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

Deadline for letters and advertisements for December issue: Monday 14 November

To place an advertisement, contact Kevin Kibble
tel: 020 7819 1200
fax: 020 7819 1210
e-mail: kevin@ professionalfundraising. co.uk

LAG
242 Pentonville Road
London N1 9UN

Telephone: 020 7833 2931
Fax: 020 7837 6094
e-mail:
legalaction@lag.org.uk
www.lag.org.uk

contents
November 2005

Cover photo: Rev Alfred Ridley at a meeting after his release from Woodhill prison © Paul Howard Photography LSWPP

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

editorial

A real voice for victims?

Michael Howard may not be much missed as leader of the Conservative party, but he will leave one enduring, if ambiguous, legacy. When he introduced the 1996 Victim's Charter, the then Home Secretary said that there was a need to redress the imbalance in the criminal justice system towards the victim. This phrase, or something like it, has come to be used as the justification for just about every piece of criminal justice legislation and policy initiative ever since.

And so it is with the latest government plans to give bereaved relatives of murder and manslaughter victims a say in criminal proceedings, set out in the consultation paper *Hearing the relatives of murder and manslaughter victims* (see October 2005 *Legal Action* 4). The 'vision' of the government, writes Lord Falconer, the Secretary of State for Constitutional Affairs, has been to rebalance the criminal justice system in order to place victims and witnesses at its centre, and now 'we want to ... let the voice of the victim be heard'.

In fact, the proposals now out for consultation are rather more limited in scope, although it is clear that, if successful, the pilot scheme will be extended to victims of other crimes. In essence, the objective is straightforward enough – to enable bereaved relatives of murder and manslaughter victims, if they so wish, to make a personal statement in court before the defendant is sentenced. While relatives would be entitled to do this on their own, the government recognises that many, if not most, would find this a challenging and traumatic experience. Therefore, the paper proposes that relatives should be able to instruct a publicly funded advocate to provide advice, assist with pre-trial processes, and to help them make their statement in court.

However, as the government recognises, the apparently simple aim involves a host of practical difficulties. Two immediate problems are who counts as a relative, and how many will be entitled to make a statement? These are especially acute questions where, as is so often the case, the victim was known to, or in a relationship with, the person who killed him/her. And how are deaths resulting from family feuds or gangland killings going to fit into the scheme? Another key concern is who may be appointed as a victim's advocate? The paper says that advocates could be lay people or lawyers and, in the case of the latter, it proposes the creation of a specialist panel. Strangely, no form of qualification or panel is considered to be necessary for lay advocates even though the person chosen by a relative may be completely unprepared for – and unsuited to – the role, and could actually make the bereaved relative's experience worse. Indeed, in some cases, it is conceivable that a relative could be placed under pressure to appoint a friend of the defendant as an advocate.

Many other important questions are still to be answered. What roles should relatives and their advocates be able to play in pre-trial proceedings such as bail hearings, decisions to downgrade charges or to discontinue proceedings, and trial management decisions? How should disagreement on the facts be dealt with, and should defendants be given the right to cross-examine a relative where there is a fundamental disagreement that could impact on the decisions made? And at what stage should relatives' advocates become involved? The consultation paper solicits views on these difficult issues, but there is little evidence that they have been adequately thought through.

Most worrying is the fact that some of the most important questions are not raised in the consultation paper. The most pressing is what is the purpose of giving victims' relatives a 'voice'? If the government intends relatives' statements to affect decisions – especially sentences – where does that leave the principle that sentencing should be rational, consistent and based on culpability? If, on the other hand, the purpose is simply cathartic – unless the process is carefully managed and relatives are fully informed – they are likely to have their expectations raised, only to be dashed when they perceive that their statement has made no difference. If statements are to be instrumental, will judges have to explain whether and how they have taken them into account in determining sentence? If a judge explains that a statement has had no or only limited impact, the relatives concerned are likely to feel victimised all over again.

And, finally, since the paper suggests that state funding will be available for relatives' advocates, how much is this initiative likely to cost and will the civil legal aid budget, once again, bear the brunt of yet another uncosted criminal justice policy? LAG believes that victims and their relatives should be treated with respect, but avoiding the really difficult questions can only lead to further grief for the bereaved.

news

DCA white paper aims to 'put consumers first'

The latest white paper from the Department for Constitutional Affairs, entitled *The future of legal services: putting consumers first*, aims to modernise legal services and make them more responsive to the demands of the market place and of consumers. The white paper, which sets out proposals for the regulatory reform of legal services in England and Wales, follows recommendations made by Sir David Clementi in his review of legal services published in 2004.

The proposals in *The future of legal services* will:

- set up an Office for Legal Complaints to investigate complaints independently;
- set up a Legal Services Board to regulate legal services; and
- enable different kinds of lawyers and non-lawyers to work together on an equal footing to provide legal and other services.

The Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, said: 'We need to reform the legal services market to put consumers first. Legal services are crucial to people's ability to access justice for all. Consumers need and deserve legal services which are efficient, effective and economic. Our proposals will help deliver that.'

At the same time, the government also announced that, later this year, it would be introducing a Compensation Bill to provide for the regulation of claims management companies.

In response to the white paper, Richard Miller, director of the Legal Aid Practitioners Group (LAPG), commented: 'The LAPG has always been concerned to ensure that the needs of legal aid clients are kept firmly in mind when devising the regulatory structure for the legal profession. ... Overall, it appears that the government has acknowledged many of the legitimate concerns that have been expressed as to the risks consumers face from too great a liberalisation of the legal services market. We will need to study the detail more closely to see whether the solutions proposed will be effective in protecting consumers.'

The future of legal services: putting consumers first is available at: www.dca.gov.uk/legalsys/folwp.pdf.

'Major changes to appeals in Immigration Bill' warns ILPA

The Immigration Law Practitioners' Association (ILPA) is anxious to inform agencies and individuals about the changes to immigration appeals in the current Immigration, Asylum and Nationality Bill. The proposed changes are significant. People who are refused visas to come to the UK, for example, as fiancé(e)s, carers, students, work permit holders, or business people, will no longer have a right of appeal if they are refused entry clearance.

The changes will also affect people with leave to remain in the UK. At present, students, family members or work permit holders, who are refused an extension of stay in the UK, have a right of appeal against the refusal and may remain in the UK while that appeal is being heard. About one-third of these appeals are successful – ie, says ILPA, one-third of the Home Office's refusal decisions are wrong.

The bill will prevent people from appealing while they are in the UK, and a person who is refused permission to stay must leave the country immediately. ILPA also considers that applicants appealing from abroad have far less chance of winning their appeals. The Home Office will be represented at appeal hearings, but applicants will be unable to attend the hearing to give evidence.

The bill's provisions will also have the effect of criminalising all people refused extensions of stay in the UK. These people will be in the UK lawfully, but once they are refused an extension of stay they may be detained and removed. If they do not leave the UK, they will be deemed to be committing a criminal offence and may be arrested by a police officer or immigration officer and, if convicted, may be jailed for up to six months.

Rick Scannell, chair of ILPA, said: 'This is not "streamlining" the appeal system as the government claims. It is subverting and stacking the appeal system. The changes will affect the families, livelihoods and careers of lawful immigrants and disrupt the workings of educational institutions and businesses by forced departures. ILPA urges readers to make representations and challenge the proposals.'

For further information, briefings and updates on the Immigration, Asylum and Nationality Bill, see the ILPA website at: www.ilpa.org.uk or e-mail: alison.harvey@ilpa.org.uk.

Baroness Usha Prashar will be the first chair of the Judicial Appointments Commission when it begins its work in April 2006.

Roof celebrates 30th anniversary

Shelter's housing magazine, *Roof*, celebrated the landmark date of its 30th birthday in October 2005. Born in the growing economic crisis of the late 1970s, *Roof* fought hard to stop the loss of public money on housing after the International Monetary Fund disaster. As right to buy was introduced in the 1980s, the magazine campaigned to show how the sale of public housing to the private sector was increasing the use of poor quality bed and breakfast hotels. In recent years, its 'Who's counting?' campaign successfully lobbied for government to record the number of people evicted from social housing.

LAG wishes *Roof* well in future decades; at a time of record homelessness, the need for informed and passionate debate is as strong as ever.

news

'Anger and frustration' expressed at LAPG annual conference

Despite much lively debate, it was hard to escape the mood of pessimism among legal aid practitioners as they looked to the future at this year's Legal Aid Practitioners Group (LAPG) conference, 'Quality matters'. LAPG's director, Richard Miller, reflected this mood in his closing speech. He spoke of his anger and frustration at, among other things, the 'sheer volume of new ideas coming out of the LSC [Legal Services Commission] ... . Perhaps the commission should be concentrating on doing fewer things better', and 'the excesses of the Home Office ... and the stubbornness of the Treasury' when faced with a steady decline in numbers for legal aid contracts, matter starts and solicitors.

Keynote speakers at the conference, which was held, in Birmingham, in October, included Bridget Prentice, the minister for legal aid at the Department for Constitutional Affairs (DCA), and Professor Avrom Sherr, the principal architect of quality assurance for legal aid lawyers and peer reviews. Bridget Prentice spoke of the need for a legal aid system that is fair to clients, the taxpayer and practitioners. She referred to the commitments made by the DCA in the July 2005 paper, *A fairer deal for legal aid*, and to the need to modernise the legal aid system, particularly to target support for those most in need.

For further information about LAPG visit: www.lapg.co.uk.

IN BRIEF

The transfer to Lord Phillips, the new Lord Chief Justice, of judicial functions from the Lord Chancellor under the Constitutional Reform Act 2005 takes effect in April 2006.

The Lord Chief Justice's new responsibilities will be:

- **to represent the views of the judiciary of England and Wales to parliament, to the Lord Chancellor and to ministers of the Crown;**
- **to provide appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor; and**
- **to manage the deployment of the judiciary of England and Wales and the allocation of work within the courts.**

Law Society's scheme helps budding lawyers

Twelve young prospective solicitors, who have had to overcome problems such as disability, illness or difficult family circumstances, will either receive free places on the Legal Practice Course or grants for legal courses under the Law Society's Diversity Access Scheme. The scheme aims to help talented, committed people overcome obstacles to becoming a solicitor.

The winners, who received their awards in October, in London, from Bridget Prentice, parliamentary under-secretary of state at the Department for Constitutional Affairs, include Akalikai Sivarajah who was born in Sri Lanka and has brittle bone disease and is a wheelchair user. She had no formal education in Sri Lanka and taught herself to read at an early age. She came to London aged 16 with her father (her mother had died when she was three) but, sadly, her father also died, leaving Akalikai to manage her personal care and education alone. Akalikai has managed to read for a law degree after only eight years of formal education and without any parental support.

The other winners of the Diversity Access Scheme awards are:

- Juliette Frangos;
- Luisa Volpe;
- Amanda Springall-Rogers;
- Michael Jackman;
- Niaomi Roberts;
- Rashid Warsame;
- Karen Cronin;
- Nihar Punj;
- Obiageli Omu.

There were also awards to two winners who wished to remain anonymous.

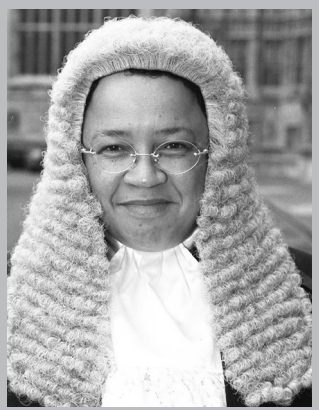
The deadline for Diversity Access Scheme scholarship applications for the 2005/6 academic year has now passed. The application process usually begins in February each year.

LAG annual lecture 2005

Places may still be available for LAG's annual lecture event: *Accuser or inquisitor – in pursuit of truth?* by the Hon Mrs Justice Dobbs DBE, which is taking place in London on Tuesday 22 November 2005 at 6 pm.

Tel: 020 7833 2931

LAG is grateful to the College of Law for supporting this event.



DCA reveals plans to increase court fees

The government has just announced that the Courts Service needs to increase court fees 'in order to meet its cost recovery targets for this current financial year and beyond'. The government hopes to raise an extra £50 million from fees from civil and family court users. The proposals in the consultation paper, *Civil and family court fee increases*, aim to recover 100 per cent costs in civil cases (other than fee remissions and exemptions) and, eventually, 66 per cent costs in family cases.

The Law Society has commented that people on low and middle incomes will be hit hard by the planned rises in family and civil court fees. The society believes that the government's proposals will mean that some court users will face fee increases of 650 per cent if they need to go to court to recover debt, obtain child contact orders and deal with financial payments following divorce. The society commented that: 'For instance, the fee for parents wishing to seek contact with their child will rise from £30 to £175.'

The closing date for responses to *Civil and family court fee increases* is 18 November 2005.

The consultation paper is available at: www.dca.gov.uk/consult/civilfam/civilfam.pdf.

ADMINISTRATION OF JUSTICE

The FOS – an example of good practice?

In its July 2004 white paper on consolidating the tribunal system, *Transforming public services: complaints, redress and tribunals*, the Department for Constitutional Affairs offered the Financial Ombudsman Service (FOS) as an example of how the reformed tribunal service might work.[1] In this article, **Val Reid**, policy officer at the Advice Services Alliance (ASA), asks whether the FOS is a model which the new tribunal system should follow.

Resolving disputes through compromise?

The FOS deals with disputes between two parties to a contractual relationship. In over half of their cases, FOS staff negotiate a resolution through guided mediation. This usually involves some compromise between the parties; complainants accept a lower level of compensation than they would have liked in return for a free dispute resolution service, which is quicker, more accessible and less stressful than going to court.[2]

This is essentially different from most of the complaints handled by the tribunal system. Apart from the Employment Tribunal Service, most tribunals deal with disputes between an individual and the state. These depend on asserting individual rights (to a state benefit, for example) and ascertaining the correct information on which a decision should be based. Such disputes are rarely amenable to compromise (see the Social Security Commissioners, 13 January 2004, CSDLA/606/03 for scathing criticism of a social security tribunal's attempt to broker a compromise in a dispute about disability living allowance). State agencies cannot offer to bend or break their own rules, nor should individuals feel under pressure to accept half their invalidity benefit or agree to asylum for just a few months.

