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SETTING THE RECORD STRAIGHT: HUMAN RIGHTS IN AN ERA OF INTERNATIONAL TERRORISM

LAG

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

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Justice extorts no kind of price

In 1997, the new Labour government was keen on innovative solutions to criminal justice problems. High on its agenda was a pledge to speed up the criminal justice system. Since legal aid procedures, such as the means-testing scheme, seemingly slowed down the system and defendants' contributions brought in less than the scheme cost to administer, the government's daring solution was to abolish the test.

The criminal legal aid means test was administered by local court staff with a minimum of formality until it was abolished in 2001 as part of the reforms introduced by the Access to Justice Act 1999. For most defendants, representation was free and those who were better off paid a sliding scale of contributions from both assets and income.

Fast-forward to 2004, a more cynical time, when the government's retreat occurred. Following growing concerns about legal aid expenditure, the government published a Criminal Defence Service Bill as part of a range of measures intended to control it. One of the bill's main proposals was the reintroduction of a means test for grants of representation. This bill was lost when the 2005 general election was called.

When, in May 2005, professional footballer El-Hadji Diouf, who reportedly earned £40,000 a week, was granted criminal legal aid on a public order charge, the media led an outcry at this apparent abuse of public funds. Thirty-six MPs signed an early day motion deploring El-Hadji Diouf's good fortune. Meanwhile, lawyers attempted to explain that El-Hadji Diouf would have to pay a recovery of defence costs order to the Criminal Defence Service fund if indeed he was convicted. But the Criminal Defence Service Bill returned on a wave of outrage: it was introduced in the House of Lords in late May 2005.

In December 2005, during the bill's second reading in the House of Commons, Bridget Prentice MP, the parliamentary under secretary of state at the Department for Constitutional Affairs (DCA), commented on 'the unfortunate stream of well-publicised cases in which apparently wealthy individuals are able to claim legal aid under the current scheme. Few would disagree that such a perverse system needs to be tackled and that is precisely what the bill sets out to do'. It was not suggested that the 'working poor' should be deprived of legal aid. The Criminal Defence Service Act received royal assent in March 2006 and means-testing was reintroduced into magistrates' courts in October 2006.

It is now clear that the means test bars most working people from receiving help. It allows a single person his/her housing costs and a living allowance of £102 per week. If that person's remaining weekly disposable income exceeds £60.70, then s/he will not be entitled to receive legal aid. The New Policy Institute (NPI) has analysed the impact of this test. Seventy-five per cent of adults in households where at least one person is doing paid work are no longer eligible for legal aid, including some lone parents on the minimum wage. Just six per cent of those households where no one is in work are ineligible. The NPI comments that legal aid in magistrates' courts is now 'restricted to people not in work and those in working households with the lowest incomes, chiefly those where part-time work only is being done'.

In a cruel twist, the simplicity of a non-contributory legal aid scheme means that those who fall outside it must raise the funds to instruct a privately-paid lawyer. For those who have no assets, this means taking out a loan; those who cannot get a loan go unrepresented and are denied their right to a fair trial. If defendants borrow the money to pay a lawyer, then the debt that they contract with a bank or credit agency will be waiting for them at the end of any sentence they may serve (unlike the old legal aid contributions, which would be remitted if an offender was imprisoned). There is a pressing need for qualitative research on what is happening to people who are outside the scope of the means-testing scheme.

The government's aim was an estimated net saving of £35m on legal aid costs. However, the costs of dealing with unrepresented defendants will be displaced elsewhere in the criminal justice system. It may once more prove cheaper to abolish the means test and reinstitute advocacy assistance for defendants in simple, speedy cases. The DCA has promised a review of the scheme's operation starting in May 2007, but this will specifically exclude the policy itself or an assessment of any alternatives.

In 1996, the National Audit Office (NAO), which reports to parliament on the spending of central government money, conducted a review into the administration of criminal legal aid means-testing in magistrates' courts. LAG believes that the NAO should, once again, be invited to look at the current arrangements and ask if they make financial sense.

news feature

Review of ongoing debate on future of legal aid

The last few weeks have seen an embattled Department for Constitutional Affairs (DCA) and Legal Services Commission (LSC) working hard to defend the proposed market-based reform of legal aid on a number of new fronts. The DCA's and LSC's joint response to Lord Carter's final report, *Legal aid reform: the way ahead*, which was published in November 2006, has failed to reassure campaigners who continue to push the case that the changes will disadvantage the most vulnerable service users and those with complex problems (see January 2007 *Legal Action* 4).

Discussions in parliament about the future of legal aid took centre stage in December 2006 and January 2007 with two general debates. During the debate in January, MPs referred repeatedly to a detailed briefing distributed by the Access to Justice Alliance (AJA).* The AJA called on the government to postpone implementation of the legal aid changes until an adequate assessment had been made of their impact on:

- the supply of advice;
- the accessibility of legal aid services to all ethnic groups;
- the local networks of organisations which provide help and support to vulnerable people; and
- the quality of advice.

Responding to MPs' comments, Vera Baird QC, MP, minister for legal aid and social exclusion, accused the Law Society's 'What price justice?' campaign of misleading other organisations: 'I accept that a number of virtuous organisations have concerns; they have, of course, been driven by the Law Society, which has told them that solicitors are likely to withdraw from the kind of work in which they need their help. They will have taken that on trust … that campaign … was based on fees that are no longer applicable.' According to a report in the *Times*, the Law Society may consider a legal challenge to the changes, with counsel instructed to advise on the prospect of a judicial review.

In early January 2007, Citizens Advice convened a meeting of its all-party parliamentary group about the legal aid reforms. In another move, the Constitutional Affairs Committee (CAC) began its evidence sessions into the implementation of Lord Carter's reforms in mid-January. LAG has been asked to give oral evidence to the CAC.

Commenting on these developments in the legal aid debate, LAG's policy director, Michael MacNeil, said: 'LAG continues to play a central role in the debate and within the AJA. We are delighted that the alliance is engaging new audiences in the debate. We need to keep up the momentum as the real concern is not about providers, it is about what changes to the service delivery structure mean for those who are disadvantaged by society and need advice and help.'

* Available at: www.lag.org.uk.

Legal Services Bill progress report

The Legal Services Bill, which will bring about fundamental change for the legal profession, is currently going through the parliamentary process following its introduction in the House of Lords in November 2006 (see January 2007 *Legal Action* 5). While LAG broadly agrees with the creation and remit of the Legal Services Board, and supports the establishment of a new, independent Office for Legal Complaints, it has expressed concern over the government's decision to go further than the Clementi report's recommendations – on which the bill is based – in permitting Alternative Business Structures to provide legal services. LAG, together with the Legal Aid Practitioners Group and the Solicitor Sole Practitioners Group, is lobbying on this particular issue.

LAG's concern is that by allowing outside ownership of businesses, lawyers' ability to act in the best interests of their clients may be compromised by pressure to act in the best interests of the business instead. This is particularly likely to arise where the cross-selling to clients of other services, such as financial services, is involved. There is also concern that new commercial entrants to the market will cream off the more profitable areas of legal work which can be easily commoditised (such as conveyancing and probate); this would make it even less financially viable for high street firms to do legal aid work, as profit margins would be squeezed in other areas of their business.

Citizens Advice says 'bailiff reforms need rethink'

Citizens Advice is concerned that proposals to reform the law relating to bailiffs, contained in the Tribunals, Courts and Enforcement Bill, may end up doing more harm than good unless the government thinks again. Evidence from the experience of citizens advice bureaux (CAB) clients shows widespread and long-standing problems with bailiffs including intimidation, misuse of powers and overcharging fees.

However, while the bill provides for a welcome modernisation of the rules governing how bailiffs can take control of goods, it does not include the plans for an independent bailiff regulator that were set out in the white paper which led to the bill. As currently drafted, the bill will instead extend the current certification scheme which has, so far, proved ineffective in preventing or addressing the sort of rogue practices that CAB clients are reporting. In addition to this, the bill will extend to more bailiffs the power to enter domestic premises forcibly to enforce debts. Although the extended power of entry will require an application to the court, the bill does not set out any safeguards on when or how it should be used.

Citizens Advice is urging all interested parties to lobby the government to reconsider this policy on bailiff reform: it believes that the bill must be amended to include powers establishing an independent bailiff regulator and proper effective safeguards on any power of forcible entry to domestic premises for the purposes of debt enforcement. A House of Commons early day motion (EDM 220) calling for the regulation of bailiffs has also been tabled, and Citizens Advice is urging MPs to support it.

Mental Health Bill progress report

The Mental Health Bill, introduced in the House of Lords in November 2006, looks likely to have a rough passage through

parliament. The government has already suffered a defeat on an amendment tabled by a cross-party group of peers who are worried about patients' civil rights.
The Mental Health Alliance (MHA), a coalition of 78 organisations, hailed the Lords' vote as a good sign for the overhaul of a bill which it describes as 'deeply flawed'. LAG will support the MHA's work in seeking changes to the bill so that it:
- does not allow preventative detention for people who have committed no crime and will receive no health benefit from compulsory detention;
- limits community treatment orders to a small number of people who really need them and does not impose unnecessary conditions on them;
- reviews the composition of Mental Health Review Tribunals; and
- allows all patients subject to compulsory powers the right to an independent mental health advocate.

Challenge to new mandatory retirement provisions referred to European Court

Rachel Crasnow, a barrister specialising in discrimination law at Cloisters Chambers, writes:
Employees over the age of 65 who are forced to retire against their wishes may now be able to bring claims in the employment tribunal. On 6 December 2006, the High Court heard a judicial review application brought by the National Council on Ageing (NCA) (which operates under the names Age Concern and Heyday) on behalf of Heyday, the membership organisation, challenging the provisions of the new age discrimination regulations (Employment Equality (Age) Regulations 2006 SI No 1031) which allow mandatory retirement of employees over 65. In *R (The Incorporated Trustees of the National Council on Ageing) v Secretary of State for Trade and Industry*, the NCA was represented by Robin Allen QC and Declan O'Dempsey of Cloisters Chambers.* The court decided to refer the case to the European Court of Justice (ECJ).

If the ECJ accepts that some parts of the current regulations are unlawful, employers will not be able to rely on the default retirement age of 65 covering retirement dismissals. While the ECJ is unlikely to give its judgment on the case until 2008, litigants can now take steps to protect their positions in the following ways:
- Those over 65 who are forced to retire at any time from 1 October 2006 can put in claims for age discrimination and unfair dismissal within three months of the dismissal date and stay them, in the hope that their claims will eventually be covered by revised legislation.
- Employees approaching 65 should make a request not to retire, following the procedure in the regulations, and put forward arguments (including uncertainty over the legality of mandatory retirements) for the employer to allow them to continue working.
- The regulations currently allow employers to refuse to recruit people, who are within six months of their 65th birthday, because of their age. People who have applied for jobs and been turned down by employers relying on this exception can also submit claims to the tribunal and seek to stay them.

The present uncertainty may encourage employers to permit those approaching retirement to continue working (unless objective and non-age-related reasons exist for terminating employment) rather than face the risk of a valid claim.

*Declan O'Dempsey is co-author of *Age Discrimination Handbook*, LAG, 2006, £35.

news feature

A fair hearing for destitute asylum-seekers?

Research that has just been published by advocacy organisation Asylum Support Appeals Project (ASAP), entitled *Failing the failed*, examines the quality of decision-making within the National Asylum Support Service (NASS).* The report highlights a catalogue of errors by NASS caseworkers when deciding not to provide housing and welfare support under Immigration and Asylum Act 1999 s4 to destitute failed asylum-seekers, many of whom have physical or mental health problems. The qualifying test for s4 support is extremely strict and many failed asylum-seekers are not aware that they may be entitled to it. Those who apply for, and are refused, support are sent a decision letter from NASS that explains why they are not entitled to help.

The report looked at 117 negative decisions made by NASS between January 2006 and December 2006 and found that over 80 per cent of these decisions either misapplied the law or interpreted it incorrectly. ASAP is extremely concerned that support is being denied to asylum-seekers in this way, and believes that NASS should make consistent, clear and accurate decisions in line with its own policy and the law. Sue Willman, ASAP's chairperson, said: 'Every person who is refused support has the right to know exactly why support has been refused in clear terms. Poor decision-making takes away the few rights failed asylum-seekers have and leaves them homeless and hungry.'

Also, in early December 2006, ASAP launched Destitution Awareness Week to highlight the plight of asylum-seekers who are made destitute as a result of the lack of competent, accessible legal advice. During the awareness week, ASAP's legal advisers teamed up with eight immigration barristers and solicitors to provide free legal advice and representation to all asylum-seekers who had asylum support appeal hearings at the Asylum Support Adjudicators' headquarters in Croydon, south London.

The team spoke to every person who had an appeal during the week beginning 4 December. It represented ten people in all and advised two people; one person declined the service. In the cases where ASAP represented the appellant, four appeals were allowed and one appeal was remitted.

Sue Willman said: 'We are calling on the Legal Services Commission to address this problem by making legal aid available for NASS appeals.'

- Available at: www.asaproject.org.uk.

In the New Year Honours List, Geoffrey Bindman (founder of and now senior consultant at Bindman & Partners) has received a knighthood for his services to human rights.

LAG annual lecture

The 2006 annual LAG lecture was given by Keir Starmer QC, in London, in December. This is an abridged version of the speech – the full text is available at: www.lag.org.uk.

Setting the record straight: human rights in an era of international terrorism

The title of this year's lecture is: 'Setting the record straight: human rights in an era of international terrorism'. I chose this title because I have become increasingly concerned over the last year or so about the claim made by several members of the Cabinet, including the Prime Minister, that there is a conflict between ensuring and protecting human rights on the one hand and ensuring and protecting all of us from terrorism on the other. Often that claim takes the form of an attack on the Human Rights Act (HRA) 1998. But it also takes the form of an attack on the judiciary, with a suggestion deliberately trailed that our judges are wrongly undermining the war on terror by deliberately misinterpreting the law. The low point was reached in May this year when Mr Justice Sullivan quashed the secretary of state's refusal of discretionary leave to remain to a number of Afghans previously acquitted on charges of hijacking a plane. In doing so he upheld the decision of a panel of three adjudicators who, having heard evidence for eight days, concluded that the Taliban had condemned the Afghans to death and vowed to kill them if they returned to Afghanistan.

Commenting on the decision (as reported by the BBC on 10 May 2006), the Prime Minister said: 'It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this.' He was wrong to say so. In the first place, the idea that the judiciary is for some reason surrendering its independence in an ill-thought-out attempt to frustrate the government is absurd and smacks of paranoia. Second, as Lord Bingham pointed out in the 'Belmarsh detainees' case, *A (FC) and others (FC) v Secretary of State for the Home Department*; [2005] 2 WLR 87 (about which more later), although the government is fully entitled to insist on the proper limits of judicial authority, it is wrong to stigmatise judicial decision-making as in some way undemocratic. The HRA gives the courts a very specific, wholly democratic, mandate.

The clash between the government and the judiciary has been at its sharpest when the preventative measures included in the government's anti-terrorism legislation have been considered by the court. In the wake of 9/11, the government introduced what became Part 4 of the Anti-terrorism, Crime and Security Act (ATCSA) 2001. That Act provided for the indefinite detention of non-nationals who the Home Secretary 'suspected', but could not prove, were international terrorists. As is well known it was condemned by the House of Lords in December 2004 in *A and others* (see above) as being incompatible with the European Convention on Human Rights ('the convention'). Given the battles that have now erupted over control orders, the successors to indefinite detention, it is worth reminding ourselves what the House of Lords thought was wrong with the 2001 Act.

There were three parts to its decision. First, the law lords found that the 2001 Act did not rationally address the threat posed by Al-Qa'ida terrorists and their supporters because it did not address the threat presented by UK nationals. As the events of July 7 last year in London underlined, that was timely advice for which the government ought to have been grateful. Second, the law lords were

Poonam Bhari, LAG's chair, and guests at the reception held after the lecture

concerned that the 2001 Act, grounded as it was in immigration law rather than criminal law, permitted suspected terrorists to leave the UK on a voluntary basis and carry on their activities abroad. In one case the individual in question simply got the Eurostar to France. Third, the law lords were concerned that the 2001 Act permitted the detention of individuals who sympathised with terrorist activity abroad but posed no threat to the UK. Against that background it can hardly be suggested that their lordships were mischievously dismantling the government's anti-terrorism strategy. They were simply pointing out that the government's approach was discriminatory, irrational and, worst of all, ineffective.

What followed, of course, were control orders. These were introduced by the Prevention of Terrorism Act (PTA) 2005. That Act allows either the court or the secretary of state to impose 'obligations' on individuals who the secretary of state (again) 'suspects', but cannot prove, have been involved in terrorist-related activity. These have now been tested in the courts, leading to further clashes between the government and the judiciary.

In the first case to go to court, *MB v Secretary of State* [2006] EWHC 1623 (Admin), the government argued before Mr Justice Sullivan that so long as the court was satisfied that the secretary of state reasonably suspected the individual in question of terrorist-related activity, it, the court, should not test for itself whether his reasons were and continued to be well-founded. This was a deliberate attempt by the government to have its legislation read in such a way as to prevent, or at least limit, the courts testing the secretary of state's evidence. Unsurprisingly, Mr Justice Sullivan ruled that it was unfair, and thus incompatible with the HRA, to impose a control order on an individual on the basis that the secretary of state suspected him/her of terrorist-related activity and then to deny him/her the opportunity of showing that the secretary of state had, in fact, got it wrong.

Again, Mr Justice Sullivan bore the brunt of the backlash from the government. He was accused by ministers of misunderstanding the law and by the then ex-minister, Charles Clarke, of failing to take responsibility for the battle against terrorism. As Lord Bingham pointed out in his lecture on the rule of law last month, the convention that ministers, however critical of judges, do not publicly disparage them 'appears to have worn a little thin in recent times' (the sixth Sir David Williams lecture, p24). What the government has been less keen to acknowledge is that when the press coverage died down and the case went to the Court of Appeal, the secretary of state did a complete U-turn and argued that the court should test the secretary of state's evidence, if necessary even by cross-examination of his witnesses, and decide for itself whether there is a reasonable suspicion that the individual in question is, or has been, engaged in terrorist-related activity: ie, the very approach Mr Justice Sullivan had indicated fairness required. It seems that it was the secretary of state who had misunderstood his own law and that it was the judges who were demanding a greater role in the battle against terrorism.

Claire Dyer, the Guardian*'s legal correspondent, and, LAG author, Nic Madge*

In the second control order case to go to court, *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin), the obligations imposed by the secretary of state were in issue. Whether these obligations were a good idea or a bad idea was not the issue before the court. The issue was whether they amounted to a deprivation of liberty, as the individuals argued, or merely a restriction on movement, as the secretary of state argued. That was a crucial distinction because when parliament passed the PTA it insisted that the secretary of state should not have power to make a control order that deprived an individual of his/her liberty. Only courts could make such an order.

The inquiry by the court, therefore, was simply to ascertain whether the secretary of state had acted within the limits of the legislation that had been sponsored by his own government. Both Mr Justice Sullivan and the Court of Appeal found that he had not. But that was not because of some obscure human rights provision that had somehow found its way into our law from Europe, but simply because, and somewhat fundamentally, the rule of law required the secretary of state to obey his own legislation.

Initially control orders were only made against non-nationals. As we shall see, that all changed after the events of July 7 in London last year. The justification for making control orders against non-nationals was the same as the justification for preventative detention under the ATCSA, namely that non-nationals suspected of terrorism-related activity could neither be prosecuted nor deported. I will return to the first of these reasons later. But, at this stage, I want briefly to examine the second.

Under article 2 (the right to life) and article 3 (the prohibition on torture and ill-treatment) of the convention, there is a rule that no government can deport an individual to another country if there is a real risk that s/he will be killed, tortured or subjected to inhuman treatment on his/her return. That rule was first articulated by the European Court of Human Rights (ECtHR) in 1989 in a case called *Soering v UK*.

For seven years that rule has been applied throughout Europe and hundreds of individuals have been spared death, torture and ill-treatment as a result. It was applied in the case of *Chahal v UK*, a case that has been singled out by the government for criticism recently. Neither the Prime Minister nor the Home Secretary John Reid like the case of *Chahal*. They think that where they assess that non-nationals are a threat to national security, they should be free to deport them even if they face death, torture or ill-treatment on their return. That thinking was crystallised by the events of July 7 in London last year; although, paradoxically, those atrocities were committed by nationals, not non-nationals.

Until July 2005, the government accepted that it could not deport non-nationals suspected of terrorism to countries such as Algeria, Jordan and Libya because there was a real risk that they would face death, torture or ill-treatment in those countries. A few weeks later, that all changed. In August, nearly all non-nationals were taken off control orders and detained with a view to deportation to the very states that, only weeks before, the government had argued had such appalling human rights records that no one could safely be returned to them. In his press conference on 5 August 2005, the Prime Minister announced that 'the rules of the game are changing' and

that new grounds were to be published for deporting such individuals. Countries with well-documented histories of human rights abuses would be invited to promise not to torture anyone sent back to them by the UK. And if that met what he called 'legal obstacles', Mr Blair promised that the government would legislate further including, if necessary, 'amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights'.

John Reid was more forthright. In his speech to DEMOS on 9 August 2006, he said:

When I see the nature of the Chahal judgment by European judges, that we ought to be prohibited from weighing the security of our millions of people in this country … if a suspected terrorist remains here when we are trying to deport him … then I sometimes feel that so many people who should be foremost in recognising the threat that exists and the … nature of [the] threat ... don't get it. They just don't get it.

As the well-respected non-governmental organisation Human Rights Watch has observed, John Reid sees an explicit trade-off between the ban on torture, on the one hand, and keeping Britain safe from terrorism, on the other (*Dangerous ambivalence: UK policy on torture since 9/11*, November 2006).

