

The court refused the application. It decided that the Home Secretary's failure to implement article 11 amounted to a mistaken construction of the Directive and not a deliberate breach. Although an error can be sufficiently serious to amount to a claim for damages, the Home Secretary's breach had not been manifestly and gravely unlawful. In any event, the Home Secretary was entitled to introduce the labour market restrictions following the decision in *ZO (Somalia)*, and on the basis of these restrictions very few applicants, and certainly not N, would have been able to obtain employment. Furthermore, N had no right to work under the European Convention on Human Rights ('the convention') and so a prohibition on working could not amount to an interference with his private life.

Comment: N has applied for permission to appeal to the Court of Appeal.

Damages for wrongful delay in granting ILR

■ Home Office v Mohammed and others

[2011] EWCA Civ 351, 29 March 2011

The respondents to this appeal were six Iraqi Kurds who arrived in the UK and claimed asylum between 1999 and 2001. Eventually they were all granted ILR in the UK, but not until between 2007 and 2009. The delay arose because the Home Secretary had either put their applications on hold under an unlawful policy or had failed to implement the appropriate ministerial policy. The respondents made claims for damages in respect of losses arising from the Home Secretary's failure to grant them ILR earlier, which they claimed amounted to a breach of statutory duty, negligence and breaches of articles 5 and 8 of the convention. The county court allowed the Home Secretary's application to strike out the claims made in relation to breach of statutory duty and article 5 only, and so she appealed to the Court of Appeal in relation to the application to strike out the negligence and article 8 claims.

The Court of Appeal struck out the respondents' negligence claims as there was an alternative means of redress, namely, a complaint to the Parliamentary Ombudsman, which meant that it was not fair, just and reasonable to impose a duty of care on the statutory relationship between the Home Secretary and the respondents. In respect of the article 8 claim, this raised a triable issue and was remitted for trial.

Damages for wrongful delay in providing immigration status documents

■ R (MD (China) and others) v Secretary of State for the Home Department

[2011] EWCA Civ 453, 18 April 2011

The five claimants were successful asylum-seekers who suffered unacceptable delay through maladministration in being provided with their immigration status documents following the Home Secretary's decision to grant refugee status. After judicial review proceedings commenced, all the claimants received their documents. However, they also sought a declaration that the Home Secretary's delay had violated article 8 of the convention, as without their documents they had been unable to work, claim welfare benefits, travel abroad and would be delayed in being eligible for British citizenship. The High Court stayed the proceedings pending the Home Secretary's conclusion under the internal complaints procedure. The claimants appealed against this decision.

The Court of Appeal refused their appeal, deciding that the continuation of the proceedings was pointless and disproportionately expensive to the damages the claimants were seeking, and that a properly structured complaints procedure was available.

Leave to remain based on child's residence in the UK

■ R ((1) Abbassi and others (2) Rahman and others (3) Adams and others) v Secretary of State for the Home Department

[2010] EWHC 2894 (Admin), 12 November 2010

The claimants all had children who had lived in the UK for over seven years, and had applied for leave to remain. The Home Secretary refused these applications, as policy DP 5/96, which contained a general presumption against the removal of immigrants where their children had accumulated seven years' continuous residence, had been withdrawn. The claimants made an application for a judicial review of this decision.

The court decided that the Home Secretary's decision not to take the policy into account when considering the claimants' applications for ILR in the UK was irrational, as the children had been in the UK for seven years before the withdrawal of the policy. Mrs Abbassi's application was dismissed, as her family had only completed seven years' residence after the policy was withdrawn, but the Home Secretary's decision in Mr Rahman and Ms Adams' cases was quashed and an order made that the applications for leave to remain be considered under policy DP 5/96.

■ ZH (Tanzania) v Secretary of State for the Home Department

[2011] UKSC 4, 1 February 2011, April 2011 Legal Action 39

ZH was a citizen of Tanzania who arrived in the UK in 1995. Over the next ten years, she made three claims for asylum, two using false identities, a human rights claim and two applications for leave to remain, all of which were unsuccessful. In 1997, she formed a relationship with a British citizen and they had two children, born in 1998 and 2001, who both had British citizenship through their father. In 2005, she separated from the children's father, but the children continued to see their father regularly. In 2007, ZH made a fresh claim for leave to remain under the Human Rights Act 1998, claiming that her removal from the UK would constitute a disproportionate interference with her right to respect for private and family life. The Home Secretary refused this application and her appeals to the Asylum and Immigration Tribunal and the Court of Appeal were unsuccessful, as it was considered that the children could reasonably be expected to follow her to Tanzania. She appealed to the Supreme Court.

The Supreme Court allowed the appeal. It held that international law, most notably UN Convention on the Rights of the Child article 3(1), places a duty on public bodies that the best interests of the child shall be a primary consideration when carrying out actions concerning children. In addition, Children Act (CA) 2004 s11 and Borders, Citizenship and Immigration Act 2009 s55 provide that public bodies must have regard to the need to safeguard and promote the welfare of children, and so any decision which is taken without having such regard will not be in keeping with the law. Relevant to the question of whether or not it will be reasonable to expect a child to live in another country will be the level of the child's integration in the UK and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationship with parents or other family members which will be severed if the child has to move away.

The court also held that the intrinsic importance of citizenship should not be played down, and that, as citizens, ZH's children have rights which they would not be able to exercise if they moved to another country. Therefore, when making the proportionality assessment under article 8 of the convention, the best interests of the child must be a primary consideration, which can be outweighed by other considerations, although the fact of British citizenship will hardly ever be less than a very significant and weighty factor against moving children to another country.

Comment: The decisions in *Abbassi* and *ZH (Tanzania)* may assist in supporting a migrant's eligibility to community care services, for example, support under CA 1989 s17, where a local authority has decided that it is not entitled to provide support because of Nationality, Immigration and Asylum Act 2002 s54 and Sch 3.

Asylum support

Section 4 bail address

■ R (Razai and others) v Secretary of State for the Home Department and Bail for Immigration Detainees (intervener)

[2010] EWHC 3151 (Admin), 2 December 2010[19]

The claimants had been placed in immigration detention following criminal convictions. They

wanted to apply for bail, but did not have an address to offer the immigration judge who, in practice, was only likely to make any grant of bail conditional on residence at a specified address. The Home Secretary has a power under IAA s4(1) to make accommodation available for immigration detainees who are released on bail. In practice, an address is usually provided before the bail application is made. The claimants applied for section 4(1) accommodation, but this was not provided on the basis that they were 'high risk' and could not be provided with regular accommodation. The Home Secretary did not provide reasons or evidence about why they were considered to be high risk or when they might expect to be offered a bail address. They made an application for judicial review claiming that their applications for section 4(1) accommodation were handled unfairly and unlawfully and that there was an unlawful delay before the applications were finally decided.

The court decided that the policy in relation to section 4(1) accommodation and high risk applicants operated unfairly, as applicants should have been told that they were considered high risk and provided with reasons for this decision in order that they could make representations in response to that view. However, the court also decided that although the Home Secretary's policy was in part unpublished, this did not render it unlawful and, in any event, did not conflict with the published policy. In addition, it decided that there was no unlawful delay in considering the claimants' applications for section 4(1) accommodation, partly because the court accepted that this was a new system under which initial problems had largely been resolved, although this issue would depend on the facts of an individual's case. The court also noted that when deciding an appeal against the Home Secretary's refusal to provide section 4(1) accommodation to a high-risk applicant, the First-tier Tribunal, under its powers under the IAA s103, can consider all relevant matters, including the reasons why the Home Secretary made her decision to refuse accommodation, including her policy, as well as the appellant's representations.

Comment: The Home Secretary subsequently published her policy on section 4 bail accommodation and high-risk applicants in full.[20]

Mixed households

■ R (MK and another) v Secretary of State for the Home Department

Court of Appeal (Civil division), 14 April 2011[21]

The appellant was a refused asylum-seeker who had submitted further representations in support of a fresh asylum claim. He applied to the Home Secretary for support under IAA s4. This application was granted and the Home Secretary agreed to offer him accommodation and payment vouchers. He refused this offer, as it required him to live separately from his British national partner and their daughter. He applied for a judicial review of the Home Secretary's refusal to grant him support in the form of vouchers only, ie, not as part of a package linked to the accommodation. He was then granted leave to remain in the UK and so his claim became academic. His judicial review application was refused permission and so he appealed that decision to the Court of Appeal.

Following the Administrative Court's approach in *R (AW (Kenya)) v Secretary of State for the Home Department* [2006] EWHC 3147 (Admin), 29 November 2006, the Court of Appeal considered itself bound by the wording of section 4. It dismissed the appeal on the basis that the Home Secretary's power to provide support under section 4 was tied to the provision or arrangement of accommodation and the provision of facilities such as payment vouchers could not be provided in isolation.

Decisions of the First-tier Tribunal (Asylum Support)

Termination of support

■ AS/11/03/26279

11 March 2011[22]

The appellant received support under IAA 1999 s95. On 18 January 2011, she received a letter from the Home Secretary confirming that she was to be granted refugee status and in due course would receive her immigration documents confirming this grant. Without these documents the appellant had no evidence that she had been granted leave to remain. On 25 January 2011, the Home Secretary wrote to the appellant, notifying her that on 27 February 2011 her section 95 support would be terminated, following the resolution of her asylum claim. She appealed on the ground that her asylum claim had not been fully determined, as she still had not been sent her immigration documents.

The tribunal allowed the appeal. It decided that an asylum claim was not determined until the Home Secretary has served the immigration documents conferring leave to remain. The appellant was entitled to section 95 support for 28 days after receiving these documents.

Related decisions on section 4 and temporary admission

■ AS/11/02/26112

4 March 2011[23]

The appellant had applied for leave to remain in the UK under article 8 of the convention after her visa had expired. The Home Secretary refused this application. She then made an application for discretionary leave to remain, pending the resolution of care proceedings in relation to her daughter, who had been taken into local authority care. In response, the Home Secretary granted her temporary admission. The appellant later applied for accommodation under IAA s4(1)(a), on the basis that she had been granted temporary admission. Support was refused on the basis that there were no special compassionate grounds warranting support under section 4(1)(a), which was only granted on an exceptional basis (as opposed to support under section 4(2) which is granted to destitute failed asylum-seekers). The appellant appealed to the First-tier Tribunal (Asylum Support). The principal judge proceeded to consider the appeal with no oral hearing.

The tribunal decided that the Home Secretary had failed to give adequate consideration regarding whether or not the appellant was entitled to section 4(1)(a) accommodation. The judge noted that the tribunal was aware of a number of similar standardised decisions in relation to section 4(1)(a). The tribunal's practice was to remit them to the Home Secretary for reconsideration, as long as there was no published guidance on the exercise of the power to provide accommodation under section 4(1)(a) reflected in the decision letters. The judge remitted the appeal to be reconsidered by the Home Secretary.

■ AS/11/03/26412

11 April 2011[24]

The Home Secretary again refused the application referred to above as *AS/11/02/26112*, and the appellant appealed. The appeal was considered by the principal judge without an oral hearing. In relation to this appeal, it was conceded on the appellant's behalf that there was a requirement to prove destitution under IAA s4(1)(a). On the particular facts of the case, the tribunal decided that the appellant was not destitute and so did not go on to consider whether the Home Secretary's failure to exercise her discretion and grant the appellant accommodation under section 4(1)(a) was unlawful. The judge observed that if she had decided that the appellant was destitute, the appeal would have again been remitted, as the policy on section 4(1)(a) accommodation had still not been published.

Comment: The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 SI No 930 provide a detailed regime for those seeking support under IAA s4(2), which includes a destitution requirement. There is no such regime for those seeking accommodation under section 4(1), which applies to those with temporary admission or those released from detention on bail. It therefore appears that the Home Secretary must exercise her discretion to consider such applications fairly, taking the convention into account. If destitution is a criterion, this should be published.

Children

Age assessment of unaccompanied minors

■ R (FZ) v Croydon LBC

[2011] EWCA Civ 59, 1 February 2011[25]

The appellant was an unaccompanied asylum-seeking child from Iran. His stated date of birth was 28 December 1993, which made him 17 years old at the date of the hearing. However, Croydon disputed his age and assessed him as being born in 1991, and so as 19 years old. Following that assessment, FZ produced a vaccination card in support of his stated age and Croydon agreed to review its previous decision. However, it refused to accept the document as proof of his age or identity and so maintained its original decision about his age. FZ applied for permission to bring judicial review proceedings against Croydon for failing to assess his needs, failing to secure him adequate accommodation and for incorrectly determining his age. The High Court refused permission on the third issue. FZ was given permission to appeal, which gave the Court of Appeal the opportunity to consider the problematic aspects of age assessment cases following the Supreme Court's decision in *R (A) v Croydon LBC* [2009] UKSC 8, 26 November 2009.

In allowing the appeal, the Court of Appeal gave guidance on the correct approach for a court when considering permission to proceed with judicial review in age assessment cases. The question for the court to consider is whether or not the material before it raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. The Court of Appeal also held that local authorities must allow young people an opportunity to respond to any adverse impressions formed during the assessment process and before a final decision is taken. In addition, the young person should be given an opportunity to have an appropriate adult present at assessment interviews.

■ R (CJ) v Cardiff CC

[2011] EWHC 23 (Admin), 17 January 2011[26]

CJ was an unaccompanied asylum-seeking child from Afghanistan, who claimed to be 15 years old when he arrived in the UK. He was in the care of Cardiff County Council, which subsequently carried out an age assessment which concluded that he was 20 years old. He provided a residence card, a health card and a vaccination card in support of his stated age. Cardiff then agreed to treat him as a child and placed him with foster carers. However, Cardiff again assessed his age and found that he was over 18. He applied for judicial review of this decision.

The court refused CJ's application. It found that he was not a credible witness and the documents he produced could not be relied on. The burden of proof was on CJ to show that he was a child. It was for the local authority to prove the jurisdictional fact which it needed to assert against a disputing claimant in order to give it the power it exercised. The court stated further that to give the benefit of the doubt to a claimant wisely reflected the uncertain nature of age assessments, but in CJ's case this was not the issue because of the large gap between the stated age and the assessed age, and came down to the credibility problem.

Comment: Permission has been granted to appeal on the question about where the burden of proof lies.