Can the FOS system of guided mediation be replicated in this very different context, and would it produce fair and just outcomes?

Accountability

Internal quality

During the last year, around 12,000 initial complaints to the FOS were 'resolved' before being taken on as cases because relatively junior FOS staff in the Customer Contact Division told the complainant that the offer of redress made by the firm was 'reasonable'. Over half of the cases taken on by the FOS reached a settlement through guided mediation.[3] However, the only advice most complainants receive about whether the settlement is reasonable is from FOS staff, so complainants are heavily dependent on the knowledge and integrity of those staff in order to make an informed decision about whether to settle. Concerns have also been raised by consumer groups about the fact that FOS staff are set targets for the number of cases resolved, and are paid incentives if those targets are met. Does this encourage FOS staff to exert pressure on consumers to agree to proposed settlements?[4]

External review

There is no external review of FOS settlements or adjudication decisions. There is an independent assessor, who is currently Michael Barnes, but he will only consider the process, not the content, of a decision. Unlike the court or tribunal system, there is no public accountability or transparency to the FOS process. Anonymous case studies are published monthly to illustrate trends in complaints and FOS decisions, but individual decisions are not amenable to appeal, review or external challenge.

Public interest – naming and shaming

The FOS does not name and shame firms with high numbers of complaints or firms against which a significant proportion of complaints are upheld. The FOS dispute resolution process is entirely confidential. Where codes of practice have been breached, disciplinary matters are dealt with by the Financial Services Authority. Is this a sufficient safeguard for consumers, when the FOS process itself is not publicly accountable? And would this be appropriate in disputes between citizen and state, where it is in the public interest that poorly performing government departments are exposed and better decision-making encouraged?

External incentives for avoiding disputes

The FOS is funded partly by an annual levy on all the firms which it covers, but three-quarters of its funds come from case fees paid by firms with more than two complaints. There is, therefore, a financial incentive on firms to avoid FOS case fees by dealing with complaints promptly and making reasonable settlements with dissatisfied users. This seems to be an important element of the 'eco-system' within which the FOS operates and it is unlikely that a tribunal service would work so well without the same mindset, motivated by the same financial incentives.

Conclusion

The FOS is highly visible and widely praised, but there are legitimate questions to be asked about the accountability and the transparency of the FOS system. There are also further questions to be asked about whether this system is transferable to tribunals. The current tribunal systems have evolved for a reason: in the types of cases they deal with there is a need for transparency, expertise, independence and accountability. FOS staff offer expertise in different financial specialisms but to replicate this in an integrated tribunal system would be resource-hungry, and would not produce the cost savings which are anticipated in the tribunal reform proposals. Transparency and accountability are not features of the FOS and to sacrifice these in return for a cheaper, speedier system risks undermining the integrity of tribunals.

1 Available at: www.dca.gov.uk/pubs/adminjust/transformfull.pdf.

2 See September 2004 *Legal Action* 10 for an overview of how the FOS operates.

3 FOS users can choose whether to accept a guided mediation settlement, or to ask for an adjudication. If they are unhappy with the adjudicator's decision, they can request an ombudsman decision or choose to take their case to the courts.

4 The FOS commissioned an 'independent' review of the FOS in 2004 from Elaine Kempson et al of Bristol University – *Fair and reasonable: an assessment of the Financial Ombudsman Service*. Kempson found the case-handling process 'robust and fit for purpose' and compliant with 'principles of due and fair process'. However, questions can be asked about whether the report itself is 'robust and fit for purpose'. First, its main aim was to 'provide an analytical description of the FOS, in order to raise awareness and understanding of the organisation's work among its stakeholders ...'. Second, Kempson interviewed FOS staff, observed the process, and audited closed files from 72 (out of over 100,000) cases; she did not include external peer review of the quality of advice and decision-making, nor any independent research into the views and experiences of users or firms. The review is available at: www.financial-ombudsman.org.uk/publications/pdf/kempson-report-04.pdf.

ADMINISTRATION OF JUSTICE

The case for oral hearings

In May 2005, the Council on Tribunals ('the council') issued a consultation paper, *The use and value of oral hearings in the administrative justice system*, in response to the government's white paper on consolidating the tribunal system.[1] (See June 2005 *Legal Action* 5.) **Adam Griffith**, a policy officer at the Advice Services Alliance (ASA), outlines ASA's concerns about the council's proposals.[2]

The council asks a total of 22 questions about oral hearings and their alternatives. It asks, for example, whether oral hearings are more or less 'user-friendly', time-consuming, legalistic and daunting; whether they increase the cost and time spent in determining a dispute; whether they are more 'effective' in various ways; what the advantages and disadvantages of 'adversarial procedures' are; whether tribunals should be more 'inquisitorial' and what the effects of this would be. Only at the end does it ask what the relevant principles should be for deciding when an oral hearing is needed.

We consider that there are clear issues of principle in favour of oral hearings, and clear evidence to demonstrate the importance of these matters in the key tribunals dealing with social welfare law. Approaching the matter in this way avoids the risk of following a Department for Constitutional Affairs' agenda that seems to be ultimately concerned with controlling, if not reducing, the costs of the tribunal system.

Issues of principle

Article 6(1) of the European Convention on Human Rights provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. We should assume that people are entitled to an oral hearing to resolve a dispute of any substance between themselves and the state. At the very least, appellants must have an opportunity to be heard, a chance to understand the process and confidence in the fairness of the process as a whole.[3]

The evidence

In two of the largest parts of the administrative justice system we have very clear evidence about the different outcomes from oral and paper hearings, and the reasons for this.

In the case of welfare benefits appeals, the latest statistics confirm a long-standing difference between the results of oral and paper hearings. In the quarter ending December 2004, 53 per cent of oral hearings were decided in favour of the appellant, as compared with 22 per cent of paper hearings. The statistics show that the attendance of the appellant (and to a lesser extent the appellant's representative) has a decisive impact on the result of the hearing.[4]

The latest report by the President of Appeal Tribunals highlights, as did previous reports, the reasons given by tribunal chairs for allowing appeals.[5] In the latest sample of successful cases:

- The tribunal received additional evidence in 63 per cent of cases;
- The tribunal formed different views of the same evidence in 37 per cent of cases;
- The tribunal accepted evidence that the decision-maker was not willing to accept in 23 per cent of cases;
- The tribunal formed a different view of the medical evidence in 22 per cent of cases; and
- The tribunal found that the medical evidence underestimated the severity of the appellant's disability in 25 per cent of cases.

The report emphasises, above all other factors, the importance of the appellant's evidence in establishing the facts of the case. This was particularly important in appeals involving medical evidence. The report notes a tendency among decision-makers to disregard evidence received from the appellant, a readiness to accept medical testimony without comparing it to the evidence provided by the appellant, and an increasing disparity between the decision-maker's and the tribunal's views of the medical evidence obtained.

In the case of immigration appeals, almost identical findings were made by a Home Office-sponsored study of the differences between oral and paper hearings in family visitor appeals.[6] Between October 2000 and September 2001, 73 per cent of oral appeals were allowed as compared with 38 per cent of paper appeals.

The ability of the appellant's sponsor to attend the appeal and present evidence in person was found to be the most influential factor in explaining this difference. The adjudicator's finding about the sponsor's credibility was paramount. The sponsor could overshadow concerns raised by the Entry Clearance Officer in the reasons for refusal. The sponsor could shed new light on the original evidence or produce new evidence: 'The adjudicators considered that the presence of the sponsor enabled them to see the broader picture, to clarify any vague or ambiguous points and to have the arguments in the appellant's favour brought to their attention more persuasively.'[7] The report concludes that the ability of the sponsor to attend the hearing 'is an essential feature of the appellate process. It ensures that the process is perceived to be fair, open and independent'.[8]

Conclusion

In our opinion, these findings confirm that the principle that appellants should be entitled to an oral hearing is fully justified, and is one that should be defended at all costs. Only an oral hearing seems to provide the opportunity for appellants to counter the arguments raised against them properly, and to counteract the disinclination by decision-makers to accept the truth and validity of what they are saying. Oral hearings enable the tribunal to hear and understand what the appellant is saying, and to ensure that the process 'is perceived to be fair, open and independent'.

1 Available at: www.council-on-tribunals.gov.uk/files/oralhearings.pdf.
2 The ASA's response to the consultation paper can be found at: www.asauk.org.uk.
3 See the comments by Hazel Genn at the council's seminar on this issue at: www.council-on-tribunals.gov.uk.
4 See the *Quarterly Appeal Tribunal Statistics* at: www.dwp.gov.uk/asd/qat.asp.
5 *President's report: report by the President of Appeal Tribunals on the standards of decision-making by the secretary of state, 2004–2005* at: www.appeals-service.gov.uk.
6 Verity Gelsthorpe et al, *Family visitor appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type*, Home Office Online Report 26/03, June 2003 at: www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf.
7 See note 6, p50.
8 See note 6, p13.

ADMINISTRATION OF JUSTICE

Litigants in person: ghosts in the machine

Richard Moorhead, Professor of Law at Cardiff Law School, Cardiff University, was commissioned by the Department for Constitutional Affairs (DCA) to conduct a study into litigants in person. In this article he summarises his findings and considers two main questions: are litigants in person increasing in numbers and are they becoming increasingly difficult in the first instance courts?

Introduction

The Lord Chief Justice, Lord Phillips, recently gave a view from the very top of the judiciary about litigants in person.[1] The story, although not necessarily the Lord Chief Justice himself, implies a growing number of obsessive litigants in person clogging up the British courts. A more cautious reading confines Lord Phillips' remarks to the Court of Appeal. There are two central points: litigants in person are increasingly difficult and they are increasing in numbers. Are these two problems found in the first instance courts?

Along with Mark Sefton, I was fortunate to have been commissioned to conduct a study for the DCA looking at issues surrounding litigants in person.[2] We were able to consider both these issues. We also looked more broadly at the problems caused by, and for, litigants in person in civil and family cases in the county courts and the High Court. The research studied four courts and is based on information from 2,432 case records, 748 case files where there were unrepresented litigants, 24 interviews with litigants, lawyers, and judges and eight focus groups with court staff. What did we discover?

Numbers of litigants in person

One of the most common assertions about litigants in person is that their numbers are growing. In relation to first instance courts, there is surprisingly little data to support the assertion, though the situation is unclear in the family courts because of a total lack of reliable data. Our interview evidence supported the view (but only on balance) that there may have been an increase in unrepresented litigants in recent years.

Conversely, what statistical evidence there was appeared to suggest that there had not been a rise. The evidence suggested that the number of unrepresented parties in county court trials had declined steadily until 2001 and the proportion of unrepresented parties at small claims hearings remained relatively steady. There were, however, modest increases in the number of unrepresented litigants at county court trials and small claims hearings after 2001, although more recent data suggests that this is not indicative of an upward trend.

Vexatious litigants

We were also keen to gauge judicial and court staff views on difficult, obsessive or vexatious litigants in person and find out how common they were. In fact, our reading of files and interviews with judges and court staff all pointed in the same direction: obsessive or difficult litigants were far from common. In the courts we researched, there were some litigants who made far-fetched claims or claims without merit, fruitless applications and indulged in abusive or unco-operative behaviour, but they were a tiny minority. Nevertheless, such litigants did pose resource issues disproportionate to their number and challenged the skills of judges and staff. General restrictions on court fee exemption are sometimes proposed as a way of inhibiting vexatious litigants. The research evidence was clearly against this: given the low numbers of difficult litigants such a response would be disproportionate.

Lack of participation

Although 'difficult' or 'vexatious' litigants were rare, unrepresented parties in cases were reasonably common in first instance courts and pose significant problems for these courts. The first problem is that so many of them do not participate or do so only very transiently. They are the ghosts in the machine. This was particularly true in county court cases (which would include housing possessions) where over a half of all individual defendants did not participate in their cases (and so were automatically unrepresented). Even in High Court cases, over one in five individual defendants did not participate, in any way apparent from the court file, in their cases. More than one in six business defendants in the High Court, and over one in four in the county court, did not appear to participate in their cases. Even in family cases, there was a significant minority of unrepresented litigants who did not participate in any way apparent from the court file. In ancillary relief, Children Act (CA) and injunction cases, about a third of unrepresented litigants did not appear to participate. In many ways our data suggests that, in terms of access to justice, there is a prior problem to the problem of non-representation, which is the decision not to participate. From the defendant's perspective, this may be for rational reasons such as having a weak case or seeking to evade any judgment. From another perspective, if disengagement is for reasons of fear, inability to secure representation, or as a strategy of avoiding enforcement, it weakens the legitimacy of the court process.

Another finding, which tends to contradict the view that unrepresented litigants are generally claimants out to cause trouble, is that it was usually defendants and not claimants/applicants who were unrepresented: this was particularly the case in civil cases but also applied in family cases. We suspect that patterns of representation reflect broader issues. The high proportion of claimants and applicants who were represented probably reflects two things: first, would-be claimants have a choice if pre-action negotiation fails: they can litigate or they can 'lump', ie, give up on, their problem. All the research evidence suggests many lump their problems. High levels of representation among claimants in the courts masks this problem. Second, patterns of representation were also, we suspect, strongly influenced by insurance and the legal services industry. So, unspecified claims show lower levels of non-representation reflecting the strong emphasis on personal injury and similar litigation where claimants would have had the benefit of insurance and/or 'no win, no fee' arrangements. Such claims would also, typically, have involved insured defendants benefiting from motor and employers' liability-type insurance.