The stage is therefore now set for another battle between the government and the judiciary – this time over deportation – and perhaps it is timely to draw breath and reflect on how it ever got to this. To untangle that question, we have to go back and examine the underlying rationale for the government's anti-terrorism measures.

It has always been the government's stated position that a criminal prosecution of those suspected of terrorist offences is preferable to preventative measures, whether those preventative measures be indefinite detention under the ATCSA or other measures such as control orders, introduced by the PTA. Thus the government repeatedly assured parliament when the 2001 Act was being debated that the priority was prosecution; if a prosecution could be brought, it would be brought.

Preventative measures should only be imposed where prosecution is not possible and only after the prosecuting authorities have, quoting Lord Rooker, 'reached the view that there is insufficient evidence and that it is not in the public interest to prosecute' (*Hansard*, 29 November 2001, Col 510).

Insufficient evidence in this context is a term of art. It does not mean that there is not enough material or information (ie, evidence) to persuade a jury that the suspected person is unquestionably guilty. It means that there is insufficient evidence that can be admitted under the current rules of evidence to enable a prosecution to take place.

It may seem odd at first blush that while serious offences such as murder and rape are routinely tried in our courts, such insuperable problems apparently exist when it comes to the prosecution of those suspected of terrorism that they must be detained, controlled or deported instead. Unpicking that oddity leads us to the door of the security and intelligence services, better known as MI5, MI6 and GCHQ.

The security and intelligence services now have at their disposal the most sophisticated and intrusive technology. The scope of their activities is loosely defined by undefined terms, such as 'national security', 'subversion', 'serious crime', and such statutory controls as there are on their activities are designed to leave them with a very wide discretion indeed. The purpose of their surveillance is intelligence gathering, intended in large part to disrupt operations, even to play dirty tricks, but not to build a case against suspects under the ordinary criminal law. A great deal of that intelligence is gained by the interception of communications, usually telephone tap evidence, which for many years was unregulated.

Things have changed and ever since the ECtHR condemned the UK's unregulated telephone tapping regime as lacking 'the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society' in *Malone v UK* (1984) 7 EHRR 14, telephone tapping has been put on a statutory footing, initially by the Interception of Communications Act 1985, but now by the clumsily titled Regulation of Investigatory Powers Act (RIPA) 2000. But – and here's the rub – like its predecessors, RIPA prohibits, in s17, the use of any telephone tap evidence in court. It even prohibits anyone from asking any question that might reveal whether or not telephone tapping has taken place.

It is this provision, RIPA s17, which, rather bizarrely, lies at the heart of the debate about deporting suspected international terrorists to countries where they face death, torture or ill-treatment. That is because even where telephone tap evidence establishes an overwhelming case that an individual has committed terrorist offences, RIPA s17 prohibits that evidence ever being used for the purposes of a criminal prosecution.

For many years there has been a strong body of opinion that this peculiarly British approach is wrong. The former Lord Lloyd conducted a review of counter-terrorism legislation in 1996 and concluded that:

We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so.

I say that this approach to telephone tap evidence is 'peculiarly British' because, as the law reform group JUSTICE has observed, lifting the ban on admitting intercept evidence would also bring the UK's position into line with that of virtually all the other legal systems in the world, including Australia, Canada, France, Germany, India, Israel, Italy, New Zealand, the Russian Federation, South Africa and the United States. The position has become even more unsustainable since the House of Lords' decision in *R v P* [2002] 1 AC 146 in 2002, which approved the use of foreign telephone intercept evidence in our courts.

The advocates of change have a powerful ally in the Attorney-General who recently confirmed his view that telephone tap evidence should be used routinely in court. Just over two weeks ago the *Guardian* reported the Attorney-General as saying:

We need to give police and prosecutors the tools they need in order to be able to bring dangerous criminals to justice. I do believe that intercept evidence would be a key tool to doing that (20 November 2006).

So who opposes a change in the law? The answer, according to press reports two weeks ago, is none other than the Home Secretary, John Reid, who has emphasised the long-term disadvantages such as diverting MI5 resources into typing out long transcripts of bugged conversations (*Independent*, 24 November 2006). Tiresome though that task inevitably would be, the alternative – preventative measures such as indefinite detention or

Alison Hannah, LAG's director, and Keir Starmer

control orders – also have their down side.

The true reason for the prohibition on admitting telephone tap evidence in court is that the security and intelligence services do not, unless they regard the task as necessary for their own purposes, follow leads or events which the material in question records so as to establish an evidential trail.

Professor Conor Gearty put it bluntly in an article he wrote for the *London Review of Books* in March 2005:

The intelligence services have never understood the need for a criminal process: their ideal world would be one in which official suspicion led straight to incarceration. This is why they so fervently oppose the idea that any of the 'evidence' they build up should be exposed to the rigours of a criminal trial ('Short cuts', 17 March 2005).

Unravelled in this way it becomes clear that the apparent tension identified by the Prime Minister and John Reid between protecting the public from terrorism and ensuring and protecting human rights stems not from the convention, the HRA, the cases of *Soering* and *Chahal* or the judges, but from the government's own reluctance to take on the security and intelligence services by insisting that henceforth they should prepare and record their intelligence differently and ensure that their methods and evidence are robust enough to withstand scrutiny in court. That is a policy choice; and not one dictated by the convention or the HRA.

There is another important twist. When assuring parliament that prosecution is its 'first priority', the government has always implied that before measures such as preventative detention, control orders or deportation are imposed, a careful decision will have been taken on the question of whether, in each case, a prosecution can be brought. Hence, Lord Rooker, on behalf of the government, told parliament on 27 November 2001 that: 'That matter is for the Crown Prosecution Service. It will already have formed the view that there is insufficient evidence and that it is not in the public interest to prosecute.'

The principle that prosecution is a priority is, of course, not merely politically expedient. It is rooted in fundamental basics of due process. If an individual is charged and prosecuted for a criminal offence, s/he is entitled to a fair trial. Although modifications to ordinary procedures are permitted to safeguard other interests, 'the overall fairness of a criminal trial cannot be compromised' (*Brown v Stott* [2003] 1 AC 681, per Lord Bingham). Reliance on secret evidence has never been accepted in criminal proceedings.

By contrast, if an individual is subjected to preventative measures, basic requirements of due process are jettisoned. The individual loses the right to know the case against him/her. S/he cannot give meaningful instructions to the only advocate who sees the secret information relied on by the court. Preventative measures can be imposed on the basis of suspicion rather than proof. There is little or no chance of an 'acquittal' and there is no fixed sentence. The decision whether an individual suspected of terrorist offences should be prosecuted or, alternatively, subjected to preventative measures is thus of critical importance to all concerned.

No one could question that the Crown Prosecution Service (CPS) is the appropriate body to decide such matters. Curious it is then that in proceedings in the High Court last week in the case of *E v Secretary of State* (judgment pending), it was revealed that the secretary of state had not referred the cases of any of the 17 individuals detained under the ATCSA to the CPS for a decision on whether any of them should be prosecuted for terrorism offences *at any stage* between the commencement of their detention under the ATCSA in December 2001 and the House of Lords' decision, three years later, that the 2001 Act was incompatible with the convention (a decision made on 16 December 2004). If the priority is prosecution that situation takes some explaining.

The government is right to take effective steps to combat terrorism and when it does so it deserves the support of all of us. Nothing in the convention or the HRA prevents those steps being taken. On the contrary, the right to life enshrined in both requires those steps to be taken. But when tensions emerge, it is important carefully to identify their origin. The government's position on not allowing telephone tap evidence to be used in court and its decision not to refer the cases of those detained for over three years under the ATCSA to the CPS for a decision on whether they should have been prosecuted for terrorist offences may be capable of coherent and compelling justification. But that is where the focus of the debate on terrorism and human rights should be, not on the misconceived notion that there is a conflict between ensuring and protecting human rights on the one hand and ensuring and protecting all of us from terrorism on the other.

Photographs by Joanne O'Brien

LAG is grateful to the College of Law for supporting the event at which this lecture was delivered

The College of Law of England and Wales

LAG annual lecture

With the announcement that the proposed Community Legal Advice Centre (CLAC) will not now go ahead in Leicester until at least April 2008 and the general lack of takers for the CLACs' initiative as originally envisaged by the Legal Services Commission (LSC), apart from in Gateshead, Steve Hynes, director of the Law Centres Federation (LCF), asks is it time to bury the corpse of this particular policy initiative or are there still twitches of life left in it?

Is there life after CLACs?

Introduction

Mainly due to the problem of getting local authorities interested and the outright hostility of the not for profit (NFP) advice sector, the LSC has had great difficulties getting the CLACs' initiative off the ground. It seems that the Leicester CLAC tender came unstuck as there was not sufficient cash in the tender to meet the specification, something which a number of commentators have argued. Leicester Law Centre's® manager Glenda Terry said:

One of the main reasons that we did not get the tender was that we were honest with the commission and local authority. We told them we could not meet the figures for enquiries they asked for.

The lack of a successful tender in Leicester must be a disappointment to the LSC as when CLACs were first floated in the LSC's consultation paper *Making legal rights a reality*, in July 2005, what was envisaged 'was up to 75' CLACs in areas of high unemployment (defined as being areas with over 50,000 benefit claimants in the consultation paper).

It is not a new idea to establish specialist centres in areas of high social deprivation. Over the last five years, LCF has established new Law Centres jointly with the LSC in such areas, for example in Plymouth where Devon Law Centre, the first of these jointly developed Law Centres, was established. Moreover, with the Carter proposals for fixed fees due to be implemented in October this year, it will be imperative for service providers to be able to deal with higher volumes of cases. Being located in areas where potential clients live is obviously going to help with this.

So why has the CLACs' initiative so far failed to inspire local government and potential providers? LCF would suggest that the blame lies mainly with the LSC's unwillingness so far to involve the likely providers in the design of the service along with its failure to appreciate the sensitivity around local government funding of advice.

Both local and central government money needed

A major problem is the LSC's assumption that local government will remain committed to its relatively recent high levels of expenditure in social welfare law. Throughout the late 1970s and the 1980s, there was an expansion of funding for both directly managed council services and services in the NFP sector. This is an illustration of local government at its best; leading innovation where central government followed by recognising that anti-poverty measures need to be backed up by access to good quality advice and representation. It should be stressed though, that these remain non-statutory services; councils used the fig leaf of administering housing benefit, which they took over in the early 1980s, to justify the expenditure, particularly on welfare benefits services.

Local councils and government are both masters at blaming each other for cuts in services. A local non-statutory service which sits beside a nationally funded service, legal aid, is particularly vulnerable to the argument, 'It's the government's responsibility not ours'. By blundering into a debate around tendering such services, the LSC risks upsetting the consensus around their funding.

Camden council in north London illustrates what could happen in the next few years. A combination of a change in political control and pressure on budgets for non-statutory expenditure has led to the proposal to cut its expenditure on the Law Centres and citizens advice bureaux it funds by 40 per cent. Let us hope that in Camden the council draws back from a decision which would decimate excellent and much needed services. Under the present system, legal advice services which provide a comprehensive service to clients need a combination of both local and central government money to do so.

Local government 'fiefdoms'

Carolyn Regan, the LSC's new chief executive, has been quoted as saying about CLACs: 'I suspect you often have to go around some well-established fiefdoms to get something like this off the ground.' In saying this, Carolyn Regan, albeit inadvertently, alights on the other factor that should be considered in this local political mix – the understandable desire for council officers to defend their in-house 'fiefdoms' against cuts or possible competitive tendering.

Many heads of welfare benefits services must worry what would happen if their in-house services were put out to tender.

Could they compete against their local citizens advice bureau, other NFP agency or private sector provider? Leicester City Council demonstrates the potentially invidious position councils that can be led into with regard to the competitive tendering of advice services. Leicester reduced its NFP advice sector by introducing a competitive tender for the generalist advice service in 1998, resulting in the closure of Leicester Citizens Advice Bureau. This led to considerable suspicion and resentment against Leicester City Council in the NFP sector. This still lingers as the council has at no time seemed to consider subjecting its large in-house service, Leicester Welfare and Employment Rights Advice Service, to the rigours of market competition.

Derby City Council is in a similar situation, as it is considering plans for what amounts to a proposed tender for the voluntary sector services it funds, though carrying the label 'CLAC'. Like Leicester, it has so far excluded its large in-house advice service from this tender. Such council officer-inspired moves to protect in-house services risk letting the genie out of the bottle. This particular genie being the often illusory character called 'cost savings through outsourcing', which can prove ideologically attractive to councillors of various political hues looking to save money to divert into electorally attractive policies.

LCF is not arguing that, in the wake of the Leicester CLAC debacle, the way forward is best value tendering for all local council and LSC-funded social welfare law services. LCF, like the other NFP providers and, for that matter, most local councils, believes that these are public services serving the most vulnerable and are therefore inappropriate for tendering.

With the lack of bidders it is clear that there is not a market at the moment for the sort of open door, social welfare law city centre services that are envisaged. This is not surprising as the tenders that were offered were no more than a reconfiguration of the money already paid to underfunded NFP organisations. For example, the Gateshead tender is based on a budget that has been at a standstill for ten years. Against the CLACs policy is also the practical consideration of the time and resources it takes to design and run individual tenders for a game of musical chairs in which the competitors end up sitting on the same chairs they started on when the music stops. This is particularly relevant to the LSC, which is likely to have far less staff in coming years to manage this particular party game.

Gateshead CLAC

In the Gateshead tender, the only private sector bidder did not make the shortlist due to lack of a track record in social welfare law. Even if a private sector bidder had emerged, it would have been as a likely 'loss leader' bid in the hope of picking up other tenders, to make savings of scale, or to provide additional profitable services to the client group, such as employment training. This would have raised inevitable questions around conflicts of interest.

The Gateshead CLAC will be run by Gateshead Citizens Advice Bureau and the Law Centre. 'We are planning to have a joint appointment system, which will mean that outside agencies can ring to make appointments to see specialists working in either organisation or one of our partners in private practice', said Gateshead Law Centre's manager, Robin Winder. Shared premises are also planned for the two organisations, but this will be subject to the availability of funding and the granting of planning permission.

Glenda Terry reports that discussion is taking place between the various specialist advice agencies in Leicester to introduce an internet-based co-ordinated appointments service so that clients can be offered appointments for specialist advice across a number of agencies. This is perhaps a more practical solution to the Pascoe Pleasence, and most recent Richard Moorhead and Margaret Robinson, research that points to the need for clients to be offered seamless services around the clusters of problems they face.[1]

Voluntary sector *Compact*

In Leicester, NFP organisations were not consulted on the proposed CLAC and there was only a limited consultation in Gateshead. The CLAC was presented as a fait accompli. This points to the main flaw in CLACs as they were first envisaged; the abject failure of the LSC to consult on their design. This seems to have happened because the LSC was under the impression that it was precluded from doing so by competition law.

However, in failing to consult on the service design, the LSC was out of step with practice across the rest of Whitehall, which is informed by the voluntary sector *Compact on relations between govenent and the voluntary sector in England*.[2] Section 2.9 of the *Compact funding code of good practice* states: 'Government undertakes to provide whenever possible an opportunity for the voluntary and community sector to contribute to programme design.'

There is an opportunity for the LSC to bring the sector, albeit belatedly, into the design process. This would be in step with the drive announced at the same time as the pre-budget report in December 2006 to switch services to the NFP sector where the sector is best placed to provide them.

It is a senseless waste of resources to establish a new brand either locally or nationally for civil law services when there are well established private and NFP services. Most importantly these services are popular with, and trusted by, our clients. New services take time to establish themselves in a marketplace where news spreads essentially by word of mouth. In addition to this, Law Centres and other NFP agencies have a good track record of bringing in other resources which the LSC cannot replicate.

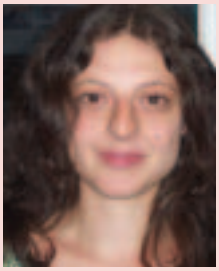
Moving towards seamless local services

There are signs that the policy on CLACs and their less debated but sensible siblings, Community Legal Advice Networks, is being re-evaluated by the government and the LSC. Everyone is agreed that looking at problems of referral fatigue and how to provide better provision of seamless services to tackle clusters of problems faced by clients is what is needed.

LCF is calling on the government, the LSC and the legal advice providers to work on joint proposals that will encourage local solutions to better integrate advice services. The voluntary sector *Compact* can provide the framework to do this. As a first step, a national agreement between the LSC and providers should be developed as a matter of urgency. This would give a lead and cut through the rancour that has so far characterised the debate on the solution to the problem of accessing legal services for the most poor and vulnerable clients.

1 *Causes of action: civil law and social justice*, Legal Services Research Centre, Research paper no 14, 2nd edition, 2006 and *A trouble shared – legal problems clusters in solicitors' and advice agencies*, Matrix Research and Consultancy, Department for Constitutional Affairs research series 8/06, November 2006.

2 Available at: www.thecompact.org.uk.



In this article, Laura Janes, chair of Young Legal Aid Lawyers (YLAL), summarises the main findings of a survey of YLAL members on their views about the Carter Review and their future in the profession.

Legal aid: what future for the 'fourth emergency service'?

Introduction

YLAL was formed in April 2005 to promote legal aid among young lawyers and to provide a voice for those entering the field at a time when the profession faces irreversible and possibly disastrous restructuring. YLAL believes that the sustainability promised by the Carter reforms will be meaningless without a skilled work force to practise legal aid work: the reforms are already having a profound effect on young lawyers as shown by the results of a survey of YLAL's members.

Gloomy prospects…

Thirty-two per cent of young legal aid lawyers did not believe they would be working in legal aid in five years' time. However, it is clear that this response does not mean that new entrants particularly want to leave legal aid for private practices that do not do legal aid work. Rather, narrative responses suggested most people enter legal aid because of a desire to promote justice, but felt that in the long-term the profession is simply not sustainable.

The three key reasons for the level of concern appear to be that:

- the current reforms to legal aid are creating a dearth of training and qualifying opportunities;
- lawyers are deterred as they feel it will not be possible to provide a high quality service under the Carter reforms; and
- being a legal aid lawyer will simply cease to be financially viable.

Serious idealists

The rapid growth of YLAL to over 400 members and four regional branches in less than two years shows that there is a real commitment among new entrants to legal aid. The survey confirmed that the prime motivation of young legal aid lawyers entering the profession is a belief in social justice. Financial gain is certainly not a reason for entering this area of work. In the survey, only one per cent of respondents listed financial reward as a motivation for doing legal aid. The overwhelming majority of respondents (76 per cent) listed working towards a more just society as a chief motivation for doing legal aid work.

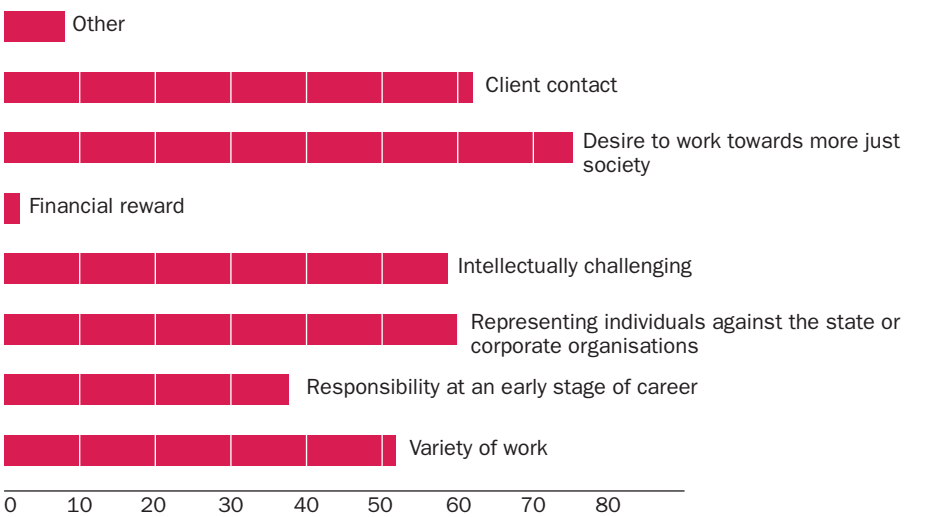
For intelligent young people the rates of pay in the City are incomparable: if it was money we were after we would not be working in legal aid (see Figure 1). Young legal aid lawyers want to provide a public service to some of the least privileged and most socially excluded members of society. While it is a fascinating and rewarding area of work, these things alone will not be enough to sustain the recruitment and retention of lawyers undertaking this kind of work in the future.

The impact of Carter: the training dearth

It is clear from the survey that new lawyers simply cannot envisage being in legal aid in five years' time *because* of the current reforms. In fact, 59 per cent of respondents admitted that the Carter reforms had given them cause to consider alternative careers.

Anecdotal evidence gathered as part of the survey revealed an enormous amount of uncertainty among potential employers and employees. One member commented that: 'In interviews for training contracts, when I have asked whether/how the interviewer thinks their firm will change over the next few years, the clear response

Figure 1: What attracts you to a career in legal aid?



has been that it will change, and that it will make it far more difficult to deliver quality services, and services at all in certain areas, as a result of Carter.'

Forty-two per cent of respondents felt that the Carter review had already negatively affected them. Some respondents were able to provide examples of firms rejecting training contract applications because of the proposals: 'Many firms I contacted told me that they were not recruiting for the foreseeable future until they knew in the short term at least how they would be affected by the report – ie, possible restructuring priorities, and no capacities to take on new staff.'

It is against this gloomy background that the vast majority of young legal aid lawyers persist in attempting to forge a career in legal aid. One respondent commented:

I continue to be determined to remain in this area but have considered other areas as a back up plan. There is no certainty in this area and no guarantee whether there will be any jobs out there in five years' time.