1 See 'New family returns process begins', available at: www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/03new-family-returns-process.
2 See 'Barnardo's will provide welfare services for families at new pre-departure accommodation', available at: www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/23-barnardos.
3 Third Country Unit cases are those where the Home Secretary can decline to examine an asylum application without substantive consideration if there is a safe third country to which the applicant can be sent. Non Suspensive Appeal cases are those where the applicant only has the right to appeal against a negative decision from the Home Secretary once outside of the UK.
4 See: www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110323/text/110323w0002.htm#11032381000023.
5 Available at: http://asaproject.org/web/images/PDFs/news/summary_pjstorey_letter.pdf.
6 Available at: www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/587/58703.htm#a3.
7 Available at: www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/control-immigration-q4-2010/.
8 *Access to the NHS by foreign nationals – government response to the consultation*, DoH, 18 March 2011, available at: www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_125271.
9 *Consultation: refusing entry or stay to NHS debtors. Results of the public consultation on proposed changes to the Immigration Rules*, UKBA, March 2011, available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/nhs-debtors/results-of-consultation-nhs?view=Binary.
10 See: http://asaproject.org/web/index.php?option=com_content&view=category&layout=blog&id=41&Itemid=72. The report is available at: www.asaproject.org/web/images/PDFs/news/asapreport260411.pdf.
11 Available at: www.oxfam.org.uk/resources/policy/right_heard/coping-with-destitution-survival-strategies-uk.html.
12 Available at: www.unhcr.org/refworld/docid/4d8b1e002.html.
13 Available at: www.childrenscommissioner.gov.uk/content/publications/content_465.
14 Available at: www.refugeecouncil.org.uk/policy/position/2011/livesinthebalance.
15 Available at: www.londonscb.gov.uk/trafficking/.
16 See: www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/?view=Standard&pubID=869472.
17 See: www.europarl.europa.eu/oeil/file.jsp?id=5849482.
18 Declan O'Callaghan, barrister, London.
19 Joanna Thomson, Louise Whitfield and Neena Acharya, Pierce Glynn solicitors, London and Nick Armstrong, barrister, London.
20 Available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/asylumsupport/guidance/section-4-bail-accommodation?view=Binary.
21 Ranjiv Khubber and Martin Westgate QC, barristers, London.
22 Refugee Action, London.
23 Simon Garlick, solicitor, and Adam Slawson, paralegal and barrister (non-practising), Ben Hoare Bell Solicitors, Sunderland.
24 See note 23.
25 Zubier Yazdani, Pierce Glynn solicitors, London, and Jan Luba QC and Shu Shin Luh, barristers, London.
26 Chris Buttler, barrister, London.

Sue Willman is a partner and Sasha Rozansky is a trainee solicitor at Pierce Glynn Solicitors. Readers are encouraged to forward relevant cases to Sasha Rozansky at: srozansky@piercegLynn.co.uk for possible inclusion in the next article, which will appear in December 2011 *Legal Action*. The authors are grateful to the colleagues at notes 18, 19 and 21–26 for transcripts or notes of judgments.

Recent developments in housing law

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

POLITICS AND LEGISLATION

Housing law reform

The House of Commons Library has produced a useful summary of changes made to the Localism Bill in the Public Bill Committee: *Localism Bill: committee stage report. Research paper 11/32*.[1] The housing parts of the bill are reviewed at pages 41–58. The bill will have its second reading in the House of Lords on 7 June 2011.

New equality duty for social landlords

The new public sector equality duty introduced by the Equality Act (EqA) 2010 s149 came into force on 5 April 2011: Equality Act 2010 (Commencement No 6) Order 2011 SI No 1066. The duty is owed by most social landlords in carrying out their functions.

Residential property tribunals

On 30 April 2011, new procedure rules and fee rates took effect in the residential property tribunals (RPTs) which determine many classes of housing dispute: Residential Property Tribunal Procedures and Fees (England) Regulations 2011 SI No 1007.

Social housing allocation

A new research paper shows that ethnic minorities using choice-based letting schemes to apply for social housing are the most likely to end up in deprived and ethnic concentration neighbourhoods: *Choice-based letting, ethnicity and segregation in England*.[2]

Mortgage arrears

The National Homelessness Advice Service has produced an updated April 2011 version of its leaflet *Are you worried about your mortgage? Get advice now*.[3]

Social housing rent arrears

In Northern Ireland, new rent collection guidance has been developed by the Department for Social Development, with support from the Northern Ireland Federation of Housing Associations, Housing Rights Service and the Northern Ireland Housing Executive.[4] The guidance states that '[e]viction should always be viewed as a last resort and should only be used when all other avenues have been exhausted' (para 10.23).

Gypsy and Traveller sites

On 30 April 2011, the provision exempting council-provided Gypsy and Traveller sites from the protection of the Mobile Homes Act (MHA) 1983 was removed by the coming into force of Housing and Regeneration Act (H&RA) 2008 s318: Housing and Regeneration Act 2008 (Commencement No 8 and Transitional, Transitory and Saving Provisions) Order 2011 SI No 1002. A new set of terms and conditions for occupation of such sites has been prescribed: Mobile Homes Act 1983 (Amendment of Schedule 1 and Consequential Amendments) (England) Order 2011 SI No 1003. However, those Travellers on official transit sites will have a reduced set of prescribed rights: Housing and Regeneration Act 2008 (Consequential Amendments to the Mobile Homes Act 1983) Order 2011 SI No 1004.

The coalition government has published a guidance note on the provisions applying the MHA to local authority Traveller sites: *Applying the Mobile Homes Act 1983 to local authority Traveller sites: guidance* (Department for Communities and Local Government (DCLG), April 2011).[5] The guidance covers the new requirement to provide a written statement to existing residents, other transitional arrangements, and terms relating to the operation of transit pitches.

The coalition government has also launched a consultation exercise seeking views on a new draft planning policy statement for controlling authorised and unauthorised Traveller sites: *Planning for Traveller sites. Consultation* (DCLG, April 2011).[6] The final statement will replace the current policy set out in Circular 01/2006: *Planning for Gypsy and Traveller caravan sites* and Circular 04/2007: *Planning for travelling showpeople*. The closing date for responses is 6 July 2011.

The Secretary of State for Communities and Local Government has announced a range of other measures related to accommodation for Gypsies and Travellers, including a decision to provide £1.2m central government funding to assist Basildon Council in evicting those who are residing unlawfully at the Dale Farm site: DCLG news release, 13 April 2011.[7]

Park home residents

On 30 April 2011, new regulations made under the MHA took effect to regulate the rights of mobile home residents on park home sites: Mobile Homes (Written Statement) (England) Regulations 2011 SI No 1006. The regulations set out the terms of written statements to be given to residents by site owners.

A new Order made under Housing Act (HA) 2004 ss229 and 250 gives the RPT jurisdiction to adjudicate on most disputes between residents and site owners: Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (England) Order 2011 SI No 1005.

Charging for social services accommodation

The coalition government has published a new edition of its guidance on charging occupiers for the provision of residential accommodation under the National Assistance Act (NAA) 1948 and other social services functions: *Charging for residential accommodation guide (CRAG)* (Department of Health (DoH), April 2011).[8] The new guidance follows the earlier distribution of the local authority circular (LAC) *Charging for residential accommodation* (LAC(DH)(2011)1, DoH, January 2011).[9]

Poor housing in Wales

The authors of a new report on housing conditions in Wales have calculated that the cost to the NHS of treating accidents and illnesses caused by problems in the home, such as unsafe steps, electrical hazards, and excessive cold, damp and mould, is around £67m a year.[10] They concluded that the total cost to society of bad housing in Wales, including factors such as children's poor educational attainment and reduced life chances, is around £168m a year: *The cost of poor housing in Wales*, Shelter Cymru and the Building Research Establishment Trust, April 2011.

Converting buildings into homes

The coalition government has launched a consultation exercise on proposed changes to

planning laws designed to make it easier for empty office blocks and other commercial premises to be converted for use as residential accommodation: *Relaxation of planning rules for change of use from commercial to residential: consultation* (DCLG, April 2011).[11] The consultation closes on 30 June 2011.

Meanwhile, the secretary of state called on local councils to use their existing powers more flexibly to facilitate such conversions pending the outcome of the consultation: DCLG news release, 8 April 2011.[12]

HUMAN RIGHTS

Article 1 of Protocol No 1

■ Brezovec v Croatia

App No 13488/07,
29 March 2011

From 1980, Mr Brezovec held a flat in Vojnić on a specially protected tenancy. He lived there with his family until October 1991, when Vojnić was captured by occupying forces. He fled and went to live in Karlovac, where, in January 1992, as an internally displaced person, he was awarded a flat on a temporary basis. In July 1996, his status as an internally displaced person was terminated, and in January 1999 he was forced to leave the flat in Karlovac. Mr Brezovec claimed that, in October 1995, after Croatia had regained control of almost its entire territory, he visited Vojnić and found his flat uninhabitable and in a very bad state of repair. He immediately began rebuilding with a view to moving into the flat; however, while he was still living in Karlovac, the local authorities, accompanied by the police, entered the flat, made a list of personal belongings, changed the locks and gave the keys of the flat to a local policeman called ZH. In December 1996, Mr Brezovec and his wife made a request to buy the flat from the Municipality of Vojnić relying on the Specially Protected Tenancies (Sale to Occupier) Act 1991. In May 2000, Mr Brezovec and his wife brought a civil action seeking a judgment which would allow them to purchase the flat. In September 2003, the court dismissed the action. It found that during the period between August 1995, when Vojnić was liberated, and August 1996, when the flat was awarded to ZH, Mr and Mrs Brezovec had only occasionally visited and used it. As a result, their specially protected tenancy had been terminated. Consequently, they were not entitled to purchase the flat. Mr Brezovec claimed in the European Court of Human Rights (ECtHR) that, by refusing his claim, the domestic authorities had violated his right to the peaceful enjoyment of his possessions.

The ECtHR found that Mr Brezovec's claim for the purchase of the flat was sufficiently established to qualify as an 'asset' attracting the protection of article 1 of Protocol No 1 (para 45). The refusal of the domestic courts to allow that claim undoubtedly constituted an interference with his right. The decisions of the domestic courts had a legal basis in domestic law as their refusal to grant the applicant's claim for purchase of the flat was based on section 2 of the Act on the Lease of Flats on the Liberated Territory 1995; however, that decision was not consistent with the court's previous case-law. Contracting states have an obligation to organise their legal system so as to avoid the adoption of discordant judgments and conflicting decisions in similar cases. Failure to do so may, in the absence of a mechanism which ensures consistency, breach the principle of legal certainty. Where no reasonable explanation is given for the divergence, such interferences cannot be considered lawful for the purposes of article 1 of Protocol No 1. There was, accordingly, a violation of article 1 of Protocol No 1. In view of this finding, it was unnecessary to examine whether a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of Mr Brezovec's fundamental rights. The ECtHR decided that the most appropriate form of redress was to reopen the domestic proceedings. There was no call to award the applicant any sum on account of just satisfaction.

■ The Association of Real Property Owners in Łódź v Poland; ■ Piotrowski v Poland

App Nos 3485/02 and 27910/07,
8 March 2011

The applicants, or their predecessors in title, owned houses which were taken under the 1946 'state management of housing matters', the 1974 'special lease scheme' and the 1994 system of 'controlled rent', which continued to apply until 2001. Since 2001, different provisions applied to the leases of flats in the houses in respect of rent increases, termination of leases, maintenance and repairs, and succession. The applicants complained that the continued restrictions on their property rights, including the control of rent increases, limitations on lease termination and vacation of flats, amounted to a breach of article 1 of Protocol No 1 to the European Convention on Human Rights ('the convention').

The ECtHR struck the applications out of its list of cases. After reviewing the legislative measures in the present-day situation and in the context of these cases, the court found no reason to depart from the findings made in the friendly settlement judgment in *Hutten-Czapska v Poland* App No 35014/97. The ECtHR found that a redress scheme introduced in 2008 offered persons affected reasonable prospects of recovering compensation for damage caused by the earlier systemic violation of article 1 of Protocol No 1. The matters giving rise to the present application and the remaining 'rent-control' applications against Poland had been resolved for the purposes of article 37(1)(b) of the convention and it was no longer justifiable to continue the examination of these cases.

Article 8 and possession claims

■ Southwark LBC v Barrett

Bromley County Court,
18 March 2011[13]

Ms Barrett had a non-secure tenancy granted in line with HA 1996 Part 7. It was determined when the landlord served a notice to quit. On 8 November 2010, a possession order was made at a hearing which Ms Barrett did not attend because, pre-*Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441, her solicitor advised that there was no defence. On 2 December 2010, Ms Barrett issued an application to set aside the order or, in the alternative, to stay execution for three months. Her argument was that to do otherwise would breach her article 8 rights as confirmed in *Pinnock*. Ms Barrett accepted that she could not remain in the premises in the long term, but claimed that she needed more time to find alternative accommodation.

By agreement of both parties' counsel, and in the light of *Hackney LBC v Findlay* [2011] EWCA Civ 8, District Judge Brett applied the checklist in Civil Procedure Rule (CPR) 39.3(5) and decided that Ms Barrett had acted promptly after finding out about the possession order and had a good reason for not attending trial (her solicitor's advice). However, the judge dismissed the application because there was no reasonable prospect of success in defending the claim. The case did not cross the initial threshold of being seriously arguable. Although article 8 of the convention was engaged and there were no factual disputes, Ms Barrett had been through the review procedure provided for by HA 1996 Part 7, but she had decided not to appeal against Southwark's decision to discharge its homelessness duty following her refusal of alternative accommodation.

SECURE TENANCY

Possession claim and drug use

■ Hammersmith and Fulham LBC v Forbes

Willesden County Court, 14 April 2011[14]

The defendant was the secure tenant of premises in which he had lived for 31 years. He was a heroin addict. There were no nuisance issues before June 2010. In the period between June 2010 and October 2010, the council received complaints from residents on the estate, who believed that the defendant was dealing drugs. The police raided his home and found a small amount of heroin. He was charged with possession of a Class A drug. He pleaded guilty. The police, with the assistance of the council, obtained a closure order for three months. The closure order was extended for a further three months by the magistrates' court. The evidence relied on to obtain the closure order was principally that of anonymous witness statements by residents on the estate, who believed that the defendant was dealing drugs at the premises and in the locality. There was also covert CCTV evidence showing the number of visitors to the premises. The same evidence was relied on at the possession trial along with further anonymous witness statements confirming the improvement on the estate as a result of the closure order. During the period of the closure order, the defendant made strenuous efforts to address his drug addiction, although at the date of the trial there had been some relapse because he was of no fixed abode.

District Judge Morris decided that, on the balance of probability, the defendant was a drug user who had allowed his home to be used by others for drug taking which had caused a nuisance to his neighbours. However, the district judge was satisfied that the defendant was not a drug dealer. He made a suspended possession order on strict terms with a review after three months so that the defendant's progress in addressing his drug addiction and the nuisance could be further assessed.

ASSURED AND ASSURED SHORTHOLD TENANCIES

Tenancy deposit scheme

■ Potts v Densley

[2011] EWHC 1144 (QB), 6 May 2011

The claimant was the tenant and the defendants were the landlords of a property let on an assured shorthold tenancy. The deposit was not registered with a deposit protection scheme. After the tenancy ended, the tenant brought a claim for the deposit's return and for a penalty of three times its amount under HA 2004 s215. Before the hearing the deposit was placed with a protection scheme. The judge considered that there was discretion under the HA 2004 regarding whether or not to impose the sanction and declined to do so. The claimant appealed.

The High Court decided that if there was non-compliance with the Act, there was no discretion about the penalty. However, as the deposit had been protected before the trial, the penalty provisions did not apply (see *Tiensia v Vision Enterprises Ltd (t/a Universal Estates)* and *Honeysuckle Properties v Fletcher* [2010] EWCA Civ 1224). The fact that the defendants had ceased to be the landlords under a tenancy by the time the deposit was protected could not alter that result.

Disability Discrimination Act 1995

■ Beedles v Guinness Northern Counties Ltd

[2011] EWCA Civ 442, 19 April 2011

Mr Beedles was an assured tenant. He suffered from epilepsy and experienced seizures regularly. It was a term of Mr Beedles' tenancy agreement that he would keep the interior of the property in good decorative order. As a result of his disabilities, he was unable to carry out those responsibilities. The landlord agreed to waive the obligation in his case, but Mr Beedles claimed that the 'reasonable adjustments' requirements of Disability Discrimination Act 1995 s24C imposed a duty on the landlord to meet his request that it carry out the works for him. Mr Beedles issued proceedings, relying on sections 24A and 24C, contending that 'enjoy' required the landlord to ensure that he could obtain pleasure from the tenancy. The High Court dismissed the claim.