Ad hoc advice

What other findings from the research may be of interest? Although many unrepresented litigants had some advice on, or assistance with, their case, the evidence suggested that this help was ad hoc: litigants might have lawyer friends who they would ask about cases, or they may have picked up some help from a citizens advice bureau or, perhaps, from a brief telephone call or free interview with a solicitor. There was little evidence of systematic, coherent

support for such litigants. Importantly, our analysis of files showed very little incidence of lay representation or assistance by way of McKenzie friends in family cases and only marginally more in civil cases. Our interview data suggested different judges had different views on whether they would usually permit such representation. The Court of Appeal has moved recently to encourage a more sympathetic approach from judges to this issue; but practice on the ground may need close monitoring.

Imbalance of representation

Perhaps most importantly, our research (which excluded small claims cases) showed that cases where both parties were unrepresented were rare. Thus, a critical issue about unrepresented litigants is that they are almost always victims of an imbalance of expertise. Such an imbalance can also create cost and ethical problems as well as unsettling the adversarial dynamic of litigation versus negotiation. Importantly, a significant minority of unrepresented litigants in family cases also had a specific indication of some vulnerability (such as being victims of violence, or having depression, or a problem with alcohol/drug use, or having a mental illness or being extremely young parents). Twenty per cent of injunction cases and 15 per cent of CA cases also involved an unrepresented party displaying some level of vulnerability. For methodological reasons these figures may, in fact, underestimate the extent of the problem.

There are other important findings pointing to the vulnerability of inexpert litigants. 'Active' unrepresented defendants appeared less likely to defend than represented defendants. Activity on cases was often led by the represented party, not the unrepresented party, who participated sporadically and made more errors.

Another important finding is that the bulk of unrepresented party participation took place via the court office not the courtroom: unrepresented litigants were far from keen on their day in court and much more likely to deal with court staff than judges. Complexity, jargon and lack of time all rendered courts (and court offices) places unsympathetic to litigants in person. Even when signposting clients elsewhere we saw evidence that courts were not confident at guiding unrepresented litigants to alternative sources of help. Staff were uncertain about what services were provided in the locality and tended to rely on very general referral to an unnamed citizens advice bureau or a haphazardly suggested solicitor.

Conclusion

In summary, litigants in person pose many challenges:

- to staff under the pressure of volume of work targets and without the training or knowledge to help litigants effectively;
- to judges who have to adapt traditional styles of judging to a new set of situations;
- to opponents who have to negotiate with inexpert adversaries; and
- to the litigants themselves who struggle with an alien process, alien language and a machinery (usually) being used against them by their opponent.

At root, the research did not suggest the situation is the same in first instance courts as the problems perceived by Lord Phillips in the Court of Appeal. It is much closer to Lord Woolf's famous remarks:

> *Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.*[3]

The problem opens up the necessity of rethinking the values and approaches of courts, lawyers and court staff, if unrepresented parties are to receive meaningful access to justice. The nature and intensity of their participation; the struggles they have comprehending law and procedure; and the importance of ensuring that substantive justice is done in our courts suggests that unrepresented litigants need help far more than they need approbation.

1 Robert Verkaik, 'Law chief hits out at litigants "who won't take no for answer"', *Independent*, 30 September 2005.
2 Richard Moorhead and Mark Sefton, *Litigants in person: unrepresented litigants in first instance proceedings*, DCA Research Series 2/05, March 2005, available at: www.dca.gov.uk/research/2005/2_2005.pdf and www.law.cf.ac.uk/staff/MoorheadR.
3 *Access to justice. Interim report to the Lord Chancellor on the civil justice system in England and Wales*, June 1995, chapter 17, para 2.

law & practice

EMPLOYMENT

Employment law update

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

LEGISLATION[1]

Statutes

Disability Discrimination Act 2005

From 5 December 2005, the Disability Discrimination Act (DDA) 1995 will be amended so that the definition of disability is deemed to include people with HIV, multiple sclerosis and cancer on diagnosis. The government has abandoned its controversial plans to exclude certain forms of easily treatable cancer from this protection.

The requirement that mental illness is clinically well-recognised will also be removed. From 4 December 2006, there will be a general statutory duty on public authorities to promote equality of opportunity for disabled people, which will be analogous to the duty under Race Relations Act (RRA) 1976 s71.

Civil Partnership Act 2004

This Act will come into force on 5 December 2005. See below for details.

Regulations

Employment Equality (Sex Discrimination) Regulations 2005 SI No 2467

The regulations came into force on 1 October 2005. They bring the definition of indirect discrimination into line with that under RRA s1(1A), introduce a specific offence of harassment (drafted more widely than that in parallel legislation) and explicitly prohibit discrimination on the ground of pregnancy or maternity leave.

Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 SI No 2114

This Order will come into force on 5 December 2005. Same-sex couples will have similar rights to register their partnership as married couples, with a similar regime on breakdown of the partnership. The protection against discrimination on the ground of marital status in the Sex Discrimination Act (SDA) 1975 will be extended to civil partnerships. Consequential amendments will be made to other legislation, including to Employment Equality (Sexual Orientation) Regulations (EE(SO) Regs) 2003 SI No 1661 reg 25, so that benefits can be granted by reference to civil partnership as well as to marital status (as opposed to unregistered or unmarried status).

Forthcoming legislation

Draft Employment Equality (Age) Regulations 2006

The long awaited draft Employment Equality (Age) Regulations (EE(A) Regs) 2006 prohibiting age discrimination have been published together with a consultation document *Equality and diversity: coming of age. Consultation on the draft Employment Equality (Age) Regulations 2006*.[2] (See October 2005 *Legal Action* 31.) The consultation closed on 17 October 2005. The final draft regulations are due to be laid before parliament in early 2006. They are due to come into force in October 2006. Once the regulations are approved, the Advisory, Conciliation and Arbitration Service will publish guidance.

The usual concepts of direct discrimination, indirect discrimination, victimisation and harassment will apply under the new regulations, but with one major difference: it will be possible for an employer to justify direct discrimination in the same way that indirect discrimination can be justified. Various specific exemptions are also set out in the draft regulations, and the differential minimum pay rates according to age, under the National Minimum Wage Act 1998, will continue to apply.

Most controversially, the government has not abolished compulsory retirement, although it says that it is keen to encourage a culture change in employers' attitudes on this. To this end, some small changes have been made:

- Employers can still force employees to retire at the age of 65, but it will, in future, be age discrimination to force retirement at a younger age, unless the employer can objectively justify doing so.
- Employees must also be notified, 6–12 months in advance, of their retirement date and of their right to request working beyond that date. However, employers are only obliged to meet employees and to give the matter consideration; they can still say no to the request. Employees can receive up to eight weeks' pay as compensation if employers fail to follow this procedure and can claim automatic unfair dismissal in some circumstances.
- The calculation of statutory redundancy pay and the unfair dismissal basic award will be changed to remove the age bands.

Equality Bill[3]

The bill establishes the single Commission for Equality and Human Rights, which is to start up in October 2007, although the Commission for Racial Equality (CRE) will not join it until 2009. The bill also creates a duty on public authorities to promote gender equality, similar to the duty under RRA s71.

New Transfer of Undertakings (Protection of Employment) Regulations

Due to the large number of responses to the consultation exercise and the issues raised by it, the Department of Trade and Industry (DTI) has announced that the revision of the Transfer of Undertakings (Protection of Employment) Regulations 1981 SI No 1794 is now timetabled to be brought into force on 6 April 2006 and not on 1 October 2005 as previously indicated. The draft regulations covered such matters as inclusion of service provision changes, a new requirement for the transferor to notify the transferee of the identities of employees transferring and all associated rights and liabilities, and transfers in insolvency situations.[4]

The Equalities Review and Discrimination Law Review

The Equalities Review, which is chaired by Trevor Phillips, is to report to the government by summer 2006 on the causes of persistent discrimination and inequality in British society. The parallel Discrimination Law Review is to look at modernising and simplifying the discrimination legislation into a single Equality Act.[5]

Codes of practice

Racial equality

The CRE's revised code of practice on racial equality in employment was laid before parliament in June 2005. The revised code is likely to be passed and available shortly.

Data protection

The Information Commissioner has issued a new user-friendly guide to data protection in the workplace entitled *Data protection. The employment practices code*. The code, which consolidates the four parts previously issued separately, runs to 91 pages with 86 pages of guidance. There is a *Quick guide to the employment practices code: ideal for the small business* summarising the main points. The code covers:

- recruitment and selection – looking at job applications and pre-employment vetting;
- employment records – collecting, storing, disclosing and deleting records;
- monitoring at work – principles for monitoring employees at work, whether examining e-mails, recording phone calls or installing CCTV; and

■ medical information – drug and alcohol testing, and obtaining and handling information on workers' health generally.

The code is intended more for data protection cases but can be referred to as evidence of good practice in appropriate employment tribunal (ET) cases (see 765 IRLB 3 for more details).[6]

DISCRIMINATION

Burden of proof

In discrimination cases where the claimant proves facts from which the ET could conclude, in the absence of an adequate explanation, that the employer committed an unlawful act, the tribunal must uphold the complaint unless the employer proves that it did not commit that act (RRA s54A; SDA s63A; DDA 1995 s17A(1C); EE(SO) Regs reg 29; Employment Equality (Religion or Belief) Regulations (EE(RB) Regs) 2003 SI No 1660 reg 29). In other words, the burden of proof passes to the employer to prove that it did not discriminate, once the claimant has proved a prima facie case.

The Court of Appeal, in *Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster* [2005] IRLR 258; 757 IRLB 4; May 2005 *Legal Action* 25 set out guidelines for the stages of applying this principle. In the following case, decided before *Igen*, the Employment Appeal Tribunal (EAT) expands on when the claimant will have proved enough for the burden of proof to move to the employer.

■ **Dresdner Kleinwort Wasserstein Ltd v Adebayo**
[2005] IRLR 514,
766 IRLB 5,
142 EOR 26, EAT

The EAT upheld the ET's finding of race discrimination. It stated firmly that RRA s54A introduced a new approach to deciding complaints of direct discrimination. The first stage is for the ET, having heard all the evidence, to establish the primary facts and to see what inferences can be drawn from which it could conclude that an unlawful act of racial discrimination had been committed, absent any explanation from the employer.

This does not mean that it is enough, at the first stage, for a black claimant simply to show, for example, that a white comparator was promoted to a post for which s/he applied. The claimant would need to show that s/he met the stated qualifications for promotion, and was at least as well qualified as the successful candidate. The burden of proof would then move to the employer to show that it did not discriminate. Evasive answers to legitimate queries in the statutory questionnaire, failure to follow recommendations in the relevant codes of practice, or failure to call, as witnesses, those who were involved in the events and decisions about which a complaint is made will all assume greater significance in the future.

In this case, the fact that the employer genuinely believed the claimant was guilty of misconduct did not mean it had discharged the burden of proving that it did not discriminate: that would fail to appreciate the insidious nature of discrimination. Discriminatory assumptions frequently underpin employers' stated reasons, even where the reasons are given in good faith and genuinely believed, and the discriminator is unaware that such assumptions are operating. ETs cannot look inside the mind of an alleged discriminator. The solution to this, at least in part, is the requirement on employers to prove that they did not discriminate, once the claimant has made out a prima facie case.

Tribunal evidence

An ET should not exclude admissible evidence merely to save time. Employment Tribunals (Constitution and Rules of Procedure) Regulations (ET(C&RP) Regs) 2004 SI No 1861 reg 3 says that the 'overriding objective' of the procedural rules is to enable tribunals to deal with cases justly. This means, so far as is practicable, ensuring that:

■ the parties are on an equal footing;
■ the case is dealt with in ways which are proportionate to the complexity or importance of the issues;
■ the case is dealt with expeditiously and fairly; and
■ expense is saved.

The objective is frequently quoted by ETs as a reason to curtail claimants' requests for documents and information or to shorten the length of a hearing. It can be a particular problem in discrimination cases, where some ETs like to confine the scope of the evidence. The EAT's comments in the following case are therefore extremely important.

■ **Senyonjo v Trident Safeguards Ltd and another**
UKEAT/0316/04

The claimant was unrepresented before the ET. When he served his witness statement, on 27 December 2003, he included incidents going back to the early years of his employment. The employer was caught by surprise by these new allegations and requested an adjournment of the hearing if the ET was to allow the evidence. The ET decided not to allow the claimant to refer to the new matters in his witness statement, on the basis that the employer would be severely prejudiced and would require an adjournment to get more witnesses. Also, witnesses' memories would have faded regarding incidents that were several years old. The ET relied on the duty to deal with cases fairly and expeditiously under the overriding objective (then ET(C&RP) Regs 2001 SI No 1171 reg 10).

The EAT overturned the ET's decision, saying that the ET had not realised this was a case where there was a tension between what expedition, and what fairness, required. The EAT said that the whole point of the tribunal system is to have a simple procedure. The evidence was admissible because there is a long stream of authority which says that past matters are relevant to establish an issue of discrimination. This was not a new cause of action; it was simply evidence supplemental to the tribunal claim. The ET had referred to prejudice to the employer but not to the prejudice to the claimant. The tribunal was rightly concerned with expedition but, in the end, justice has to be preferred to expedition. The claimant would have walked away from the tribunal feeling that he had not had a fair opportunity to put his case. The claimant should have been allowed to put in that evidence, although there may have been an issue raised regarding costs if an adjournment was necessary.

Drawing inferences

If the employer 'deliberately and without reasonable excuse' fails to answer a questionnaire within eight weeks, or answers in a way that is 'evasive or equivocal', the ET may draw an inference that the employer committed an unlawful act of discrimination (RRA s65(2)(b); SDA s74(2)(b); EE(SO) Regs reg 33(2)(b); EE(RB) Regs reg 33(2)(b)). This provision does not apply only to the special questionnaire procedure.