Carter fails the quality mark

For those who do remain persuaded to pursue a career in legal aid, there are further hurdles: most believe that they will not be able to provide the quality of service they would like to provide. This is a big turn-off for young lawyers who are almost wholly motivated to do the work by their belief in the importance of legal aid in a fair and just society.

The overwhelming majority of respondents were convinced that Carter will compromise quality: One hundred per cent of respondents felt that fixed fees would not promote a better quality of justice, and 86 per cent felt that they would not promote efficiency.

The general view of young legal aid lawyers is that the suggested rates of pay are punitively low. This is likely to result in firms being forced to cherry pick simple cases or a reduced quality of service. One survey respondent felt that 'people will focus on easy areas of law to earn enough to survive'. Ninety-three per cent of survey respondents felt that the introduction of fixed fees would place them under pressure to provide a quality of service below the standard that the interests of justice require.

Lord Carter persistently claims that one size does not fit all; but his proposals appear to provide very limited room for individualised consideration of cases. The principle of fixed fees across the board, calculated on the basis of seriously questionable data, is both likely to have a devastating impact on the quality of legal services that all clients receive and to penalise vulnerable clients the most. Why should the less privileged and most socially excluded only have access to legal services which will be of a lesser quality than those available to clients able to fund themselves? One respondent to our survey summarised the likely position well: 'The foremost consideration for every lawyer will be when does the money run out as opposed to what is in the best interests of the client.'

Some respondents were frank about the quality issue – one stated that: 'I do not want to provide poor quality legal representation to vulnerable clients' and another that: 'If I can't do the job properly, I don't want to do it at all.'

Many respondents felt that the issue of quality was inextricably bound to the appalling rates of pay. One highlighted the difficulties 'with the prospect of a greater part of the work being delegated to non-qualified workers as a cost-cutting measure' and felt that this would lead to 'a reduced service to clients' but also pointed out that 'the proposed Carter fees are so low that my salary is likely to remain fairly low and I cannot afford to work on this salary long term'.

Another respondent put the issue simply, asking:

How will I buy a house, take care of any children I might have, have any sort of life outside of work if I am not paid according to my time and skills? I would leave law altogether if I can't do legally aided work. I am qualifying as a lawyer so that I can help the most vulnerable members of society and help create a sense of justice and redress. I couldn't do that outside of legal aid work so I would retrain in an entirely different field if necessary.

Rich parents and a calling

There was no doubt from the survey results that there is great concern that it is simply not financially viable to be a legal aid lawyer, as shown by the following response:

I have a young family to support. Since I went into the publicly funded sector five and a half years ago, hourly rates have not changed, fixed fees have come in and are now being restricted even further. I simply cannot afford to remain in the sector if this is the way things are going.

Training as a lawyer is an expensive business. Forty-nine per cent of our respondents had spent between £10,000–£20,000, 16 per cent had spent between £20,000–£30,000 and eight per cent had spent over £30,000. Thirty-one per cent of our respondents owe between £10,000–£20,000, 22 per cent owe between £20,000–£30,000 and seven per cent owe over £30,000 as a result of their education and training expenses.

Such debts will be almost impossible to pay off on the very low starting salaries offered in legal aid, both for trainees and newly qualified lawyers. The possible abolition of the minimum training contract salary and the reintroduction of unfunded pupillages further reduce prospects of financial certainty.

The result will be that the profession loses bright and committed lawyers simply because they cannot afford to be legal aid lawyers. With the best will in the world, young lawyers simply cannot afford to work for such low pay. The following comment reflects the general sentiment among YLAL members: 'as much as I enjoy the work, if I am unable to pay off my debts when other so called "key workers" are getting student loans paid off for them and help with housing etc, it all becomes a little disillusioning'.

It is clear that the immense hurdles new entrants to legal aid have identified in the survey will have a profound effect on both the diversity and sustainability of the profession. Notably, despite numerous submissions to Lord Carter and the Department for Constitutional Affairs about this, not one of the many documents about the way ahead addresses the issue.

1 The results are taken from the first 100 respondents to the YLAL survey conducted in September 2006. All respondents were members of YLAL, which means they are either students intending to practise in legal aid, training as legal aid lawyers or newly qualified (under ten years). The survey was made in order to provide evidence for YLAL's submissions to the Constitutional Affairs Committee's inquiry into the implementation of the Carter review and the submissions and survey results are available in full at: www.younglegalaidlawyers.org.

YLAL has organised a 'Question Time', hosted by Jon Snow, to address the issues raised by the findings of the survey of its members. 'Legal aid: what future for the fourth emergency service?' will take place at 7 pm on 22 February 2007 at South Bank University. Tickets are free although a donation of £5 is requested and places can be reserved by e-mailing: **ticket@younglegalaidlawyers.org**.

Family and children's law review

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

POLICY AND LEGISLATION

Children and Adoption Act 2006

The Children and Adoption Act (CAA) 2006 received royal assent on 21 June 2006. Section 17 of the CAA, which came into force on the same day, simply provides for 'short title, commencement and extent'. The remaining provisions will come into force on days to be appointed. However, there is some controversy regarding the availability of resources to fund the implementation of the CAA's provisions. The government is currently considering plans for implementation and later in this year will outline the timetable for implementation of each provision.[1]

Practitioners will find the most pertinent provisions are contained in CAA Part 1 (orders with respect to children in family proceedings):

- Section 1 makes provision to enable courts to make directions and conditions in respect of contact activities. It also inserts ss11A to G after s11 of the Children Act (CA) 1989.
- Section 2 permits the court to direct that a Children and Family Court Advisory and Support Service (CAFCASS) officer monitors contact and reports to the court on such matters relating to compliance, as the court may specify, for a period of up to a year. It does so by inserting s11H into the CA 1989.
- Section 3 states that whenever a court makes or varies a contact order, it must attach a notice warning of the consequences of a failure to comply with the same.
- Section 4 enables the court to make an enforcement order that requires a person who has breached a contact order to undertake unpaid work. Before making an enforcement order, the court must be satisfied 'beyond reasonable doubt' that the person has, without reasonable excuse, breached the contact order. The court must also be satisfied that the making of the order is necessary to ensure compliance with the contact order and that the order is proportionate. Section 4 inserts s11M into the CA 1989 which allows the court to ask a CAFCASS officer to monitor a person's compliance with an enforcement order. The details surrounding the enforcement order are contained in CAA Sch 1.
- Section 5 allows the court to require an individual, who has caused financial loss to another as a result of breaching a contact order, to pay compensation up to the amount of the loss.
- Section 6 extends the power of the court in relation to the duration of family assistance orders and the threshold for making a family assistance order is lowered as there is no longer a requirement that these orders be made in exceptional circumstances. The court may make an order for a maximum duration of 12 months. Previously, the limit was set at six months.
- Section 7 requires CAFCASS officers to carry out risk assessments and produce them to the court, in respect of any of their functions in private law family proceedings under the CA 1989, if they suspect that the child concerned is at risk of harm. The bulk of the risk assessments will relate to applications for residence and contact orders.

The second major thrust of the CAA is the reform of adoptions with a foreign element. The provisions are contained in CAA Part 2 ss9–14.

- Section 9 provides for the secretary of state to impose special restrictions on intercountry adoption from countries and territories where the secretary of state has decided that it would be contrary to public policy. This section applies to all adoptions, whether or not the country in question is a signatory to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 ('the Hague Convention 1993'). Before the CAA, the secretary of state had no express statutory right to place restrictions on adoptions from particular countries. Historically, the UK has placed restrictions on countries such as Guatemala.

Comment: One criticism of the CAA has been its failure to define the meaning of 'public policy'. It is also unclear what criteria the secretary of state will apply when deciding whether or not to apply special restrictions to a particular country. Like many other pieces of legislation, the CAA continues the trend of including detail within future regulations. The CAA does not require the secretary of state to consult with any particular party or body except for the National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland before declaring that special restrictions will apply to intercountry adoptions from a particular country. This enactment confirms the government's refusal to accept recommendations on the need to consult more widely with adoption agencies based in the UK and abroad.

- Section 10 requires the secretary of state to keep the list of restricted countries and territories under review.
- Section 11 makes provision for the special restrictions that may be applied as a result of CAA s9.
- Section 12 permits the secretary of state to impose extra conditions that must be met in relation to adoptions from any restricted country or territory. A person who brings, or causes another to bring, a child into the UK without meeting those conditions is guilty of an offence.
- Section 13 empowers the secretary of state or the National Assembly for Wales to charge a fee to adopters or prospective adopters for services provided or to be provided in relation to intercountry adoptions. The fee charge will not be greater than the cost of providing the services to the prospective adopters.
- Section 14 amends previous legislation concerning intercountry adoption. Section 14(1) amends Adoption and Children Act (ACA) 2002 s83 by making restrictions on intercountry adoptions more rigorous. Currently, s83 makes it an offence for British residents to bring a child into the UK who has been adopted within a period of six months before entering the UK. Section 14(1) extends that time limit to 12 months.
- Section 15 Sch 2 deals with minor and consequential amendments, and s15 Sch 3 deals with repeals.
- Section 16 deals with the making of regulations and orders under the CAA.

Once the CAA is fully in force it will add and amend the following Acts:

- Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11;
- Family Law Act 1986 ss5, 29, 30, and 31;
- Children Act 1989 ss11A–11P, 14B, 16, 16A, 91, 104, 105, and Sch 8;
- Family Law Act 1996 Sch 3 para 9; and
- Adoption and Children Act 2002 ss26 and 83.

Family Justice Council first annual report

In September 2006, the Family Justice Council (FJC) published its first annual report, which looked back at its work to bring in a new joined-up approach to family cases.[2] The report, which is 74 pages in length, highlights the work of the FJC and the operation of its committees.

Over the last year, the FJC has been a lead advocate in the debate on transparency in family courts. The FJC is also promoting strongly more effective expert witness training through the 41 Local FJCs (LFJCs) that it has put in place. The FJC is the primary body for promoting an interdisciplinary approach to family justice. This is seen as being in the best interests of children and litigants themselves who will usually need to co-operate closely in the future.

The FJC's full business plan for 2006/2007 is contained in its annual report at Annex D. The FJC has set itself six strategic objectives to deliver in 2006/2007:

- To establish effective links with and support to the LFJCs;
- To implement the recommendations of the Spencer review of the national council;
- To examine the use and role of experts in the family justice system;
- To identify and address major issues of concern in proceedings safeguarding children (public law and adoption);
- To ensure better outcomes for parties and children in private law proceedings;
- To identify and address major issues which affect families in relation to financial and property matters.

The FJC is funded by the Department for Constitutional Affairs under the sponsorship of the Family Justice Division. Much of the work of the FJC is carried out through its committees. The three main committees are:

- Children in Safeguarding Proceedings (Children Act 1989 and Adoption and Children Act 2002);
- Children in Families (Children Act 1989 and Family Law Act 1996); and
- Money and Property (Matrimonial Causes Act 1973).

Constitutional Affairs Committee on family courts

On 21 November 2006, the Constitutional Affairs Committee (CAC) welcomed the government's assurances that it has accepted the committee's insistence that there should be no reduction in the number of legal advisers in magistrates' courts.[3] The CAC, in its report on the family courts entitled *Family justice: the operation of the family courts revisited*, had warned that a reduction in the number of legal advisers in family proceedings courts would cause additional difficulties and hinder the judiciary from reducing delays in the family proceedings courts.[4] The CAC also called on the government to 'open up the family courts' so that contentious cases about access and custody of children become more transparent. The CAC recommended that more should be done to resolve family court cases through mediation wherever possible.

Care matters green paper

In October 2006, the government produced the green paper *Care matters: transforming the lives of children and young people in care* for consultation.[5] The closing date for responses was 15 January 2007. *Care matters*' laudable aim is to address every aspect of the lives of children in care and every public service that they encounter. It also claims to deliver reform both in the way in which the care system works for children and the quality of experience that they and others, who are on the edge of entering or leaving care, actually receive. It also seeks to put the voice of the child in care at the centre of the reforms and day-to-day practice. Through a series of regional conferences and workshops, the consultation has sought to include the views of children and young people who are or have been in the care system. *Care matters* recognises that earlier reforms through the previous green paper *Every child matters* agenda, including the Quality Protects Programme and the Children (Leaving Care) Act 2000, have not improved the outcomes of the lives of children and young people leaving care significantly.

- Chapter 1 sets out the need for reform and the shocking statistics on the education of children in care. Only 11 per cent of children in care obtained five good GCSEs in 2005 compared with 56 per cent of all children, and similar performance gaps exist at all stages both before and after Key Stage 4. The long-term outcomes for children leaving care are also devastating. They are over-represented in a range of vulnerable groups including those not in education or training post–16, teenage parents, young offenders, drug users and prisoners.
- Chapter 2 launches a national debate on the future of care by examining who care is for, whether there are any groups of children for whom care is not appropriate and what the profile of children in care should be in the future. It also examines what future steps could be taken to reassert the responsibility of parents and support family and friends as carers.
- Chapter 3 looks at the role of corporate parenting and seeks to address the gap that children in care have identified as being the lack of a consistent adult in their lives. The government's proposals include:
  – exploring the feasibility of piloting new independent 'social care practices', which would be small independent groups of social workers who contract with the local authority to provide services to children in care;
  – piloting the use of individual budgets for each child in care to be held by his/her lead professional – ie, his/her social worker;
  – clarity over the use and role of care plans; and
  – a revitalisation of the independent visitor scheme to provide 'independent advocates' for children in care whose role would be to act as a mentor to encourage their achievements.
- Chapter 4 looks at the need to ensure that children are placed in correct placements in order to make certain they are not moved around the care system, which can prove highly damaging to their development and ability to achieve their potential. The proposals include the establishment of a Multi-Dimensional Treatment Foster Care pilot to assess the success of the new regional commissioning units which the government believes will secure better value for money and offer children a choice of placements.
- Chapter 5 sets out the proposals for improving education services for children in care. *Care matters* lays the blame for poor educational outcomes on the fact that many children in care are moved frequently and do not have a parent to champion their cause.

However, this writer suggests that the problems are more deep-rooted than this, particularly when a child in care has special educational needs (SEN). Usually, it is a parent who makes the request for the local authority to carry out a statutory assessment of his/her child's SEN, which is the starting point for implementing the SEN statementing process. Very few social workers and foster carers are trained to understand the legal framework for SEN provision, which is why so many children in care fail to have their SEN identified.

- Chapter 6 seeks to improve the life experiences and broader education of children in care, and improve the level of support for young women in care who become pregnant.

Comment: Professionals and legal advisers involved in care proceedings and providing services to looked-after children will be fully aware that the care system is a Cinderella service which frequently condemns such children and young people to bleak futures. Unless there is some significant investment in holistic services to support foster carers and young people themselves, there is frankly no point deluding ourselves that the new proposals will deliver improved life chances for care-leavers.

CASE-LAW

■ Re D (a child)

[2006] UKHL 51,
16 November 2006

This judgment provides useful authority on the meaning of 'rights of custody' as contained within article 5 of the Convention on the Civil Aspects of International Child Abduction 1980 ('the Hague Convention 1980'). The facts of the case, which was on appeal from *D (a child)* [2006] EWCA Civ 830, 25 May 2006, involved an 8-year-old child who was removed from the jurisdiction of Romania by his mother in December 2002, without the prior knowledge of the child's father. The child's parents were married in January 1998 and had divorced in November 2000. The child and his mother had remained in the UK since December 2002 and the child had settled down to a new life in the UK to the extent that he was reluctant to return to Romania.

Article 12 of the Hague Convention 1980 only permits the courts in a signatory country to consider ordering the return of a child to the original country if the removal of the child was 'wrongful' within the meaning of article 3 of the convention. Central to the concept of 'wrongfulness' is the question of whether the father had 'rights of custody' within the meaning of the convention. The Romanian legal code at the time of the couple's divorce did not accord parents with equal parental responsibility in the event of a divorce.

In the leading judgment, Baroness Hale held that, because under Romanian law the divorced father did not have 'rights of custody' when the child was removed, the removal could not be 'wrongful'. Therefore, the court had no power to order the return of the child under article 12. The appeal was allowed.

Baroness Hale led a fascinating discussion in her judgment on the rights of children to express their views in Hague Convention 1980 cases. She identified that hitherto there was no developed practice in this country, in Hague Convention 1980 cases, of enabling the views of children to be heard independently of the abducting parent, save in the most exceptional cases. She called on this test to be less stringently applied and for there to be an examination of the question of hearing children's views afresh in light of the requirements of the Brussels II revised regulation.[6]

Comment: Children's rights lawyers will be delighted to see this judicially-led initiative to bring proceedings in England and Wales into line with many other European jurisdictions where, at the outset of Hague Convention 1980 proceedings, there is a requirement to consider whether and how the child is to be given the opportunity to be heard.

Publicity in CA 1989 cases

In *Clayton v Clayton* [2006] EWCA Civ 878, 27 June 2006; August 2006 *Legal Action* 20, the Court of Appeal held that the prohibition contained in CA 1989 s97(2) against the identification of children involved in court proceedings, lasts only so long as the proceedings themselves and does not continue after their conclusion as had been understood previously. The court's decision, published on 27 June 2006, was accompanied by a press release in view of the court's reversal of previous case-law and practice. As highlighted by *Pelling* below, the tide of case-law continues to flow in favour of increased publicity in court cases involving children.

■ Pelling v Bruce-Williams

[2006] EWCA Civ 1046,
25 July 2006

Dr Pelling, an indefatigable litigant in person, was a party to residence proceedings concerning his son which led to an injunction order in 1996 restraining publicity of the case. He took appeals to the European Court of Human Rights (*B and P v UK* App Nos 36337/97 and 35974/97, 24 April 2001; (2002) 34 EHRR 529) and to the Court of Appeal (*Pelling v Bruce-Williams and Secretary of State for Constitutional Affairs (interested party)* [2004] EWCA Civ 845, 1 July 2004; August 2005 *Legal Action* 14).

In the instant case, Dr Pelling sought to discharge or, alternatively, to set aside the original injunction order on the ground that, following the Court of Appeal's decision in *Clayton* above, it should never have been made. He pointed out that the court had itself named the child and the parties in a later judgment. He also claimed that there had been a breach of natural justice as a result of the injunction being made without him being heard.

The Court of Appeal held that the result of its decision in *Clayton* was that Dr Pelling was, indeed, entitled to have the 1996 injunction order discharged. However, the court refused to set the order aside, since such orders were standard at the time. Even if Dr Pelling had been heard fully, there was no doubt, in the Court of Appeal's view, that the order would have been made on the law as it was then applied.

■ In the matter of BW (a child): Norfolk CC v Webster and others

[2006] EWHC 2733 (Fam),
2 November 2006

Munby J, sitting in the High Court, applied *Clayton* above in lifting an injunction order restricting the access of the media to an interim hearing in care proceedings. The parents fled to Ireland before the birth of their youngest child, B, their three older children having been previously removed from them for adoption on the basis of findings of physical abuse. The parents had always denied the allegations and there had been extensive media coverage of their claims that they had been the victims of a miscarriage of justice.

On their return to England, care proceedings were instituted in respect of B. The court made an order preventing the media, including the BBC and newspaper reporters, from either being present at an interim hearing or reporting on the evidence. The parents, the BBC and the newspaper publisher applied to vary the order to allow the media to attend the hearings. They were opposed by B's guardian.

The court found that the original order was too wide and had interfered disproportionately with the parents' right of freedom of expression under article 10 of the European Convention on Human Rights ('the human rights convention'). There should no longer be any presumption in favour of privacy when the court carries out the necessary balancing exercise between rights of privacy and publicity respectively under articles 8 and 10 of the human rights convention. Furthermore, there is no presumption that the welfare of the child is paramount.

In the present case, reasons in favour of publicity included the following:

- The case was alleged to involve a miscarriage of justice.
- The parents wished for publicity.
- There had already been considerable media coverage of the case.
- There was a need for the facts of the case to be made clear to command public confidence in the judicial system.

Munby J presented a useful review of case-law concerning publicity, and made an important distinction between public law proceedings, such as care proceedings, and private law proceedings including applications under CA 1989 s8. In the judge's view, the need for privacy falls away in public law cases where the state is interfering in family life and (usually) seeking to remove children: the arguments in favour of openness become stronger correspondingly.

Placement applications under ACA 2002

There has been some controversy over the correct procedure that local authorities should adopt when applying for a placement order under ACA s22, which has now been settled by the Court of Appeal. The issue concerned whether a local authority may properly issue an application for a placement

order before a favourable recommendation has been made by the adoption panel (the 'best interests' panel) under the Adoption Agencies Regulations (AA Regs) 2005 SI No 389 reg 18(3).

■ Re P-B (a child)

[2006] EWCA Civ 1016, 15 June 2006

In the course of care proceedings, the local authority changed its care plan, at a late stage, from one of reunification with the mother to one of adoption. The final hearing had been fixed to start on 6 March 2006, but the local authority did not issue its application for a placement order until 8 March 2006, on the third day of the hearing. The local authority had waited for the adoption panel to approve the placement application, which happened on 6 March 2006. The trial judge allowed the local authority to proceed with the placement application at the same time as the care hearing and found against the mother on both applications.

The mother appealed. The principal ground of her appeal was that the local authority should have issued the placement application earlier, before the determination of the best interests panel, in order to allow her a fair opportunity to respond and prepare for the hearing of that issue.

The Court of Appeal supported the local authority's view of the law, which was that it was acting as an adoption agency in making the placement application. Therefore, it had to comply fully with the AA Regs, including the requirement for approval by the adoption panel before making a court application.

The effect of the Court of Appeal's decision in this case was to approve the original court's proceeding to make both care and placement orders without an adjournment, which the court felt was clearly in the best interests of the child. However, this decision may have the consequence, in other cases, of requiring an adjournment on purely procedural grounds where the local authority has not taken the required steps in the right order.