The Court of Appeal dismissed Mr Beedles' appeal. The words 'enjoy' or 'enjoyment' of premises used in the Act meant no more than that the tenant should be able to live in his home as any typical tenant would. Although anti-discrimination statutes are, in general, to be construed benevolently towards their intended beneficiaries (see *Archibald v Fife Council* [2004] UKHL 32; [2004] 4 All ER 303 and *Malcolm v Lewisham LBC* [2008] UKHL 43; [2008] 1 AC 1399), on the facts found by the judge, conditions at the premises had not degraded to such extent as to interfere with their ordinary use. Readers should note that since 1 October 2010, EqA ss20, 21, 22 and 38, and Sch 4, apply, which contain similar, but not identical, provisions.

Costs

■ Cockett v Moore

[2011] EWCA Civ 493, 29 March 2011

Ms Cockett brought a claim for possession and rent arrears against her tenant, Mr Moore. He counterclaimed for a declaration that he had a beneficial interest in the value of the property. At the first hearing, a possession order was made and the other claims were adjourned for full trial. At the trial, the rent arrears claim was dismissed save for an admitted and agreed amount and the counterclaim was dismissed. The judge ordered the tenant to pay 90 per cent of the landlord's costs. He appealed against the costs order.

The Court of Appeal refused permission to appeal. Although Mr Moore had defeated the main rent arrears claim, the judge had found that his counterclaim had taken up the bulk of the time at trial and in preparation for it. The claim for a possession order had also succeeded. There were no prospects of upsetting the judge's order on costs.

Warrant for possession

■ Fineland Investments Ltd v Pritchard [No 3]

[2011] EWHC 1063 (Ch), 20 April 2011

In a High Court claim against a former licensee of a house, the claimant obtained a possession order and other relief (see *Fineland Investments Ltd v Pritchard* [2011] EWHC 113 (Ch)). Once the date for possession had passed, the claimant applied, without notice, for a warrant of possession, which was executed, again without notice, by High Court officials. The defendant applied for an order restoring her to possession on the basis that the grant of the warrant and its execution had been unlawful.

Morgan J dismissed the defendant's application. Once her licence ended, she was a trespasser. The claim for possession against her was therefore a claim against a trespasser under CPR Part 55, even if other remedies had been sought on the claim. In the High Court, no notice had to be given of the application for, or execution of, a warrant to recover land from trespassers.

PROTECTION FROM HARASSMENT ACT 1997

■ Allen v Southwark LBC [No 2]

[2011] EWCA Civ 470, 23 February 2011

Mr Allen was the defendant in five claims for possession for rent arrears. All the claims were dismissed. He claimed that the taking

of the multiple claims amounted to a course of harassment contrary to the Protection from Harassment Act (PHA) 1997. The Court of Appeal decided that his claim was arguable: [2008] EWCA Civ 1478. At the subsequent trial, the judge decided that the possession claims had each been brought in good faith by the council 'however mistakenly or incompetently' and dismissed Mr Allen's claim.

The Court of Appeal dismissed an application for permission to appeal. There was no real prospect of showing successfully that, on the facts, the judge had been wrong.

■ **Kosar v Bank of Scotland plc (t/a Halifax)**

[2011] EWHC 1050 (Admin), 18 January 2011

District Judge Richardson ruled that PHA s7(5), which states that 'references to a person, in the context of the harassment of a person, are references to a person who is an individual' means that an offence of harassment 'can only be committed by a person who is an individual against a person who is an individual' (para 2).

Silber J allowed an appeal. He held that section 7(5) does not preclude a company from committing a criminal offence of harassment contrary to section 2(1).

MOBILE HOMES ACT 1983

■ **Murphy v Wyatt**

[2011] EWCA Civ 408, 12 April 2011

In 1975, an owner let a plot of 1.7 acres of land on a weekly tenancy. The land was used for horse stabling, a livery business and grazing. In 1979, the tenant brought a caravan onto the land and lived in it as his home. The caravan was later replaced with a mobile home. The landlord served notice to quit and sought possession. HHJ Wakefield decided that the MHA did not apply to the tenancy of the land.

The Court of Appeal rejected the tenant's appeal. The Act only applied to the letting of a mobile home's site and any associated amenity land (for example, a garden). The MHA could not apply to the tenancy of a large parcel of land on only a small part of which the mobile home was stationed. It would be a little surprising if the MHA protected an occupier who, after entering into an agreement, brought a caravan onto the premises and lived in it, simply because there was nothing in the agreement which prevented him/her from so doing. The MHA was clearly directed to agreements whose purpose was, and was substantially limited to, providing a pitch and amenity land. It was not permissible to sever the land consisting of the pitch from the rest of the land comprising the tenancy. In addition, in 1975 when the tenancy began, the MHA could not have applied because the land had no planning consent for residential use (see *Balthasar v Mullane* (1985) 17 HLR 561, CA).

HOMELESSNESS

Terminating the temporary accommodation duty

■ **Goodwill SIP Ltd v Newham LBC**

[2011] EWHC 980 (QB), 14 April 2011

The claimant companies provided Newham with residential accommodation to be used for temporary housing by homeless households who were being assisted under HA 1996 Part 7 (homelessness). The companies sued on unpaid invoices for over £78,000 in respect of accommodation charges for 'overstayers', ie, residents who had refused to leave even though the council had notified the occupiers that its homelessness duties towards them had ended. The council accepted liability in respect of those cases where it had delayed eviction awaiting the outcome of *Desnousse v Newham LBC* [2006] EWCA Civ 547; [2006] QB 831, CA. The council denied liability in all the other cases on the basis that once it had notified the resident and the company that a duty had been discharged, no further charges were payable in respect of that occupier.

Hickinbottom J rejected the companies' claim that it was for the council to evict those residents who overstayed. On a true construction of the contractual arrangements made, the council had no financial liability once its duties to the homeless households in question had ended. It was for the companies to evict the residents if they did not leave.

■ **Sharif v Camden LBC**

[2011] EWCA Civ 463, 20 April 2011

The claimant applied to the council for homelessness assistance. Her household included her disabled father and a dependent younger sister. Camden accepted that it owed the main housing duty (HA 1996 s193) and initially performed it by providing a three-bedroom house in the private rented sector. Later, the council decided to provide the claimant with two self-contained units in a hostel: one for the father and one for the two sisters. The units were on the same floor of the hostel but a few yards apart. The claimant refused the offer. The council decided that the refusal had released it from the main housing duty: section 193(5). This decision was upheld on review and HHJ Mitchell dismissed an appeal against it.

The Court of Appeal allowed a second appeal. It held that the statutory obligation to provide suitable accommodation for an applicant could only be satisfied if the accommodation met the requirements in section 176: 'Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him together with: (a) any other person who normally resides with him as a member of his family ...'. The obligation to accommodate the claimant 'together with' other household members could not lawfully be performed by the provision of two, separate self-contained units.

■ **Akhtar v Birmingham City Council**

[2011] EWCA Civ 383, 12 April 2011

Birmingham owed the claimant the main housing duty under the homelessness provisions: HA 1996 s193. It made her an offer of a tenancy of council accommodation which she refused. The council decided that its duty had been discharged by the refusal: section 193(7). The claimant sought a review on grounds that the offered property had not been suitable because of:

- its small size; and
- its location in a particular part of the city.

A reviewing officer found that the property had not been suitable. File notes recorded that the officer had accepted that the family required larger accommodation. The decision to uphold the review was notified by a letter that did not contain the reasons.

The council then offered a second larger property in the same area of the city. The claimant again refused and sought a review on the basis that the second property was unsuitable by reason of its size and location. The reviewing officer upheld a decision that the second offer had discharged the council's duty. HHJ Worster dismissed an appeal and the Court of Appeal dismissed a second appeal.

The court held that as the first review had succeeded, there had been no duty to give reasons for the successful review outcome: sections 202–203. It had not therefore been necessary to spell out that the first review had only dealt with size and not location. Nor was there a duty in making a second offer to indicate expressly why the review of an earlier offer had succeeded.

HOUSING AND CHILDREN

■ R (YA) v Hillingdon LBC

[2011] EWHC 744 (Admin), 1 March 2011

The council provided accommodation for the claimant under the Children Act (CA) 1989 on the basis that she was 15. In May 2009, the council undertook an assessment in which it found her age to be 19. In February 2010, a claim for judicial review of that decision was made and fixed for trial at the end of March 2011. Ahead of the trial, the High Court dealt with three preliminary issues at a case management hearing.

Keith J decided, first, that usually the claim would be out of time. Ascertaining a child's age correctly was not a continuing duty: time had begun to run in May 2009 with the first assessment. However, on the particular circumstances of the case, an extension of time was granted. Second, as the claimant would on any view be an adult at the date of trial, she should attend for cross-examination. Third, special measures would be in place to accommodate her vulnerabilities at trial.

■ R (G) v Newham LBC

[2011] EWCA Civ 503, 5 April 2011

The claimant said that he had been born on 31 January 1993 and had been a child on his arrival in the UK to seek asylum. Kent County Council Social Services assessed him as being over 18. He sought accommodation from Newham under CA 1989 s20. In 2010, Newham assessed him as being between 21 and 25 years old. The claimant sought judicial review. Burton J refused him permission to pursue that claim and he appealed.

The Court of Appeal refused a renewed application for permission to appeal. Sullivan LJ said that three features of the case were particularly important:

- there had been a full and detailed assessment;
- this was not a case like *R (FZ) v Croydon LBC* [2011] EWCA Civ 59, in which the assessed age was only relatively narrowly different from the claimed age;
- there was no expert evidence in support of the claimant's case.

HOUSING AND COMMUNITY CARE

■ R (W) v Croydon LBC

[2011] EWHC 696 (Admin), 3 March 2011

The claimant was a young disabled adult to whom the council owed the accommodation duty under NAA s21. From 2005, the council had funded his accommodation in a residential placement at a specialist facility in Yorkshire. In June 2010, it conducted an assessment which decided that the claimant should be moved because:

- he was not being encouraged sufficiently towards independence; and
- the cost of £4,800 a week for the Yorkshire accommodation was more than double what the council would usually have paid for similar accommodation.

Acting on the assessment, the council decided to move the claimant. He sought a judicial review.

Ouseley J allowed the claim. He held that on the specific facts the council had failed to consult the claimant's parents properly. They had only been provided with a copy of the assessment on their arrival to meet council officials and had not had a proper opportunity to prepare a response before the decision was taken.

■ Buckinghamshire CC v Kingston upon Thames RLBC

[2011] EWCA Civ 457, 19 April 2011

Kingston had a statutory duty to provide residential accommodation for a disabled woman under NAA s21. In 2009 it decided that she could leave residential care and live independently in the community with support. It facilitated a move by her to a shared bungalow in Buckinghamshire provided by a charity, and which she occupied on an assured shorthold tenancy. Kingston later notified Buckinghamshire County Council that it would become liable for meeting her ongoing care needs under NAA s29. Buckinghamshire contended that the move had been unlawful as the council had not been consulted and, as a result, it had no such liability. Wyn Williams J dismissed a claim for judicial review: [2010] EWHC 1703 (Admin); November 2010 *Legal Action* 31.

The Court of Appeal dismissed an appeal. It held that there had been no obligation on Kingston to consult Buckinghamshire. Consequently, the move had been lawful and Buckinghamshire had the responsibility to meet ongoing care costs.

Local Government Ombudsman

Complaint

■ Liverpool City Council

10/008/979, 4 April 2011

The council transferred some of its housing stock to a social landlord, Liverpool Mutual Homes (LMH). As part of the transfer, LMH agreed a protocol that if an occupational therapist identified a tenant as needing an adaptation to his or her home, the necessary work would be completed within 60 working days, subject to the social landlord having funding.

The complainant was assessed by an occupational therapist as needing a level-access shower by reason of his disability. His landlord, LMH, told him that it would take three years before the work could be carried out because of a shortage of funds. After 16 months had passed, he complained to the council but it took no action.

The Local Government Ombudsman (LGO) found that the council had no system for monitoring whether or when adaptation work that an occupational therapist had identified as necessary had been carried out by a social landlord. The council had not considered how to discharge its statutory duty owed as a social services authority under the Chronically Sick and Disabled Persons Act 1970 and had not informed the complainant of the right to apply for a disabled facilities grant. The LGO recommended £2,000 compensation and made a series of service improvement recommendations.

1 Available at: www.parliament.uk/briefingpapers/commons/lib/research/rp2011/RP11-032.pdf.
2 Available at: http://enhr2010.com/fileadmin/templates/ENHR2010_papers_web/papers_web/WS12/WS12_120_Manley.pdf.
3 Available at: www.nhas.org.uk/publications_events.htm.
4 Available at: www.dsdni.gov.uk/index/hsdiv-housing/ha_guide/haghm-contents/hagtm/hagtm-managing-rent-collection.htm.
5 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/1885648.pdf.
6 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/1886164.pdf.
7 Available at: www.communities.gov.uk/news/corporate/1886556.
8 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_125836.pdf.
9 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_123875.pdf.
10 Available at: www.brebookshop.com/, £30 (downloadable version) or £25 (hard copy).
11 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/1883189.pdf.
12 Available at: www.communities.gov.uk/news/corporate/1883250.
13 Daniel Skinner, solicitor, Batchelors, Bromley and Andrew Lane, barrister, London.
14 Sue James, solicitor, Hammersmith and Fulham Community Law Centre® and Jim Shepherd, barrister, London.

Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Nic Madge is a circuit judge. The authors are grateful to the colleagues at notes 13 and 14 for transcripts or notes of judgments.

Recent developments in public law – Part 2

Kate Markus and **Martin Westgate QC** continue their regular series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. These articles will now be published on a quarterly basis in August, November, February and May. The authors welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled. Part 1 of this article was published in May 2011 *Legal Action* 16.

CASE-LAW

Equality duties

■ R (Fawcett Society) v (1) Chancellor of the Exchequer (2) HM Treasury (3) Commissioners for HM Revenue and Customs

[2010] EWHC 3522 (Admin), 6 December 2010

This was a judgment rejecting the Fawcett Society's renewed application for permission to apply for judicial review of the defendants' failure to have due regard to the statutory matters under Sex Discrimination Act (SDA) 1975 s76A, and, in particular, to promote equality of opportunity between men and women. The matters to which the challenge was directed were the 2010 budget and the public spending envelope that set out the departmental limits within which the comprehensive spending review was being carried out.

Ouseley J refused permission. He held that the government could analyse the gender equality impacts by consideration of the line items in the budget, rather than the budget as a whole. He also rejected the claimant's submission that it was not possible to challenge the limits set by the public spending envelope when the precise distribution of funds within a department came to be considered. The reality was that a departmental budget would have considerable scope for reallocation of monies so as to remedy gender inequality. Section 76 permits judgments to be made about the stage at which to carry out the duty. He said that there is a level of macro-economic judgment of a political nature in relation to the choices about when policy is formulated and formulated in such detail as to enable the section 76A goals to be met.