■ **Dattani v Chief Constable of West Mercia Police**
[2005] IRLR 327,
764 IRLB 13,
779 IDS Brief 9, EAT

In this case the EAT said that an inference can also be drawn under the same sections (see above) from the following:

■ an evasive or equivocal reply to any other direct questions put, in writing, by the worker to his/her employer; or
■ by the employer's complete failure to reply; or
■ by any contradiction between the employer's written case in the tribunal response and in additional information and the witnesses' oral evidence.

Direct discrimination

■ **Redfearn v Serco Ltd t/a West Yorkshire Transport Service**
[2005] IRLR 744,
789 IDS Brief 3, EAT,
October 2005 *Legal Action* 34

In a decision with horrifying implications, the EAT has decided

that it can be direct race discrimination to dismiss someone for his/her membership of the British National Party. This is because RRA s1(1)(a) refers to less favourable treatment 'on racial grounds'. It was established by *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7, EAT, that these grounds can cover any reason for an action based on race, whether it be the race of the person affected by the action or that of others.

Comment: In *Showboat*, a white man was dismissed for his refusal to carry out an instruction to exclude black customers from an amusement centre. In the other key case, *Weathersfield Ltd t/a Van & Truck Rentals v Sargent* [1999] IRLR 94, CA, a receptionist was constructively dismissed when she resigned on being told to tell minority ethnic customers that no vehicles were available.

Both these cases are factually different from *Redfearn* in that they involve instructions to discriminate against others on the ground of their race. *Redfearn* simply concerns the dismissal of someone because of his racist views, or because of the fear of violence or the anger of Asian colleagues or customers. Hopefully, *Redfearn* can be distinguished when it goes to the Court of Appeal.

Indirect discrimination

It is well established in unfair dismissal law that it is not for the ET to decide whether it would have dismissed the employee. A dismissal is only unfair if it is outside the band of reasonable responses open to a reasonable employer. The position is different in discrimination law when an employer attempts to justify indirect discrimination. Although the following case was decided under the pre- October 2005 definition of indirect sex discrimination, the same principle should apply to the current definition.

■ **Hardys & Hansons plc v Lax**
[2005] EWCA Civ 846,
[2005] IRLR 726,
786 IDS Brief 3,
767 IRLB 17, CA
Mrs Lax won her claim for indirect sex discrimination in respect of her employer's refusal to allow her to job share following maternity leave. The employer appealed unsuccessfully to the EAT. On appeal to the Court of Appeal, the employer argued that the justification test for indirect discrimination requires an employer to be granted a margin of discretion in deciding whether to permit a job share.

The Court of Appeal said that the tribunal was correct not to give the employer a margin of discretion in deciding whether to permit the job share. The range of reasonable responses test does not apply. It is for the tribunal to decide whether the refusal was justifiable, ie, reasonably necessary. The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but the tribunal still has to make its own judgment.

Sex discrimination

The following sex discrimination case may also be relevant to justification for age discrimination once the draft EE(A) Regs (above) come into force. The key point concerns whether indirect discrimination can be justified by cost considerations. It is important to remember that the ET found the discriminatory impact of the retirement policy on one sex weighed lightly on the particular facts of the case. Therefore, the justification needed to be less cogent than in other situations, for example, where more employees would be badly affected.

■ **Cross and others v British Airways plc**
[2005] IRLR 423,
782 IDS Brief 9,
761 IRLB 14,
142 EOR 26, EAT
British Airways (BA) cabin crew and pilots challenged its contractual retirement age of 55 as indirect sex discrimination. BA put forward a number of justifications for its policy, some of which the ET rejected. However, the ET found that BA had justified the policy on two main grounds, one of which was – given the financial position in which BA found itself – avoiding the cost of changing its terms and conditions relating to retirement.

The EAT dismissed the employees' appeal. Reviewing the European Court of Justice's (ECJ's) case-law, the EAT said that it is clear that a national state cannot rely on budgetary considerations to justify a discriminatory social policy. In contrast, although an employer cannot justify a discriminatory policy solely by cost considerations, it can put cost into the balance together with other considerations. The EAT said that although in the weighing exercise costs justifications may often be valued less, particularly if the discrimination is substantial, obvious and even deliberate, an economic justification such as the saving or non-expenditure of costs must be considered.

Compensation

Where an individual respondent is named in addition to the employing organisation in a discrimination case, the ET can make findings and award compensation against each of them.

■ **Way and another v Crouch**
[2005] IRLR 603,
790 IDS Brief 3, EAT
The EAT said that an ET can make an award in a discrimination case on a joint and several basis against an employer and individual employee, as opposed to apportioning the award between them. However, it would be rare for a tribunal to make a joint and several award which is 100 per cent against each party. Under Civil Liability (Contribution) Act 1978 s2, the tribunal must assess the amount recoverable from each party according to their relative culpability and not according to their ability to pay.

Statutory dispute resolution procedures

There have been a few early ET decisions under the statutory dispute resolution procedures which were introduced, in October 2004, by the Employment Act (EA) 2002 and the Employment Act 2002 (Dispute Resolution) Regulations (EA 2002 (DR) Regs) 2004 SI No 752. Under EA s31, compensation is adjusted by 10–50 per cent where either party fails to comply with the procedures.

■ **Giles v Geach and Jones t/a Cornelia Care Homes**
(2005) 145 EOR 50, ET
Ms Giles won her claim for indirect sex discrimination regarding her hours of work. Her award was increased by 40 per cent because of her employer's failure to respond to her grievance.

Under the EA 2002 (DR) Regs, an employee must send his/her employer a Step 1 grievance letter and wait 28 days before s/he can bring a discrimination case in an ET regarding discriminatory actions other than dismissal. There are limited exceptions. The following case, although only in the ET, is an early illustration of the pitfalls.

■ **Noskiw v Royal Mail Group plc**
(2005) 786 IDS Brief 7, ET
Mr Noskiw brought an ET claim under the DDA 1995 complaining that he was denied both a pay review and access to training, and that he had failed to obtain several posts within the company. Mr Noskiw said that he had raised the pay review issue by e-mail on 15 October, but had not referred to grievances on the other two matters because the employer had made it clear to him that such issues would not be dealt with.

The ET said that Mr Noskiw had failed to write a grievance letter in respect of all three matters. His e-mail of 15 October had been too general and had not mentioned disability discrimination. Regarding the other two matters, it was not sufficient that the employer had said it would not deal with any grievance if raised. None of the exceptions to the statutory dispute resolution procedures applied. Mr Noskiw's claims were, therefore, rejected.

Comment: It is uncertain whether the EAT would agree with this interpretation by the ET. However, it does illustrate the danger of not making discrimination allegations explicit in a grievance. It is also worrying if an employee who is discouraged from

lodging a grievance cannot be fitted within one of the exceptions. An employee in Mr Noskiw's position may still be able to rescue the situation. If the discrimination claim is rejected because the employee has not yet lodged a grievance, s/he may be able to send a grievance letter at that stage, wait 28 days and relodge the ET claim within the extended (six-month) time limit. However, this is only possible if the grievance letter is sent no later than four months after the discriminatory actions.

PREGNANCY AND MATERNITY

■ **North Western Health Board v McKenna**
(C-191/03),
(2005) 790 IDS Brief 5, ECJ
The ECJ has not followed the radical opinion of the Advocate-General in this case. Where a woman is absent through sickness during her pregnancy, there is no rule that she continues to receive full pay, provided she receives the same amount of sick pay as anyone else under the employer's sick pay scheme. The only requirement is that her pay must not fall below an adequate level.

Comment: By analogy with *Gillespie*, statutory sick benefits would be enough (*Gillespie v Northern Health and Social Services Board* [1996] IRLR 214, ECJ; *Gillespie v Northern Health and Social Services Board (No 2); Todd v Eastern Health and Social Services Board and Department of Health and Social Services* [1997] IRLR 410, NI CA).

DISABILITY

The definition of disability

A worker has a disability under the DDA 1995 if s/he has an impairment which has a substantial and long-term adverse impact on his/her ability to carry out day-to-day activities. Where an impairment is likely to have such an effect but for measures being taken to treat or correct it, it is taken to have such an effect (DDA 1995 Sch 1 para 6(1)). 'Measures' include medical treatment and the use of a prosthesis or other aid (DDA 1995 Sch 1 para 6(2)).

■ **Carden v Pickerings Europe Ltd**
[2005] IRLR 720,
768 IRLB 9,
144 EOR 29, EAT
Mr Carden was successfully treated for a fracture of his ankle in 1984, when a plate and pins were surgically inserted. By the time he brought a DDA case, in 2004, he had had no further treatment of any note since 1984. The ET said that since the treatment had ceased and was not continuing, the adverse effect of Mr Carden's impairment should be assessed with the benefit of the treatment that he had had. It was irrelevant that Mr Carden's mobility might be substantially impaired if the pins were removed. Mr Carden, therefore, was not disabled under the DDA 1995. Mr Carden appealed.

The EAT upheld the appeal. It said that a plate and pins, depending on the facts, could amount to an 'aid', just as much as the use of a stick. The relevant question was whether the plate and pins were giving any continuing support or assistance to the functioning of Mr Carden's ankle. The case was remitted to the ET to decide this issue.

Mental impairment

The DDA 1995 covers mental impairments, which may consist of mental illness or other impairment such as learning difficulties. The Act originally required a worker to prove that any mental illness was clinically well-recognised, although this requirement is to be removed from 5 December 2005. It has never been necessary to prove that other forms of mental impairment are clinically well-recognised. However, it will still be important for workers with any kind of mental impairment to provide some specialist evidence about the existence of an impairment.

■ **Dunham v Ashford Windows**
[2005] IRLR 608,
785 IDS Brief 5, EAT,
October 2005 Legal Action 34
Mr Dunham brought a DDA claim regarding his dismissal as driver of a forklift truck and yardman. He said that he had 'severe reading and writing difficulties'. The employers said that although he may have learning difficulties, he did not have a specific mental impairment or a clinically well-recognised illness. Mr Dunham provided an expert report from an educational psychologist, but the ET considered this evidence insufficient as it was not from a doctor. The ET said that Mr Dunham had not proved that he had a disability because he had not established a specific mental impairment or clinical condition. Mr Dunham appealed.

The EAT upheld the appeal. There is no requirement to show that a mental impairment, which is not based on mental illness, is clinically well-recognised. Nevertheless, an ET hearing a case of mental impairment based on learning difficulties is likely to look for expert evidence of an identified condition and as to the nature and degree of the impairment. It is not enough for the worker to say that s/he had difficulties at school or is 'not very bright'. Evidence of 'generalised learning difficulties' is sufficient, as this is an identified condition which has generalised, ie, widespread, effect. There is no reason why expert evidence of learning difficulties cannot be provided by a suitably qualified psychologist as opposed to a medical practitioner.

EQUAL PAY

Comparators

Under the Equal Pay Act (EqPA) 1970 (unlike the SDA) a woman must find an actual man with whom she can compare herself. She cannot simply ask the ET to infer that her terms and conditions are less favourable than those of a man would have been. The position is different if she complains of pay discrimination due to pregnancy.

■ **Alabaster v Barclays Bank plc and Secretary of State for Social Security (No 2)**
[2005] IRLR 576,
782 IDS Brief 7,
763 IRLB 7,
142 EOR 25, CA
Ms Alabaster became pregnant in May 1995 and started her maternity leave on 8 January 1996. Her annual salary was increased from 1 December 1995. However, her statutory maternity pay was calculated by reference to the then relevant period, which was before the pay increase. Ms Alabaster claimed that this was contrary to the EqPA and article 141 of the EC Treaty. She did not provide a male comparator.

The Court of Appeal said that Ms Alabaster was entitled to have the pay increase taken into account in the calculation of her statutory maternity pay. She did not need a male comparator for her claim. In order to give her an effective remedy to comply with EC law, it was appropriate to disapply those parts of EqPA s1 which imposed a requirement for a male comparator.

Indirect discrimination

The narrow definition of indirect discrimination in the SDA need not be adopted under the EqPA. Pay systems are often opaque and it can be hard to find a discriminatory provision, criterion or practice. A number of cases have concerned what constitutes a prima facie case of indirect discrimination such that the employer must provide a justification.

■ **Home Office v Bailey and others**
(2005) 780 IDS Brief 3,
762 IRLB 17, CA
The Court of Appeal confirmed the ET's decision in this case. Where one group of employees, which contains a significant number of female workers, is paid less than another group,

whose work has been evaluated as equal but which is predominantly male, the employer must justify the pay differential.

Here, a prima facie case was proved even though there were a significant number of men in the disadvantaged group. Of course, this fact indicates that the employer may be able to prove a genuine material factor defence unrelated to sex.

Comparable terms

When an equal pay claim succeeds, EqPA s1 inserts an equality clause into the woman's contract. Each contractual term that is less favourable than the equivalent term in the comparable man's contract is modified to make it equal. It is, therefore, important to consider what amounts to an individual 'term'.

■ **Degnan and others v Redcar and Cleveland BC**
[2005] IRLR 615,
785 IDS Brief 3,
768 IRLB 7, CA

The claimants brought equal pay claims comparing their work to that of gardeners, refuse workers and drivers, and road workers. All the male comparators received the same basic hourly rate as the claimants, but the gardeners also received a fixed bonus of 40 per cent, the refuse workers and drivers received a 36 per cent bonus plus a weekly attendance allowance, and the road workers received a 33 per cent bonus plus a lower weekly attendance allowance.

The ET said that each claimant could compare her pay with the relevant male worker most advantageous to her for the purpose of the bonus element of his pay, and with a different male worker who had the highest attendance allowance. She would, therefore, be entitled to a 40 per cent bonus plus an attendance allowance. As a result, she would get more than any of the male comparators. The employers appealed and the matter eventually went before the Court of Appeal.