1 See *Hansard*, HC Written Answers col 874W, 30 November 2006.
2 *Family Justice Council report and accounts 2005–2006*, available at: www.family-justice-council.org.uk/docs/fjc_ra.pdf.
3 *Response to the Constitutional Affairs Select Committee report: Family justice: the operation of the family courts revisited*, Cm 6971, November 2006, available at: www.official-documents.gov.uk/document/cm69/6971/6971.pdf, or from TSO, £5.
4 Available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1086/1086.pdf, or from TSO, £9, June 2006.
5 Available at: www.dfes.gov.uk/consultations/downloadableDocs/6731-DfES-Care%20Matters.pdf.
6 *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, which came into effect on 1 March 2005.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Recent developments in prison law – Part 2

Hamish Arnott, Nancy Collins and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This series appears in January and February, and in July and August. Part 2 of this update reviews the recent developments in case-law regarding lifer parole, minimum terms, determinate parole and compassionate release. Part 1 was published in January 2007.

Lifer parole

■ R (Gardner) v Parole Board

[2006] EWCA Civ 1222, 5 September 2006

The Court of Appeal upheld the decision of the Administrative Court that the Parole Board (the Board) had the power to exclude a prisoner while evidence was being taken from a witness and that the power had been properly exercised on the facts of this case (see July 2006 *Legal Action* 16 for the Administrative Court's judgment).

The prisoner had been recalled to custody from his life licence following allegations that he had assaulted his wife. His wife's evidence was absolutely central to the recall decision, and yet she expressed reluctance to attend the parole hearing as she was frightened of her husband. The panel authorised her to attend on the basis that she would not have to give evidence in front of her husband (although the judge later explained that he believed she would not maintain this position once she was actually at the hearing). The prisoner was removed from the hearing while she gave evidence; his barrister was permitted to remain and to cross-examine her. The Court of Appeal, for largely the same reasons given in the Administrative Court decision, held that it was within the ambit of the Parole Board Rules, domestic law and the European Convention on Human Rights ('the convention') for this type of step to be taken in the interests of witness protection. The court did note, however, that it had been unwise for the witness to be given an assurance in advance and that, in future, the investigations into alternatives, such as screens or video links, should be more rigorous.

Comment: This decision of the Court of Appeal is deeply depressing on two levels. First, the reluctance of the witness to give evidence in front of her husband cannot have been generated by a fear for her safety given that he knew of the allegations she was making and given the presence of police and prison officers in the room to protect her. The cases relied on by the Court of Appeal for authority that this type of procedure has been approved domestically and by the European Court of Human Rights all relate to situations where witnesses were unavailable or required anonymity for their safety. It is very difficult to see how these principles can be cross applied to a situation where the witness and the thrust of her evidence are known to the person against whom she is giving that evidence.

Second, the prisoner does not appear to have ever been the subject of criminal charges, even though the police investigated the allegations and were present at the hearing. The reliance on the Board to act as

the primary fact-finder in the place of the criminal courts is not generally considered to be good practice. In cases where the allegations against the prisoner amount to criminal charges, there is long-standing advice from the Crown Prosecution Service that the criminal charges should still be prosecuted notwithstanding the recall. The Board operates to a lower standard of proof and has far less rigorous procedural safeguards than the criminal courts. It is difficult to reconcile the fairness of abrogating the prosecution to the Board given the very different nature of the proceedings.

■ Hirst v Secretary of State for the Home Department and the Parole Board

[2006] EWCA Civ 945, 6 July 2006

The Court of Appeal also upheld the finding of the Administrative Court in this case involving the procedures for the recall of life-sentenced prisoners (see January 2006 *Legal Action* 23 for the Administrative Court's decision). The claimant had been recalled on 2 August 2004, the secretary of state having first taken advice from the Board. There followed a short delay in the provision of the reasons for the recall and the papers relied on. The recall hearing was convened on 9 November 2004 and a decision made to release Mr Hirst on 16 November 2004.

In the Administrative Court, he had succeeded in obtaining a finding that the delay of two weeks in the provision of the reasons for the recall and the dossier of papers was in breach of articles 5(1) and 5(4) of the convention and received £1,500 in compensation. However, he had been unsuccessful in his claim that the statutory provisions governing the recall (Crime (Sentences) Act 1997 s32) are themselves in breach of article 5 and this was the sole issue before the Court of Appeal.

The basis of the appeal was that the initial decision to return a life-sentenced prisoner to custody is made by the secretary of state – either with advice from the Board or, in cases of emergency, without any such advice. The first occasion when this is reviewed by a 'court' is at the oral hearing before the Board. As can be seen from this case, that hearing is typically three to five months after the recall has taken place. It was argued by Mr Hirst that this period breached article 5(1)(a) as it was an executive act of detention.

This submission was rejected by the Court of Appeal, which did not accept that the release of a life-sentenced prisoner necessarily broke the chain of causation in his/her detention. The life sentence continued to be administered through the life licence and as long as the behaviour which resulted in the recall reflected the concerns that led to the life sentence being imposed in the first instance, the fact that the initial power to recall rests with the executive does not breach article 5(1). The statutory scheme provides for the recall decision to be reviewed by the Board as quickly as possible and this satisfies the requirements of article 5.

Comment: The Court of Appeal dismissed the argument that there should be some form of judicial oversight of the initial recall decision. It found that the power of the Board to review that decision is sufficient. The difficulty with this approach is that in cases like this, where the Board ultimately directs release at the subsequent review, there remains a concern about whether the initial, emergency recall was ever truly justified. The length of time that it usually takes to secure an oral hearing before the Board to have the recall reviewed is also of great concern. While executive powers to recall a life licensee may be justified for public safety reasons, the implications of executive detention are such that greater emphasis should be placed on the 'speedy' review of that detention guaranteed by article 5(4). Unfortunately, the court's analysis does little to further the understanding of the complex interface between articles 5(1) and 5(4) in the context of parole recalls.

The Parole Board

■ Girling v Secretary of State for the Home Department and the Parole Board (interested party)

[2006] EWCA Civ 1779, 21 December 2006

The Court of Appeal considered whether the independence of the Board was unlawfully interfered with by the secretary of state issuing directions to it on matters to be taken into account when making release decisions for life-sentenced prisoners. The Administrative Court (see July 2005 *Legal Action* 12) held that, although the directions which had been issued were generally unobjectionable, the legislative power to make such directions (now contained in the Criminal Justice Act (CJA) 2003 s239(6)) should be construed as not applying to the Board when acting judicially. This was on the basis that it is improper for the executive to seek to influence judicial decisions.

The Court of Appeal allowed the secretary of state's appeal on the basis that 'directions' in this context did not necessarily mean mandatory directions to act in a particular way. Furthermore, parliament could not have intended to give the Home Secretary the power to require the Board to do anything but apply the correct legal test when issuing its decisions. Accordingly, there was nothing legally objectionable in using the power to make directions 'to provide guidance to the Board as to the matters to be taken into account, in so far as they are legally relevant, in order to assist the Board to reach a structured decision on the question which is its duty to decide'.

Minimum terms

■ R v Sampson

[2006] EWCA Crim 2669, 24 October 2006

■ R v Tucker

[2006] EWCA Crim 1885, 5 July 2006

These cases both looked at the question of whether minimum terms can be reduced for post-conviction behaviour. In *Sampson*, the appellant had been convicted of murder in March 2002 and received judicial recommendations that her minimum term should be set at 12 years. The secretary of state did not set her term before he was stripped of this power by the CJA 2003, and so sentence fell to be set by the High Court under the transitional arrangements in CJA 2003 Sch 22. The trial judge had, in the meantime, been appointed to the High Court and duly set the minimum term at 12 years less time spent on remand.

The facts of the offence were that Ms Sampson had a long-running dispute with her neighbour culminating in an incident where she was confronted, and possibly racially abused, by the victim. She in turn took a knife and stabbed him once resulting in his death. The defences of accident and self defence were rejected by the jury. It was argued on behalf of Ms Sampson that as she was contesting the conclusions made by the trial judge, her case was akin to an appeal and the minimum term should have been set by another judge. She further argued that insufficient account had been taken of her mitigation and her exceptional progress in custody.

The Court of Appeal rejected the submission that it was in breach of article 6 for the original trial judge to have set the minimum term. It noted that it was always desirable for a trial judge to set the appropriate sentence and that there remained the right of appeal from that decision in any event. It did, however, accept the argument that insufficient attention had been paid to the appellant's exceptional progress in custody and reduced the minimum term by two years to reflect that progress.

In *Tucker*, the case concerned a lifer who had a tariff set by the secretary of state but who had applied for this to be reset by the High Court under the CJA 2003. The original judicial recommendations had been for a minimum term of 14 years, but this was

actually set at 12 years by the secretary of state. Mr Tucker sought a further reduction on the ground of his exceptional progress in custody. This was rejected by Mitting J who considered that behaviour post-conviction could not alter the appropriate sentence ([2005] EWHC 2247 (QB), 26 October 2005). It appears that he reached that decision in ignorance of previous guidance from the Divisional Court on the subject. The Court of Appeal felt able to make a reduction of one year for the exceptional progress made during the sentence, notwithstanding the unusual fact that Mr Tucker still maintained his innocence of his conviction.

Comment: These two cases should now have resolved any residual confusion about the extent to which exceptional progress is relevant to the length of a minimum term being set or reset by the High Court. Much of the confusion seems to have been caused by the refusal of Mitting J to accept that the case of *R (Cole, Rowland and Hawkes) v Secretary of State for the Home Department* [2003] EWHC 1789 (Admin), 10 July 2003 could be an authority for this proposition, even though he had not read the case.

■ R v Birch

[2006] EWCA Crim 2240,
4 August 2006

Mr Birch was convicted of two attempted robberies which he committed with the express intent of being apprehended and placed in custody as he could not cope with life outside prison. The trial judge sentenced him to imprisonment for public protection (IPP) with a minimum term of three years.

This was mistakenly recorded as an extended sentence imposed under Powers of Criminal Courts (Sentencing) Act (PCC(S)A) 2000 s85. It was subsequently noted that the extension period of the licence was in excess of the permitted statutory maximum. The sentencing judge amended the sentence under the slip rule to extended sentences with custodial terms of two and three years and extension periods of five years. The sentence remained problematic as s85 had been repealed, the sentence was still unlawful under s85 in any event and the amendment had been made one day too late.

These errors were brought to the court's attention and the sentencing judge relisted the matter to confirm that this meant the existing sentence of IPP had to stand. Even though he no longer considered it appropriate in light of the Court of Appeal's decision in *R v Lang and others* [2005] EWCA Crim 2864, 3 November 2005 (see July 2006 *Legal Action* 14), the sentence remained lawful and could now only be altered by the Court of Appeal.

The Court of Appeal considered the case to be a borderline one where IPP might be justified. However, in light of the clear indication given by the judge to the defendant that he would receive a determinate prison sentence, it considered that the appellant had a legitimate expectation that he would receive such a sentence. Accordingly, concurrent determinate sentences of two and three years were imposed.

Comment: The facts of this case help to illustrate the confusion which reigns in relation to the current sentencing regimes. Although these particular facts are somewhat extreme, they do serve to provide a useful reminder to practitioners to look very carefully at sentences imposed on prisoners serving IPP, especially those imposed before the *Lang* decision. It does not appear that the refinements to the sentence set out in *Lang* managed to filter through to courts and solicitors, and so sentences imposed just before and immediately after the judgment may require rectification.

Determinate parole

■ R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another

[2006] UKHL 54,
13 December 2006

In conjoined appeals, the House of Lords considered whether it was discriminatory under article 14 of the convention, in conjunction with article 5, for either:

■ the final decision on parole for prisoners serving determinate sentences of 15 or more years to be made by the Home Secretary, where such decisions were delegated to the Board for prisoners serving shorter sentences; or

■ the decision whether to release prisoners liable to removal from the UK serving determinate sentences to be made by the Home Secretary, rather than by the Board as for other prisoners.

The Lords considered that the appeals raised three key questions. The first was whether the decisions under challenge were within the ambit of article 5 (so as to enable reliance on the prohibition on discrimination in article 14). The Lords were unanimous in deciding that the parole decisions were within this ambit. Although the general principle (see *Giles* below) is that no fresh issues about the legality of detention under article 5 arise during the currency of a fixed-term sentence imposed as punishment, this did not prevent the operation of a system of early release being within the article's ambit for the purpose of article 14, as such systems are obviously closely linked to the core right that article 5 is designed to protect.

The second question was whether the alleged discrimination was on the basis of one of the grounds contained in article 14. In the cases involving prisoners liable to removal, it was accepted that the different and less favourable treatment was on the basis of national origin and so covered by article 14. However, the Lords decided this issue against the prisoner serving 15 years or more, the rationale being that the length of a prison sentence is not a 'personal characteristic' so as to come within the definition of 'other status' for the purposes of article 14.

The final issue was whether there was any objective justification for the discrimination. On this question, in relation to both categories of prisoner, the Lords held that there was no proper justification. In both cases, a key feature in the reasoning was that the Board now has directive powers of release for all classes of life sentence, including where the lifer is to be removed. It was, therefore, an anomaly for prisoners, who may have been convicted of far less grave sentences, to have their release determined by the executive.

This outcome required a declaration of incompatibility in relation to the legislation which requires the cases of prisoners liable to removal to have their release determined by the Home Secretary rather than the Board (CJA 1991 ss46(1) and 50(2)).

Comment: Although the Lords decided that retention by the Home Secretary of the power to refuse the release of prisoners serving 15 years or more, even where this is recommended by the Board, does not breach article 14, Lords Bingham and Brown expressed very strong views about whether it is rational. Lord Brown described the position as 'plainly unjustifiable' and Lord Bingham as an 'indefensible anomaly'. It seems likely that these comments will provide strong support to any future challenge based on irrationality, rather than the convention.

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

[2006] EWCA Civ 1639,
1 December 2006

The prisoner appealed the judgment of the Divisional Court (see July 2006 *Legal Action* 18) which decided that where a determinate prisoner was recalled under the terms of the CJA 2003 (in force from 4 April 2005), any subsequent release was also under that Act, even where the sentence was imposed before enactment. The result of this finding was that the recalled prisoner, who under the previous legislative framework (CJA 1991) would have been entitled to unconditional release at the three-quarters point of the sentence (as the sentence was imposed for an offence that pre-dated the coming into force of the Crime

and Disorder Act 1998) would be released on licence until the expiry of the whole sentence.

The Court of Appeal reversed this decision on the basis that the commencement order that introduced the new legislation, which was in any event poorly drafted, did not suggest that existing prisoners should be so prejudiced. Accordingly, when such prisoners are re-released, the length of their licences will be governed by the CJA 1991.

Comment: This is an extremely important case with serious ramifications as there will be a significant number of prisoners who, on the Court of Appeal's analysis, are currently detained unlawfully having been recalled for a second time at a time when they should not have been on licence at all. Because of the seriousness of the issues that this case raises, the House of Lords has given the Home Secretary leave to appeal and an expedited hearing is to take place in February 2007.

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

[2006] EWHC 1772 (Admin), 11 July 2006

The claimant was serving a seven-year sentence administered under the CJA 1991. Accordingly, he was entitled to have his eligibility for release on parole licence considered at the halfway point (s35) and to automatic release on licence at the two-thirds point (s33).

His parole eligibility date (the 'PED') fell on 3 June 2003. There was delay by the prison in referring his case to the Board. After the issue of judicial review proceedings, the matter was referred and he was released on 23 February 2004. The claim for judicial review continued as the claimant claimed that the delay in releasing him breached his right to a speedy review of the legality of his detention under article 5(4) of the convention.

The claimant did not suggest that detention beyond the PED without a review would make his detention unlawful under article 5(1)(a) of the convention. This was because there was House of Lords' authority for the fact that article 5(1)(a) is satisfied for the duration of a fixed-term sentence (*R v Parole Board and another ex p Giles* [2003] UKHL 42, 31 July 2003). However, he maintained that this did not prevent there being a breach of article 5(4). He relied on the fact that the Lords had, in a different case, held that in denying fixed-term prisoners an oral hearing when their recall was considered, the Board breached the requirements of article 5(4) (*R v Parole Board ex p Smith and West* [2005] UKHL 1, 27 January 2005).

The judge refused to accept that article 5(4) was engaged. He accepted the Board's argument that *Smith and West* could be distinguished as in that case the House of Lords was considering the position of prisoners who had been released on licence but who had then been returned to prison on the revocation of those licences and this 'deprived them of liberty in a very real sense'. The position where a prisoner remained in prison with no right to release absent a positive recommendation from the Board was very different. The remedy for delay was to seek a mandatory order in judicial review proceedings to require the Board and/or secretary of state to take the necessary steps to conclude the parole process.

Comment: The degree to which article 5 of the convention applies to the administration of fixed-term sentences has been complicated by the *Smith and West* decision as, at first sight, it appears heretical to suggest that article 5(4) can be breached where there is no possibility of detention becoming unlawful under article 5(1). This case answered the question by limiting the *Smith and West* principle to the recall context.

■ R (K) v Parole Board

[2006] EWHC 2413 (Admin), 5 October 2006

The claimant was a 15 year old serving an extended sentence totalling four years consisting of a two-year custodial term and a two-year extended licence period. The sentence was imposed for an offence committed after 4 April 2005 and so was made under CJA 2003 s228. The statutory regime entitles the offender to release halfway through the custodial term where there is a positive recommendation by the Board and automatically on licence at the end of the custodial term (s247).

The Board considered the claimant's case on the papers and refused release on parole licence. The claimant, among other grounds, submitted that the Board had acted unlawfully in not ensuring he had the assistance of an appropriate adult in the parole process and in not giving him an oral hearing to consider his eligibility.

The judge granted the application. Section 239(3) of the CJA 2003 gave the Board a discretion about whether to interview a parole applicant or hold a hearing. At the relevant time the claimant was 14, and so it was incumbent on the Board to be particularly scrupulous when it came to issues of fairness *Secretary of State for the Home Department v SP* [2004] EWCA Civ 1750, 21 December 2004). He had been given the impression that he would be visited by a member of the Board but this had not happened. Furthermore, the evidence was that he had been given no assistance in understanding the parole dossier and formulating representations. This rendered the right to make representations effectively worthless. The judge considered that it was not necessary to consider whether an oral hearing was necessary in this case as it seemed that the claimant had not been told of this possibility and the desirability of such a hearing had not been considered by the Board at all.

The judge held that appropriate adult assistance should be provided to children in the parole process, although what this may consist of may vary from case to case. He went on to say:

[h]owever, I would have expected minimum standards of fairness to afford a possibility for the dossier to be gone through scrupulously by an adult with the child; for the strengths and weaknesses of the child's case to be identified. Assistance should be offered in formulating and reviewing any written representations, including any representations asking for an oral hearing if that appears desirable. The final product should also be looked at by an adult and advice given where appropriate before any document is delivered to the Board.

Comment: The judge made clear that the duty to provide adult assistance fell on the Prison Service rather than the Board. Clearly, children will generally be entitled to free legal advice and assistance, and where necessary representation, from solicitors holding General Criminal Contracts with the Legal Services Commission. Where they are not represented, it is unclear who it is anticipated will fulfil the role of what the judge termed as, rather worryingly, the 'well meaning adult'.

This case turned on the traditional requirements of fairness (as set out in *R v Home Secretary ex p Doody* [1994] AC 531 and *Smith and West* (see above)) rather than on any convention rights. However, there is an argument that release at the halfway point of the custodial term of the extended sentence now imposed under the CJA 2003 does raise issues under article 5. This is because such sentences are only imposed where the sentencing court decides that the offender is dangerous. Those not found to be dangerous are automatically released at the halfway point of the sentence rather than release being decided by the Board. Accordingly, *but for* the finding of the sentencing court of dangerousness, the extended sentence prisoner would be released at that point. As dangerousness is a factor susceptible to change, it is arguable that a hearing that satisfies 5(4) of the convention is required at the halfway point of the custodial term. Permission has been granted in a claim for judicial review on this point (*R (O'Connell) v*

Parole Board CO/8167/2006, 12 January 2007 (this case will also raise the issue about whether the Board is sufficiently independent, in convention terms, given its continued sponsorship by the Home Office and will be heard with *Brooke* CO/9344/2006, 12 January 2007, which also raises the issue of independence).

Compassionate release

■ R (A) v Governor of Huntercombe Young Offenders Institute and Secretary of State for the Home Department

[2006] EWHC 2544 (Admin), 19 October 2006

The claimant was convicted of causing grievous bodily harm with intent, on 8 December 2005, when he was aged 17. He was remanded for 43 days until he was sentenced on 20 January 2006 to three years' detention under PCC(S)A s91. He appealed and, on 22 September 2006, the Criminal Court of Appeal, on the basis that he was guilty of a lesser offence, substituted the sentence with a Detention and Training Order (DTO) of 18 months imposed under PCC(S)A s100.

Offenders spend half the length of the DTO in custody (PCC(S)A s102(2)). The claimant's sentence, as it ran from 20 January 2006, would normally result in release nine months later on 19 October 2006. However, the order issued by the Court of Appeal indicated that the 43 remand days should count towards the sentence, this having been raised at the appeal hearing. If this had been done, the claimant would have been entitled to immediate release.

However, the Prison Service did not release the claimant. It considered that the Court of Appeal's order was unlawful as DTOs have to be one of a specific number of terms (either 4, 6, 8, 10, 12, 18 or 24 months – PCC(S)A s101(1)) and remand time can only be taken into account in determining which of these terms should apply (PCC(S)A s101(8)). When this became clear, the Prison Service indicated to the claimant's family that if the court directed immediate release this could be given effect to. A fax to this effect was sent to the Court of Appeal from the Prison Service and was returned endorsed by two of the appeal judges recommending that the claimant should be immediately released, while stating that the ultimate decision was one for the Prison Service.