Moreover, one of the specific challenges related to the VAT increase that had been subject to legislation and so came within the exclusion in section 76A(4) of the Act. This is not to say that it could not have been raised earlier, but it had become academic. There were two matters where the government admitted that it had not carried out a gender equality impact assessment as early as it should have done. However, assessments had since been carried out so that the case was also academic. In relation to other matters that did require the government to have due regard to gender equality, it was lawful for the government to wait until policy had been formulated adequately for there to be a clear basis on which the gender equality impact could be assessed. The point at which that is reached is a matter of rationality, not of duty. There were other cases where the government said that no assessment was necessary or appropriate because there was no real prospect of a disproportionate effect on one gender or it was not possible to produce a sufficiently robust impact assessment. There was a dispute between the claimant and the defendants about the usefulness of using data aggregated to household level or disaggregated by gender. This was a question for a rationality challenge, and there was no prospect of a court saying that the defendants' approach to the data was unlawful. Furthermore, the Act permits a judgment to be made about whether or not an impact assessment is necessary, including whether there is any reasonable prospect of there being any impact before undertaking an impact assessment.

■ R (Hajrula) v London Councils

[2011] EWHC 448 (Admin) 28 January 2011

The claimants were users of a service provided by a Roma support group, providing support to children of Roma and Travellers, in particular in education, which was funded by the defendant. The defendant was a body set up by the London boroughs and the City of London to make grants for voluntary organisations which work across London. Following a review by the defendant of the scope of its activities and the currently commissioned service, it decided to cut the funding to the Roma support group. The claimants alleged that the defendant had failed to consult lawfully and had failed to comply with its statutory race, gender and disability equality duties.

The consultation challenge failed (except in so far as it overlapped with the equality duty challenge), but Calvert-Smith J held that the defendant had breached the equality duties. He noted that the requirement for due regard was higher where there were large numbers of vulnerable people involved. In this case, the defendant had created priority categories for funding. Seventy per cent of the service providers allocated to the two lower priority categories were targeted primarily at protected groups whereas only 38 per cent of the high priority category were so targeted. The decision-making process in this case was dealt with by service heads which were not created with the protected groups in mind. Moreover, it was no answer that the equality duties would apply at the stage when individual boroughs decided whether services no longer to be funded by the defendant would be funded at all, bearing in mind the likelihood that its decision will bring an end to the services to many protected persons.

■ R (Luton BC and others) v Secretary of State for Education

[2011] EWHC 217 (Admin), 11 February 2011

The claimants were all local authorities which had school building projects in the pipeline under the Building Schools for the Future (BSF) programme when, following the general election, the secretary of state announced that they would be stopped. The process for the BSF programme involved a local authority receiving approval for an outline business case (OBC) for a particular project, and then, following further development work, including tendering for a private sector partner and drawing up detailed plans, approval of the final business case (FBC) which would trigger government funding for the project. All the claimants had passed the FBC stage for certain projects that were to go ahead, and all but one of those which had been cancelled by the decision challenged in these proceedings had reached the OBC stage.

The claimants challenged the decision on grounds of rationality/fettering of discretion, and breach of substantive and legitimate

expectations (see below). They also submitted that the secretary of state had failed to comply with the equality duties in SDA s76A, Race Relations Act 1976 s71 and Disability Discrimination Act 1995 s49A.

Holman J held that the secretary of state was aware of his duty to have 'due regard' to the identified goals. However, at best the secretary of state took a generalised approach to consideration of equality matters which did not begin to discharge the equality duties in substance and with rigour. There was no good practice of either expressly announcing the secretary of state's regard to the statutory needs and duties or of making adequate records to record and demonstrate that regard. The option papers prepared for ministers did not contain a single reference to disability, race or gender need or impact and, while the absence of such references was not determinative, the judge regarded them as glaring and very telling. He was not satisfied that any regard was had to the relevant duties, let alone rigorous regard.

Rationality

■ R (Luton BC and others) v Secretary of State for Education

[2011] EWHC 217 (Admin), 11 February 2011

In this application for judicial review, considered in more detail above, the court rejected emphatically the claimants' submission that the decision to cancel the school building projects in question was irrational. Holman J said that the case concerned very major decisions with a patently political and heavy macro-economic content, made at the highest level in the immediate aftermath of a general election and change of government, and patently intended to help achieve economic demands from the Treasury. The secretary of state understood what he was doing and there was no inherent irrationality in the decision. The court said that to examine the rationality of the reasons further would be a grave and exorbitant usurpation by the court of the minister's political role.

However, the decisions were made according to a set of 'rules' which were applied in a hard-edged way with no residual individual discretion, in circumstances where the secretary of state was required not to fetter his discretion.

Legitimate expectation

■ R (Luton BC and others) v Secretary of State for Education

[2011] EWHC 217 (Admin), 11 February 2011

This case is considered in more detail above. As well as complaining of the secretary of state's failure to comply with the sex, race and disability equality duties, the claimants also relied on both substantive and procedural legitimate expectations.

Holman J held that the OBC approval letters, even in the context of the scheme as a whole, did not amount to a clear and unambiguous promise, commitment, undertaking or assurance which was capable of creating a substantive legitimate expectation. The claimants knew that the critical stage by which the secretary of state bound himself was the FBC approval. It was at that stage that a promissory note was given from which there was no going back. Although a legitimate expectation does not require a contract, either in being or in prospect, if there is a later contract or giving of a promissory note in prospect and that stage has not been reached, there is no legitimate expectation. The BSF programme was a very long-term project and BSF documents made references to it being subject to future funding decisions and changing government priorities. No authority with less than FBC approval could have had a legitimate expectation that any project would still go ahead after the general election.

However, the claimants did have a procedural legitimate expectation that the secretary of state would consult them before cancelling the projects. It was not suggested that the secretary of state should consult them before taking the overarching decision in principle to scrap the programme. However, in the implementation of the BSF programme there had been continuous and intense dialogue with each of the claimants over many years, up to almost the very last moment. The claimants had had their recent OBC approval letters and were continuing to act and spend in reliance on them and actively to engage in continuing dialogue with the department about them. The very large sums involved fortified the duty to consult. Applying the test set out by Laws LJ in *R (Bhatt Murphy (a firm) and others) v The Independent Assessor* [2008] EWCA Civ 755, 9 July 2008, the impact of the department's past conduct on the claimants was 'pressing and focussed' and change could not lawfully be made abruptly without some prior consultation (para 94).

Consultation would not have been unacceptably time consuming. The way in which the secretary of state abruptly stopped the projects which had received OBC approval, without any prior consultation with the claimants, was so unfair as to amount to an abuse of power. In respect of the project which had not yet reached the OBC stage, the authority had received OBC and FBC approval on the understanding that certain other projects (including the one in question) would go ahead and funding transfers had taken place on that basis. The authority also therefore had a legitimate expectation to be consulted before cancellation of that project.

■ Paponette and others v Attorney General of Trinidad and Tobago

[2010] UKPC 32, 13 December 2010

P was an association of taxi drivers. Until 1995, they operated from a stand which they managed themselves and they did not have to pay any fees. In 1995, they were persuaded by the Minister of Works and Transport to move to a new site on land owned by a publicly-owned bus corporation (PTSC) which they regarded as a competitor. The members of P were told, among other things, that they would not be under the management and control of PTSC and that management of the new site would be passed over to them after a period of training.

Management was never transferred to P; instead, two years after the move, the government passed regulations placing the management of the site in the hands of PTSC and giving it power to charge the members of P for using it. PTSC took over management in 1998, and in 2001 it introduced charges payable by P's members.

P brought proceedings, alleging, among other things, that the defendant had acted in breach of its legitimate expectation and that therefore amounted to an interference with its property rights that was not 'by due process of law'. The Court of Appeal rejected the argument. It held that the words 'control and/or management' were too imprecise and that there was therefore no unequivocal representation (para 29).

The Privy Council disagreed (Lord Brown dissenting). It held that the correct test was how the promise would have been 'reasonably understood by those to whom it was made' (para 30). It held that management and control were ordinary English words that were well understood and that members of P would have understood them to mean that they would be able to continue to manage their own affairs if they moved and that they would not have to satisfy anyone else, still less a rival, that they were fit and proper persons or pay a fee.

> *The fact that there might have been some uncertainty as to precisely what management entailed does not mean that the representations were not clear and unambiguous. They were certainly devoid of any relevant qualification* (para 30).

This then left the question of whether or not the defendant had acted unlawfully in relation to the expectation. The Privy Council

clearly endorsed the following points taken from the English cases:

The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The [Privy Council] agrees with the observation of Laws LJ in Nadarajah v Secretary of State for the Home Department *[2005] EWCA Civ 1363 at para 68: 'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.' It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified* (paras 37–38: emphasis in the original).

Since the authority had not produced any evidence to justify the interference, the legitimate expectation claim succeeded. Paragraph 42 of the judgment gives clear guidance about the standard of evidence required. There might be some cases where the reason for the decision is apparent from the surrounding circumstances, but this was not one of them.

The Privy Council also expressly approved the statement of *Schiemann LJ in R (Bibi) v Newham LBC* [2001] EWCA Civ 607, 26 April 2001; [2002] 1 WLR 237, where he held that an authority is under a duty to consider a legitimate expectation in its decision-making process. It held:

Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account (para 46).

This had not happened in this case and was a further reason to allow the claim.

Substantial compliance

Finality

■ R (Coker) v Independent Police Complaints Commission

[2010] EWHC 3625 (Admin), 16 November 2010, May 2001 Legal Action 24

C's brother (X) had died in police custody after using cocaine. On C's complaint the Independent Police Complaints Commission (IPCC) found that the duty officer (W) had lost his temper with X's girlfriend (Y). She then failed to co-operate and W lost the chance to find out what drugs X had taken and to pass that information on to the medical team.

The IPCC at first considered that the case should go to a formal misconduct hearing. The police force argued instead that W should receive words of advice, which are not a formal disciplinary sanction. This view was backed by counsel's advice. The IPCC considered this and remained of the view that the misconduct was too serious to be dealt with by words of advice. However, it did accept that W need not go to a full disciplinary board and that instead he should receive a written warning. The IPCC then wrote to C saying that W would receive a written warning. However, this could only happen if W admitted the misconduct which he did not do. Ordinarily, if an officer refused to accept a warning the matter would go to a disciplinary board. However, in this case, the IPCC eventually changed its mind and agreed with the police force that words of advice were appropriate after all.

C then challenged the change of mind by the IPCC. She argued that the IPCC did not have power to reconsider the matter after it had concluded that the appropriate sanction was a written warning. Calvert-Smith J rejected this argument. He accepted that some decisions by the IPCC were final and could not be reopened, for example, a decision under the IPCC's formal appeal powers. In those cases the interests of finality in litigation meant that the decision had to stand unless quashed (paras 33–35). However, that principle did not apply to a decision of the present kind, which was more like a decision whether or not to prosecute and needed to be kept under review throughout. In any event it was not for the IPCC to decide what action to take. This was a decision for the police force in the first instance.

Costs

■ R (J) v Hackney LBC

[2010] EWHC 3021 (Admin), 25 October 2010

The claimants had been destitute and sought assistance from the defendant, but the council refused. The claimants obtained interim relief from the out-of-hours judge, and the defendant had since then provided assistance under that order. Following settlement of the proceedings, the claimants sought their costs.

Applying the principles in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258, McKenna J decided that the claimants were entitled to their costs because it was obvious from the outset that they would be likely to succeed. In any event, the defendant would have been liable for at least a proportion of the costs because of its conduct: the defendant failed to respond to the obvious needs of the claimants; it took 12 months to file an acknowledgment of service; the content of the summary grounds was unsatisfactory; the defendant did not concede the claim until five months after the Court of Appeal handed down the judgment which caused it to do so; and the defendant then unreasonably required an oral costs hearing.

■ R (Edwards and another) v Environment Agency and others (No 2)

[2010] UKSC 57, 15 December 2010, [2011] 1 WLR 79

This decision concerned the jurisdiction of UK Supreme Court costs officers. The costs were in respect of a judicial review of a decision to issue a permit to operate cement works. The second claimant (P) had had her liability for costs in the Court of Appeal capped at £2,000. Her appeal was dismissed and she was ordered to pay the defendants' costs, capped at £2,000. She appealed to the House of Lords and sought a protective costs order, seeking a cap on her liability for costs. In respect of the latter, she relied on article 10a of Council Directive 85/337/EEC, article 15a of Council Directive 96/61/EC and article 9.4 of the Aarhus Convention, stating that access to the courts should not be 'prohibitively expensive'.

The House of Lords rejected her application on the grounds that she had refused to provide details of her means or the means of those she claimed to represent; that the protective orders did not appear reasonable; and that no case had been

made that the proposed appeal would be 'prohibitively expensive' without an order. P proceeded with the appeal, which the House of Lords dismissed. She resisted a costs order on similar grounds to her application for a protective costs order, but this time provided some information about her means (though in general terms and unaccompanied by detailed evidence). The House of Lords ordered her to pay costs but gave no reasons.

In carrying out the detailed assessment of costs, the Supreme Court costs officers held that compliance with the Directives was a relevant factor for them to take into account unless the court awarding costs had done so already. They decided to disallow any costs which they considered to be prohibitively expensive. They rejected the defendants' contention that P was estopped from raising those issues which had been raised twice in the House of Lords because they did not consider that the House of Lords had made any decision on the implementation of the Directives.

The Supreme Court set aside the costs officers' rulings. The jurisdiction of the costs officers in Supreme Court Rules 2009 SI No 1603 r49(1) to carry out a detailed assessment does not enable them to decide whether or not a party should receive less than 100 per cent of its costs, which decision is reserved to the court. They must assess on the basis prescribed by the rules. The assessment of reasonableness which they must apply is directed to the costs of the receiving party, not to the entirely different question of whether or not the costs to the paying party would be prohibitively expensive. The refusal of a protective costs order at the outset of the proceedings does not preclude further consideration by the court of expense at the end of the proceedings. However, it appears that at both stages of its consideration of costs, the House of Lords took a purely subjective approach even though authority suggests that an objective approach should be taken under the Aarhus Convention. Given that the correct test is not clear, the court referred the issue to the European Court of Justice.

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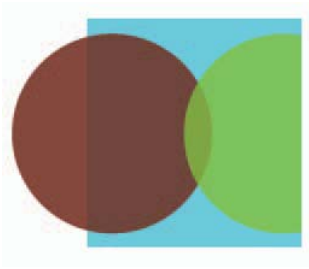
Employment law update – Part 2



This article by Philip Tsamados looks at changes to the financial limits of employment tribunal (ET) awards and increases to the national minimum wage as well as the latest case-law relating to ET practice and procedure, contractual and employment rights and unfair dismissal. Part 1 by Tamara Lewis was published in May 2011 *Legal Action* 10. From October 2011 *Legal Action*, the authors will write quarterly updates on employment law.

POLICY AND LEGISLATION

Employment Rights (Increase of Limits) Order 2010 SI No 2926

From 1 February 2011, the financial limits of certain awards which can be made by ETs were increased. These include the maximum amount of a gross week's pay for calculation of the basic award for unfair dismissal and redundancy payments, which increased from £380 to £400, and the limit on the compensatory award for unfair dismissal, which increased from £65,300 to £68,400.

National minimum wage

On 7 April 2011, the government announced the annual increases in the rates of the national minimum wage, which take effect on 1 October 2011:*

- the adult rate will increase from £5.93 to £6.08 an hour;
- the rate for 18–20 year olds will increase from £4.92 to £4.98 an hour;
- the rate for 16–17 year olds will increase from £3.64 to £3.68 an hour;
- the rate for apprentices will increase from £2.50 to £2.60 an hour.