The Court of Appeal said that the attendance allowances were a single term together with the hourly rate and fixed bonuses. It was necessary to look at the reality of the situation and all monetary payments should be added together and regarded as a single term.

Compensation

■ **Council of the City of Newcastle upon Tyne v Allan and others; Degnan and others v Redcar and Cleveland BC**
[2005] IRLR 504,
781 IDS Brief 7,
764 IRLB 11, EAT

The EAT said that compensation for non-economic loss cannot be awarded under the EqPA. Unlike the other discrimination legislation, awards for injury to feelings therefore cannot be made.

Comment: The EAT also considered a point on time limits, which is not covered in this article.

PARENTAL LEAVE

Under the Maternity and Parental Leave etc. Regulations (M&PL etc. Regs) 1999 SI No 3312, employees with at least one year's service have the right to unpaid leave for the purpose of caring for a child up to the age of five years old (or 18 years, if s/he is disabled). The entitlement is to a total of 13 weeks. Collective or workforce agreements can be made, setting out details of the entitlement. These agreements cannot opt for less than the minimum entitlement, but can be more generous. If there is no such collective agreed scheme, a default scheme applies (M&PL etc. Regs reg 16).

■ **Rodway v South Central Trains Ltd**
[2005] IRLR 583,
781 IDS Brief 5,
765 IRLB 4, CA

Under the default scheme set out in M&PL etc. Regs Sch 2, an employee can only take the unpaid leave in one-week blocks (or part-time equivalent), but not in single days (except if his/her child is disabled). The employee cannot take only one day's leave and ask for it to be deemed as one week's leave out of his/her total entitlement. However, where there is a collective or workforce agreement, this can always agree that leave is taken for periods of less than one week.

EMPLOYMENT TRIBUNAL PROCEDURE

ET claim and response forms

From 1 October 2005, the ET1 and ET3 forms prescribed by the ET(C&RP) Regs 2004 became compulsory for use.[7] The forms must be completed, and returned electronically, or by post, fax or hand. We understand that Employment Tribunal Service's (ETS's) staff have been instructed only to accept these versions of the forms, because they will be scanned directly into the new ETS's case management system.

Rules of procedure

■ **Sodexho Ltd v Gibbons**
UKEAT/0318/05; 0319/05; 0320/05

This case essentially involved an ET's decision to overturn, on review, its decision to strike out Mr Gibbons's claim for failure to pay a costs deposit within the specified time limit. The claimant's solicitors had not received the costs deposit order due to a mistake on the ET1 about their postcode.

The employer appealed and the case delved headfirst into the complexities of the ET(C&RP) Regs 2004. The EAT principally decided that:

■ A strike-out under Sch 1 r20(4) was a judgment within the meaning of Sch 1 r28(1)(a) and, thereby, reviewable under Sch 1 r34(1)(b);

■ A deposit order under Sch 1 r20(1) was not a judgment, but an order under Sch 1 r28(1)(b) and, thereby, not open to review, but open to variation under Sch 1 r10(2)(a);

■ The expression 'administrative error' within Sch 1 r34(3)(a) covers such errors by the parties as well as by ET staff (but not by the ET chair);

■ 'The interests of justice' ground for review within Sch 1 r34(3)(e) should not be construed as narrowly as it was before the ET(C&RP) Regs 2001 introduced the overriding objective now contained within ET(C&RP) Regs 2004 reg 3.

However, the judgment is memorable for the following rather telling postscript from HHJ Peter Clark:

> *… one can only speculate at what Lord Donovan and the members of his Commission, reporting in 1965, would have made of the arcane procedural points … raised … and discussed in this judgment. … Whilst it may on close analysis, become tolerably clear to a practitioner in the field of employment law appearing in employment tribunals … for 25 years and with a further ten years' experience sitting in [the Employment Appeal Tribunal], what is the difference between a reviewable strike out judgment and a deposit order which, whilst not reviewable, may be varied through the, now, Rule 10 procedure, the same is not necessarily true of litigants in person or their representatives, legally qualified, or otherwise, or even Chairmen of employment tribunals and learned commentators on the subject. I nevertheless prefer to believe that the gradual modification and sophistication in Employment Tribunal Rules of Procedure over the years should be viewed not as a trap for the unwary, but a procedure designed to do justice between the parties. The introduction of the overriding object and the increased powers of employment tribunal Chairmen to make orders on their own initiative should be seen as valuable signposts to Chairmen to exercise their independent judgment to ensure fairness between the parties. It is what … truly distinguishes between judicial and administrative decisions.* [para 84]

■ **Grimmer v KLM Cityhopper UK**
[2005] IRLR 596, EAT

Ms Grimmer brought an ET claim regarding refusal of her request for flexible working. She put 'flexible working' in box 1 of her claim form and gave details in the box that 'the company's business

argument for refusing my application is based on the assumption that, if they concede to my request, others would be requesting similar/same working arrangements'. The ET refused the claim on the basis that it did not contain details of the claim as required under ET(C&RP) Regs 2004 Sch 1 r1(4)(e).

The EAT allowed the claim. The tribunal applied the test of whether it can be discerned from the claim that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the ET.

HHJ Prophet remarked, commenting on the earlier case-law (*Burns International Security Services (UK) Ltd v Butt* [1983] IRLR 438, EAT), that:

> *[it is a] vital principle … that the Rules of Procedure cannot cut down on an employment tribunal's jurisdiction to entertain a complaint which the primary legislation providing an employment right empowers it to determine. If there is a conflict, the Rules must give way.*
> [para 13]

HHJ Prophet also commented that those responsible for introducing the rules do not appear to have proper regard for the case-law which emphasises that 'the threshold for access should, in the interests of justice, be kept low'.

■ **Richardson v U Mole Ltd**
[2005] IRLR 668, EAT
The ET did not accept the claimant's claim because it did not expressly state that he was an employee, as required by ET(C&RP) Regs 2004 Sch 1 r1(4)(f). However, the claim did include answers to questions such as 'what job did you do for your employer' and 'the dates of your employment'; whether the claimant was an employee was, in fact, not disputed by the employer.

The EAT overturned the ET's decision stating that there was no breach of the ET(C&RP) Regs 2004. Mr Justice Burton commented that 'the sooner' that rules 'are looked at again the better'. He added that much as ETs might be concerned about the rules as they presently stand and prefer them to be amended, there is, nevertheless, a power to review. The ET should use its power to review its decision and allow through a claim form or response that does not initially comply with the requirements.

CONTRACT AND EMPLOYMENT RIGHTS

Compromise agreements

Section 203 of the Employment Rights Act (ERA) 1996 sets out the requirements for a valid compromise agreement. This is mirrored in other employment legislation relating to different types of claims. Section 203(3)(b) specifically states that to be valid a compromise agreement 'must relate to the particular proceedings'.

■ **Hinton v University of East London**
[2005] IRLR 552,
763 IRLB 4, CA
The Court of Appeal held that a compromise agreement must clearly identify the particular proceedings to which the complaint relates. It is not sufficient to use a clause containing 'a rolled-up expression such as "all statutory rights"'. The particular or potential claims which are to be compromised must be identified either by a generic description such as 'unfair dismissal', or by reference to the section of the statute giving rise to the claim. Lady Justice Smith stated that it would not be good practice for lawyers to draft a standard form of compromise agreement which lists every form of employment right known to law and that, instead, agreements should be tailored to the individual circumstances of the instant case.

Comment: While this appears to be intended as a warning for the lawyers who draft agreements for employers, it is perhaps also of assistance to employees in obtaining more directed advice about the terms and effect on specific claims before signing such agreements.

Harassment

Although the Protection from Harassment Act (PHA) 1997 was not brought in to deal with employment situations, it can apply and is useful where the harassment complained of is not covered by discrimination legislation, for example, bullying on a general level:

■ A person must not pursue a course of conduct which s/he knows or a reasonable person would know amounts to harassment of another person (PHA s1). 'Course of conduct' means conduct on at least two occasions (PHA s7(3)).

■ Harassment is not defined except to say that it includes alarming the person or causing him/her distress, and that the conduct can include speech (PHA s7).

■ It is an offence to cause another person, on at least two occasions, to fear that violence would be used against him/her (PHA s4).

■ Breach of either PHA s1 or s4 is a criminal offence liable to imprisonment or a fine (PHA s2(2)).

■ A civil claim can also be made for damages for financial loss and anxiety (PHA s3(2)).

The Court of Appeal has considered two aspects of the PHA in the following cases:

■ **Majrowski v Guy's and St Thomas's NHS Trust**
[2005] IRLR 340,
779 IDS Brief 5,
760 IRLB 9,
141 EOR 23, CA
The Court of Appeal ruled that employers could be held vicariously liable under the PHA for their employees' acts of harassment of third parties. The court further held that there is nothing in the wording or in the policy of the PHA that prevents employers being vicariously liable for harassment by their employees, as long as there is a sufficiently close connection with employment.

Lord Justice Auld found that this could cover situations where one employee, in the course of his/her employment, harasses another employee and, in addition, where an employee, in the course of his/her employment, harasses an outsider, for example, a customer or some other third party with whom work brings him/her into regular contact.

■ **Banks v Ablex Ltd**
[2005] IRLR 357, CA
The Court of Appeal held that for an offence to be committed under the PHA, there must be a course of intentional conduct which amounts to harassment. Misconduct on one occasion will not suffice.

Working Time Regulations

Holiday pay

In 'Employment law update' May 2002 *Legal Action* 15, the authors reported the case of *Kigass Aero Components Ltd v Brown* [2002] IRLR 312, EAT. Working Time Regulations (WT Regs) 1998 SI No 1833 reg 13(1) states that 'a worker is entitled to four weeks' annual leave in each year'.

The EAT held that this meant that the entitlement arises if the worker is, or has been, a worker during the whole or part of the leave year, regardless of whether any work was done during that period. As a result workers on sick leave, having exhausted their entitlement to contractual sick pay, were entitled to four weeks' paid annual leave.

The Court of Appeal has overruled the EAT in *Kigass* in the following case:

■ **Commissioners of Inland Revenue v Ainsworth and others**
[2005] IRLR 465,
762 IRLB 15, CA
The Court of Appeal held that a worker on long-term sick leave, who had exhausted his/her entitlement to contractual sick pay, was not entitled to four weeks' annual paid leave under WT Regs reg 13 in one year when s/he has not been able to attend for work at any stage. The Court of Appeal found that the decision in *Kigass* created an unjustified windfall which was not the intention of the WT Regs. The WT Regs

provide minimum amounts of leave entitlement, for health and safety reasons, to workers who are working during the period in question. Equally, a worker whose employment is terminated after a 12-month period of absence through ill health is not entitled to payment in lieu of untaken leave in that year.

The Court of Appeal also overruled the EAT in *List Design Group Ltd v Douglas* [2003] IRLR 14; May 2003 *Legal Action* 22). It held that a claim to enforce entitlement to holiday pay can only be brought under the WT Regs and not as a claim for unauthorised deductions from wages under ERA s23. This has the effect of limiting such claims to unpaid or untaken annual leave in the current leave year.

Comment: This decision is disturbing because it leaves unanswered the question: what is the position if a worker is absent through sickness for most, but not all, of the year? Some employers may try to suggest that sick pay should be pro rata to attendance during the year, but this would surely be in breach of the Working Time Directive (Council Directive 93/104/EC of 23 November 1993). We may be left with the odd position that a worker who is absent for 360 days or 330 days is entitled to four weeks' paid sick leave, whereas a worker who is absent for 365 days is not.

The decision regarding enforcement is also problematic. Although untaken annual leave does not accrue from year to year under the WT Regs because it is intended to be taken, there is no remedy in the ET for a worker who has either been denied entitlement to annual leave by an employer or is unaware of his/her entitlement. It might be possible to bring a claim for untaken or unpaid holidays going back several years as damages for breach of contract, either on termination of employment in the ET, or in the county court or High Court.

UNFAIR DISMISSAL

Compensation

Increase for delayed payment

In unusual cases, where future loss of earnings is likely to be career-long, a discount (usually of 2.5 per cent) may be made to represent the value of a large cash award up front (*Kingston upon Hull CC v Dunnachie, HSBC Bank plc v Drage* [2003] IRLR 843, EAT; *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] IRLR 364, CA). An increase in payment for delayed payment is less usual.

■ **Melia v Magna Kansei Ltd**
[2005] IRLR 449,
786 IDS Brief 6,
763 IRLB 16, EAT

The EAT held that it was just and equitable within ERA s123 for an ET to award a premium of approximately 2.5 per cent in respect of delayed payment of some elements of an award of compensation. The EAT said that this is particularly appropriate in a case where some items have been discounted for accelerated payment, but is not absolutely necessary for the principle to apply. The EAT said this is not the same as an award for interest (that is a much higher rate), which is available only in discrimination cases.

Reduction of basic award

■ **Bowyer v Siemens plc t/a Siemens Communications**
UKEAT/0021/05,
(2005) 767 IRLR 7, EAT

Under ERA s122(4), the basic award for unfair dismissal is reduced by the amount of any payment made by the employer to the employee in respect of redundancy. However the EAT found, following *Boorman v Allmakes Ltd* [1995] IRLR 553, CA, that for this section to apply, an ET must make a finding that an employee's dismissal is actually on the ground of redundancy.

Time limits

It is always thought that receiving the wrong advice about time limits from an adviser will prevent a claimant from succeeding in presenting an out of time claim. The general rule is that a person cannot hide behind the mistakes of his/her adviser. In a case about the exercise of the ET's discretion to extend the statutory time limit in order to allow a late claim of unfair dismissal under ERA s111, the Court of Appeal considered the impact of negligent advice.

■ **Marks & Spencer plc v Williams-Ryan**
[2005] IRLR 562, CA

The Court of Appeal held that although a claimant who fails to meet a time limit through a solicitor's negligence cannot argue that it was not reasonably practicable to present the claim within the time limit, there is no binding authority extending that principle to a situation where advice is given by a citizens advice bureau. However, whether this can be relied on as affecting the reasonable practicability of presenting a claim in time would depend on who gave the advice and in what circumstances.