By this stage, the claimant was expecting to go home and had packed his belongings ready for release. On further consideration, the Prison Service decided not to release the claimant on the Court of Appeal's recommendation. It instead considered whether there were grounds for early release under two other statutory provisions. The first was the power under s102(4) to release an offender serving a DTO of 18 months or more either one or two months before the halfway point (which by policy is used to reflect 'progress in custody': see Prison Service Order 6650 para 15.5.1). The Prison Service decided that this section did not apply as the power to release only arose one or two months before what would otherwise be the release date and not at any other time (by the time the issue arose there was less than a month to the release date). The second provision was the power to release where the secretary of state is satisfied 'that exceptional circumstances exist which justify the offender's release on compassionate grounds' (PCC(S)A s102(3)). The Prison Service decided that the circumstances of the claimant were not sufficiently exceptional to warrant release under that section.

The claimant challenged the decisions by way of judicial review. He submitted, first, that the statutory framework did not preclude remand time being calculated as reducing the term of a DTO; second, that the fact that he could not be released exactly one month before his release date did not preclude use of the s102(4) power; and, third, that the decision not to release on compassionate grounds under s102(3) was irrational.

The judge (Stanley Burnton J) rejected the first submission as it was inconsistent with the clear statutory wording and other decisions of the Court of Appeal. He also rejected the second submission on the basis that s102(4) could not be construed as authorising release on any date other than the two specified (if a continuing power had been intended then there would have been no need for the statute to specify the power to release at one month before the normal release date).

However, he accepted that the decision on compassionate release was irrational. The Prison Service had indicated that compassionate release would only be considered where the young person or a close family member was terminally or seriously ill, or in a situation of equivalent severity. The judge considered that for release to be justified under the section there have to be:

- exceptional circumstances;
- which give rise to compassionate grounds;
- which, in turn, justify release.

The judge held that a mistake in sentencing would not normally, of itself, amount to an exceptional circumstance. However, the matters, taken cumulatively, which did render this situation exceptional were:

- the fact that the criminal appeal hearing had been deferred. If the claimant's sentence had been reduced on the original hearing date, it would have been open to the Prison Service to use the s102(4) power;
- the desire of the Court of Appeal that remand time should count;
- the apparent assurance given to the family that the claimant would be immediately released if the Court of Appeal so recommended (which in fact it did) which gave rise to a legitimate expectation.

Matters that were not considered to give rise to exceptional circumstances were the facts that the claimant would spend his 18th birthday in custody if not released, and any inconvenience to the family of having travelled to the prison in anticipation of release.

The judge considered that compassionate grounds could not be limited to issues of death or illness, as they arose wherever there was 'pain or suffering or distress or misfortune'. The narrow scope of the power was dictated by whether the circumstances were exceptional, not by whether they were compassionate. The Prison Service had therefore adopted too narrow a test. In this case, the repeated indications that the claimant would be released and, in particular, the assurance which was given that should the Court of Appeal recommend release, then this would be done, must have given rise to real feelings of 'upset and disappointment' by the claimant and his family. These circumstances also justified release, as where the Prison Service has given an apparently reliable assurance of immediate release and the circumstances are exceptional, and an exercise of compassion is involved, the power under s102(3) should be exercised unless there are good grounds for not doing so. The judge therefore directed the claimant's release at the end of the hearing on 4 October 2006.

Comment: This is another case where a judge has commented on the inevitable errors made in sentencing where there is an increasingly complicated statutory framework aimed at reducing judicial discretion. The judge commented that 'the plethora of mandatory provisions cannot be kept in mind at all times by those advising or representing a defendant, or indeed by a sentencing judge'.

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Recent developments in social security law – Part 1

Sally Robertson and **Stewart Wright** continue their six-monthly series, discussing important and current topics and summarising the decisions of the Social Security Commissioners since their last article was published in August 2006 *Legal Action*. This series will now appear in February and March, and in August and September. Part 1 of this article reviews the recent developments in case-law relating to administration of claims and payments, human rights and equal treatment and European Community law. Part 2 will review case-law regarding both non-means-tested and means-tested benefits.

ADMINISTRATION

Claims and payments

Date when a valid claim is made

■ R(IS)10/06

6 February 2006

The claimant requested an income support (IS) claim form on 21 July 2004. The claim was then made on (and in respect of the period from) 2 August 2004 but was defective because verification of her award of child benefit was not provided until 31 August 2004. The issue in the appeal was whether the claim could only run from 31 August 2004 (as it was more than one month after the claim form was requested) or whether it could run from 2 August 2004 (being the date of the 'defective' claim).

In adopting the latter construction, the commissioner held that the correct approach to Social Security (Claims and Payments) Regulations (SS(CP) Regs) 1987 SI No 1968 reg 6(1A)(b) and the one-month period it refers to is to start with the properly completed claim form when it is received, and work backwards, rather than forwards, from the date that the claim form is requested. Therefore, the claim was made on 31 August 2004. Moreover, no order of priority is created by reg 6(1A)(c), which gives the claimant a choice to run the one-month period (to make the properly completed claim) either from the request for the claim form or when s/he submits the defective claim. Here, this meant that the (properly completed) claim was submitted within one month of the date of the defective claim. So, the claim could be treated as having been made on 2 August 2004. It was irrelevant that the properly completed claim was submitted more than one month after the claim form was first requested.

Comment: The Department for Work and Pension's (DWP's) view is that this decision conflicts with *R(IS)16/04*, 20 May 2004 (which the DWP contends holds that the one-month period runs from the first point of contact (ie, the request for a claim form or the submission of a defective claim form)).

Proving date of claim when sent by post

■ Levy v Secretary of State for Work and Pensions

[2006] EWCA Civ 890,
24 May 2006,
R(G)2/06

Mrs Levy was widowed on 23 May 2000. On 4 July 2000, she posted a claim form for widow's benefit to the Glasgow Benefits Centre. The claim form never reached that office. As Mrs Levy was very ill at the time, she made no enquiries about what had happened to her claim. It was not until October 2001 that she sent a further claim for widow's benefit. This claim was received by the relevant DWP office and benefit awarded on it from October 2001.

Regulation 6(1)(a) of the SS(CP) Regs provides that a claim is made on the date on which it is received in an appropriate office. The issue was whether the claim could be treated as having been made by the original claim sent on 4 July 2000 or by the later claim that was received on 29 October 2001. The Court of Appeal held the latter.

Regulation 6(1) was not ultra vires the Social Security Administration Act (SSAA) 1992. This was either because reg 6(1) was empowered by SSAA s5(1) or, even if that was wrong, because SSAA s189(5) empowered its making. Furthermore, Interpretation Act (IA) 1978 s7 had no application to reg 6(1) as that regulation was not concerned with serving documents by post, rather it was concerned with the date the claim was made. Even if that was wrong, however, and IA s7 could in theory apply, its application in this case was ousted because of the plain contrary intention evidenced in the wording of reg 6(1) that a claim was made on the date it was received. Seeking to craft on notions of deemed receipt made no sense where reg 6(1) was plainly referring to the date on which the claim form was actually received in the DWP office.

Overpayments

Whether partner of claimant can fail to disclose

■ CIS/1996/2006

10 October 2006

The claimant's partner had been working without her knowledge with the result that she had been overpaid IS. Her partner later admitted lying about whether he was working. He also admitted that he was aware that his earnings would have an effect on the IS which his partner had claimed for them as a couple. However, it was accepted that he had never told his partner that he was employed and that she did not know he was working.

On these facts, the commissioner held that the overpayment was not recoverable from the claimant or her partner. As the claimant never knew the relevant material fact (ie, that her partner was working) it was common ground that she could not have failed to disclose. Moreover, any attempt to pin failure to disclose on her partner, despite his clearly knowing about and concealing his working and knowing what effect his earnings would have on their income, could not succeed post the Court of Appeal's decision in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, 20 July 2005; [2005] 1 WLR 3796; R(IS)9/06. Following that decision, the claimant's partner could only be guilty of a failure to disclose if he was under a legal duty to disclose. But SS(CP) Regs reg 32(1B) placed no duty on him, as the partner of the claimant, to report or disclose any change in his circumstances.

Accordingly, notwithstanding that disclosure of his employment could reasonably have been expected of the claimant's partner, the decision in *B* meant that the overpayment was not, and could not be, recoverable from him. Anything said in *CIS/674/1994*, 15 May 1995 about the possible liability of partners of claimants could no longer stand in the light of *B*. In coming to this conclusion, the commissioner commented:

It may be debated whether it was wise (or even necessary: cf. [R(A) 2/96]) for the

Tribunal of Commissioners and the Court of Appeal in [B] to throw overboard the previous law and practice on failure of disclosure under section 71 to the extent they did, and with such scant regard for the learning and experience of those who evolved and applied it over so many years; but there is no denying it has been done.

Appeal tribunals

Whether right of appeal against tribunal chair's decision

■ CIS/1363/2005; CIS/2322/2005; CJSA/3742/2005

12 June 2006

The claimant in *CIS/1363/2005* appealed the decision to stop paying him by order book. The appeal was struck out on the basis that it was outside the tribunal's jurisdiction. In *CIS/2322/2005*, the legally qualified panel refused to extend time for appealing because the appeal had been brought more than a year late. In *CJSA/3742/2005*, an appeal against suspension of jobseeker's allowance (JSA) was struck out.

The commissioner decided that, in principle, an appeal can lie to the commissioners from the decision of a legally qualified panel member on either a strike-out decision or a ruling refusing to extend time for appealing. The implication of Social Security Act (SSA) 1998 s12(2) is that parliament intended that these types of decisions would be made (or be treated as having been made) by an appeal tribunal.

Moreover, it could not be right that the general right of appeal to an appeal tribunal conferred by the SSA could be undermined by the secretary of state providing, without express authority, that appeals may be disposed of other than by the appeal tribunal. Absent such authority in the SSA, all decisions made by legally qualified panel members must, in principle, be regarded as decisions of appeal tribunals, and that remains the case even where the substantive appeal was to be heard by a tribunal with other members among its constitution.

However, it did not follow that all such decisions are appealable under SSA s14(1). The key, following *Rickards v Rickards* [1990] Fam 194, was whether the decision in question acted to dispose finally of the appeal. This was the case with both strike-out decisions and those refusing to extend time for appealing to the appeal tribunals. So, each decision of the legally qualified panel was a decision of an appeal tribunal which was capable of being appealed under SSA s14(1). In most cases, however, leave will seldom be given because the scope of the issues to be considered in such cases was limited, so the capacity for errors of law in making such decisions was correspondingly limited.

Comment: It is understood that the secretary of state is to seek to challenge this decision.

Tribunal's observations of appellant

■ R(DLA)8/06

25 April 2006

This decision points out that although tribunals should be wary about placing undue weight on observations of a claimant on the day of the hearing, and should, in general, provide an appellant with the opportunity of commenting on any inferences the tribunal may be thinking of drawing from those observations, this need not apply in every case. The touchstone is that observations should only be given weight if they are both relevant and reliable. Accordingly, where an observation merely confirms what the tribunal would have decided in any event, a failure to invite comment on it will not render the decision erroneous in law, as long as the reasons make this plain.

However, if the reasons do not identify the significance (or lack of it) attached to the observations, then it is likely to be assumed that they were significant and a failure to have put them to the appellant may render the tribunal's decision erroneous in law. Even here, however, the context is important.

In this case, the observation of the claimant coming into the tribunal room (though not leaving it) had been put to him and the significance of the same, though not stated to the claimant, would have been obvious to him since his case was based on his being in pain and suffering from exhaustion.

Criminal and appeal proceedings arising out of same facts

■ R(IS)1/07

20 July 2006

This decision holds that there is no rule that criminal proceedings should take precedence over an appeal hearing such that the latter should always be adjourned until the former are concluded. Whether an appeal should be adjourned in these circumstances is a discretionary decision of the tribunal and commissioners will not interfere unless the appeal tribunal erred in law in its approach or arrived at a perverse decision. Here, cogent reasons had been given for the refusal to adjourn the appeal, namely that:

- entitlement was a different issue to whether the claimant had dishonestly falsified a document or failed to report a change of circumstances;
- dishonesty was not relevant to entitlement or to recoverability under the social security and housing benefit provisions;
- the judge at the criminal trial would be able to withhold from the jury any evidence from the appeals that would be unfairly prejudicial and, therefore, nothing decided by the tribunal would undermine the presumption of innocence in the criminal trial;
- had the claimant attended the appeal hearing, he would have been entitled to decline to answer any question from the tribunal if the answers may have tended to incriminate him;
- it would be inappropriate to adjourn solely to give the claimant the tactical advantage of surprise in the criminal proceedings; and
- it could be useful for the purposes of any necessary mitigation in the criminal proceedings that the matters before the tribunal had already been resolved.

HUMAN RIGHTS AND EQUAL TREATMENT

Pension age and sex discrimination

In the following cases, the European Court of Human Rights (ECtHR) has followed *Stec and others v UK* App Nos 65731/01 and 65900/01, 12 April 2006; August 2006 *Legal Action* 13 in rejecting complaints that had, as a common feature, the linking of benefit entitlement to the differential pensionable age for men and women. The justification for having a differential pensionable age itself had been answered conclusively in *Stec*.

■ Barrow v UK

App No 42735/02,
22 August 2006, unreported

Mrs Barrow complained that the UK's rule which prevented her from continuing to get long-term incapacity benefit beyond the age of 60 was contrary to her rights under article 1 of Protocol 1 of the European Convention on Human Rights ('the convention') when read together with article 14 of the convention. This led to Mrs Barrow losing £24.04 per week when her long-term incapacity benefit of £81.85 per week stopped when she reached 60 and she, instead, became entitled to state retirement pension of £57.81 per week.

It was accepted in *Stec* that the use of the state pension age as the cut-off point made the scheme easy to understand and administer. It was further accepted in *Stec* that questions of administrative economy and coherence were, in general, matters which fell within the state's margin of appreciation. In addition, the European Court of Justice (ECJ) case of *Secretary of State for Social Security v Graham* [1999] ECR I-2521, which held that the loss of invalidity benefit for women at the age of 60 did not breach EU law, was of strong

Social Security Commissioners' decisions: significant cases between June 2006 and November 2006

Child benefit

CF/741/2006
30 June 2006
Procedure – Appeals Service lost both the decision notice and the record of proceedings – chairman unable to produce statement of reasons – only fair way to resolve matter is to remit to a fresh tribunal for rehearing.

Disability living allowance

CDLA/3941/2005
16 June 2006
Mobility component – higher rate – DLA Regs reg 12(1)(a)(iii) – effect of exertion – meaning of serious deterioration – anything which gives rise to repeated invasive surgery, repeated general anaesthetics, repeated periods of restricted mobility or total immobility and a knee replacement operation, sooner rather than later, leads to a serious deterioration in health – irrelevant that such procedures may be routine for surgeons.

CDLA/2807/2003
26 June 2006
Payability – care component – residential school – operative decisions revised on basis of official error – payable from 1997 for days at home – exceptionally complicated technicalities made simple.

CDLA/487/2006
12 July 2006
Mobility component – higher rate – inadequate reasons – vagueness needed exploration – given evidence of stumbling and panic attacks bringing on palpitations, error not to consider lower rate.

CDLA/1639/2006
19 July 2006
Mobility component – higher rate – effect of migraines – erroneous not to distinguish between the effect on vision, on balance and, if it lasted longer than the effect on balance, the effect of pain – only the effect on balance is relevant.

CDLA/3429/2005
31 July 2006
Revision or supersession – benefit wrongly paid from outset – straightforward trawl through the relevant steps.

CDLA/1480/2006
11 August 2006
Procedure – care component – lower rate, cooking test – breach of natural justice to remove it without warning on a paper hearing.

CDLA/393/2006
16 August 2006
Supersession – care component middle rate – not possible to revise original lower rate award – original decision not perverse – although adjudication officer should not have treated the original claim pack as a sufficient basis for a negative decision, that error was contributed to by the claimant's mother's restrained style – thus, no official error. Down's syndrome – continual supervision – structured and limited environment, including ad hoc supervision from local people when out of house.

CDLA/1490/2006
6 September 2006
Procedure – breach of natural justice – claimant misled by official information to request paper hearing – understood her father, as representative, would not be able to give evidence – subject to sensible case management, any representative is entitled to give evidence of what s/he has seen and heard.

CDLA/1190/2006
20 September 2006
Procedure – revision – mobility component higher rate – child's third birthday within three months of renewal of care component – official error to say that mobility component 'cannot be considered' before reaching three years – CP Regs reg 13A and 13C wide enough to enable advance award.

CDLA/2328/2006
23 November 2006
Overpayment – duty to disclose – tribunal erred in failing to identify whether the duty arose under CP Regs reg 32(1A) or (1B) – duties under each considered – relevance of instructions to claimants.

CA/2650/2006
27 November 2006
Overpayment – attendance allowance – residence and presence – date from which ordinary residence in GB ceased – effective date of supersession – commissioner and tribunal entitled to come to a different decision to that of an unappealed but erroneous tribunal decision on entitlement when deciding the different question of recoverability of an overpayment.

CDLA/2747/2006
30 November 2006
Mobility component – evidence – incompatible examining medical practitioner and medical adviser reports – relevance of non-organic behavioural signs – mere presence of such signs is inconclusive.

Incapacity benefit

CIB/712/2006
23 June 2006
Personal capability assessment – pain – no direct link between clinical findings and level of pain – agrees with the approach to assessing pain in *CDLA/902/04* – reasonable regularity and sitting, standing and walking descriptors considered.

C9/05-6(IB)
3 July 2006
Personal capability assessment – descriptor 15(b) – often sits for hours doing nothing – on the claimant's own evidence of drinking until he fell asleep, the tribunal was entitled to find this was not satisfied. Obiter discussion of 'distress' and irritation and the need to show that causation related to mental disablement.

CIB/960/2006
5 July 2006
Personal capability assessment – activity 8 – lifting and carrying – use of upper body and limbs – tribunal erred in excluding the effect of back pain on this activity.

CIB/1374/2006
5 July 2006
Personal capability assessment – anxiety and depression – illustrative exploration of mental health descriptors results in award.

CIB/1064/2006
14 July 2006
Personal capability assessment – exemption – IFW Regs reg 27– consider work of the type the claimant would be required to be available for – would it result in consequences to his health which would be substantial having regard to both likelihood of occurrence and degree of harm – consequences need not be life-threatening.

CIB/885/2006
5 October 2006
Evidence – routine destruction of documents – *R(IS)11/92* misunderstood – to decide whether a claim had in fact been made, the tribunal had to consider, on balance of probabilities, what had happened at an interview, given its purpose and the Department for Work and Pension's obligations under the CP Regs – benefit awarded from date of interview.

CSIB/803/2005(T)
30 October 2006
Personal capability assessment – validity of amendment to activity 14 considered at length – amendment accepted as valid – *R(IB)3/04* wrong to hold otherwise – meaning of 'altered consciousness' and 'seizures' considered.

Income support

CIS/4096/2005
4 May 2006
Relevant education – whether claimant's partner estranged from her parents – meaning of estrangement considered – mutuality of alienation not relevant in this case.

CIS/1363/2005
12 June 2006
Jurisdiction – there is a right of appeal against decisions of a legally qualified panel member not to admit late appeals and to strike out appeals – in the absence of express authority to the contrary in primary legislation, all decisions made under the procedure regulations must be regarded as having been made by an appeal tribunal – see page 23 of this issue.

CIS/326/2006
15 June 2006
Housing costs – IS Regs Sch 3 para 8(3) – abandonment by partner – causation – borderline case, but tribunal entitled to find that the reason she claimed benefit was the loss of her job due to ill health and not to the earlier abandonment.

CIS/176/2006
20 June 2006
Asylum-seeker – IA Regs reg 12(5) applies to end that status as soon as the asylum claim is recorded as

decided by the Home Secretary (other than on appeal) and that decision has been communicated to the claimant – appealing cannot restore that status.

CIS/933/2006
20 July 2006
Housing costs – loan cap – detailed analysis of why tribunal right to limit claimant to interest on £100,000 and not on his full loan.

R(IS)1/07
20 July 2006
Overpayment – procedure – criminal and appeal proceedings arising out of same facts – no rule requiring automatic adjournment of appeal – matter for tribunal's discretion – relevant factors considered – see page 23 of this issue.

CIS/203/2002
24 August 2006
Overpayment – failure to disclose – error not to revise or supersede all operative decisions, but no need, in this case, to produce the actual decisions – secondary evidence sufficient.

CIS/3182/2005
1 September 2006
Person from abroad – no right to reside – Dutch national – work ended by childbirth and the need to care for ill baby – claimant's arguments rejected – 'Recent developments in social security law – Part 2', March 2007 *Legal Action*.

CIS/3875/2005
1 September 2006
Person from abroad – no right to reside – French national, mentally ill, incapable of making rational decisions – although the provision of accommodation, medical and social services can fall within scope of EC Treaty article 50, that provision must be for remuneration and not for an indefinite period – in any event, no evidence that he had returned to UK in order to receive services – see 'Recent developments in social security law – Part 2', March 2007 *Legal Action*.

CIS/1996/2006
10 October 2006
Overpayment – failure to disclose by claimant's partner – in SSAA s71 'failure' depends solely on the existence of an express duty to disclose that is imposed specifically on the person concerned – *R(IS)9/06* followed – no such duty exists – obiter inference that failure to comply with a duty not to misrepresent might have avoided this problem – see page 22 of this issue.

CIS/4422/2002
10 October 2006
Overpayment – failure to disclose – same local office dealing with retirement pension and income support – erroneously based benefit on wife's own retirement pension rather than on the automatically higher amount payable on the claimant reaching 65 years – nothing to disclose – higher pension, in fact, paid to wife at the start of her benefit week, some days before the start of the claimant's benefit week in which the overpayment was first made – so no material change of circumstances to report.