EMPLOYMENT TRIBUNAL PRACTICE AND PROCEDURE

Witness statements

Usually ETs hear evidence by way of pre-prepared witness statements which are read aloud by the witness. It is surprising the number of claimants who are not aware of this and advisers should always take care to warn their clients of this possibility. If there are any reasons why reading a statement will be difficult for a client or his/her witnesses, this should be brought to the attention of the tribunal in advance, which may then take the statement as read (ie, read the statement to itself). Sometimes, tribunals will decide to take statements as read in any event, usually to save time. In the following case, the Employment Appeal Tribunal (EAT) gave guidance about when statements need and need not be read aloud. This will be of use to advisers in guiding themselves and their clients about what to expect at a tribunal hearing and what matters to raise in support of either option.

- **Mehta v Child Support Agency**

UKEAT/0127/10,
5 November 2010,
[2011] IRLR 305,
918 IDS Employment Law Brief 16, EAT

The EAT held that it was not unfair of an ET to require some of the employer's witnesses to read out their statements during a hearing, but to take the unrepresented claimant's statement as read. It was satisfied that the claimant had consented to this proposal and the tribunal had taken steps to ensure that she had understood what was proposed. However, the EAT took the opportunity to provide some guidance on when and when not to take statements as read. The guidance is worth reading in full, but the main points are set out below:

- A tribunal does not have to require every witness statement to be read aloud either in full or at all. It can be a more efficient and effective use of time for the tribunal to read statements outside the hearing, and in line with the tribunal's overriding objective (under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI No 1861). This may be particularly so when the statements have been drafted by lawyers and where they cover large amounts of detailed material.
- There may be particular cases and circumstances where there is good reason for

a witness statement to be read aloud in whole or in part, perhaps, in particular, the claimant's statement and where the claimant is not represented. Factors to take into account include:
– enabling a claimant to feel that s/he has had his/her say;
– where the statement is set out in a confused or incomplete way and so it is important to take the witness through it to allow proper explanation or amplification;
– where the content is very technical; and
– where it would be unfair to expose a witness immediately to hostile cross-examination without some opportunity to settle him/herself by answering some friendly or at least neutral questions.

■ Sometimes it may make sense for part of a statement to be read aloud or for a witness to be 'walked through' his/ her statement by the representative, summarising some parts and pausing for the key points to be read out and/or further explained or amplified.

■ Sometimes where a statement drafted by a lawyer covers an important factual incident, a tribunal may wish to hear the witness give that evidence in his/her own words. Alternatively, in a case where the statement of an unrepresented party has been taken as read, it might be appropriate for the employment judge briefly to summarise that evidence to reassure the party that his/her case has been understood.

■ It is for an individual tribunal as part of its case management powers to decide what course of action to take in any particular case. Guidance from a regional tribunal that routinely witness statements should be read aloud whatever the circumstances should be reconsidered.

■ In exercising a course of action in any particular case, a tribunal should attempt to proceed as far as possible by agreement. This should not normally be difficult to achieve where both parties are represented. However, where one or both parties are unrepresented, the employment judge should ensure that an unrepresented party understands what s/he is being asked to agree to.

■ If it proves necessary for the tribunal to make a direction about the way in which witness statements are to be dealt with, it should be sensitive to concerns of substance and fairness from either party and, in particular, to the perception that different parties are being treated differently. This does not mean that all of the witness statements must always be treated in the same way. There may be good reasons for treating them differently.

CONTRACTUAL AND EMPLOYMENT RIGHTS

Written statement of particulars of employment

An employee is entitled to a written statement of particulars of his/her employment not later than two months after commencing employment (Employment Rights Act (ERA) 1996 s1). This statement includes such particulars as hours of work, rate of pay and holiday entitlement. Any changes to the particulars must also be provided in writing within a month of the change (section 4). If an employer does not comply with these requirements, an employee may bring a claim to the ET seeking determination of what particulars ought to have been provided (sections 11 and 12). The question which arose in the following case was whether or not the tribunal actually has the jurisdiction to construe terms and conditions contained or referred to within a written statement of particulars.

■ **Southern Cross Healthcare Co Ltd v Perkins and others**

[2010] EWCA Civ 1442,
16 December 2010,
[2011] IRLR 247,
921 IDS Employment Law Brief 10, CA

The claimant employees were issued with a written statement of particulars of employment by their employer. This included a clause about entitlement to annual leave. A dispute arose about the correct interpretation of the clause after the statutory annual leave entitlement under the Working Time Regulations 1998 SI No 1833 increased. The claimants brought a claim in the ET which found in favour of their interpretation. The employer appealed to the EAT on the ground that the tribunal had no jurisdiction to construe the claimants' statutory statements. The EAT upheld the tribunal's decision. The employer appealed.

The Court of Appeal held that the ET has no jurisdiction to interpret the statutory statement of particulars of employment. The ET can only amend it to ensure that the statement corresponds with the agreement between the parties and to that extent the tribunal must identify the terms of the employment contract in order to see that the written statement reflects them correctly. The only forum with jurisdiction in relation to the construction of a statutory statement is the ordinary civil courts.

The Court of Appeal indicated that this finding, while regrettable, arose from the construction of ERA ss11 and 12 and the unwillingness of successive governments to broaden the jurisdiction of ETs over contracts.

Comment: This case seems to draw rather a fine line between what amounts to deciding what are the employment particulars and what amounts to interpreting the contract. Of course ETs have jurisdiction to deal with employees' breach of contract claims arising on termination of employment (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI No 1623 and Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI No 1624). A tribunal can also determine the construction of specific contractual terms either during or after termination of employment as part of the process of determining whether or not an unauthorised deduction of wages has occurred (ERA s13).

Employment status

There are increasingly complex and confusing arrangements by which people are taken on by one organisation but assigned to work elsewhere. This arises commonly in the context of agencies and agency workers. However, the terminology hides a whole host of legal issues when such workers attempt to rely on statutory employment rights.

Agency workers may in theory be employees of the agency which assigns them or of the organisation for whom they actually work (the 'end-user'). Although the usual tests of mutual obligation and control apply when deciding whether or not the worker is an employee of either party, when considering whether the worker is an employee of the end-user, the more important question is whether or not there is any contract between the worker and that organisation. Usually there is no express contract between them, so the issue becomes whether or not a contract can be implied. In most cases, this arrangement can be decided by consideration of the express agreements between the end-user and the agency and between the worker and the agency. A contract can only be implied if it is necessary to do so, to give business reality to the fact that the organisation provides work and the worker carries it out (*James v Greenwich LBC* [2008] IRLR 302, CA). It would need some specific words or action to convince a tribunal that the agency arrangements no longer explain the relationship. The fact that the arrangement has been going on for a long time is not enough on its own, as that is explicable by mutual convenience. This approach has been emphasised again recently by the Court of Appeal in *Tilson v Alstom Transport*, which contained the most complex of agency arrangements.

■ **Tilson v Alstom Transport**
[2010] EWCA Civ 1308,
19 November 2010,
[2011] IRLR 169,
918 IDS Employment Law Brief 13, CA
The claimant, Mr Tilson, worked under a complex agency arrangement as Fleet Health Manager at Alstom Transport ('Alstom'). This arrangement comprised of three contractual relationships:
■ First, Mr Tilson entered into a verbal contractual relationship with Silversun Solutions Ltd ('Silversun') by which Silversun received his wages and paid them on to him less a three per cent service charge.
■ Second, there was a contract between Silversun and Morson Human Resources Ltd ('Morson') by which Silversun provided Mr Tilson's services to Morson. Clause 3.1 of this contract stated that neither Morson nor Alstom would exercise any 'supervision, direction or control' over Silversun and Mr Tilson 'in the manner or performance' of his work (para 13). However, Alstom was not party to this contract. Clause 8 provided that the contract did not constitute a relationship of employer and employee, either between Mr Tilson and Morson or between Mr Tilson and Alstom.
■ Third, there was a general contract between Alstom and Morson by which Morson provided a wide range of services to Alstom, including the provision of individual workers. This contract said virtually nothing about the relationship between Mr Tilson and Alstom. It did not include any undertaking or representation to the effect that Alstom would not exercise supervision or control over any operative supplied to it.

In reality, despite the provisions of clause 3.1 in the contract between Silversun and Morson, Mr Tilson was fully integrated into Alstom. In terms of his duties and responsibilities he was to all intents and purposes performing his work in the same way as any of Alstom's employees.

When Alstom terminated his employment, Mr Tilson brought a claim of unfair dismissal, at which the issue of whether or not he was an employee arose. The ET found in his favour; it held that there was an implied contract of service between him and Alstom. The employment judge held that clause 3 of the Silversun/Morson contract was 'bogus', in that it did not reflect the reality of the relationship and, as a result, the contract between Silversun and Morson was not genuine. From this the judge inferred that the other contracts did no more than create a payment mechanism. The reasoning behind this was that the relationship between Mr Tilson and Alstom could not be explained by the written contractual arrangements and in the circumstances it was necessary to imply a contract to explain the basis on which he was working for them, and that contract could only be a contract of service (as an employee). The judge was influenced by the extensive integration of the claimant into Alstom's business, the gulf between clause 3 of the Silversun/Morson contract regarding how Alstom would treat the claimant and the reality of the relationship, as well as the fact that Mr Tilson had to notify his line manager before taking his holidays.

Alstom appealed. The EAT reversed the tribunal's decision on the basis that:
■ the judge had not been entitled to find that clause 3.1 was a sham;
■ even if it was a sham, he had not been entitled to find that the contract as a whole was not genuine;
■ even if the contract was not genuine, this did not justify the judge inferring a contract between the claimant and Alstom.

Mr Tilson appealed. The Court of Appeal, dismissing the appeal, held that there was no proper basis to find on the facts that there was a direct contractual relationship between Alstom and Mr Tilson. A contract between an agency worker and the end-user can be implied only if it is necessary to do so. The onus is on a claimant to establish that a contract should be implied. It is insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to so contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract. If those principles are not satisfied, no contract can be implied.

The Court of Appeal found that a significant degree of integration of a worker into the end-user organisation is not necessarily inconsistent with there being an agency relationship in which there is no contract between worker and end-user. In most cases, of necessity a worker will become integrated into the end-user's business so as to provide a satisfactory service. Inevitably, this will involve the end-user exercising control over what is done and in part concerning the manner in which it is done. The degree of integration might be relevant to the issue of whether, if there is a contract, it is a contract of service. However, in itself it is a factor of little or no weight when deciding whether or not there is a contract in place.

The Court of Appeal stated that in many cases an employer enters into an agency arrangement so as to avoid employment rights as an employee arising. Some workers may even prefer such an arrangement. Yet even where an employer is attempting to avoid employee rights arising in a case where the worker would have preferred to be an employee, if, as a matter of law, the arrangement has in fact achieved the objective for which it was devised, a tribunal cannot find otherwise simply because it disapproves of the employer's motives.

Whistle-blowing

Detrimental treatment

Under ERA s47B, a worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his/her employer on the ground that the worker has made a protected disclosure, ie, for whistle-blowing (this does not include dismissal: employees are protected against unfair dismissal for making a protected disclosure under ERA s104). In a recent case, the EAT held that causation in cases of detrimental treatment should be treated the same way as in discrimination cases.

■ **Fecitt and others v NHS Manchester**
UKEAT/0150/10,
23 November 2010,
[2011] IRLR 111,
919 IDS Employment Law Brief 7, EAT
Ms Fecitt, Ms Hughes and Ms Woodcock were registered nurses employed by NHS Manchester, working at a walk-in centre. Ms Fecitt was also the clinical co-ordinator for walk-in centres. They raised concerns about Mr Swift, a general nurse at the centre, whom they believed had misrepresented his clinical experience and qualifications. Mr Swift accepted that he had exaggerated his qualifications and experience to colleagues, although he had not done so to his employer, and he apologised. No further action was taken against him.

The claimants were not satisfied by this and continued to pursue the matter. As a result Mr Swift became extremely distraught, concerns were expressed about his mental health and he threatened suicide. Staff at the centre became divided between those who supported Mr Swift, those who supported the claimants and those who did not want to become involved in the dispute. A further investigation was carried out, but again it was concluded that no further action would be taken.

Mr Swift lodged a complaint of bullying and harassment against Ms Fecitt, but no findings were made against her, although concerns were expressed about her management style. The situation at the centre continued to deteriorate, and Mr Swift was suspended.

Ms Fecitt then made a formal complaint under the employer's whistle-blowing policy. The employer attempted to persuade the staff at the centre to behave professionally towards each other, but did not make any

real attempt to find out what behaviour the claimants had been subjected to, by whom and whether the threat of disciplinary process was necessary to control an escalating situation. The employer's medical director investigated and found that Ms Fecitt had acted properly in raising the issue of Mr Swift's conduct and in pursuing the matter further when it was decided not to take further action, but he expressed concern about a lack of robust management to deal with the situation.

In the meantime, Ms Fecitt received an anonymous call from a man threatening to burn down her home if she did not drop her complaint against Mr Swift. Ms Fecitt's picture appeared on a Facebook page, causing her distress. All three claimants raised grievances, which were investigated by an outside consultant. Only Ms Hughes's complaint proceeded to a hearing where it was held that she had suffered unpleasant treatment which had left her feeling isolated and prejudiced, and that the employer's management could have done more.

The employer removed Ms Fecitt from her managerial responsibilities, and later she and Ms Woodcock were redeployed away from the centre. Ms Hughes, who was a bank nurse, was not given any more work. The claimants brought ET proceedings against the employer, alleging that they had suffered detriments as a result of their protected disclosures within the meaning of ERA s47B. These concerns constituted 'protected disclosures' for the purposes of ERA ss43A and 43B as they tended to show that the health and safety of individuals was being endangered.

The tribunal dismissed their claims. It held that the claimants had been subjected to detriment by the actions of staff members at the centre who were supportive of Mr Swift following protected disclosures having been made by the claimants to the employer. However, the tribunal did not specify what those actions were or consider whether or not the employer was vicariously liable for the actions of the staff members. It also held that in order to establish liability under section 47B there had to be a causal connection between the protected act and the employer's acts or omissions. It considered that any failure on the part of the employer to take sufficient steps to protect the claimants from being subjected to a detriment was not 'because' they had made protected disclosures and was not therefore 'on the ground that' they had made the protected disclosures (para 24). The decision to redeploy Ms Fecitt and Ms Woodcock was made because it was the only feasible way of resolving the problem and was not 'on the ground that' they had made protected disclosures. The tribunal held that the decision not to provide work to Ms Hughes was not because she had made protected disclosures but because management had already formed a negative view of her and partly to redress the dysfunctional state of the centre.

The claimants appealed to the EAT, which found that the ET had erred in law concerning the issues of causation and vicarious liability. The EAT held that the correct test of causation applying to cases of detrimental treatment for whistle-blowing (in other words victimisation) was that used in cases of discrimination, including victimisation. In *Igen Ltd and others v Wong* [2005] EWCA Civ 142, 18 February 2005; [2005] IRLR 258, CA; May 2005 *Legal Action* 25, the appropriate test for causation in discrimination cases requires the employer to prove that the treatment was in no sense whatever on the ground of the protected characteristic. Parliament has provided protection to whistle-blowers and a broad view of the provisions should be taken so as to achieve this. Accordingly, once less favourable treatment amounting to a detriment has been shown to have taken place following a protected act, the employer has to show that the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act. In the present case, the ET had applied the wrong test of causation.