RECOMMENDED READING

IDS Brief

- Human Rights Act and employment law update 779
- Collective redundancy consultation 780
- Settlements 1 – the settlement agreement 781
- Settlements 2 – negotiating a settlement 782
- Current issues in redundancy law – 1 784
- Current issues in redundancy law – 2 785
- Age discrimination – draft regulations and final round of consultation 786
- Guide to the Disability Discrimination Act 2005 787
- Sex discrimination legislation changes 790

Industrial Relations Law Bulletin (IRLB)

- Information and consultation (1) – the ICE Regulations 758
- Information and consultation (2) – the ICE Regulations in context 759
- Points of procedure 762
- Workplace stress and avenues in litigation 767

Equal Opportunities Review (EOR)

- DDA 2005: an EOR guide 141
- Compensation awards 2004 144
- Developments in the law on sexual orientation 145
- Draft age discrimination regulations: an EOR guide 145

Other

- *2004 annual report of the Commission for Racial Equality* is available at: www.cre.gov.uk/downloads/AR04main.pdf.
- *DRC impact report 2004/05: 5 years of progress* is available at: www.drc-gb.org/uploaded_files/documents/4008_404_annual2005_DRC_Impact_Report_2005.pdf.
- *Equal Opportunities Commission annual report 2004–2005* is available at: www.eoc.org.uk/PDF/annual_report_2004_05.pdf.
- *ETS annual report and accounts 2004–05* is available at: www.ets.gov.uk/annualreport2005.pdf.
- *Greater expectations: final report of the EOC's investigation into discrimination against new and expectant mothers in the workplace*. The summary final report is available at: www.eoc.org.uk/PDF/pregnancy_gfi_final_report.pdf.
- *Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA*, Tamara Lewis.
- *SDA and equal pay questionnaires: how to use the questionnaire procedure in cases of sex discrimination in employment*, Tamara Lewis, 2nd edn. Both documents are available from Central London Law Centre, tel: 020 7839 2998.
- DTI guidance on collective redundancy consultation and notification, available at: www.dti.gov.uk/er/redundancy/consult-pl833a.htm.

It should be noted that, in discrimination cases, an ET may allow a claim outside the time limit if it is just and equitable to do so and a mistake by a worker's legal adviser should not be held against him/her (*Chohan v Derby Law Centre* [2004] IRLR 685, EAT).

■ **Tyne and Wear Autistic Society v Smith**

[2005] IRLR 336, EAT

The EAT has held that an online ET1 is presented to the ET for time limit purposes once it is successfully submitted online to the ETS's website, rather than when it is received by the e-mail service which hosts the ETS website or when it is forwarded on to an ET office. This decision amplifies the EAT's finding in *Mossman v Bray Management Ltd* (UKEAT/0477/04, May 2005 *Legal Action* 28, EAT).

Comment: We would repeat our caution that it is vital for advisers to ensure that a claim arrives at the ET within the time limit.

■ Tamara Lewis is a solicitor in the employment unit at Central London Law Centre® (CLLC). Philip Tsamados is a solicitor with Pollecoff Solicitors, London, and a volunteer adviser at CLLC. Contributions for the next update, which will be published in May 2006, may be sent to Tamara Lewis at CLLC, 19 Whitcomb Street, London WC2H 7HA or to Philip Tsamados at Pollecoff Solicitors, 41 Tabernacle Street, London EC2A 4AA.

1 The full text of Acts and statutory instruments are available at: www.opsi.gov.uk/acts.htm.
2 Both documents are available at: www.dti.gov.uk/er/equality/age.htm.
3 Available at: www.publications.parliament.uk/pa/pabills.htm.
4 See: www.dti.gov.uk/er/tupe/consult.htm for more details.
5 For further details see: www.theequalitiesreview.org.uk/
6 Both documents are available at: www.informationcommissioner.gov.uk.
7 The forms are available at: www.employmenttribunals.gov.uk.

LOCAL GOVERNMENT

Reforming council tax recovery

The result of the general election on May 5 2005 has secured the future of the council tax for at least the next four years and it has made news headlines recently with the cases of Reverend Alfred Ridley, aged 71, and Sylvia Hardy, aged 73, who were sentenced to 28 days and seven days respectively for non-payment of council tax. In this article, **Alan Murdie** suggests that the whole area of local tax enforcement through the magistrates' court needs significant reform and looks specifically at areas where there is an urgent need for alteration or clarification by legislation or higher court rulings.

Introduction

In England a general revaluation of all domestic dwellings is proposed with a view to having a new valuation list in operation for 1 April 2007. In Wales a new list came into force on 1 April 2005. In Scotland, the Scottish Parliament has shelved any plans for revaluation at the present time.[1]

Inevitably, rebanding will dominate public discussion of the council tax. However, the fact remains that the value of a property may bear no relationship to the ability of the residents to pay the council tax levied on it. Increases in council tax amid record levels of consumer borrowing are likely to push many people into becoming local tax defaulters.

Unfortunately, the rights available to debtors in local taxation proceedings fall far short of those in other civil debts cases in many respects. The enforcement of local tax debts remains crude in its approach and practice. The vast majority of cases are dealt with in the magistrates' court, primarily a court of criminal rather than civil jurisdiction. Problems are complicated by the obscure nature of many of the regulations, recovery being governed by the Council Tax (Administration and Enforcement) Regulations (CT(AE) Regs) 1992 SI No 613, as amended. These are modelled on provisions for the community charge. Although extensively amended, the regulations are inadequate for the recovery of local tax in the 21st century and fall short of the standards which would be expected in the fair and impartial determination of a person's civil rights and obligations. There also exist a number of areas in which the law is unclear, particularly as regards the discretion of the court.

A recent Court of Appeal judgment, *R (Mathialagan) v Southwark LBC* [2005] EWCA Civ 1689, highlighted several areas of concern within the enforcement system, in particular, the inadequacy of the current bulk procedure system for obtaining liability orders. Arguably, the whole area of local tax enforcement through the magistrates' court is in need of comprehensive reform, but the following provides a list of points where there is currently a marked need for alteration, clarification or amendment either by legislation or in rulings from the higher courts.

Magistrates' discretion at local taxation hearings/power to give directions to parties

The scope of magistrates' discretion in local taxation is unclear, it never having been fully reviewed since *Potts v Hickman* [1941] AC 212, HL. Discretion existed under the General Rate Act 1967 about whether a distress warrant should be issued, but to what extent may magistrates today set terms and conditions on the enforcement of liability orders? Practice varies between courts but there is no established rule.

Alteration of back-dating council tax benefit rules

Under the council tax benefit regulations, a claim for council tax benefit can be back-dated for a maximum of 52 weeks (Council Tax Benefit (General) Regulations 1992 SI No 1814 reg 60). However, this may not be sufficient to cover the situation where a local authority serves a bill more than 12 months or, indeed, several years after the financial year in question.

This is a particular problem following *Regentford Ltd v Thanet DC* [2004] EWHC 246 (Admin), which held that a valid demand notice can be served more than six years after the tax was originally set. The rules need attention to cope with this anomaly.

Is instigation of court proceedings while benefits are being assessed lawful?

The case of *R v Bristol City Magistrates' Court and Bristol City Council ex p Willsman and Young* [1991] 156 JP 409 is a relic from the days of the community charge used by authorities to justify recovery action before council tax benefit has been assessed. It should be pointed out that a financial incentive exists for authorities since an estimated 30 per cent of taxpayers pay up at the summons stage, whether liable to pay the full sums demanded or not. Bulk summonsing can involve lists of 1,000 or more taxpayers, with costs of £44 payable on each order. This makes enforcement a profitable activity.

Problems arise for those taxpayers who are entitled under the council tax to 100 per cent benefit or who have a bona fide dispute over benefit entitlement. Arguably, parliament did not intend such persons to be subject to recovery proceedings with the provision of 100 per cent benefits. Furthermore, the applicability of the case on every occasion has been doubted by the Local Government Ombudsman as a basis for taking court action against a taxpayer whose benefits had yet to be decided.[2]

The granting of a liability order for council tax, purportedly on the basis of *Willsman and Young*

Unfair dismissal
Recommended reading
Employment law update
EMPLOYMENT
Reforming council tax recovery
LOCAL GOVERNMENT

may fall foul of Strasbourg jurisprudence with respect to the need for certainty in judicial orders and judgments. Arguably, in the determination of civil rights and obligations, the taxpayer is entitled to certainty about the amount of debt s/he is liable to pay to the authority.

Clarification of CT(AE) Regs reg 57 ('Miscellaneous provisions')

With reference to the Local Government Finance Act (LGFA) 1992, CT(AE) Regs reg 57(1) provides that: 'Any matter which could be the subject of an appeal under section 16 of the Act [liability and calculations as to sums in tax] or regulations under section 24 of the Act [valuations] may not be raised in proceedings under this Part.' Everything depends on the precise meaning of the words 'could be the subject of an appeal'. At least four different constructions are possible:

- Reg 57(1) is an ouster clause imposing a blanket prohibition on any matter within the jurisdiction of a valuation tribunal being raised, including matters already decided or actually under appeal;
- Reg 57(1) imposes a partial restriction on raising any matter which a taxpayer could potentially lodge as an appeal but has not yet done so. Matters that are before the tribunal or have been considered may be raised;
- Reg 57(1) is a prohibition on the local authority bringing any potentially disputed case to court until it has been decided by the tribunal;
- Reg 57(1) is void, being ultra vires, and purportedly ousting the jurisdiction of the courts.

The first interpretation would mean that despite the name of the order being a 'liability order', the one issue which cannot be decided is liability to tax. If so, the phrase 'proceedings under this Part' would also preclude liability from ever being raised, including at committal. It would be a strange situation if a person who was not liable for council tax was prevented from pointing it out at a means inquiry. Under the rates system a person was entitled to deny liability at the committal stage (*R v Ealing Justices ex p Coatsworth* (1980) 126 SJ 128).

The second interpretation allows the magistrates' court to consider the position where a taxpayer has already put an appeal into a valuation tribunal so the matter is before the tribunal or where the matter has already been conclusively decided by a tribunal. Thus, a taxpayer is entitled to raise a matter which is being considered or has been the subject of appeal. Arguably, the wording of the regulation is not wide enough to exclude these alternative situations, and the courts should give effect to the interpretation which most protects the liberty of the subject.

The third interpretation is that the regulation operates as a bar on the local authority (which is responsible for the instigation of proceedings under this Part) seeking a liability order where there is a bona fide dispute about liability or any matter which may be subject to an appeal. This is already the position with the recovery of penalties, with CT(AE) Regs reg 29(2) providing that no amount shall be payable while a matter is being determined by a valuation tribunal.

The fourth possibility is that the regulation is invalid for purporting to oust the jurisdiction of the courts. A strict interpretation of the regulation would mean that local authorities could seek liability orders regardless of the actual position of the taxpayer, even where his/her position had been established by a competent tribunal. Since CT(AE) Regs reg 34(2) provides that a person is summonsed before a magistrates' court to show 'why he has not paid' it would be an anomaly if the taxpayer was then prohibited from explaining his/her existing or successful valuation tribunal case or decision to the court. A ruling would provide definitive proof that s/he was not the liable person.

In this respect, the term 'appeal' in reg 57(1) also needs to be clarified since regarding LGFA 1992 s16 either the local authority or the taxpayer may appeal to the High Court. It would be peculiar if a magistrates' court could grant a liability order while the same individual matter was subject to an appeal before the Divisional Court or, indeed, after a ruling.

Admissibility of evidence by the taxpayer

The current position for a taxpayer is governed by the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 SI No 681. Admissibility of evidence caused major problems in 1992 with respect to computer evidence and ultimately resulted in the Civil Evidence Act 1995. The CT(AE) Regs are currently wholly one–sided, considering only the local authority's position with no express provision for taxpayers.

Recording orders and decisions at liability order hearings

The requirement of magistrates' courts to make a record of proceedings is unclear. This was an issue on which the Court of Appeal expressed concern in *Mathialagan*.

Clarification of the scope of magistrates' set aside powers

In *Mathialagan*, the court considered the scope of set aside powers but without fully clarifying the matter or consolidating all authorities. As a consequence, the issue has been left in doubt. The Court of Appeal implies that magistrates may have a power to set aside, but that it might be confined to 'strong cases' (undefined). Regrettably not all authorities were cited to the court. The solution proposed by the court in *Mathialagan* was an extension of Magistrates' Courts Act 1980 s142.

Means inquiries: abolition of culpable neglect

Culpable neglect should be abolished. It was originally included in the rates system, and is derived from its inclusion in provisions made under the LGFA 1988 for community charge and re-enacted for council tax. During the passage of the Local Government Finance Bill in the House of Lords, in 1988, Lord Wilberforce drew attention to the fact that culpable neglect:

> *… is a very variable concept. Magistrates throughout the country, as we know from the rent administration, applied quite different standards. For goodness sake, who amongst us in this Chamber has not been guilty of culpable neglect in not paying bills? We have been guilty of culpable neglect but have not been sent to prison …*[3]

Over a decade and a half later, the concept of culpable neglect may be vulnerable in terms of human rights principles and Strasbourg jurisprudence as being void for uncertainty.

Amendment/abolition of imprisonment

The power to imprison for local tax default is found in CT(AE) Regs regs 47 and 48. Abolition of imprisonment for debt was proposed as long ago as 1758 by Dr Samuel Johnson.[4] Jailing people for civil debt is an anachronism and no other country in Europe permits it.

At the very least powers to commit a debtor to prison should be amended to prevent pregnant women, persons over retirement age, persons with a registered disability, and parents with children under 16 from being committed to prison.