CIS/2317/2006
20 October 2006
Responsibility for a child – no entitlement for children living with claimant before she received child benefit – meaning of 'received' considered – although child benefit was paid into her account, the actual beneficiary was her husband.

CIS/1757/2006
29 November 2006
Capital – deprivation of resources – not oppressive or irrational to take account of disposals made by current partner before she became the claimant's partner.

Industrial injuries

CI/3565/2004
2 June 2006
Assessment of disablement – accident and disease – PD D7 occupational asthma – any other sensitising agent – no significant evidence of any cause other than allergy to latex.

CI/421/2006
28 June 2006
Assessment of disablement – PD A11 vibration white finger – breach of natural justice not to carry out cold water provocation test following request by claimant – use of such tests discussed.

CI/2930/2005
30 June 2006
Assessment of disablement – physical and mental – offsets and interaction – meticulous illustration and explanation of the required step-by-step approach to applying the basic rules and distinguishing between accident, injury, loss of faculty, disabilities, other effective causes, total disablement, offsets and relevant dates.

CI/142/2006
23 August 2006
Accident – effect of language – must always consider the context as well as the words used – an interview not in accordance with policy may because of that context be an 'accident' – 'Recent developments in social security law – Part 2', March 2007 *Legal Action*.

CI/954/2006
19 September 2006
Assessment of disablement – aggregation of assessments – a separate 'claim' is unnecessary where supersession on the ground of a worsening condition due to a different industrial accident is sufficient to trigger aggregation – useful exploration of the technicalities relating to claims and supersession considered in relation to the facts of this case.

Invalid care allowance

CG/1752/2006
6 September 2006
Earnings – payment in respect of person placed with claimant under an Adult Placement Scheme – as he had been living with claimant for five years, he was normally a member of her household, so the payment could not be disregarded – meaning of 'temporary' and correct approach to that issue also discussed.

State pension credit

CPC/1820/2005
28 July 2006
Housing costs – eligible service charges – supported accommodation – broad approach required to estimating the cost of services related to the provision of adequate accommodation – evidential requirements will vary but should be based on the housing unit in question, not on average figures – details of the lease, cost of services, amount (if any) met by the Supporting People programme, and a statement from the scheme manager about how his time is usually divided up should normally be sufficient to make a reasoned estimate.

CPC/206/2005
29 September 2006
Assessed income period – official error not limited to public law or any other errors of law – in the knowledge that the claimant's home was for sale, no reasonable decision-maker could have decided on a five-year assessed income period.

CF/1727/2006
25 October 2006
Overpayment – effect of transfer of functions on duty to disclose – necessity for a formal determination on the employment status of the claimant's partner before considering issues arising under European law – tribunal not entitled to decide employment status.

Working tax credit

CI-05-06 TC(T)
27 October 2006
Childcare element – autistic child cared for by minder in parental home (at the material time in Northern Ireland that excluded ability to register as a child minder – law has since been changed) – payment to non-registered childminders – whether breach of ECHR considered at length – no discrimination.

Abbreviations
CP Regs = Social Security (Claims and Payments) Regulations 1987 SI No 1968
DLA Regs = Social Security (Disability Living Allowance) Regulations 1991 SI No 2890
ECHR = European Convention on Human Rights
IA Regs = Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 SI No 636
IFW Regs = Social Security (Incapacity for Work) (General) Regulations 1995 SI No 311
IS Regs = Income Support (General) Regulations 1987 SI No 1967
PD = prescribed disease
SSAA = Social Security Administration Act 1992

persuasive value. As in *Stec*, the linkage of the cut-off age for long-term incapacity benefit to the notional end of working life or the state pension age had to be regarded as pursuing a legitimate aim and being reasonably and objectively justified. There was, therefore, no breach of article 14 of the convention.

■ Pearson v UK

App No 8374/03,
22 August 2006, unreported

The applicant challenged the rule which meant that he would not qualify for a state retirement pension until he was 65, whereas at his age of 63 a woman would qualify for a state retirement pension. However, the exact same issue had been considered and decisively ruled on by the Grand Chamber of the ECtHR in *Stec*. The court here could not but reach the same conclusion in *Pearson*.

■ Walker v UK

App No 37212/02,
22 August 2006, unreported

Mr Walker complained that the UK's rule which required him to pay national insurance (NI) contributions while he was working between the ages of 60 and 64, whereas a woman in the same situation would not have to pay such contributions, was contrary to his rights under article 1 of Protocol 1 of the convention when read together with article 14 of the convention.

Similarly to *Stec*, Mr Walker's obligation to pay NI contributions was linked to the date at which he was eligible to obtain his state retirement pension. The use of the state pension age as a cut-off point made the scheme easy to understand and to administer, and questions of administrative economy and coherence are, in general, matters that fall within the state's margin of appreciation. The fact that, over time, an increasing percentage of the NI fund had been diverted to the NHS did not render the continuing policy choice of linking the obligation to pay contributions until the state pension age manifestly unreasonable. There was still a link between work and working life and the payment of NI contributions.

Moreover, although not directly on point, the ECJ's judgment in *R v Secretary of State for Social Security ex p Equal Opportunities Commission* [1992] ECR 1–4297 was of some persuasive value as it found that the inequality between men and women with respect to contribution periods could not be dissociated from the difference in pensionable age and was justified. Accordingly, the linkage of the requirement to pay NI contributions to the notional end of working life or state pension age had to be regarded as pursuing a legitimate aim and as being reasonably and objectively justified.

Denial of disability premium to street homeless

■ R (RJM) v Secretary of State for Work and Pensions

[2006] EWHC 1761 (Admin),
13 July 2006, unreported

This is the judgment of the High Court on a test case brought by Child Poverty Action Group (CPAG) on behalf of a 'street homeless' claimant who had been denied entitlement to the disability premium in his IS for the periods when he was sleeping rough on the streets. The critical substantive issue on the judicial review was whether the denial of the disability premium to a person who was street homeless amounted to unjustified discrimination contrary to article 14 of the convention.

The claim for judicial review was rejected for two reasons. First, the High Court said that article 14 was not engaged because treating someone differently because s/he was street homeless did not amount to discrimination on the ground of 'status' under article 14. The difference in treatment had to be based on a personal characteristic but, in the judge's view, a 'lifestyle of being liable to be a rough sleeper' did not amount to a personal characteristic. Second, even if this was wrong, however, the judicial review failed because the discrimination was justified.

As the decision of the House of Lords in *Carson and Reynolds* [2005] UKHL 37, 26 May 2005; [2005] 2 WLR 1369 made plain, in the field of allocation of social welfare benefits whether a difference in treatment is justified is primarily a matter for the legislature and the executive; all a court has to be satisfied of is whether the difference in treatment has a rational basis. Such rational reasons for the difference in this case had been put forward by the secretary of state: he wanted to target finite resources and assist the homeless (and not least the disabled homeless) in other ways than through premiums in their IS. This was a sufficient explanation to render the difference in treatment justified.

Comment: The claimant has been granted leave to appeal to the Court of Appeal.

Habitual residence and the Chagos Islands

■ R (Couronne) v Crawley BC and Secretary of State for Work and Pensions and others

[2006] EWHC 1514 (Admin),
30 June 2006,
August 2006 Legal Action 38

A number of British citizens of non-British origin arrived in the UK in 2004. They had come from Mauritius and were the children of Chagossian islanders who had been forcibly removed to Mauritius in 1971 from the Chagos Islands to enable the USA to operate a large military airbase on Diego Garcia. They were refused entitlement to JSA on the basis of the habitual residence test. They brought the judicial review proceedings on the basis that the imposition of the habitual residence test discriminated against them as a distinct ethnic group when compared with British citizens of Irish ethnic origin, and so was contrary to Race Relations Act (RRA) 1976 Part III and/or Council Directive 2004/431/EC (the Race Directive). Alternatively, the test discriminated against them contrary to article 14 of the convention when read with either article 8 or article 1 of Protocol 1 of the convention. All the grounds were rejected by the High Court.

The habitual residence test could not be attacked on race discrimination grounds under the RRA because of the exception provided by RRA s41(2), which says, in effect, that no act will be unlawful if the discrimination based on a person's nationality or place of residence arises under any statutory instrument. Moreover, nothing in the Race Directive properly affected this conclusion as, following *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685, 14 November 2001; *R(IS) 5/02*; [2002] 1 CMLR 20, the Race Directive had no application to this dispute because it did not concern movement within the EU but rather movement from outside the EU (Mauritius) to it.

As to article 1 of Protocol 1 to the convention – notwithstanding the ECtHR's decision in *Stec* and following the House of Lords' decision in *Leeds City Council v Price* [2006] UKHL 10, 8 March 2006 – the High Court was bound to follow the Court of Appeal's decision in *Campbell and others v South Northamptonshire DC and others* [2004] EWCA Civ 409, 7 April 2004; *R(H)8/04*, and hold that the non-contributory benefits claimed in these cases were not 'possessions'. Accordingly, article 14 could not apply as the benefits in question did not come within the 'ambit' of article 1 of Protocol 1. Equally, the benefits in question and the habitual residence test, in particular, did not come within the ambit of article 8 as the test itself has nothing to do with promoting respect for private and/or family life.

Comment: Leave has been granted to the claimants to appeal to the Court of Appeal. It is frustrating that despite what was understood to be the secretary of state's acceptance that *Stec* had settled that non-contributory benefits are 'possessions' once and for all (at least for article 14 discrimination arguments), he is now using

Price to block article 14 arguments concerning means-tested benefits. However, it is arguable that the special circumstances of the post-Court of Appeal litigation in *Reynolds* above (to which CPAG was a party) would provide grounds for not following the general rule in *Price*.

EUROPEAN COMMUNITY LAW

Exporting carer's allowance

■ **Hosse v Land Salzburg**

Case C-286/03,
21 February 2006,
[2006] All ER (EC) 640 (ECJ)

The claimant was a German national who worked in Austria. He paid taxes and social security contributions in Austria, but lived in Germany with his severely disabled daughter. He made a claim for a care allowance to the Austrian social security authority in respect of his daughter. This was refused on the basis that the person reliant on care (here, the claimant's daughter) had to have his/her main residence in Austria and the claimant's daughter lived in Germany. In the course of challenges by the claimant to this decision, the Austrian Supreme Court referred the issue to the ECJ for a preliminary ruling. It was dealt with by the Grand Chamber of the ECJ because of its importance.

The ECJ observed that the provisions of Regulation (EEC) No 1408/71 (Reg 1408/71) must be interpreted in the light of the objective of contributing to the greatest possible freedom of movement for migrant workers. This objective would be undermined if workers were to lose benefit because they moved to work in another member state. Accordingly, any derogation, such as in Reg 1408/71 article 4(2)(b), has to be interpreted strictly. That means satisfying all the conditions laid down in article 4(2) as well as being listed in Reg 1408/71 Annex II.

The concept of 'social security benefit' within article 4(1)(a) and special non-contributory benefit within article 4(2)(b) (and article 10a) are mutually exclusive. So, if the care allowance fell within article 4(1)(a), then it could not fall within article 4(2)(b), notwithstanding that it may appear in Annex II. In this case, the care allowance was a 'sickness benefit' falling within article 4(1)(a) because it was granted objectively on the basis of a legally defined position and was intended to improve the state of health and life of persons reliant on care.

Moreover, it would be contrary to Reg 1408/71 article 19(2) to deprive the daughter of a worker of a benefit to which she would be entitled if she were resident in the paying state (here, Austria); to hold otherwise would deter workers from exercising their right to freedom of movement.

Comment: In the light of the Grand Chamber of the ECJ's approach to the first issue in this case, it is arguable that the UK's adherence to the view that disability living allowance, attendance allowance and carer's allowance are not exportable benefits (based on *Snares* R(DLA) 5/99, 4 November 1997; Case C–20/96) and *Partridge* R(A)1/99, 22 June 1998; Case C–2097/96 will be found, by the ECJ, to be unsustainable.

Stewart Wright is legal officer at CPAG. Sally Robertson is a barrister at Cloisters Chambers, London.

Recent developments in housing law

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

POLITICS AND LEGISLATION

Eligibility for housing

For homelessness applications (and applications for allocation of social housing) made on or after 1 January 2007, the eligibility rules have been modified in respect of Romanian and Bulgarian nationals by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (No 2) Regulations 2006 SI No 3340. For an introduction to the consequences on social welfare provision of the EU accession of those two countries see January 2007 *Legal Action* 13.

Regulation and inspection of social landlords' services

■ The Audit Commission inspects the performance of local authorities and housing associations in the delivery of housing services. Service provision is scrutinised using 'key lines of enquiry' (KLOEs). For inspections on site from February 2007, the commission will be applying recently revised KLOEs for Tenancy and estate management (KLOE 6) and Diversity (KLOE 31).[1]

■ On 14 December 2006, the government announced an independent review of the regulation of social housing provision to be conducted by Professor Martin Cave.[2] The review will cover all the present arrangements for regulating social housing providers, and 'will put the needs of tenants at the heart of the regulatory process'. The review team has issued a call for submissions (to be made by 16 February 2007): Communities and Local Government (CLG), formerly the Department for Communities and Local Government, news release 2006/0177.

Homelessness

■ The latest homelessness statistics for England (third quarter 2006) were published in December 2006. They indicate the lowest number of acceptances of applications by local authorities for over 20 years: CLG statistical release 2006/0163. Some £74m will be available to fund further homelessness prevention measures in 2007/2008: CLG news release 2006/0168.

■ To accompany the figures, CLG published *Homelessness statistics December 2006 and the homelessness funding allocation for local authorities. Policy briefing 17*.[3] This includes the following text on homelessness prevention:

> *Preventative approaches appear to have been particularly successful in achieving a reduction in the number of homeless acceptances. However, the government has always emphasised that while homelessness prevention is important, local authorities should not delay making inquiries under section 184 of the Housing Act 1996 as soon as they have reason to believe that someone who is seeking accommodation or assistance in obtaining accommodation is or may be homeless or likely to become homeless within 28 days. [Where a person is accepted as owed a duty under the homelessness legislation, prevention initiatives may still have a valuable role in helping an authority improve outcomes for homeless applicants].*

■ For its part, the Housing Corporation has published *Tackling homelessness: the Housing Corporation strategy* (Housing Corporation, November 2006) committing itself to 'embed

prevention of homelessness and tenancy sustainment as one of housing associations' strategic and operational priorities'.[4]

■ *Hospital admission and discharge: people who are homeless or living in temporary or insecure accommodation* (CLG, December 2006) invites hospitals, primary care trusts, local authorities and the voluntary sector, working in partnership, to develop effective admission and discharge protocols for people who are not living in settled accommodation.[5] The aim of the agreed protocols will be to ensure that no one is discharged to the streets or inappropriate accommodation.

■ In December 2006, the Dogs Trust launched its *Welcoming dogs* booklet as part of a campaign to persuade housing providers to reconsider their policies on providing accommodation for homeless people who have dogs.[6]

Housing allocation

On 12 December 2006, the government announced approval for a further round of choice-based letting (CBL) schemes including the new pan-London *Capital Moves* scheme (to be established during 2007): CLG news release 2006/0169. This will bring the number of local housing authorities with CBL schemes to over 200.

House construction

A new national standard for sustainable design and construction of new housing was launched in December 2006.[7] The Code for Sustainable Homes is intended to achieve a voluntary 'step-change' by the house building industry to produce accessible and climate friendly homes. The regulatory impact assessment on the new standard was also published in December (CLG, 2006).[8]

Disability and housing

The latest tranche of Disability Discrimination Act (DDA) 2005 provisions relating to housing came into force in December 2006. They impose on most landlords new duties to make reasonable adjustments to reflect the needs of disabled people and require public and social landlords to discharge a general disability equality duty. The most extensive impact will be in the social housing sector: see *A guide to the disability equality duty and Disability Discrimination Act 2005 for the social housing sector* (Disability Rights Commission, 2006).[9] For a review of the changes see Mark Robinson, 'Disability discrimination in housing', *Adviser* 119 January/February 2007, p39.

Gypsies and Travellers

The Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006 SI No 3190 define the term 'Gypsies and Travellers' to be used by local authorities when assessing the accommodation needs of such persons in their area as:

(a) persons with a cultural tradition of nomadism or of living in a caravan; and
(b) all other persons of a nomadic habit of life, whatever their race or origin, including –
(i) such persons who, on grounds only of their own or their family's or dependant's educational or health needs or old age, have ceased to travel temporarily or permanently; and
(ii) members of an organised group of travelling showpeople or circus people (whether or not travelling together as such).

The assessment duty itself is contained in Housing Act (HA) 2004 s225. This provision came into force on 2 January 2007 (see the Housing Act 2004 (Commencement No 6) (England) Order 2006 SI No 3191) as did the regulations.

Anti-social behaviour

■ The Local Authorities (Contracting Out of Anti-social Behaviour Order Functions) (England) Order 2007 was laid before parliament on 9 January 2007: CLG news release 2007/0001. If approved by both houses of parliament, the Order will enable any of the more than 200 Tenant Management Organisations established under HA 1985 s27 to apply for anti-social behaviour orders (ASBOs) (after consultation with the relevant local authority).

■ *Promoting respect: tackling nuisance behaviour* (Housing Corporation, January 2007) sets out what the corporation has done, and intends to do, to encourage and enable housing associations to tackle anti-social behaviour.[10]

■ On 7 December 2006, the National Audit Office published *The Home Office: tackling anti-social behaviour*, its report on the effectiveness (or otherwise) of enforcement measures taken by public sector landlords and others in respect of anti-social behaviour.[11]

■ The latest statistics on ASBOs show that, by the end of December 2005, over 9,800 ASBOs had been made.[12]

Licensing private landlords

On 27 November 2006, the government issued new guidance to local housing authorities considering applying for approval of selective licensing schemes, in respect of private rented housing, under HA 2004 Parts 2 or 3: *Approval steps for additional and selective licensing designations in England* (CLG, 2006).[13]

Representing ALMOs

County courts have been issued with additional guidance about representation of Arms Length Management Organisations (ALMO) in possession cases. On 1 December 2006, *Inside Housing* reported that the Master of the Rolls, Sir Anthony Clarke, had sent a briefing to district judges particularly relating to 'rights of audience' of ALMO staff.[14] See too *Hackney LBC v Spring* January 2007 *Legal Action* 23.

Domestic violence and housing

In December 2006, Communities Secretary Ruth Kelly MP launched *Options for setting up a sanctuary scheme* (CLG, 2006) and called on every local authority to offer sanctuary schemes for victims of domestic violence.[15] The accompanying press release claimed that in Barnet, north London, the establishment of sanctuary schemes had led to a 40 per cent decrease in households in temporary accommodation as a result of domestic violence: CLG news release 2006/0181.

Introductory tenancies in Wales

The Introductory Tenancies (Review of Decisions to Extend a Trial Period) (Wales) Regulations 2006 SI No 2983 came into force on 17 November 2006. The regulations make provision for the procedures to be followed in respect of a review of a decision to extend the period of an introductory tenancy in Wales from 12 to 18 months. (The equivalent regulations in England are the Introductory Tenancies (Review of Decisions to Extend a Trial Period) (England) Regulations 2006 SI No 1077, which came into force in May 2006).

SECURE TENANCIES

Anti-social behaviour

■ Lambeth LBC v Assing

Lambeth County Court, 27 November 2006[16]

Mr Assing was the secure tenant of a flat. He had lived on the estate for 30 years and been a tenant for nine years. There was a dispute about the water supply to the bin chamber. In July 2005, Mr Assing broke the padlock to the bin chamber. In September 2005, he assaulted the concierge and subjected him to verbal abuse. He was charged with assault and, in February 2006, he pleaded guilty and was sentenced to a community order with requirements that he perform 100 hours unpaid work and attend an anger management course.

The council issued proceedings seeking a demotion order or a postponed possession order for a period of two years. The defendant

conceded that the grounds for possession were made out, but reasonableness was in issue. District Judge Wakem noted that the assault was serious and that there was no question of the degree of the defendant's responsibility. However:

... as to continuation of the offence, it has ceased. This is not a case where there is an obvious effect on neighbours. The neighbours were not aware or concerned with the case. [The concierge] does not feel a continuing threat. ... There is no suggestion that the defendant has threatened any other employee or that they have reason to fear.

The defendant had been punished by the magistrates' court and had behaved well for the year since the assault. He had also been 'fine' for the previous 29 years.

District Judge Wakem concluded that a demotion order would be further punishment, but that it was not her role to punish the defendant again. She was satisfied that neither the other tenants nor the council staff needed the protection of a postponed possession order. She considered that no further action in relation to the tenancy was appropriate and so made no order.

Postponing the date for possession

■ Lambeth LBC v Samuels

Wandsworth County Court, 27 November 2006[17]

The defendant was originally a secure tenant. In 2003, a 'suspended possession order' was made on terms that she paid £2.70 per week towards arrears of £2,117. A lump sum payment of £1,445 was received from housing benefit (HB) six weeks after the date of the possession order. Over the next three and a half years, the defendant made regular payments, usually in excess of the required amount, although occasionally she missed a week. For the first six months, the net rent after HB kept varying. There was also a period of ten months when she paid just £1.36 per week towards the arrears. As a result, she breached the terms of the order and became a tolerated trespasser. Ms Samuels' home suffered from 'substantial disrepair'.

In May 2006, Ms Samuels asked the council to consent to a variation of the order, postponing the date for possession. Lambeth consented, but then requested that an additional condition be imposed to the effect that she could not bring a claim for damages for breach of a repairing covenant during the period when she had been a tolerated trespasser.