The EAT also held that an employer may be vicariously liable for acts of victimisation of employees under the whistle-blowing provisions. In the present case, the ET had not dealt with this issue. It should have made appropriate findings on the following:

- whether or not there were acts of employees against any of the claimants by reason of their having done protected acts;
- if so, what was the nature of those acts and the identity of the perpetrators;
- whether or not the unwanted treatment amounted to a detriment; and, if so,
- whether or not the acts complained of were so closely connected with the employment of the perpetrators so as to make the employer vicariously liable for their actions.

UNFAIR DISMISSAL

Dismissal

Usually an employer terminates an employee's employment with or without notice using clear and unambiguous words. However, real life throws up curious situations where sometimes there is a dispute about whether or not there has been a dismissal, when an employer uses ambiguous words which the employee may understand as a dismissal, but the employer later denies were used at all or that they were intended to amount to a dismissal. If there is a dispute over whether or not a dismissal has occurred, the onus is on the employee to show on the balance of probabilities that s/he has been dismissed.

Where the employer's words are ambiguous, the tribunal will look at the purpose and effect of those words in the light of all the surrounding circumstances and, in particular, the conduct of the parties and what happened before and after the disputed dismissal. The tribunal must then decide how a reasonable person would have interpreted the employer's words.

In the following case involving the employer's defence that there was a mistaken dismissal, the EAT reviewed the principles applying to words of dismissal.

■ Willoughby v CF Capital plc

UKEAT/0503/09,
13 July 2010,
[2011] IRLR 198, EAT

Ms Willoughby was employed as an account manager in the sales team by CF Capital. By late 2008, the employer had made some redundancies because of the effects of the banking crisis and was looking to make savings within the sales team. In an attempt to avoid further redundancies, the employer held meetings with the sales team to find out whether any of them would move from being a direct employee to being self-employed. On 1 December 2008, Mr Keeley, Ms Willoughby's line manager, met with her and she said that she would consider the option of self-employment once she received the detailed terms. However, Mr Keeley thought that she had simply agreed to become self-employed.

During December 2008, Ms Willoughby asked repeatedly for the relevant paperwork which Mr Keeley had said would be provided. She was interested in the prospect of self-employment, but wanted to have detailed terms before making a final decision.

On 22 December 2008, Mr Keeley wrote to the claimant stating:

> *... we have been able to mutually agree to a change in your employment status and our working relationship will continue by your move into self-employment. The termination of your existing employment contract will be effective from 31 December 2008. Your agency agreement will commence 1 January 2009 ...* (para 13).

The agency agreement was enclosed.

Ms Willoughby received the letter on 23 December 2008, the last day before the Christmas break. The office was then closed until Monday 5 January 2009. By that time, Ms Willoughby had taken advice. She telephoned Mr Wilding, the managing director, to say that she would not be accepting the agency agreement and had been advised that the letter dated 22 December amounted to termination of her employment.

The employer attempted to retrieve the situation and Mr Keeley telephoned Ms Willoughby on two occasions seeking to reassure her that there had been a misunderstanding and that if she did not wish to move into self-employment she could continue as before. Although there was further correspondence, Ms Willoughby maintained that she had been dismissed. She brought unfair dismissal proceedings against the employer, which denied dismissal and argued that she had resigned.

The ET found that 'without more' the employer's letter dated 22 December 2008 would have amounted to a dismissal (para 18). However, it relied on case-law which established that in 'special circumstances' an employer could withdraw a dismissal that was founded on a mistake, as long as it did so quickly or in good time (para 20). The tribunal held that there were such special circumstances: a reasonable person, understanding the true outcome of the meeting on 1 December, would have realised when reading the letter of 22 December that something had gone seriously wrong, that there had been a mistake and that the reference to termination of employment had been an error. Although the employer did not withdraw the dismissal until 5 January, it had done so as soon as was practicable after Ms Willoughby alerted it to the mistake. The employer then tried to remedy its mistake. The tribunal accepted that Ms Willoughby had resigned and so dismissed her unfair dismissal claim. Ms Willoughby appealed.

The EAT held that the ET was wrong to find that Ms Willoughby had resigned and had not been dismissed. In its judgment, the EAT restated principles arising from the case-law relating to words of dismissal:

- An employer that uses unambiguous words of dismissal, which an employee understands to be words of dismissal, will thereby dismiss the employee and terminate the contract of employment. Conversely, as a general rule, an employee who uses unambiguous words of resignation, which the employer understands as such, will thereby resign and terminate the contract of employment.
- Exceptions to this rule are limited and tribunals should not be quick to find them.

RECOMMENDED READING

IDS Employment Law Brief

The vital question to ask will be: were there special circumstances which ought to indicate to the recipient of the words that they were not meant or should not be taken at face value?

- The special circumstances will therefore focus on whether or not the decision was a conscious and rational one. This is why the only special circumstances so far recognised in case-law are words used in the heat of the moment but soon after retracted. We generally take people to mean what they say, but will usually make allowances for words spoken in anger, recognising that these may soon be retracted having not been intended other than in the moment. The law allows for this, but it does not serve the wider interests of justice if employers and employees cannot usually be taken to mean what they say.
- If the fact that an employer or employee was or might in some way have been mistaken in sending a letter of dismissal or resignation were in itself a special circumstance, the exception would have become the rule. Employers will often believe that employees are making a mistake by resigning, but they are still in general entitled to take a resignation at face value. Employees will often believe that an employer is making a mistake in dismissing them, but they are still generally entitled to take a dismissal at face value. Furthermore, if an unambiguous dismissal is not to be taken at face value, it must be retracted immediately.
- It can be the case that in fact the employer's actions in dismissing an employee give rise to a repudiatory breach of the employee's contract of employment. In such a situation 'special circumstances' cannot apply because case-law has held that an employer which has committed a repudiatory breach of contract has no right to an opportunity to cure the breach (see *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, 24 February 2010; [2010] IRLR 445, CA; June 2010 *Legal Action* 19).

In the case before it, the EAT found that the tribunal had not applied the correct test. It had not considered whether Ms Willoughby was entitled to view the decision to dismiss her as set out in the letter as a conscious, rational decision. Had the tribunal done so it would have found that she was entitled to do so. While a reasonable person, knowing what had happened on 1 December, would have realised on receiving the letter of 22 December that something was seriously amiss, such a person would not necessarily consider that reference to termination of her contract was an error. A reasonable person, knowing that the letter claimed erroneously that Ms Willoughby had agreed to self-employment and knowing that despite requests for further information about the terms of self-employment this had never been provided, might equally think that her employers were 'bent on riding roughshod over her rights and reasonable requests' (para 47). The reference to termination was not an error by Mr Keeley because he had intended to terminate Ms Willoughby's employment. The error was his understanding of what had happened at the meeting on 1 December. There was no reason why Ms Willoughby should have expected him to have formed this misunderstanding.

In addition, the EAT found that the tribunal was wrong in finding that the employer's change of mind on and after 5 January took place in good time. Indeed, the employer did not retract the dismissal until after the claimant had taken legal advice and responded indicating that she had been dismissed. While there was an intervening holiday period, this was no excuse in the circumstances, where the dismissal was to take effect on 31 December and the employer should have expected Ms Willoughby to take urgent legal advice.

Effective date of termination

Under ERA s97, the 'effective date of termination' (EDT) is defined as being the date that the notice expires, where an employee's contract of employment is terminated by notice, and the date on which termination takes effect, where the contract is terminated without notice. The EDT is important because it is the date on which the time limit in respect of presenting a claim for unfair dismissal begins to run and length of continuous service is measured (ERA ss111 and 108 respectively). However, does the EDT occur when a letter is posted, received or read? In 'Employment law update – Part 1', November 2009 *Legal Action* 21 (which contains the facts of the case), the authors reported the following case, when it was before the Court of Appeal, involving a letter of dismissal not read until several days after

it was received. The case has now come before the Supreme Court and its judgment indicates an empathetic and commonsense approach to the realities of life.

■ **Gisda Cyf v Barratt**

[2010] UKSC 41,
13 October 2010,
[2010] IRLR 1073,
919 IDS Employment Law Brief 12, SC

The Supreme Court upholding the decisions of the ET, the EAT and the Court of Appeal, found that where an employee is dismissed by letter, the three-month limitation period for bringing a claim for unfair dismissal runs from the date when the employee has actually read the letter, or had a reasonable opportunity of reading it, rather than the date when the letter was posted or delivered, or the date when the employer has decided to dismiss the employee.

The Supreme Court observed that being dismissed is a major event in anyone's life and that decisions that may have a profound effect on one's future have to be made. The court accepted that it is entirely reasonable that the time (already short) within which one should have the chance to make those decisions should not be reduced further by complications surrounding the receipt of the information that one has, in fact, been dismissed.

The Supreme Court further held that where an employee has been dismissed by letter and a question arises about whether or not s/he had the opportunity to read or learn of the contents of the letter, for the purposes of determining the EDT, the question should then be to determine the reasonableness of his/her behaviour in failing to attempt to find out the contents, rather than the existence of the opportunity to so do. To concentrate solely on that which is practically feasible may result in a failure to consider what realistically can be expected.

In the following case, the EAT held that contractual notice of dismissal, whether given orally or in writing, runs from the day after notice is given unless any contractual term exists to the contrary.

■ **Wang v University of Keele**

UKEAT/0223/10,
8 April 2011

During the late afternoon or evening of 3 November 2008, the claimant received an e-mail from his employer attaching a letter giving him three months' notice of termination of his employment. He later learned that he would only be paid until 2 February 2009. The claimant subsequently lodged a claim for unfair dismissal on 2 May 2009. The employer contended that the EDT was 2 February 2009, notice having commenced on 3 November 2008 and employment in any event ending on 2 February 2009. The ET accepted these contentions and dismissed the claim. The claimant appealed.

The EAT held, reviewing existing case-law, that the principle that verbal notice takes effect from the following day applies equally to written notice. This meant that notice in this case ran from 4 November 2008 and ended on 3 February 2009, that date being the EDT. If notice only started to run from 4 November 2008, the unilateral decision by the employer to only pay the claimant until 2 February 2009 did not change the EDT. As a result the claimant's claim of unfair dismissal was presented in time.

The EAT further stated that if notice of dismissal is ambiguous then by applying the contra proferentem rule, the ambiguity should be construed in favour of the employee.

Employer's knowledge

In the following case, the Court of Appeal considered the position of the employer's knowledge where an employee was dismissed by a manager unaware of information that was known to another manager which would have mitigated the employee's misconduct.

■ **Orr v Milton Keynes Council**

[2011] EWCA Civ 62,
1 February 2011,
[2011] IRLR 317,
924 IDS Employment Law Brief 8, CA

The Court of Appeal held that the determination of whether a dismissal is fair or unfair under ERA s98(4) has to be judged on the state of mind of the decision-maker. The employer is not taken to know of facts likely to show that an employee is free from guilt or blame, which are known to the employee's manager but are withheld from the decision-maker. Thus the issue for the tribunal is what the decision-maker knew or ought reasonably to have known at the time when the decision to dismiss was taken.

Comment: While it is the knowledge of the decision-maker which is determinative of the fairness or unfairness of a dismissal, it should be remembered that this also extends to what the decision-maker ought reasonably to have known as a result of carrying out a reasonable investigation.

* See: http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=419057&NewsAreaID=2.

Philip Tsamados is a non-practising solicitor. 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. Contributions to be included in the update in October 2011 *Legal Action* may be sent to Tamara Lewis at Central London Law Centre®, 14 Irving Street, London WC2H 7AF, tel: 020 7839 2998.

Changes to support and accommodation schemes under Part III of the Children Act 1989 – Part 2

In the second of two articles about important changes to the Children Act (CA) 1989 that came into force from 1 April 2011, Caoilfhionn Gallagher reviews changes to the law for children and young people leaving care and children who move from care to custody. 'Changes to support and accommodation schemes under Part III of the Children Act 1989 – Part 1' appeared in April 2011 *Legal Action* 41.

On 1 April 2011, a number of important changes came into effect regarding the operation of the CA 1989 scheme in relation to children 'in need'. Despite their significance, little attention has been devoted to these changes, and unfortunately they appear to have gone unnoticed in many quarters.

Parts 1 and 2 of this article aim to assist practitioners and legal advisers quickly to get up to speed in relation to the most important of these changes, which have the potential to improve outcomes for children in need and former children in need to a significant extent without altering radically the CA 1989 scheme. Understanding these changes will greatly assist vulnerable clients and allow practitioners and legal advisers to play their part in ensuring compliance with the duties that parliament has intended should safeguard and promote the welfare of vulnerable children and their families.

In Part 1 of this article, the authors (Caoilfhionn Gallagher and Steve Broach) examined support and accommodation entitlements for looked after children and the provision of short breaks to disabled children. This article examines the consequences of two further sets of the latest changes which both involve children and young people in transition, ie, imprisoned children who previously have been 'looked after' by a local authority and those young people who are leaving care to start independent lives in the community.

Local authority duties to children in custody

Child prisoners tend to come from troubled backgrounds that often involve homelessness, sexual and physical abuse, domestic violence, drug and alcohol use, literacy difficulties and school exclusion. As Munby J has noted in *R (Howard League for Penal Reform) v Secretary of State for the Home Department and Department of Health (interested party)* [2002] EWHC 2497 (Admin), 29 November 2002; [2003] 1 FLR 484, they 'are, on any view, vulnerable and needy children' (para 10). They are more likely to have physical and mental health problems than their counterparts outside prison, and are 18 times more likely to commit suicide.[1] The majority of child prisoners also have a history of accommodation disruption, and a high proportion have had previous involvement with children's services before entering custody: 71 per cent in the latest research on this issue.[2] Some of these children have also been 'looked after' by children's services, ie, they have been accommodated by their local authority because of being homeless or the unsuitability of their accommodation. Research indicates that looked after children enter custody at a higher rate than other children. A report by Her Majesty's Inspectorate of Prisons and the Youth Justice Board identified that 24 per cent of 15–18 year olds were looked after before entering custody.[3]

Given this profile, it is clear that children who are sent to prison represent some of the most damaged and vulnerable members of society. Almost inevitably, they will be 'children in need' who are entitled to an assessment of their needs from the relevant local authority under CA 1989 s17, which should assess their needs while in custody, but also plan how their needs will be met on release: see paragraph 39 of *R (K) v Manchester City Council* [2006] EWHC 3164 (Admin), 10 November 2006; (2007) 10 CCLR 87. Regrettably, such assessments remain rare, despite it being clear that this statutory duty continues while the child is in custody: see *Howard League for Penal Reform* (above), and despite the undoubted importance of such an assessment and a plan in ensuring that there is a smooth transition from custody to the community when s/he is released: *R (S) v Sutton LBC* [2007] EWCA Civ 790, 26 July 2007; (2007) 10 CCLR 615.