■ Alan Murdie is a barrister, who co-founded the Poll Tax Legal Group in 1990. He has been involved with many test cases concerning the community charge and has wide experience of liability order applications in the magistrates' courts. He is co-author, together with Ian Wise, of *Enforcement of local taxation: an advisers' guide to non-payment of council tax and the poll tax*, LAG, 2000, £15.

1 *Scottish Parliament Official Report*, col 15979, 14 April 2005.
2 Sandwell MBC (03/B/12862), 29 September 2004.
3 *Hansard* HL, vol 497, 1332–1335.
4 *The Idler* 16 September 1758.

HOUSING

Recent developments in housing law


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

POLITICS AND LEGISLATION

Housing Act 2004: commencement

On 10 October 2005, the government announced that the implementation of the key elements of Housing Act (HA) 2004 Part 1 (housing conditions) and Part 2 (licensing of houses in multiple occupation) had been put back to 6 April 2006 and that the enforcement powers which underscore them would not be commenced until 3 July 2006: Yvette Cooper MP, the housing minister, *Hansard* HC Written Ministerial Statements col 6WS. These provisions are helpfully outlined in 'Health and safety rating' and 'HMO licensing', *Adviser 111*, September/October 2005, pp35 and 39 respectively. The parts of the HA 2004 dealing with selective licensing of private landlords and the acquisition of empty homes will also be commenced in April 2006 with the new tenancy deposit scheme arrangements to follow in October 2006: Office of the Deputy Prime Minister (ODPM) news release 0204/2005.

Allocation of social housing

In *Choice and voice in the reform of public services: government response to the PASC report – Choice, voice and public services* (Cabinet Office, July 2005),[1] the government has robustly responded to the critique of its policy on 'choice' in housing allocation offered by the House of Commons Public Administration Select Committee: see June 2005 *Legal Action* 30.

The *Choice-based lettings newsletter* (ODPM, summer 2005, issue 8) brings together information on the moves to achieve a nationwide system of choice in lettings by 2010.[2] It highlights:

- the publication of the new ODPM housing information leaflet on choice-based lettings (CBL) (leaflet 05 HC 03050/4):[3] see August 2005 *Legal Action* 17;
- the provision of £4m over three years to support the development of regional and sub-regional CBL schemes. This *Regional Fund Scheme* was announced by the ODPM on 11 July 2005; and
- the website dedicated to CBL.[4]

In the absence of promised ODPM guidance (on reconciling choice and need in allocations), commentators have continued to doubt whether CBL is compatible with allocation law: see, for example, the letter 'Choice-based lettings are out of step with the law', *Inside Housing* 22 July 2005, p15.

Homelessness

The statistics for statutory homelessness in England for the second quarter of 2005 were published on 12 September 2005 (ODPM news release 2005/0189). They showed that the number of households in temporary accommodation had remained above 100,000 for a third quarter. The number of official acceptances of new homelessness applications was falling, but there is some concern that those statistics do not accurately represent the numbers approaching local housing authorities for assistance: see 'Prevention or cure?', *Adviser 111* September/October 2005, p18. To indicate how local housing authorities might best achieve the target of a 50 per cent reduction in the number of homeless households in temporary accommodation by 2010, the ODPM established a Homelessness Innovation Fund of £2m in June 2005.

On 20 September 2005, the housing minister, Yvette Cooper MP, announced a £3m Ethnic Minorities Innovation Fund designed to address the fact that ethnic minority households are at disproportionate risk of homelessness. On the same day, the ODPM published *Tackling homelessness amongst ethnic minority households – a development guide* and *The causes of homelessness amongst ethnic minority populations*. Both reports are being distributed to all local housing authorities: ODPM news release 2005/0194.

In July 2005, the government issued further guidance for local housing authorities seeking to apply the new Best Value Performance Indicator on Homelessness Prevention: *Best Value Performance Indicator 213 housing advice service: preventing homelessness* (ODPM, July 2005).

Effective initiatives to prevent homelessness (primarily through rent deposit and mediation schemes) are reviewed in *Prevention works: London councils' homelessness prevention initiatives* (Association of London Government, July 2005, £6.95).[5]

On 28 June 2005, the Homelessness & Housing Support Directorate released *Homelessness and health information sheet: Number 4 hospital discharge* (ODPM, June 2005), advising authorities on how to work together to prevent homelessness arising when patients are discharged from hospital.

Meanwhile, in Scotland, further progress is being made towards the abolition of the 'priority need' criteria. In August 2005, the Scottish Executive published *Homelessness and the abolition of priority need by 2012: consultation on ministerial statement required by section 3 of the Homelessness etc (Scotland) Act 2003* – responses were required by 14 October 2005.[6]

Complaints to the Local Government Ombudsmen

In 2004/2005 32 per cent of all complaints to the Local Government Ombudsmen (LGO) for England concerned housing or housing benefit (HB). The *Annual Report 2004/05* (LGO, July 2005) records 6,104 housing-related complaints, of which the most significant sub-categories were HB (1,467) and council housing repairs (1,227).[7] A selection of case summaries on those complaints is contained in the free *Digest of cases 2004/05* (LGO, August 2005).

Decent homes

On 2 August 2005, the government announced that a further 138 local housing authorities had received approval for their plans to achieve the target that all their homes should be decent homes by 2010 (ODPM news release 2005/0161). The three options available to attract the necessary additional investment are:

- stock transfer (to a registered social landlord);
- establishment of an Arms Length Management Organisation; and
- Private Finance Initiative schemes – a further £1.8bn from the private sector routed through such schemes was announced on 23 June 2005 (ODPM news releases 2005/0121 and 2005/0122).

The case for a fourth option (retention of housing stock with additional public investment) is explored in *Support for the 'fourth option' for council housing* (House of Commons Council Housing Group, summer 2005, £10).[8]

Extrapolating from the data available from the English House Condition Survey, the Halifax Bank announced, in August 2005, that the likely cost of bringing all of the country's housing up to the 'decent' standard would be £48bn (HBOS plc news release, 27 August 2005).

Mortgage arrears

The latest *Housing market reports* (ODPM Housing Statistics Division, August and September

Reforming council tax recovery
LOCAL GOVERNMENT
Politics and legislation
Recent developments in housing law
HOUSING

2005) and the *Statistics on mortgage possession proceedings issued in the county courts – second quarter 2005* (Department for Constitutional Affairs press notice, 27 July 2005)[9] indicate some worrying trends in relation to mortgage arrears in the first part of 2005:

- the number of borrowers with loans six months or more in arrears has increased by 13.7 per cent since December 2004 to 43,360;
- the number of homes repossessed by mortgage lenders in the first six months of 2005 (4,640) represents an increase of over 50 per cent compared with the second half of 2004;
- the number of mortgage possession actions rose by 15.3 per cent in the three months to August 2005 compared with the previous three months and was 59.1 per cent higher than for the same period in 2004;
- the number of possession orders made rose by 13.3 per cent in the three months to August 2005 compared with the previous three months and was 64.5 per cent higher than for the same period in 2004.

The long-term trends in mortgage repossession activity are shown in the table 'Mortgage arrears and repossessions', *Roof* September/October 2005, p53, and the likely impact of recent increased rates of mortgage default on social housing providers is explored in 'Stretched to the limit', *Inside Housing* 23 September 2005, p22.

PUBLIC SECTOR

Secure tenants

Possession claims – incapacity

- **Camden LBC v M**

29 July 2005,
Central London Civil Justice Centre[10]

Camden issued possession proceedings against a secure tenant in July 2004 based on arrears of £540.78, which related entirely to non-payment of water and gas charges. The defendant refused to pay because he had found cheaper providers. The defendant did not attend the hearing and Camden obtained an outright possession order. Later, the order was varied to a suspended order. The defendant breached the suspended order. He was evicted in March 2005.

A certificate of incapacity was obtained. It concluded that the defendant had had a mental disorder since April 2003. The Official Solicitor was instructed on his behalf. He applied to set aside the possession orders and for re-entry for the defendant on the basis that the orders were without effect, as he had had no litigation friend when they were made (Civil Procedure Rules 21.3(4)). Documentation showed that, from at least October 2004, Camden was concerned that he had underlying mental health problems. He had been banned from writing more than one letter per week to the council and there were records of telephone calls that he had made which were not rational. Records also showed that the police and neighbours considered that he had mental health problems.

HHJ Medawar set aside the possession orders. The evidence drove him to conclude that the defendant's incapacity probably existed from April 2003 but at least from the start of 2004.

Warrants

- **Kensington and Chelsea RLBC v Scarlett**

29 July 2005,
Central London Civil Justice Centre[11]

The claimant council obtained a suspended possession order in March 1998. In May 2005, it applied for permission to issue a warrant for possession out of time (ie, more than six years after the order). It claimed that it would be disproportionate to require the issue of new proceedings given that 'the defendant has failed to reduce her arrears stemming from the original proceedings'. It also argued that the length of time it would take the defendant to clear the arrears and costs under the 1998 possession order (approximately 11 years), along with the fact that, under the terms of the order, the council could enforce the order on any default up to the point all arrears and costs were cleared, took this case out of the ordinary situation where a judgment debt had not been enforced. The defendant relied on the following propositions:

- the mere passage of six years is a sufficient ground in itself for refusing permission (*Patel v Singh* [2002] EWCA Civ 1938 at paras 14 and 21);
- the court will not, in general, extend time beyond the six years except where it is 'demonstrably just' to do so (*Duer v Frazer* [2001] 1 WLR 919 at p925C);
- the longer the period that has been allowed to lapse since the order the more likely it is that the court will find prejudice to the defendant (*Duer* at p925E); and
- the burden of proving that it is 'demonstrably just' to extend the time is on the claimant (*Duer* at p925C).

District Judge Price rejected the council's submissions and did not accept that there had been any chronic failure on the defendant's part to pay her rent, but rather found that she had done her best to meet her rent payments. The issue of one warrant did not demonstrate 'chronic failure'.

He further rejected the suggestion that the council had actively pursued the matter or that the case was in any way out of the ordinary. The fact that the original order allowed for a payment scheme running beyond six years was not exceptional. It was of the type regularly made to ensure a balance was struck between the needs of the defendant (including benefit issues) and the need for him/her to take responsibility for some payments.

The court was not satisfied that the council had discharged its burden to demonstrate that this was a case out of the ordinary. He accordingly rejected the application for permission to issue the warrant.

Anti-social behaviour

- **LGO investigation 04/B/2615 (Peterborough City Council)**

28 July 2005

The complainants were owner-occupiers. Their neighbours were council tenants. As a result of complaints of anti-social behaviour, including swearing, verbal abuse, playing loud music and throwing rubbish into the complainants' garden, the council served a notice seeking possession. However, the notice was 'withdrawn' when the neighbours made an application to purchase their property under the Right to Buy scheme. The neighbours were subsequently convicted of the criminal offence of harassment and fined £750 each.

The ombudsman made a finding of maladministration. The council should have done more to establish the nature and extent of the nuisance. The decision to withdraw possession proceedings did not take account of all the available evidence. The subsequent conviction for harassment cast doubt on the council's judgment that a possession action would not have succeeded. The complainants had a justifiable sense of outrage with the council over its actions. The council agreed to apologise and pay compensation of £2,000 for the injustice suffered.

PRIVATE SECTOR

Assured tenants

Possession claims

- **Milecastle Housing Ltd v Walton**

14 June 2005,
High Court of Justice, Newcastle upon Tyne District Registry[12]

The defendant was an assured tenant. Arrears accrued when he stopped receiving HB because the housing benefit authorities formed the view that he had ceased to occupy the premises. The claimants sought possession under HA 1988 Sch 2 Part II Grounds 10 and 12 – discretionary grounds based on rent arrears. At the hearing, the defendant's representative sought an adjournment to try to sort out

the defendant's housing benefit position. A district judge refused the application, referring to *North British Housing Association Ltd v Matthews* [2004] EWCA Civ 1736; [2005] 1 WLR 3133. He made a 28-day possession order. The defendant appealed.

HHJ Langan QC, sitting as a deputy High Court judge, allowed the appeal. The effect of *Matthews* is that the power to adjourn, in HA 1988 s9(1), must not be used when possession has been sought on one of the mandatory grounds: 'The decision has nothing whatever to do with cases such as the present, where possession is sought on one of the discretionary grounds.'

The district judge had, by error of law, debarred himself from giving proper consideration to a matter that he should have considered, namely, whether he should exercise the power to adjourn. The possession order was set aside and a new trial ordered.

Warrants

■ **Circle 33 Housing Trust v Ellis**
B2/05/1746
23 September 2005

The defendant, Mr Ellis, was an assured tenant. He was receiving income support (IS) and HB. HB was paid direct to Circle 33. His tenancy agreement included an express term that Circle 33 should make every effort to make direct contact with the housing benefit department before taking enforcement action in respect of rent arrears. After some time, HB payments ceased. Circle 33 sought possession on the ground of arrears of £1,739 at the date of the hearing. Mr Ellis did not attend the hearing and an outright order was made. Mr Ellis was evicted.

After eviction, he made enquiries and was given a letter from the local social security office confirming that he had received IS during the relevant periods. The housing benefit department reassessed his claim and confirmed that he had, in fact, been entitled to benefits at all material times. His rent account was accordingly credited with the benefit payments, leaving arrears of £203. HHJ Ansell refused his application to set aside the warrant and to be reinstated. Holland J, on appeal, found that execution of the warrant was oppressive. He allowed the defendant's appeal, quashed the eviction and ordered that re-entry be permitted.

The Court of Appeal allowed Circle 33's further appeal. A finding of oppression in the execution of an order cannot be made unless the court's process has been misused. Circle 33 made enquiries of the housing benefit department and was informed that the defendant was not eligible for HB. That view persisted until the defendant himself made enquiries of the housing benefit department following his eviction. It was impossible to say that the claimant had been doing less than it was required to do. Its conduct did not amount to oppression. Holland J's order was set aside.