By November 2006, when the issue of the condition came to court, Ms Samuels had paid all the arrears (although the costs remained outstanding). If she had simply paid £2.70 per week, she would have paid £523.80 towards the arrears between February 2003 and November 2006. As it was, £2,117.70 had been paid (£672.70 from the defendant, the balance as HB).

District Judge Gittens decided not to impose the additional condition sought by Lambeth. He took into account that the defendant had personally paid around £150 in excess of the amount that should have been paid. He held that, although the defendant's management of her rent account had not been ideal, there were no flagrant or significant breaches of the order. There had been no suggestion at any time that Lambeth was considering applying for a warrant. During the period when Ms Samuels was a tolerated trespasser, Lambeth had accepted her application to buy the property under the right to buy scheme. He also took into account the defendant's age (63), her ill health (she suffered from diabetes) and that her husband had died around a month after the suspended possession order had been made. While Lambeth was entitled to ask for the condition to be imposed, he did not consider that the condition was justified.

Warrants

■ Southwark LBC v Augustus

Lambeth County Court, 24 November 2006[18]

The defendant was a secure tenant. Southwark obtained a suspended possession order as a result of rent arrears. The defendant breached the terms and the claimant applied for a warrant. The defendant failed to open the letter notifying her of the impending eviction. The warrant was executed while she was out at work.

HHJ Welchman set aside execution of the warrant. The claimant had acted oppressively. The court could consider public law issues where the claimant was a public authority. The claimant had failed to have regard to its own rent arrears policy requiring it to use eviction only as a last resort. The defendant was in work and had been making some payments. The arrears were £274 at the date of the request for the warrant. The claimant had failed to consider applying for an attachment of earnings order.

PRIVATE SECTOR

Business or residential use?

■ Broadway Investments Hackney Ltd v Grant

[2006] EWCA Civ 1709, 20 December 2006

In 1995, the claimant's predecessor in title granted a ten-year lease to the defendant. The property comprised a basement, ground floor and first floor. The lease described the property as 'shop premises' and the 'permitted use' clause allowed for the use of 'the lower part of the premises for the sale and catering for fish, and the upper part for residential purposes only'. The lease also obliged the tenant 'to keep the premises open as a shop for carrying on the permitted use at all times of the year during the usual business hours of the locality, and at all times to maintain in good order an adequate and appropriate display in the shop windows'. The defendant sold fish and groceries in the lower part and lived upstairs.

However, arrears accrued and the claimants issued proceedings for forfeiture, almost £25,000 of arrears, mesne profits, interest and costs. The defendant sought relief from forfeiture under County Courts Act 1984 s138. District Judge Manners found that the premises were occupied for the purposes of a business and made an order for possession in 28 days. On appeal, HHJ Cotran found that they were not occupied for business premises, allowed the defendant's appeal, set aside the absolute possession order and substituted an order suspended on terms that the defendant pay current rent and £1,000 per month towards the arrears.

The claimant appealed successfully to the Court of Appeal. Lloyd LJ, after considering Landlord and Tenant Act 1954 s23, said that the question posed by that section 'is a factual one. Does the tenant occupy all or part of the premises comprised in the tenancy, and if so does he occupy them, or part of them, for the purposes of a business carried on by him, or for those and other purposes?' He concluded that on the basis of the facts of this case, 'it seems difficult to see how there could be any doubt as to that. Mr Grant does occupy the premises, and he does so, as regards the ground floor and basement, for the purposes of his shop business carried on in that part of the premises.' Following *Cheryl Investments v Saldanha* [1978] 1 WLR 1329, this was a tenancy under which the defendant was not only 'allowed to use the ground floor and basement for business purposes, and for no other purpose, but he was positively required to do so', by the lease. He had a business tenancy, not an assured tenancy.

The Court of Appeal restored the absolute possession order. Obiter, Lloyd LJ, after pointing out that courts were obliged to consider whether or not the Rent Acts applied in any case. regardless of whether the tenant took the point at all, said: 'It seems to me that the court would be justified in taking the same stance as regards premises which may

be held on an assured tenancy, still as an exception to the general rule [precluding the raising of points on appeal that had not been taken in the lower court] which continues to apply under the Civil Procedure Rules.'

Rent

Duty to mitigate?

■ Reichman v Beveridge

[2006] EWCA Civ 1659, 13 December 2006

The claimants let office premises to the defendants who were solicitors on a five-year lease. The defendants ceased to practise as solicitors. They did not pay rent from March 2003. The claimants sued for those arrears. The defendants served a defence asserting that the claimants had failed to mitigate their loss by failing to instruct agents to market the premises, failing to accept the offer of a prospective tenant who wanted to take an assignment or a new lease, and failing to accept an offer from one of the defendants to negotiate payment of a consideration for surrender of the defendants' lease. District Judge Kubiak was asked to determine as a preliminary issue 'whether it is necessary as a matter of law for a landlord to mitigate his loss when seeking to recover arrears of rent'. She held that there was no such duty. An appeal by one of the defendants was dismissed by HHJ Reid QC.

The Court of Appeal dismissed a second appeal. After reviewing authorities from courts in this country and the Commonwealth, it held that the defendants' defence was 'not open' to them.

Discrimination

■ Williams v Richmond Court (Swansea) Ltd

[2006] EWCA Civ 1719, 14 December 2006

Mrs Williams was aged 81 and had mobility problems. She was a long lessee and lived on the third floor of a block of flats. Her flat was served by stairs. She had mobility problems and could only get up and down the stairs with the greatest difficulty. She needed a stairlift. The defendants, her landlords, did not agree to the installation of a stairlift, even though it would be installed at no expense to them. Mrs Williams claimed that their refusal to consent was discrimination. The defendants contended that they had done nothing to interfere with her right to use the stairs and had done nothing to her detriment. They said that they had merely failed to confer a benefit which was not covenanted in her lease, and that her problem was caused by nature rather than any action on their part. Mrs Williams issued proceedings. The defendants applied for summary judgment. District Judge Evans refused the defendants' application and then determined a preliminary issue, namely whether the defendants' refusal of consent to the installation of a stairlift at the claimant's expense constituted discrimination within DDA 1995 s22(3), in favour of Mrs Williams. A circuit judge dismissed the defendants' appeal.

The Court of Appeal allowed their second appeal. The sole issue was whether the defendants had discriminated against Mrs Williams as a disabled person. None of the reasons for refusing consent (other tenants voting against it, aesthetics, the cost of repair and inconvenience to the residents as a whole) related to Mrs Williams' disability.

The Court of Appeal distinguished *Manchester City Council v Romano* [2004] EWCA Civ 834, 29 June 2004; [2005] 1 WLR 2775 (where the reason for discrimination was assumed not to apply to comparators) and *Clark v Novacold Ltd* [1999] ICR 951 (where the critical reason for the claimant's absence from work was his disability). The effect of the judge's decision was to impose a positive duty on the manager of premises to do whatever was necessary (not just what was reasonable) to ensure that a disabled occupier was able to enjoy the relevant benefits or facilities to the same extent as relevant comparators. The judge had wrongly failed to carry out a two-stage test: first, to identify the relevant act or omission on the part of the defendants and, second, to identify the relevant act or omission, if any, towards relevant comparators. The defendants had not treated the claimant less favourably than they had treated or would have treated anyone else within the meaning of DDA 1995 s24(1). The Court of Appeal granted summary judgment to the defendants.

Damages for unlawful eviction

■ Brindley v Brown

Dudley County Court, 15 December 2006[19]

The claimant had a 12-month fixed term assured shorthand tenancy. She was unlawfully evicted after one month. She returned to the premises with her young daughter in the early hours of the morning to discover the locks had been changed. Her daughter suffered an asthma attack. The landlord refused to answer her calls and refused to readmit her. She received a threatening phone call from the landlord's agent. The landlord left children's toys and some items in black bags outside the premises. Most of the tenant's personal belongings were disposed of. The tenant and her daughter slept on a relative's sofa for six months until she found alternative private accommodation. Judgment in default was entered against the landlord who took no part in the proceedings. Deputy District Judge Long awarded £5,300 general damages, £500 aggravated damages, £500 exemplary damages, £550 for the loss of her deposit and £1,030 special damages.

Damages for harassment

■ Bruce v Woods

Guildford County Court, 14 November 2006[20]

Mr and Mrs Bruce and Mr and Mrs Woods were neighbours. In December 2003, the Woods began a campaign of harassment against the Bruces, which lasted for two and a half years. During that time, the Bruces received countless silent telephone calls from the Woods and were subjected to noise nuisance, comprising loud banging, loud music and the running of an electric motor intermittently throughout the day and night. On several occasions, the Woods trespassed on the Bruces' land and damaged the Bruces' property by daubing their car with paint, puncturing the car tyres, pouring water into their oil tank, cutting down their bird table and attempting unsuccessfully to cut through the gas pipe feeding their garden barbecue. The Bruces were subjected to foul language and, on several occasions, threats of harm. On one occasion, Mr Woods assaulted Mr Bruce while brandishing a hammer. He tailgated Mrs Bruce in her car on one occasion and, on a further occasion, drove at Mrs Bruce's car, swerving only at the last minute to avoid a collision. The Bruces issued a claim against the Woods for an injunction and general and aggravated damages under Protection from Harassment Act 1997 ss1 and 3. After serving a defence, the Woods took no further part in the proceedings. They were debarred from defending the claim because of repeated failures to comply with court orders.

HHJ Reid QC heard evidence that the Bruces had been unable to use their garden because of the Woods' behaviour. They had had to go on holiday separately for fear of their home being damaged in their absence. Their daughters had been upset by the Woods' threats and abusive language and the Bruces' relationship had suffered under the strain imposed by the Woods' misconduct. In addition, Mrs Bruce had suffered a short episode of mild depression for which she had received treatment for one month. After considering *Perharic v Hennessey* (1997) 9 June, unreported, CA, HHJ Reid QC awarded the Bruces £18,454 in damages and interest, comprising £7,500 each in general damages, £1,500 each in aggravated damages and interest of £227 each at the Judgment Act rate of eight per cent.

HOUSING ALLOCATION

■ R (Heaney) v Lambeth LBC

[2006] EWHC 3332 (Admin), 17 November 2006

The claimant, a Lambeth tenant, applied for a transfer. Her six-year-old daughter had died suddenly and unexpectedly in her home. The death had had a devastating effect on the claimant and her other children. Her application for a transfer was supported by medical opinion and a social services assessment.

The council's allocation scheme had eight priority groups (A to H). The claimant asked to be placed in Group B, which dealt with 'emergencies' (cases with a 'very high level of need') and gave priority over all other groups. That application was refused.

Collins J dismissed an application for judicial review. The council had, eventually, considered all the relevant material. Even if the council's final decision were to have been viewed as irregular, granting relief to the claimant would have brought no advantage to her as the 'threshold is a very high one' for Group B and it was 'quite impossible to envisage' that she could qualify for it.

HOMELESSNESS

Accommodation pending appeal

■ Lewis v Havering LBC

[2006] EWCA Civ 1793, 23 November 2006

Mr Lewis applied for assistance as a homeless person but was found by Havering, on review, not to be in priority need. He told the council he would appeal that decision and asked for accommodation pending appeal. The council refused.

He then lodged an appeal against both the review decision (HA 1996 s204) and the decision to refuse accommodation pending appeal (HA 1996 s204A). HHJ Platt allowed the s204A appeal and quashed the council's decision to refuse accommodation pending appeal on the ground that the decision contained no reasons. The council then reconsidered the position but issued a further decision not to accommodate pending appeal.

The claimant lodged a further appeal under s204A contending that the council had failed to consider the merits of the grounds of his main s204 appeal. On the second s204A appeal, HHJ Polden allowed the council to put in a witness statement from its officer indicating that he had considered 'all the documentation'.

The Court of Appeal dismissed a further appeal. It held that it was appropriate in such cases for the grounds of the substantive appeal to be considered by the officer who was seized of the application for accommodation pending that appeal. In the present case, it was fairly to be inferred from the council's decision letter that the officer had not considered those grounds. However, the evidence showed that this had, in fact, been done. The judge had not been wrong to admit the evidence as it had caused no unfairness to the claimant (applying *Hijazi v Kensington and Chelsea RLBC* [2003] EWCA Civ 692, 7 May 2003; [2003] HLR 72).

Assessing vulnerability

■ Khelassi v Brent LBC

[2006] EWCA Civ 1825, 7 December 2006

The claimant appealed successfully to the county court against a homelessness review decision in which the council had found that he did not have a priority need for accommodation as he was not 'vulnerable' (HA 1996 s189(1)(c)). The judge held that, on the specific facts of the case relating to the claimant's mental illness (supported by a specialist psychiatric expert opinion) the council ought not to have relied simply on the advice it had received from its general medical adviser.

The council's application for permission to bring a second appeal was refused by the Court of Appeal as it raised no important point of principle or practice. The judge had not suggested that there was a general principle that in every case of mental illness an authority had to commission a psychiatric report rather than rely on a general medical adviser. All he had said was that a more authoritative opinion had been required in this particular case.

Time limits for appeals

■ Lambeth LBC v Namagembe

6 December 2006, [2006] All ER (D) 70 (Dec)

The claimant sought to appeal against a review decision made on her homelessness application (HA 1996 s202). The council said that the review decision had been sent by post in October 2005. The claimant said that she had not received it but had only collected a copy of the decision from the council offices in November 2005. The question of whether the appeal had been lodged in time (under HA 1996 s204) was listed for trial as a preliminary issue. The judge considered witness statements from the claimant's solicitor and a council officer and found that the appeal was made in time.

Blackburne J allowed the council's appeal from that decision. There had been no evidence from the claimant herself and the conflict between the witness statements should have been resolved by cross-examination.

1 Copies of the KLOEs and individual inspection reports are available at: www.audit-commission.gov.uk.
2 The details are available at: www.communities.gov.uk/cavereview.
3 Available at: www.communities.gov.uk/pub/138/HomelessnessStatisticsDecember2006andTheHomelessnessFundingAllocationforLocalAu7_id1505138.pdf.
4 Available at: www.housingcorp.gov.uk/upload/pdf/Homelessness_strat_20061128094557.pdf.
5 Available at: www.communities.gov.uk/pub/111/HospitalAdmissionandDischargePeoplewhoarehomelessorlivingintemporaryorinsecurean_id1505111.pdf.
6 Available at: www.dogstrust.org.uk/VirtualContent/110689/Welcome_dogs_full_pack.pdf.
7 *Code for sustainable homes. A step-change in sustainable home building practice* is available at: www.planningportal.gov.uk/uploads/code_for_sust_homes.pdf.
8 *Proposal to introduce a code for sustainable homes: regulatory impact assessment* is available at: www.communities.gov.uk/pub/172/ProposaltointroduceaCodeforSustainableHomes_id1505172.pdf.
9 Available at: www.drc-gb.org/pdf/DED_Housing_Guidance.pdf.
10 Available at: www.housingcorp.gov.uk/upload/pdf/Promoting_Respect.pdf.
11 Available at: www.nao.org.uk/publications/nao_reports/06-07/060799.pdf or from TSO, £13.50.
12 Available at: www.crimereduction.gov.uk/asbos/asbos2.htm.
13 Available at: www.communities.gov.uk/pub/750/ApprovalstepsforAdditionalandSelectiveLicensingDesignationinEngland_id1504750.pdf.
14 The memorandum is available at: www.judiciary.gov.uk/docs/almo_31102006.pdf.
15 Available at: www.communities.gov.uk/pub/297/OptionsforSettingupaSanctuaryScheme_id1505297.pdf.
16 Dawn McPherson, Fisher Meredith solicitors, London and Beatrice Prevatt, barrister, London.
17 Patricia Carr, Anthony Gold solicitors, London and Liz Davies, barrister, London.
18 Andrew Brooks, Anthony Gold solicitors, London and William Geldart, barrister, London.
19 Hadens solicitors, West Midlands.
20 Barry Brooks, solicitor, Brooks & Co, Surrey and Dean Underwood, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder. They are grateful to the colleagues at notes 16–20 for supplying transcripts or notes of judgments.

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Legislation

CHILDREN

Childcare Act 2006 (Commencement No 1) Order 2006 SI No 3360

This is the first commencement order made under the Childcare Act (CA) 2006. Article 2 sets out provisions of the CA coming into force on 20 December 2006 to the extent specified in each paragraph.

CRIME

Criminal Justice Act 2003 (Commencement No 14 and Transitional Provision) Order 2006 SI No 3217

This Order brings into force in England and Wales on 1 January 2007, subject to the transitional provision in article 3, Criminal Justice Act (CJA) 2003 ss14 and 15(1)-(2) in relation to certain offences specified in article 2(a). The specified offences are those to which Bail Act (BA) 1976 Sch 1 Part 1 paras 2A(2)(b), 6(2)(b), 9AA(1)(b) and 9AB(1)(b) apply in relation to which the defendant is liable on conviction to a sentence of imprisonment for life, detention during Her Majesty's pleasure or custody for life.

■ The effect of the Order is that the new criteria in BA Sch 1 Part 1 paras 2A(1) and 9AA(2), as substituted by CJA s14(1), will apply as to when bail may be granted to a defendant who has, on or after 1 January 2007, committed a specified offence, and who appears to the court to have been on bail in criminal proceedings on the date of the offence.

■ The Order also has the effect that the new criteria in BA Sch 1 Part 1 paras 6(1) and 9AB(3), as substituted by CJA s15(1)-(2), will apply as to when bail may be granted to a person who, having been released on bail in, or in connection with, criminal proceedings for a specified offence, appears to the court to have failed to surrender to custody in those proceedings on or after 1 January 2007.

Criminal Justice Act 2003 (Commencement No 15) Order 2006 SI No 3422

This Order brings into force on 8 January 2007 the provisions of the Criminal Justice Act 2003 referred to in article 2.

Domestic Violence, Crime and Victims Act 2004 (Commencement No 7 and Transitional Provision) Order 2006 SI No 3423

This Order brings into force on 8 January 2007 the provisions of the Domestic Violence, Crime and Victims Act 2004 specified in article 2, subject to the transitional provision in article 3.

DISCRIMINATION

Disability Rights Commission Act 1999 (Commencement No 3) Order 2006 SI No 3189

This Order brings into force the whole of the Disability Rights Commission Act 1999, so far as it is not already in force, on 4 December 2006. The practical effect is to bring into force the repeal of a few minor and obsolete provisions of the Disability Discrimination Act (DDA) 1995 relating to codes of practice prepared by the (former) National Disability Council and the secretary of state. Codes of practice are now prepared by the Disability Rights Commission under DDA s53A.

EDUCATION

Education (Special Educational Needs) (England) (Consolidation) (Amendment) Regulations 2006 SI No 3346

These regulations amend the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 SI No 3455 and apply only in relation to England. In force 1 March 2007.

Education and Inspections Act 2006 (Commencement No 2) Order 2006 SI No 3400

This Order is the second commencement order made under the Education and Inspections Act 2006. Articles 2-7 contain the provisions of the Act to be commenced. Articles 2, 4 and 6 list those provisions which are commenced in relation to England only.

■ Section 4 sets out a new duty for local education authorities (LEAs) to make arrangements to enable them to identify children not receiving education and is commenced in relation to England only.

■ Section 5 sets out a new duty for LEAs in England to appoint a school improvement partner in relation to each maintained school which they maintain.

■ Sections 41-51, 53-54 and 163 make amendments to the School Standards and Framework Act (SSFA) 1998 regarding school admissions. Section 39 re-states the restriction on selection by ability.

■ Section 57 and Sch 5 make amendments to SSFA Part 2 Chapter 4 (financing of maintained schools).

■ Section 173 imposes a new duty on governing bodies to designate a staff member as the special educational needs co-ordinator. In force 8 January 2007, 8 February 2007 and 27 February 2007.

EMPLOYMENT

Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 SI No 3314

These regulations amend the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI No 3236 to widen the scope of the statutory right for employees to request a contract variation, which previously applied to carers of children under six or disabled children under 18, to cover employees who care for certain adults. This right is provided for in the Employment Rights Act 1996, as amended by the Work and Families Act 2006. In force 6 April 2007.

HOUSING

Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006 SI No 3190

Housing Act (HA) 2004 s225 imposes a duty on local housing authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to their district, when undertaking a review of housing needs in their district under HA 1985 s8.

These regulations define 'Gypsies and Travellers' for the purposes of that duty in relation to England. In force 2 January 2007.

Housing Act 2004 (Commencement No 6) (England) Order 2006 SI No 3191

This Order brings Housing Act 2004 s225 (duties of local housing authorities: accommodation needs of Gypsies and Travellers), s226 (guidance in relation to s225) and Sch 15 para 47 (housing strategies and statements under Local Government Act 2003 s87) into force in England on 2 January 2007.

Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (No 2) Regulations 2006 SI No 3340

These regulations amend the provisions of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294 ('the eligibility regulations') which determine which persons from abroad, other than persons subject to immigration control, are ineligible for an allocation of housing accommodation under Housing Act (HA) 1996 Part 6 or for housing assistance under HA 1996 Part 7.

A person who is not subject to immigration control is ineligible for an allocation or for housing assistance if s/he is not habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland, unless specifically exempted from that requirement.

The effect of the amendments made by reg 2 is to insert a new category of persons who are exempt from the habitual residence test. The category applies to nationals of Bulgaria and Romania, countries which accede to the EU on 1 January 2007. Those Bulgarian and Romanian nationals who are subject to the worker authorisation scheme established by the Accession (Immigration and Worker Authorisation) Regulations 2006 SI No 3317 are exempt from the habitual residence test when they are treated as workers under those regulations. In force 1 January 2007.