The transition from custody to the community is difficult for most prisoners, regardless of their age. Many are at high risk of self-harm, suicide and reoffending if they do not have appropriate support, care and accommodation on their release. Child prisoners are, in this sense, no different to adult prisoners. However, there are three key differences between child and adult prisoners as follows:

- First, children are inherently more vulnerable than adults, and of course tend to be particularly vulnerable on release.
- Second, for many child prisoners, their release is actually contingent on suitable accommodation being in place for them in advance. This may be either because without a definite address in place they cannot secure early release to which they are otherwise entitled (an address is needed in advance for the electronic tagging scheme for children serving detention and training orders), or without a definite accommodation and support package they will be unable to persuade the Parole Board of their suitability for release. The latter issue is all the more pressing because there is no open estate for child prisoners. Child prisoners must persuade the Parole Board to release them from closed conditions, without having had the chance to prove themselves in an open prison. In these circumstances, having a suitable accommodation and support package ready in the community is essential.
- Third, there is a clear legal framework setting out the duties placed on children's services departments, custodial institutions and youth offending teams (YOTs) from the moment of the child's entry into custody until his/her release back into the community. This framework comprises the 1989 and 2004 Children Acts, the Crime and Disorder Act 1998, *National standards for youth justice services*, local authority circulars and statutory guidance.[4]

Regrettably, despite this clear framework and the imperative under the UN Convention on the Rights of the Child to ensure that

children remain in custody for the minimal time possible, many children remain in custody unnecessarily past their release dates because of lack of accommodation and planning, and on their release many children are either homeless or provided with inadequate or no support to assist them with resettlement. These problems are predictable for most child prisoners, but all the more so for those who were in the care of or looked after by their local authority immediately before entering custody. As these children were reliant on the local authority to accommodate and support them at the time of sentence, it is apparent that they are likely to require such accommodation and support again on their release.

Where a child is the subject of a care order under CA 1989 s31, the local authority shares formal parental responsibility for the child and has ongoing duties to support him/her while s/he is in custody and plan for his/her release and resettlement in the community. These duties include planning where the child will live on release and how s/he will be provided with the support and services required to meet his/her needs. Similarly, where a young person is entitled to a full leaving care package, there is an obligation to assess his/her needs and produce a 'pathway plan', ie, a document which details comprehensively how those needs will be met, including on release.

However, where a child or young person was looked after but was not the subject of a care order, and, therefore, was not entitled to a full leaving care package (see below), s/he often fell between the cracks and had no assessment or local authority support while in custody and, therefore, no planned release package. An important, albeit modest, change in the law has now come into force to provide additional protection to this group of children and young people.

Visits to former looked after children in custody

As of 1 April 2011, the following legislation and supporting guidance came into effect:

- CA 1989 s23ZA (as a result of Children and Young Persons Act 2008 (Commencement No 3, Saving and Transitional Provisions) Order 2010 SI No 2981 article 4(d));[5]
- the Visits to Former Looked After Children in Detention (England) Regulations (VFLACD(E) Regs) 2010 SI No 2797; and
- *The Children Act 1989 guidance and regulations. Local authority responsibilities towards former looked after children in custody.*[6]

The legislation and statutory guidance concern children in custody who, immediately before remand or sentence, were looked after by the local authority and who are not eligible for full leaving care support. They set out how local authorities should carry out their responsibilities to this group of children in custody. The statutory guidance is issued under the Local Authority Social Services Act 1970 s7. Local authorities are required to comply with it unless there are exceptional reasons not to do so. While the guidance is directed primarily at local authorities, at the outset it recognises sensibly that it is also of relevance to 'managers of [YOTs] and their staff ... governors, directors and registered managers of establishments in the secure estate', and 'partner agencies and ... providers of services to looked after children, including agencies in the private, voluntary and public sectors' (page 1).

Section 23ZA imposes a duty on the local authority to ensure that a child, who was looked after by that authority but has ceased to be so as a result of certain circumstances, is visited by a representative of the authority. The local authority also has a duty to arrange for appropriate advice, support and assistance to be available to such children.

The VFLACD(E) Regs provide that these duties apply to children and young people who have ceased to be looked after as a result of being detained in a young offender institution, secure training centre or secure children's home, and who are not 'relevant' children under regulation 2(2) (and see below). This means that when a looked after child is imprisoned, the responsible local authority, ie, the child's 'home' local authority, must appoint a representative to visit him/her to assess his/her needs. Importantly, this role cannot be delegated by the local authority to the YOT; usually, it should be carried out by a qualified social worker employed by the local authority (para 13 of the guidance). This representative must make recommendations about any appropriate advice, support and assistance needed by the child, including arranging for his/her accommodation on release, if necessary, which might involve planning for him/her to be looked after again. While this is a welcome change in the law which recognises the importance of ongoing assessment and release planning for imprisoned children, had local authorities been complying with their existing statutory duties it would have been unnecessary. Clearly such children are 'children in need', who are entitled to an assessment under CA 1989 s17 in any event. If they are likely to require accommodation on release, the local authority had an existing duty to plan and arrange such accommodation in advance under section 20. However, while arguably in theory this is a superfluous change, in practice the existence of clear and detailed statutory guidance directed specifically at how to maintain contact with this group of children while in custody may improve outcomes for them on the ground.

The leaving care scheme

Overview

For any child or young person, leaving home and starting to live independently is a key stage in their life. Those who have spent part of their childhood in the care of local authorities being 'looked after' are no different in this respect. However, there are some fundamental differences in their experiences. For example, young people who have been looked after for a substantial period are unlikely to have adequate financial, emotional or practical support from their families. Despite this, they are likely to move to independent living between the ages of 16 and 18, whereas the average age for the general population is 22.[7]

While many care leavers can and do go on to have successful lives, their chances of doing so are far worse compared with other young people. Research has long demonstrated that this group of young people is particularly vulnerable: ie, more likely than other young people to suffer homelessness, be imprisoned and be on benefits, and less likely to continue in education or to secure stable employment.[8] (Of course these difficulties may be in part because of the experiences which led to their entry into care in the first place.) These problems are now well recognised, and over ten years have passed since the CA 1989 was amended by the Children (Leaving Care) Act (C(LC)A) 2000 to tackle them. However, outcomes for this vulnerable group remain poor. The legislative scheme has now been reinforced with important amendments, some of which are examined in this article.

Background to the introduction of the leaving care scheme

In 1999, an extensive consultation process took place concerning how to improve the life chances of a particularly vulnerable group of young people, ie, those who had been, as children, in care or looked after for a substantial period of time. At that time the amount of support provided by local authorities to children and young people when they left care was described by Janet Rich, founding trustee of the Care Leavers' Foundation and co-ordinator of National Care Leavers' Week, as 'very patchy across the country'.[9] There were discretionary powers in place in the CA 1989 to provide help to care leavers, but they were used rarely and inconsistently. Research by the Department of Health (DoH) and others showed that

provision of support was uneven, with considerable variation in the services provided to young people even within, as well as between, individual local authorities.[10] Many young care leavers received little support from their 'parent', ie, the local authority, and often their time in care ended abruptly at the age of 16 or 17 (often on their 16th birthday, when they were transferred to adult services). Undoubtedly this absence of support and inadequate transition planning contributed to the stark statistics cited in the DoH 1999 consultation document, *Me, survive, out there? New arrangements for young people living in and leaving care*:

- As many as 75 per cent of young people leaving care had no educational qualifications.
- Up to 50 per cent of young people leaving care were unemployed.
- Up to 20 per cent of young people experienced some form of homelessness within two years of leaving care.[11]

The paper's title, *Me, survive, out there?*, was a phrase taken from a poem written by a 15-year-old girl about her panic at the prospect of being cut loose from children's services on her 16th birthday. The paper recognised the difficulties faced by this group of young people and criticised the 'increasing trend' by local authorities to discharge young people from care early, and considered how to put in place effective mechanisms to alter this situation. It also proposed what was later implemented as the leaving care regime. As Baroness Hale later put it in *R (G) v Southwark LBC* [2009] UKHL 26, 20 May 2009; [2009] 1 WLR 1299, the general aim of the 'leaving care' duties which resulted from that consultation process was to 'provide a child or young person with the sort of parental guidance and support which most young people growing up in their own families can take for granted but which those who are separated or estranged from their families cannot' (para 8).

Following the 1999 consultation process, parliament introduced the C(LC)A, followed by the detailed Children (Leaving Care) (England) Regulations (C(LC)(E) Regs) 2001 SI No 2874 and the associated statutory guidance, *Children (Leaving Care) Act 2000: regulations and guidance*.[12] The legislation and guidance together constituted the leaving care regime.[13] Although criticised by some groups for not going far enough, the new scheme established that 'corporate parents', ie, local authorities, had responsibility for children beyond their time in care and mandated a certain level of support for care leavers until the age of at least 21, with more limited duties until the age of 24. Reflecting the stated aspirations in the 1999 consultation paper, the statutory guidance made clear from the outset that the support provided under the leaving care scheme 'should be, broadly, the support that a good parent might be expected to give'.[14]

While the leaving care regime was a welcome and essential legal development, problems persisted on the ground. Some local authorities failed to comply with their duties to young people who were entitled to benefit from the statutory leaving care scheme, despite its mandatory and clear nature and a series of judgments from the Administrative Court, most notably the landmark case of *R (J) v Caerphilly CBC* [2005] EWHC 586 (Admin), 12 April 2005; [2005] 2 FLR 860. Furthermore, Munby J, in *R (G) v Nottingham City Council and Nottingham University Hospitals NHS Trust (interested party)* [2008] EWHC 400 (Admin), 5 March 2008, went so far as to describe the 'catalogue of failings' towards a care leaver by the local authority in that case as 'depressing', given that nearly a decade had passed since the 1999 consultation process and almost three years had passed since his judgment in *Caerphilly* (para 39).

Critics of the scheme also focused on difficulties in the transition process, with young people often transferred abruptly, on a particular date and without an understanding of the need for better transitional support. In 2006, detailed research demonstrated that children and young people continued to be at a sharply heightened risk of homelessness soon after leaving care and to have low educational attainment, with the majority leaving care without any qualifications and failing to establish a stable pattern of education, training or work in the early years after leaving care.[15] These were precisely the problems that the *Me, survive, out there?* consultation paper and the subsequent C(LC)A, C(LC)(E) Regs and statutory leaving care guidance were intended to address.

A further consultation document, the green paper *Care matters: transforming the lives of children and young people in care*, was issued in 2006.[16] *Care matters* raised issues regarding children in and leaving care. This consultation was followed in 2007 by a white paper, *Care matters: time for change*, which focused on children in care but also recommended some changes to the leaving care regime.[17]

In November 2008, parliament passed the Children and Young Persons Act (CYPA) 2008. The CYPA amended further the CA 1989 by extending support for young people in and leaving care. In October 2010, the suite of guidance regarding care leavers was revised and came into force in April 2011.

The 2001 leaving care regime

The C(LC)A, C(LC)(E) Regs and *Children (Leaving Care) Act 2000: regulations and guidance* introduced both a full leaving-care package for children and young people who had been looked after for a substantial period of time and some more limited support for those who had been looked after for a shorter period but did not qualify for the full scheme. In this article, the author is concerned only with the full leaving care scheme (although readers should note that some changes have also been made to the more limited 'advice and assistance' scheme).

The full leaving care scheme

From 2001, it was recognised that there were three broad categories of young person to whom the full leaving care provisions applied. These categories of young person remain in place after the changes in April 2011 as follows:

- An 'eligible child', ie, a child of 16 or 17 who has been looked after for sufficient time to qualify for the full leaving care package, and who remains a looked after child.
- A 'relevant child', ie, a child of 16 or 17 who has been looked after for sufficient time to qualify for the full leaving care package, but who is no longer looked after.
- A 'former relevant child', ie, a young person aged 18 or over who is entitled to the full leaving care package.

Underpinning each of these three categories is the duty detailed in CA 1989 Sch 2 para 19A: 'It is the duty of the local authority looking after a child to advise, assist and befriend him with a view to promoting his welfare when they have ceased to look after him.'

Duties to eligible children

CA 1989 Sch 2 para 19B placed certain duties on local authorities in relation to 'an eligible child whom they are looking after'. An eligible child is a child aged 16 or 17 (para 19B(2)(a)) who has been looked after by a local authority for a cumulative total of 13 weeks beginning after the age of 14 and ending after the age of 16 (para 19B(2)(b) and C(LC)(E) Regs reg 3), and who continues to be looked after. The key question is whether or not the child has accumulated a 13-week period of time as a looked after child. This can be made up of a single, continuous period of time, or a series of shorter periods.

Under the 2001 system, a local authority had the following five duties in relation to eligible children:

- Duty to appoint a 'personal adviser' for the child (CA 1989 Sch 2 para 19C). The personal adviser performs a crucial role for

the eligible child, ie, s/he is an advocate for the child and the conduit between him/her and the local authority.

■ Duty to prepare a 'written statement describing the manner in which the needs of each eligible … child will be assessed' (C(LC)(E) Regs reg 5). The written statement must be made available both to the child and his/her personal adviser (C(LC)(E) Regs regs 5(3) and 7(5)). Its content was prescribed by the C(LC)(E) Regs.

■ Duty to 'carry out an assessment of his needs with a view to determining what advice, assistance and support it would be appropriate for them to provide him … while they are still looking after him; and … after they cease to look after him' (CA 1989 Sch 2 para 19B(4)). The time frame for, and the content and process of, this assessment are mandated in the C(LC)(E) Regs.

■ Duty to prepare a 'pathway plan' 'as soon as possible after the assessment' (CA 1989 Sch 2 para 19B(4) and C(LC)(E) Regs reg 8). This is a crucial document for a care leaver, and it should be a 'detailed operational plan': *R (J) v Caerphilly CBC* (above) para 46. The plan must include a number of matters mandated in the C(LC)(E) Regs.

■ Duty to keep the pathway plan under regular review (CA 1989 Sch 2 para 19B(5)).

Duties to relevant children

The next category of young person entitled to the benefit of the full leaving care package is a 'relevant child' (CA 1989 s23A). A relevant child is a 16 or 17 year old who is not being looked after by a local authority but was, before last ceasing to be looked after, an eligible child under CA 1989 Sch 2 para 19B. In other words, a relevant child who is no longer being looked after, but has already accumulated a sufficient period of looked-after time to qualify for the full leaving care package, ie, 13 weeks between the ages of 14 and 18, including at least one day on or after his/her 16th birthday).

Under the 2001 system, the responsible local authority had the following duties to a 'relevant child':

■ Duty to appoint a personal adviser if it had not done so already (CA 1989 s23B(2)).

■ Duty to prepare a written statement if it had not done so already.

■ Duty to carry out a pathway assessment if it had not done so already (CA 1989 s23B(3)(a)).

■ Duty to prepare a pathway plan for him/her if it had not done so already (CA 1989 s23B(3)(b)).

■ Duty to keep the pathway plan under regular review (CA 1989 s23B(7)).

■ Duty to 'safeguard and promote the child's welfare' under CA 1989 s23B(8): 'The responsible local authority shall safeguard and promote the child's welfare and, unless they are satisfied that his welfare does not require it, support him by … maintaining him; … providing him with or maintaining him in suitable accommodation; and … providing support of such other descriptions as may be prescribed.'

The first five duties listed above merely repeated the duties owed to eligible children. However, the final duty, to 'safeguard and promote the child's welfare', was new. It did not appear in the statute or the regulations in relation to eligible children, as of course they would still be looked after by the local authority, and so this additional duty was not required. This duty remains after the April 2011 changes, supplemented by Care Leavers (England) Regulations (CL(E) Regs) 2010 SI No 2571 reg 9. It specifies that the authority must provide assistance to meet the needs of the relevant child in relation to education, training or employment, as provided for in his/her pathway plan, and that this support may be in cash. With the recent abolition of the education maintenance allowance and increased university tuition fees, the residual duty under CA 1989 s23B(8)(c) may in future take on more significance for relevant children.

Duties to former relevant children

The final category, former relevant children, is dealt with in CA 1989 s23C. A 'former relevant child' is 'a person who has been a relevant child for the purposes of section 23A (and would be one if he were under [18]), and in relation to whom they were the last responsible authority' (s23C(1)(a)). The continuing duties set out in section 23C subsist until the young person reaches the age of 21 unless his/her pathway plan sets out a programme of education or training that extends beyond his/her 21st birthday, in which case the category continues beyond that date.