IMMIGRATION

Asylum (Designated States) (Amendment) Order 2006 SI No 3215

Nationality, Immigration and Asylum Act (NIAA) 2002 s94 concerns appeal rights for unfounded human rights or asylum claims. Under NIAA s94(2), a person may not bring an appeal under NIAA s82(1) while in the UK where s/he has made an asylum or human rights claim (or both) if the secretary of state certifies that the claim or claims is or are clearly unfounded. The secretary of state shall issue a certificate under NIAA s94(2) if he is satisfied that the asylum or human rights claimant is entitled to reside in a state listed in NIAA s94(4) unless he is satisfied that the claim is not clearly unfounded. This Order removes Bulgaria and Romania from the list of states in NIAA s94(4). These states accede to the EU on 1 January 2007, and from that date the Immigration (European Economic Area) Regulations 2006 SI No 1003 will govern the appeal rights of people who are citizens of

these states. In force 1 January 2007.

Asylum (Designated States) (Amendment) (No 2) Order 2006 SI No 3275

Nationality, Immigration and Asylum Act (NIAA) 2002 s94 concerns appeal rights for unfounded human rights or asylum claims. Under NIAA s94(2), a person may not bring an appeal under NIAA s82(1) while in the UK where s/he has made an asylum or human rights claim (or both) if the secretary of state certifies that the claim or claims is or are clearly unfounded. The secretary of state shall issue a certificate under NIAA s94(2) if he is satisfied that the asylum or human rights claimant is entitled to reside in a state listed in NIAA s94(4) unless he is satisfied that the claim is not clearly unfounded. This Order removes Sri Lanka from the list of states in NIAA s94(4). In force 13 December 2006.

Immigration (Designation of Travel Bans) (Amendment) Order 2006 SI No 3277

This Order amends the Immigration (Designation of Travel Bans) Order 2000 SI No 2724 ('the 2000 Order') by substituting the Schedule to this Order for the Schedule to the 2000 Order (which was last substituted by the Immigration (Designation of Travel Bans) (Amendment) Order 2005 SI No 3310). Any person named by or under an instrument listed in the new Schedule or falling within a description in such an instrument will be excluded from the UK (subject to the exceptions specified in article 3 of the 2000 Order). In force 13 December 2006.

Accession (Immigration and Worker Authorisation) Regulations 2006 SI No 3317

These regulations make provision in relation to the entitlement of nationals of Bulgaria and Romania to reside and work in the UK on the accession of those states to the EU on 1 January 2007. In force 1 January 2007.

Asylum (First List of Safe Countries) (Amendment) Order 2006 SI No 3393

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 Sch 3 Part 2 lists those countries which are to be treated as safe for the purpose of determining whether a third country national, who has made an asylum or human rights claim in the UK, may be removed to one of them. The list includes all member states of the EU and states in the European Economic Area.This Order adds Bulgaria and Romania to the list from the date of their accession to the EU. In force 1 January 2007.

MENTAL HEALTH

Mental Capacity Act 2005 (Commencement No 1) (Amendment) Order 2006 SI No 3473

This Order amends the Mental Capacity Act 2005 (Commencement No 1 Order) 2006 SI No 2814 ('Commencement Order No 1') under the Mental Capacity Act 2005. That Order brought into force ss30–34 (research). Article 2 substitutes in Commencement Order No 1 new dates for these provisions to come into force.

Sections 30–34 of the Act will now come into force on 1 July 2007 for the purpose of enabling applications for ethical approval of research to be made to, and determined by, an appropriate body. Sections 30-34 will now come into force on 1 October 2008 in relation to research projects which have begun before 1 October 2007 and have been ethically approved before that date. Sections 30–34 will now come into force on 1 October 2007 in relation to all other research projects, namely those beginning on or after 1 October 2007 or which have begun, but have not been ethically approved, before that date.

POLICE

Police and Justice Act 2006 (Commencement No 1, Transitional and Saving Provisions) Order 2006 SI No 3364

This Order brings into force those provisions of the Police and Justice Act (PJA) 2006 set out in article 2 on 15 January 2007.

- Article 3 makes transitional and saving provisions that provide that the current Schs 2, 2A, 3 and 3A of the Police Act 1996 that relate to police authorities shall continue in force until 31 March 2008 or 2 July 2008 as provided for in that article.
- Article 4 makes transitional provisions in relation to the commencement of PJA s45, which substitutes for Crime and Disorder Act 1998 s57 a new s57A-E relating to live links at certain preliminary and sentencing hearings.

Police and Justice Act 2006 (Supplementary and Transitional Provisions) Order 2006 SI No 3365

This Order makes supplementary and transitional provision which is expedient for the purposes of bringing into force and giving full effect to Police and Justice Act (PJA) 2006 Sch 2 paras 1-6. Paragraphs 1-6 of Sch 2 to the PJA introduce a new regime for the membership of police authorities. Those provisions will be brought into force on 15 January 2007.

PRACTICE AND PROCEDURE

Civil Procedure (Amendment No 3) Rules 2006 SI No 3435

These rules introduce a new Part 36 and Part 37. In addition, the following amendments are made:

- to rr3.1, 27.2, 27.14, 44.3, 44.12, 45.3, 47.7 and 52.12, and a new r41.3A consequential on the changes to Part 36 and Part 37;
- to r14.1, and a new r14.1A making provision for admissions made before proceedings are commenced;
- a new sVI in Part 65, for applications for drinking banning orders under the Violent Crime Reduction Act 2006.

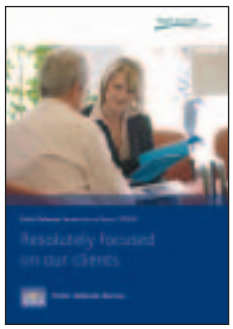
The opportunity has also been taken to revoke a number of RSC and CCR Rules contained in Sch 1 and Sch 2 to the Civil Procedure Rules. In force 6 April 2007.

SOCIAL SECURITY

Social Security (Bulgaria and Romania) Amendment Regulations 2006 SI No 3341

These regulations amend the Income Support (General) Regulations 1987 SI No 1967, the Jobseeker's Allowance Regulations 1996 SI No 207, the State Pension Credit Regulations 2002 SI No 1792, the Housing Benefit Regulations 2006 SI No 213, the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 214, the Council Tax Benefit Regulations 2006 SI No 215 and the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 216 in consequence of the accession to the EU on 1 January 2007 of Bulgaria and Romania. In force 1 January 2007.

Reports



Public Defender Service research and annual report 2005/6

Independent research into the quality of service provided by the Public Defender Service (PDS), and the PDS annual report 2005/6, were published on 8 January 2007. *Evaluation of the Public Defender Service in England and Wales* by Lee Bridges, Ed Cape, Paul Fenn, Anona Mitchell, Richard Moorhead and Avrom Sherr represents one of the largest and most detailed peer review evaluations of criminal defence services ever conducted and is available at: www.legalservices.gov.uk/criminal/pds/evaluation.asp. *Public Defender Service annual report 2005/6: Resolutely focused on our clients*, Legal Services Commission, is available at: http://www.legalservices.gov.uk/docs/pds/PDS_ap2006_final.pdf.

Family Procedure Rule Committee annual report 2005–06

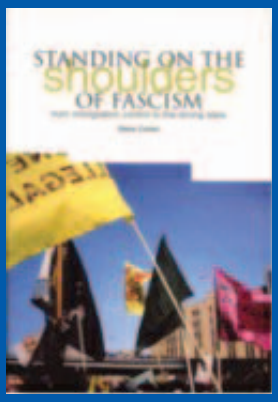
The Family Procedure Rule Committee (the FPRC) is an advisory, non-departmental public body sponsored by the Department for Constitutional Affairs. Its function is to make rules of court governing the practice and procedure in family proceedings in the high court, county courts and magistrates' courts. Its power to make rules is to be exercised with a view to securing that the family justice system is accessible, fair and efficient and the rules are both simple and simply expressed. The FPRC was established in 2004 in line with the provisions of the Courts Act 2003. To date, the FPRC's power to make rules has been brought into force only in regard to matters relating to adoption. The report is available at: www.dca.gov.uk/procedurerules/fpr_annualreport-05-06.pdf.

Consultations

Consultation on draft UK Supreme Court Rules

Lord Bingham is seeking views on the draft UK Supreme Court Rules between 12 January 2007 and 10 April 2007. The consultation paper is available at: www.parliament.uk/judicial_work/judicial_work.cfm. Comments may be submitted by post, fax or e-mail to: UKSC Rules Consultation, House of Lords Judicial Office, House of Lords, London SW1A 0PW, tel: 020 7219 3120, fax: 020 7219 6156, e-mail: lawlords@parliament.uk.

reviews



Standing on the shoulders of fascism: from immigration control to the strong state
Steve Cohen

'As soon as it became obvious that he [Jean Charles de Menezes] was himself not involved in terrorism, the Home Office suggested he had overstayed his leave in the UK – as though this somehow justified his being shot dead.'

In this collection of essays, new and old, Steve Cohen, a retired barrister who has campaigned on immigration issues for over 30 years, demonstrates that immigration controls are not so much standing on the shoulders of fascism as seeped in every fibre of their being with fascist overtones, and that they have always been so. Fascist upsurges have prefaced all legislative and practical controls on the movement of people, just as ' … the Nazi extermination programme was preceded in time by the forced, brutal, mass deportation of Jews'.

Three questions emerge: Can anti-fascist and anti-immigration control movements ever join together? Is it possible to argue for 'fair' or even 'benign' controls? Can the success of individual anti-deportation campaigns translate into opposition to all immigration controls?

In reverse order, the author first suggests that it is only through self-organisation of the 'undocumented', in militant campaigns, that victory can be achieved. This requires solidarity, not pity: 'The struggle against controls is only politically effective when it is threatening, when it involves masses of people in struggle, when it refuses to make any concessions to the ideology of immigration control, when it represents a danger to the state.'

Second, the notion of 'just' or 'humane' controls is a contradiction in terms: 'A system of law built historically on fascist activity could never be humane.' Reminiscent of Thatcher's election-winning slogan, 'Labour isn't working', then Home Secretary Charles Clarke was removed because his system of deportation of non-British prisoners 'wasn't working'. But no one subject to immigration controls wants them to 'work better' when what this means is yet more, firmer, faster, and furious, unchallengeable removals, including of those 'criminals' who have been (re-)detained for crimes of fabricating documents simply because they wanted to work (legitimate work, paying taxes and national insurance, contributing to society and the economy).

Indeed, the Home Office's Immigration and Nationality Directorate employs 17,392 people – whose job in 2004 was to remove 56,920 other human beings. Not to mention the private contractors which manage removal centres and immigration escort services. The latest Home Secretary, John Reid, assured parliament that he had over 400 full-time staff now coping with the 'problem' of 1,000 people who had served their time but were going to be rounded up, detained again, and then deported. This new triple punishment exceeds the objections of the Manifesto of the Campaign Against Double Punishment, of the early 1990s, usefully appended by the author.

'Indeed, the Home Office's Immigration and Nationality Directorate employs 17,392 people – whose job in 2004 was to remove 56,920 other human beings.'

Finally, there is no choice. There is no third way. Collusion with the machinery of immigration control stands shoulder-to-shoulder with collusion with the fascists. Local authorities, voluntary services, even lawyers – all have to take sides.

But the question of how anti-fascist and anti-immigration control movements can make effective common cause is another story. Still waiting, still needing, to unfold – and be told.

John Nicholson, immigration barrister, Kenworthy's Chambers, Salford.

Trentham Books, ISBN 978 1 85856 374 9, 189pp, September 2006, £17.99.

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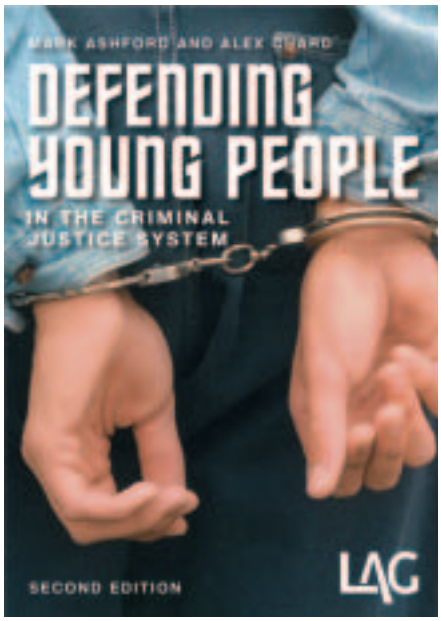

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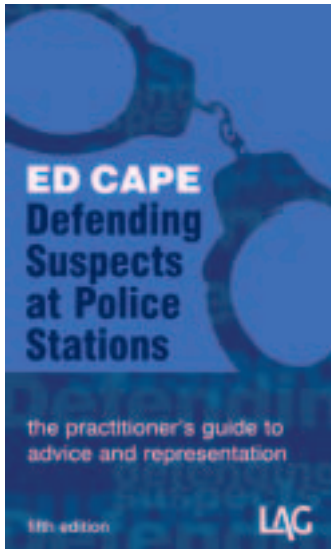

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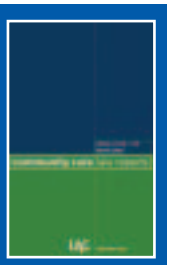
Community Care Law Reports



***Community Care Law Reports* is the only law reports service devoted to community care issues and the rights of vulnerable people to accommodation and services.**

'In an area of growing social and legal importance, the Community Care Law Reports *provide a swift, comprehensive and conveniently aggregated compilation of the major decisions.'*
Michael Beloff QC

Subscriptions
2007 parts service: £265

noticeboard

Conferences and courses

Shelter
Prisoners – the housing perspective: from custody to community
5 February 2007
9.30 am–4.15 pm
Manchester
£220 + VAT (first delegate), £180 + VAT (second or subsequent delegate)
This conference will showcase the work of a number of agencies in meeting the housing needs of prisoners. It will explore developments in accommodation issues for prisoners and workshops will provide opportunities for the discussion of good practice.

Speakers include: Richard Taylor (Community Integration Unit, NOMS), Ruth Power (South West Accommodation Gateway Project) and Adam Sampson (Shelter). Workshops include:
- Peer mentoring;
- Preserving housing;
- Private sector accommodation;
- Regional or sub-regional protocols;
- What is working?
- Timely assessments.

Tel: 020 7490 6720
E-mail: training@shelter.org.uk
www.shelter.org.uk/conference

Child Poverty Action Group
Interviewing skills
8 February 2007
10 am–4.30 pm
London
£195 lawyers (other rates available)
5 hours CPD
This course will assist advisers in developing the necessary skills to effectively manage interviews with clients. It will consider issues around communication in some difficult situations such as:
- dealing with anger and other negative emotions;
- communicating with those with a sensory disability; and
- the needs of people with mental health problems.

E-mail: training@cpag.org.uk
www.cpag.org.uk

Doughty Street Chambers
The Mental Capacity Act 2005
21 February 2007
9.30 am–5 pm
London
£150 + VAT full rate (other rates available)
5.5 hours CPD
This one-day course aims to introduce some of the key concepts relating to personal welfare decision-making under the new Act, which is expected to come into force in April 2007. It will include the overlap with the existing common law on capacity and best interests. It will also consider the interface with the Mental Health Act.
Tel: 020 7404 1313
E-mail: training@doughtystreet.co.uk
www.doughtystreet.co.uk

Public Law Project
Advisers' training day: the Ombudsman and non-litigation remedies
1 March 2007
11 am–4 pm
Manchester
£60 + VAT
This practical training course aims to give solicitors and advisers the knowledge and tools to make effective use of the non-litigation remedies available within public law. The focus is on common problems with the benefit authorities such as:
- what to do about delays and other failures within the administration of benefits by the Department for Work and Pensions, local authorities and HM Revenue and Customs;
- what to do if you think there has been an unreasonable decision about the recovery of benefit overpayments; and
- what to do about problems caused by the application of new policies and procedures.

Tel: 020 7697 2191
E-mail: p.powell@publiclawproject.org.uk
www.publiclawproject.org.uk

Refugee Council in association with Immigration Law Practitioners' Association (ILPA)
Practice and procedure: an asylum policy and legislation update
7 March 2007 (London)
22 March 2007 (York)
9.30 am–5.30 pm
£319 full rate (other rates are available)
This conference is for all those working with asylum-seekers and refugees, and for those formulating policies on refugee issues. It aims to outline policy and legislation changes and their implications for service providers in terms of their roles, service provision, good practice and multi-agency working. Speakers include: Chris Hudson (Immigration and Nationality Directorate), Shami Chakrabarti (Liberty), Steve Symonds (ILPA) and Nick Oakeshott (Refugee Legal Centre).
Tel: 020 7346 6737
E-mail: marketing@refugeecouncil.org.uk
www.refugeecouncil.org.uk/conferences

University of the West of England and University of Bristol
Policing and defending in a post-PACE world
29 March 2007
9.30 am–5 pm
Bristol
6 hours CPD
A conference examining the Police and Criminal Evidence Act (PACE) 1984 past, present and future. 2007 marks the 21st anniversary of the implementation of PACE. The time has come to ask the question: has PACE come of age, or should it be pensioned off?
Contact Susan Harris
Tel: 0117 32 82424
E-mail: Susan.Harris@uwe.ac.uk
www.uwe.ac.uk/www.bris.ac.uk

Lectures, seminars and meetings

Law Society
Efficient management techniques for legal aid practices
21 February 2007 (Derby)
28 February 2007 (Newcastle)
12 pm–3 pm or 4.30 pm–7.30 pm (Derby)
4 pm–7 pm (Newcastle)
£90 + VAT
3 hours CPD
A seminar to enable legal aid practitioners to employ the most effective management tools available to them in a climate of continued and progressive change.
Contact Kerry Fox (Derby seminar)
Tel: 0116 285 9120
E-mail: kerry.fox@lawsociety.org.uk
www.lawsociety.org.uk

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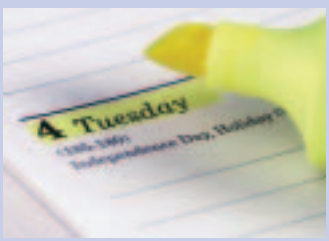


Copy deadlines for entries to appear in:

March: 5 February
April: 5 March
May: 9 April
June: 7 May
July: 11 June
August: 9 July

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

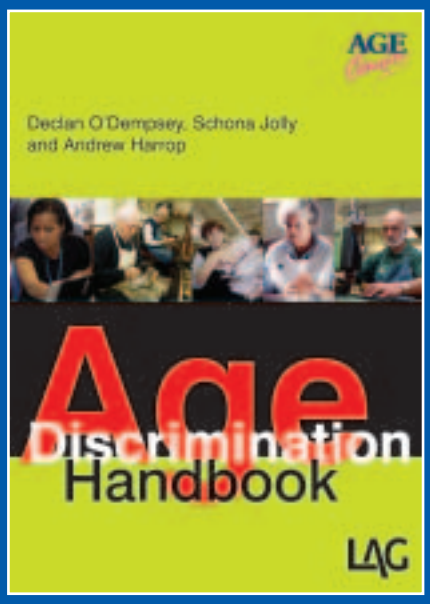
NEW
FROM LAG BOOKS

Age Discrimination Handbook

Declan O'Dempsey, Schona Jolly and Andrew Harrop

The Employment Equality (Age) Regulations in force from October 2006 implement the EU Framework Directive on Equal Treatment in Employment and Occupation, making discrimination on the ground of age unlawful in employment and education. *Age Discrimination Handbook* is a comprehensive, yet practical, guide to these changes.

Pb 978 1 903307 48 9 760pp October 2006 £35



Maternity and Parental Rights

Camilla Palmer, Joanna Wade, Katie Wood and Alexandra Heron

Often called 'the bible of working parents' rights', *Maternity and Parental Rights* is a complete guide to the statutory framework relating to parents' rights at work – a patchwork of UK and European employment, discrimination and social security law.

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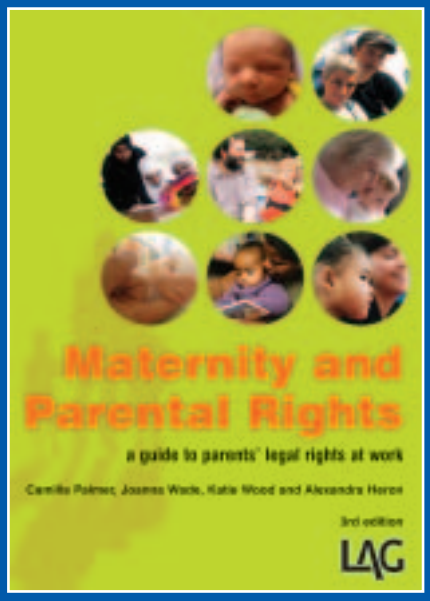
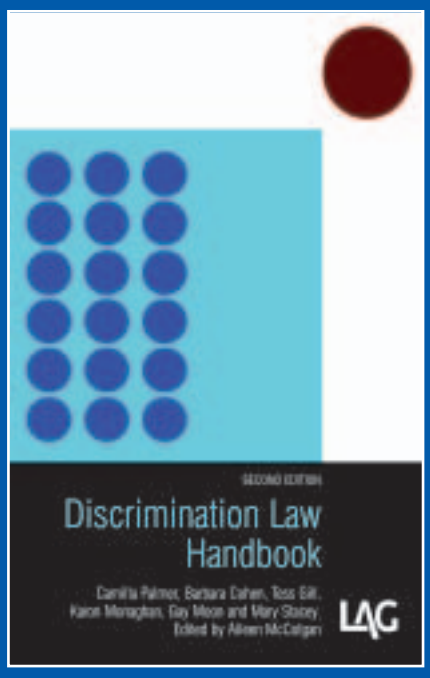


Discrimination Law Handbook

Camilla Palmer, Barbara Cohen, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey. Edited by Aileen McColgan

Second edition of the practical, accessible guide to all aspects of discrimination law covering employment, goods and services. This edition has been updated to include all the provisions that came into force in October 2006.

Pb 978 1 903307 38 0 1168pp December 2006 2nd edition £55



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