There are three clusters of duties in relation to a former relevant child as follows:

■ Contact: the local authority must take reasonable steps to keep in touch with the former relevant child, even if s/he is no longer within its area, or to re-establish contact if lost (s23C(2)).

■ Continuity: the local authority must continue the appointment of a personal adviser and continue to keep the pathway plan under regular review (s23C(3)).

■ Assistance: the local authority must provide certain types of assistance, to the extent that the young person's welfare requires it (s23C(4)).

Key changes to the leaving care regime

The CYPA amended the law concerning care leavers in a number of respects. In October 2010, the Secretary of State for Education made the CL(E) Regs, which came into force on 1 April 2011. The CL(E) Regs maintain the three-stage system for the full leaving care scheme, ie, eligible child, relevant child and former relevant child, and replicate largely verbatim the requirements of the C(LC)(E) Regs.

In addition, new guidance also came into effect as of the same date. Again, this is statutory guidance that must be followed unless there are good reasons not to do so. Practitioners should become familiar with it as quickly as possible. However, while the framework remains the same, the new statutory guidance is far more detailed. It includes a detailed volume entitled *The Children Act 1989 guidance and regulations. Volume 3: planning transition to adulthood for care leavers* ('the transition guidance'), which is fuller and clearer than its 2001 predecessor, and makes better use of practical examples.[18]

There are three key practical changes for care leavers:

■ Introduction of a higher education bursary for former relevant children (CA 1989 s23C(5A)).

■ A personal adviser, pathway assessment and pathway plan for former relevant children up to the age of 25 who take up a programme of education or training (CA 1989 s23CA).

■ The role of an independent reviewing officer (IRO) to ensure that children of 16 or 17 do not leave care prematurely or inappropriately.

Higher education bursary

CA 1989 s23C(5A) provides for a bursary for care leavers going on to higher education. Provision was made for this in the Children Act 1989 (Higher Education Bursary) (England) Regulations ('the Higher Bursary Regs') 2009 SI No 2274, which came into force on 22 August 2009.

Under regulation 1(2), the Higher Bursary Regs apply to a former relevant child who is pursuing a course of higher education started on or after 1 September 2008. 'Higher education' in CA 1989 s23C(5A) means a course of higher education that is of at least two academic years' duration and designated by or under regulations made under Teaching and Higher Education Act 1998 s22(1). The amount payable is £2,000.

Personal adviser, pathway assessment and pathway plan

CA 1989 s23CA extends provisions concerning former relevant children to an

upper limit of age 25 in the case of a young person who 'has informed the responsible local authority that he is pursuing, or wishes to pursue, a programme of education or training'. Unlike the definition of a 'course of higher education' in section 23C(5A), there is no specific definition given for a 'programme of education or training'. The transition guidance makes clear that the phrase should be interpreted broadly: 'For example, this might include options such as: completion of a basic skills course, so that the young person has the numeracy and literacy skills needed to compete in the jobs market; take up of a course of further education; take up of a university place; support to enable the young person to complete a recognised postgraduate qualification; or participation in vocational training and apprenticeships' (para 3.49).

In such circumstances, there will be a duty to appoint a personal adviser, to conduct an assessment of the young person's related needs and to prepare a pathway plan. The transition guidance states that the 're-instated pathway plan must have a specific focus on the support that the individual care leaver will need to be able to meet the education or training goals agreed with their responsible authority' (para 3.53). As a result of section 23CA(5), a former relevant child who falls within this provision is entitled to the same form of support available to qualifying persons under CA 1989 s24B, ie, assistance through contributing to expenses or making a grant.

Under the transition guidance, each local authority is required to develop 'its own specific policy setting out the support that it is prepared to offer to this group of care leavers (para 3.50). It would seem sensible for legal advisers now to request sight of the local policy as a matter of course when engaging in pre-action correspondence in respect of an individual care leaver.

Independent reviewing officers

A central issue for looked after children has been premature or abrupt moves from care to independence. A particular problem has been the persisting, incorrect assumption by some that at 16 or 17 a child who has accumulated 13 weeks as a looked after child and falls within the leaving care regime should no longer be looked after, and instead should become the responsibility of the leaving care team or adult services.

During parliamentary debates on the Children and Young Persons Bill, the government indicated sensibly that in general looked-after 16 or 17 year olds should continue to be looked after until the age of 18. Sarah McCarthy-Fry MP, during the bill's third reading in the House of Commons, emphasised this point, stating:

In future, there will be a presumption that children will continue to be looked after up to the age of 18 and that there will rarely be good reasons for a local authority to cease looking after a child before he or she turns 18. Therefore, it is government policy that relevant children will become a residual category of children (*Hansard* HC Debates col 343, 8 October 2008).

However, the proposed and accepted response to this identified problem was to rely on the use of IROs to review individual children's cases. Sarah McCarthy-Fry considered that a review process by IROs:

… will stop the current poor practice in local authorities that means that a child is placed in independent living arrangements without review and/or is automatically deemed to have left care at the same time. That poor practice is a misunderstanding of the current legislative framework. Clause 9 of the bill, regulation-making powers and the revised Children Act statutory guidance, give us a review mechanism to correct that. So, in future, there may still be a small number of cases where a review of the young person's case endorses the social worker's assessment that that young person's welfare would be promoted by the young person leaving care because he or she is ready and wants to take on the challenge of living more independently (*Hansard* HC Debates col 343, 8 October 2008).

It is of concern that the assumption appears to be that a move to more 'independent' living will necessarily take a child outside the care system, whereas of course independent or semi-independent living may still be provided under CA 1989 s20. In any event, CA 1989 ss25A–25C now provide for the appointment of IROs and outline their review functions. It remains to be seen whether this reduces the number of 16 and 17 year olds discharged from care.

Additional changes

The personal adviser

Under the new transition guidance, far more detail is given concerning the role of the personal adviser.[19] Much of the material simply replicates that in the 2001 leaving care guidance but there is important additional information. For example, the transition guidance refers to the need for the personal adviser to 'possess a sound demonstrable understanding of human growth and development (in particular being competent in understanding the insecurities faced by looked after children as they make their transition to adulthood)' (para 3.21). It highlights the importance of a good 'working relationship' between the personal adviser and young person and gives practical examples of the types of support the personal adviser may be required to provide (paras 3.26 and 3.28).

However, there are some worrying issues in this part of the transition guidance, and it is unfortunate that the guidance does not draw in more detail on the case-law over the past decade. An example of a flawed approach in the transition guidance is where reference is made to changing personal adviser at the age of 18, 'where young people have continued to have a qualified social worker as their [personal adviser]' (para 3.19). This appears to suggest that this role could be performed by a social worker from within the local authority; however, the personal adviser should be independent in order to perform the role correctly, and should not be the budget holder, or employed by the budget holder.

Written statement

Under the 2001 version of the leaving care scheme, there was an important stage between the appointment of the personal adviser and the completion of the pathway assessment. The responsible local authority had a duty to prepare a 'written statement describing the manner in which the needs of each eligible … child will be assessed' (C(LC)(E) Regs reg 5). This written statement had to be made available both to the child and his/her personal adviser (C(LC)(E) Regs regs 5(3) and 7(5)), and to certain other people (C(LC)(E) Regs reg 7(5)). Its content was prescribed by the C(LC)(E) Regs in a non-exhaustive list set out in regulation 5(2) (see below). The written statement had to include, in particular, information about:

(a) the person responsible for the conduct and co-ordination of the assessment;
(b) the timetable for the assessment;
(c) who is to be consulted for the purposes of the assessment;
(d) the arrangements for recording the outcome of the assessment; [and]
(e) the procedure for making representations in the event of a disagreement.

The statement was, in essence, a signposting or planning document, which was a precursor to the preparation of the pathway assessment and pathway plan. The local authority had to make a copy of the statement available to the child and to other

key people. These people were those who were entitled to involvement in the pathway assessment process, so it stood to reason that they should be informed of the commencement of the process, the relevant time frame and other logistical arrangements.

Unfortunately, this stage of the process does not appear in the new scheme. While in practice this stage of the process was often neglected, it is regrettable that the requirement for a written statement has now been removed entirely: action should have been taken to ensure compliance with this important step in the process.

Conclusion

Care leavers have long suffered great disadvantages compared with their peers. Since 1999 substantial progress has been made in introducing and developing a legal framework to protect care leavers and ensure that their life chances are maximised. However, unfortunately, those protections are not always realised in practice. The central difficulties identified in 1999, ie, the high risk of homelessness, and poor employment and education prospects, still persist more than a decade after the CA 1989 was amended by the C(LC)A in an attempt to tackle them.

Regrettably, it remains the case that care leavers' life chances are severely restricted and that many of them receive inadequate support from their corporate parent, the local authority. It is clear that the key ingredients for success for care leavers are settled care, thorough transition planning and assessment, and, crucially, delaying young people's transitions from care.[20]

The April 2011 changes to the leaving care scheme go some limited way towards recognising these persistent problems and enshrining the need for longer and better-supported transitions to adulthood for young care leavers within the legislation. Leaving care should be a gradual process, not a one-off, abrupt event; the April 2011 changes recognise this and emphasise the importance of a smooth transition from care to independence. It is to be hoped that the legislative changes translate into improved outcomes for this vulnerable group of young people.

1 Stefan Frühwald and Patrick Frottier, 'Suicide in prison', *The Lancet*, vol 366, issue 9493, 8 October 2005.
2 *Accommodation needs and experiences*, Youth Justice Board, 2007, available at: www.yjb.gov.uk.
3 *Children and young people in custody 2008–2009. An analysis of the experiences of 15–18-year-olds in prison*, HM Inspectorate of Prisons and Youth Justice Board, 2009, available at: www.justice.gov.uk/inspectorates/hmi-prisons/docs/Children_and_Young_People_in_Custody_2008-09_rps.pdf. The statistic was cited in draft statutory guidance to the Visits to Former Looked After Children in Detention (England) Regulations 2010, Department of Education, 2010, footnote 1, available at: www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1713&external=no&menu=3..
4 The detail of this web of legal provisions is beyond the scope of this article, but see further Ian Wise QC, Steve Broach, Caoilfhionn Gallagher, Alison Pickup, Ben Silverstone and Azeem Suterwalla, *Children in Need: Local authority support for children and families*, LAG, 2011, chapter 5.
5 Section 23ZA was already partly in force, but is now in force for all remaining purposes in England; however, it is not yet fully in force in Wales.
6 Available at: www.education.gov.uk/publications/eOrderingDownload/DfE-00562-2010.pdf.
7 See: *Me, survive, out there? New arrangements for young people living in and leaving care*, Department of Health, 1999, para 2.1, available at: www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_4010312.
8 See note 7, para 2.6; Jim Wade and Jo Dixon, 'Making a home, finding a job: investigating early housing and employment outcomes for young people leaving care', *Child & Family Social Work*, 2006, vol 11, issue 3, pp199–208; and Philip Mendes and Badal Moslehuddin, 'From dependence to interdependence: towards better outcomes for young people leaving state care', *Child Abuse Review*, 2006, vol 15, issue 2, pp110–126.
9 'Care leavers should not become "yesterday's news"', interview with epolitix.com, 27 October 2009, available at: www.ePolitix.com/interviews/interview-detail/newsarticle/care-leavers-should-not-become-yesterdays-news/.
10 Nina Biehal, Jasmine Clayden, Mike Stein and Jim Wade, *Moving on: young people and leaving care schemes*, HMSO, 1995, available at: www.tsoshop.co.uk; *When leaving home is also leaving care: an inspection of services for young people leaving care*, Social Services Inspectorate, DoH, 1997; Bob Broad, *Young people leaving care: life after the Children Act 1989*, Jessica Kingsley, 1998; and Jim Wade and Jo Dixon, 'Making a home, finding a job: investigating early housing and employment outcomes for young people leaving care', note 8.
11 See note 7, para 2.6.
12 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4058600.pdf.
13 The C(LC)A amended the CA 1989, so the leaving care provisions are to be found in the latter Act, as amended.
14 See note 12, chapter 4 para 3.
15 Jim Wade and Jo Dixon, 'Making a home, finding a job: investigating early housing and employment outcomes for young people leaving care', note 8.
16 Available at: www.education.gov.uk/publications/eOrderingDownload/Care-Matters%20Green%20Paper.pdf, and from TSO at: www.tsoshop.co.uk.
17 Available at: www.education.gov.uk/publications/eOrderingDownload/Cm%207137.pdf, and from TSO at: www.tsoshop.co.uk.
18 Available at: www.education.gov.uk/publications/eOrderingDownload/DfE-00554-2010.pdf.
19 See note 18, chapter 3.
20 See note 15, p200.

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letters

DCLG consultation on local authority statutory duties

I hope you will publish this response to the comments by Professor Luke Clements ('DCLG reviews "burdensome" local authority duties', April 2011 *Legal Action* 4). Frankly, Luke's comments constituted a ridiculous rant. The government is carrying out a review of every single statutory duty imposed on local government. The accompanying blurb from the Department for Communities and Local Government states that some of these duties are vital and invites people to say which ones should be kept, just as much as that some of them may constitute unnecessary burdens which should be repealed. It is a comprehensive exercise in administrative rationalism, not the kind of stupid ransacking alleged by Luke.

The nature of the coalition government is that it has to listen to backbenchers in two parties rather than remaining aloof, as the most recent Labour and Conservative administrations were able to do. This is a unique opportunity to exert influence, albeit within the severe economic limitations imposed by the UK's debt burden. The government's zeal for simplification and burden reduction is an open invitation to argue, among other things, that community care law can finally be simplified and that we should see the back of the kind of micro-management exercised by the Legal Services Commission.

Luke is exactly the kind of person who, through his previous work, carries authority which is an essential part of exerting influence. Being one-eyed and offensive is the surest way to abandoning all influence. I hope very much that no one from the government saw or took seriously Luke's comments and that Luke can calm down and contribute positively instead.

Nicholas Nicol, barrister, 1 Pump Court, London.

Legal aid and patient access to MHRT: LSC's response

The Legal Services Commission (LSC) takes issue with your claim that 'Legal aid delays deny patients access to mental health tribunal', February 2011 *Legal Action* 5. Legal aid continues to ensure access to justice for people with mental health problems by securing high quality legal advice and representation. As the article rightly quotes, the LSC's expenditure in mental health law has increased, illustrating our commitment to this vulnerable group of clients.

We accept that, in this category, the client/provider relationship often carries great significance, requiring a more flexible approach. This is why we will do all we can to ensure continuity of service, where required, by finding additional new matter starts to accommodate existing clients. However, to stay within the fixed legal aid budget, we would generally expect firms that have used their allocation to refer new clients, who will not have established such relationships, to other providers who have capacity to take on more cases.

Finally, to clarify the quote attributed to me, I was not implying that clients with mental health problems should be as easily adaptable to a change of solicitor as any other client – simply that many types of client we help are vulnerable, and they all need access to high quality legal aid.

Hugh Barrett, Executive Director of Commissioning, Legal Services Commission.

We welcome readers' letters and comments on *Legal Action*, which we will publish, subject to space. The editor reserves the right to shorten letters, unless it is stated that a letter should be published in full or not at all. The closing date for letters for the next issue is 20 June 2011. Post or e-mail your letter to LAG (addresses on page 2 of this issue).

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