Assured shorthold tenancies – s21 notices

■ **Baynes v Hall and Thorpe**
29 June 2005,
Dewsbury County Court[13]

The defendants were assured shorthold tenants. There was an initial fixed-term tenancy for six months, starting on 15 June 2003 and ending on 14 December 2003. Rent was due on the 12th day of each month. The tenants remained in occupation after the expiry of the fixed term as statutory periodic tenants.

On 6 February 2005, the landlord served a HA 1988 s21 notice that expired on 14 April 2005 or 'if later, the day on which a complete period of your tenancy expires next after the end of two months from the service of this notice'. A possession claim was issued on 25 April 2005. The defendants, relying on HA 1988 s5(3)(d), sought to defend on the basis that the claimant had issued proceedings too early – ie, before the true expiry of the notice. Their case was that the periodic tenancy ran from the date when rent was paid, not from the date of expiry of the fixed-term tenancy.

District Judge Addlestone made a possession order. He said:

It is asserted by the defendant that [section] 5(3)(d) means that the date of commencement of the tenancy is converted to the date when rent is payable. My view is that [section] 5(3)(d) does not mean that. [Section] 5(3)(d) means that the periods of the [statutory periodic] tenancy are the same as the period when rent was payable: so if rent was payable monthly, it is a monthly tenancy; if rent was payable three-monthly, it is a three-monthly tenancy. … The words of [section 5(3)(a)] seem to me to be very clear.

That subsection provides that the statutory periodic tenancy takes effect 'immediately on the coming to an end of the fixed-term tenancy'.

Long lessees

Service charges

■ **Staghold Ltd v Takeda**
8 August 2005,
Central London Civil Justice Centre

Mr and Mrs Takeda were long lessees. Their lease provided that they should pay as 'additional further rent' sums relating to the lessor's costs, expenses and outgoings and the cost of employment of legal advisers in connection with the exercise of the lessees' rights or obligations. The parties were involved in a dispute before the Leasehold Valuation Tribunal (LVT) about service and management charges. The LVT ruled in favour of the lessor. Subsequently, the lessor sought to recover a portion of its legal costs relating to the dispute from the couple, and other lessees, as service charges under the lease. The lessees argued that the lease did not cover this situation, as the lessor's involvement in the LVT proceedings was optional, and that Commonhold and Leasehold Reform Act 2002 Sch 12 prevented the lessor from recovering its legal costs.

HHJ Levy QC found in favour of the lessor. On the true construction of the lease the lessor was entitled to claim these sums. The lessor had been forced by the Takedas into litigation in which they were almost wholly unsuccessful. The lessor had incurred considerable costs and it was prima facie inequitable that it should not be entitled to recover those costs under the terms of the leases with its lessees. Furthermore, Sch 12 of the Act did not preclude the lessor from recovering its legal costs.

Trespassers

Adverse possession

The changes in the law relating to adverse possession, introduced by Land Registration Act 2002, mean that there is a continuing flow of cases where squatters are trying to establish claims to adverse possession under the old law (Limitation Act 1980 s15). (See, for example, June 2005 *Legal Action* 31; July 2005 *Legal Action* 29; and September 2005 *Legal Action* 16.)

■ **Chapman v Godinn Properties Ltd**
[2005] EWCA Civ 941,
27 June 2005

After considering *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, HL, and *Buckinghamshire CC v Moran* [1990] Ch 623, CA, the Court of Appeal found that HHJ Reid QC had been entitled to reach the conclusion that the claimant trespassers had established sufficient factual possession of a disputed strip of land, between a fence and a driveway, and that they had an intention to possess. They had done all that they could be expected to do in relation to the land to make their intentions unambiguously clear to the world at large. The claimants had established possessory title.

■ **Wretham v Ross**
[2005] EWHC 1259 (Ch),
1 July 2005

David Richards J held that a deputy solicitor to the Land Registry

had not applied the correct test when considering applications to register possessory title to various outbuildings and pieces of land adjoining a cottage. Following *Pye* (see above), David Richards J stated that the first issue for a court dealing with claims to adverse possession is whether the occupier has been in factual possession over the relevant period – ie, has used the land as an occupying owner might have been expected to use it while no one else has done so. There must be 'a sufficient degree of exclusive physical control'. Whether there has been factual possession should be objectively assessed by reference to a squatter's acts relied on to constitute possession.

■ Jan Luba QC is a barrister at Garden Court Chambers, London WC2 and a recorder. Nic Madge is a circuit judge. They are grateful to the colleagues at notes 10–13 for supplying transcripts or notes of judgments:

1 Available at: www.cabinetoffice.gov.uk/opsr/documents/pdf/choice_voice.pdf.
2 All ODPM documents can be found at: www.odpm.gov.uk.
3 To order a copy please call: 0870 1226 236.
4 See: www.odpm.gov.uk/choicebased-lettings.
5 For more information visit: www.londonhousing.gov.uk.
6 Available at: www.scotland.gov.uk/consultations.
7 Available at: www.lgo.org.uk.
8 See: www.support4councilhousing.org.uk.
9 Available at: www.gnn.gov.uk/environment/dca/.
10 Pierce Glynn, solicitors, London, for the Official Solicitor and Tracey Bloom, barrister, London.
11 Samantha Mowlah, solicitor at Alan Edwards & Co, London and Andy Lane, barrister, London.
12 Deborah Still, Newcastle Law Centre and Laura Cawsey, barrister, Manchester.
13 Alison Greenwood, housing adviser, CHAS Housing Aid Centre, Dewsbury.

HOUSING

Beating the rule in *Hammersmith and Fulham LBC v Monk*

Ian Loveland offers an argument using article 8 of the European Convention on Human Rights ('the convention') to help sidestep a draconian rule of housing law whereby, following *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, any one joint tenant can terminate the tenancy by giving a valid notice to quit to the landlord.

Introduction

The House of Lords in *Monk* held that any one joint tenant can terminate the tenancy by giving a valid notice to quit to the landlord.[1] The tenancy is determined even if the other tenant(s) do not know of the notice and have no wish to end the tenancy. When the notice expires, the former tenants become trespassers with no right to remain. The device is sometimes deployed by local authority landlords and registered social landlords to deal with domestic violence cases. It offers a landlord an oblique way to rehouse the victim without also having to house the perpetrator. Whether such rough justice is ever desirable is a debatable point. It is obviously problematic where the unknowing joint tenant has not behaved culpably.

The rule seems – superficially – to have been affirmed by the Court of Appeal's recent judgments in *Birmingham City Council v Bradney*: *Birmingham City Council v McCann* [2003] EWCA Civ 1783. In both cases, the local authority broke promises to the departing joint tenant that it would not evict her joint tenant partner if she served a notice to quit. Neither defendant challenged the validity of the notice. Both contended instead that the facts of the case made this an 'exception' to the rule in *Harrow LBC v Qazi* [2003] UKHL 43; [2004] AC 983, and that article 8 of the convention protected their continued occupancy of their respective homes against their landlord's efforts to evict them. The Court of Appeal curtly rejected this argument. The defendants' legal interest in their homes had been terminated in accordance with domestic law; they were trespassers and had no defence to possession proceedings.

This article offers a different basis for inserting article 8 into this scenario. The argument combines previously unsuccessful attacks on the rule in 'domestic' law with a hitherto rather neglected line of article 8 case-law.

Challenging the rule in domestic law

In subsequent years, various attempts have been made to sidestep the *Monk* rule. In *Hounslow LBC v Pilling* (1993) 25 HLR 305, the Court of Appeal redefined a purported notice to quit as an attempt to exercise a break clause. Since valid exercise of the break clause required the positive assent of all tenants, its exercise by one joint tenant could not determine the tenancy. In *Wandsworth LBC v Osei-Bonsu* (1999) *Times* 4 November, the court simply measured the tenant's notice to quit against the Protection From Eviction Act 1977 s5 and found it wanting. More expansive challenges have, however, failed.

The defendant in *Notting Hill Housing Trust v Brackley* [2002] HLR 212 rooted his argument in Trusts of Land and Appointment of Trustees Act (TLATA) 1996 s11. The argument begins with the uncontentious premise that a secure or assured tenancy creates a trust of land. In joint tenancies, the tenants are simultaneously the trustees and the beneficiaries. Section 11 requires trustees to consult beneficiaries before exercising any 'function' arising under the trust.

The defendant contended that serving a notice to quit was a 'function' within s11; that for one joint tenant to serve a notice unilaterally was a breach of trust; and that the notice was therefore invalid.

The Court of Appeal rejected the argument. It held that giving a notice to quit was not a 'function' within s11. As Jonathan Parker LJ put it: '... [S]ince the notice does no more in substance than express the personal wish and intention of the joint tenant who serves it that the periodic tenancy should not continue, there would be nothing to consult the other joint tenant about' (para 32). The commonsense proposition that what the notice does 'in substance' is obliterate any other joint tenant's legal interest in his/her home did not commend itself to the court.

A second unsuccessful attack emerged from the sphere of family law. The defendant in *Newlon Housing Trust v Alsulaimen* [1999] 1 AC 313 invoked Matrimonial Causes Act (MCA) 1973 s37(2)(b) in an attempt to invalidate a notice given by his former joint tenant. Section 37(2)(b) empowers a court to set aside any 'disposition' of marital property which the court considers was made to frustrate a party's entitlements in relation to a property adjustment order.

The House of Lords accepted that an assured tenancy was 'property' per s37. But it rejected the argument that unilateral termination through a notice to quit was a 'disposition'. There was therefore nothing for the court to set aside.

The key to finding some protection for defendants in this unhappy situation is to persuade the courts to accept a new interpretation of the notion of a 'disposition' under the MCA and/or of a 'function' within TLATA s11. It is here that article 8 of the convention and Human Rights Act (HRA) 1998 s3 come into play.

Participation rights under article 8

The European Court of Human Rights (ECtHR) has repeatedly held that article 8 affords procedural entitlements – or more precisely participation entitlements – as well as substantive benefits to individuals. More specifically, several judgments suggest that a person may not be deprived of an important article 8 interest by

a legal process in which s/he has not been able or permitted to participate in.

The issue before the court in *W v UK* (1987) 10 EHRR 29 was the compatibility with article 8 of an adoption order relating to W's child. The order was made without W's consent and without – in W's contention – granting him sufficient opportunities to participate in the relevant decision-making process. The ECtHR accepted W's submission that the notion of 'respect' in article 8 implied that some procedural rigour had to be observed in the making of substantive decisions:

It is true that article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision … Accordingly, the court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by article 8. (para 62)

The court has been consistent in finding participation rights within article 8. In *Keegan v Ireland* (1994) 18 EHRR 342, the court held that an adoption process initiated without the child's father's 'knowledge or consent' (paras 51 and 55), which produced 'irreversible' legal consequences prima facie breached the father's article 8 rights, and could rarely be justified under article 8(2) (see also *McMichael v UK* (1995) 20 EHRR 205).

A recent – post-*Qazi* – ECtHR's decision has reiterated this point in the specific context of housing/land possession cases. The applicant in *Connors v UK* App No 66746/01, 27 May 2004 was a Gypsy, whose rights to occupy his caravan were – in perfect accordance with domestic law – summarily terminated without him being given any opportunity to contest the necessity of the termination before a court. The ECtHR reiterated the 'due respect' principle laid out in *W* and subsequent cases. It upheld the applicant's article 8 complaint on the basis that the law's summary nature was procedurally inadequate because: '[T]he eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement [by the landlord] to establish proper justification for the serious interference with his rights …'. (para 79)

The rule in *Monk* has just the same summary nature. The rule clearly deprives a person of his/her home. Moreover, the rule makes it possible that the person's right to occupy his/her home was extinguished without his/her knowledge, participation or consent. The rule thus affords no respect – let alone the 'due respect' identified by the ECtHR – to an interest protected by article 8 of the convention.

A better way forward?

Peter Gibson LJ observed in *Brackley* that if the meaning of TLATA s11 was to be changed to catch the rule in *Monk*: '[T]hat is a matter for the legislature and not the courts' (para 26). But it can now be argued that parliament has indeed changed the meaning of s11 (and/or MCA s37(2)(b)) indirectly through HRA s3. If *Monk* is incompatible with article 8 of the convention, and if it is 'possible' to lend any existing statutory provisions a meaning which removes that incompatibility, those provisions must be accorded a new meaning.

For present purposes, we might note the initial approach to s3 mandated by the House of Lords (per Lord Steyn) in *R v A* [2001] 3 All ER 1:

… The interpretive obligation under s3 of the 1998 Act is a strong one … [It] goes far beyond the rule which enabled the courts to take the convention into account in resolving any ambiguity in a legislative provision … In accordance with the will of parliament as reflected in s3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute, but also the implication of provisions … . (para 44)

More recently, the House of Lords has indicated that courts should not use s3 to write absent provisions into Acts of parliament nor override the clear words of a statute.[2] To reconstrue a notice to quit as a 'function' of a trustee and as a 'disposition' of trust property may offend the sensibilities of some property lawyers; but it would seem hard to argue that such a redefinition is not 'possible' even within the more restrictive interpretive regime now governing s3.

Should that argument be accepted, a unilateral notice to quit would be invalid. The defendant's tenancy would be in place and – unless there had been a breach of the agreement – there would be no basis for possession proceedings. That in itself, however, is not a desirable outcome. The three parties in this situation each seek a different result. The departing tenant wishes to be freed of his/her obligations. The resident tenant wants a sole tenancy. And the landlord wants possession of the premises. Fortuitously, domestic law offers off-the-shelf procedures through which the courts can tackle this conundrum in an article 8 compliant way.

For joint tenants who are spouses/cohabitees, the way forward is provided by Family Law Act (FLA) 1996 s53 and Sch 7. Section 53 enables either joint tenant to apply to the court to have the joint tenancy turned into a sole tenancy. The court's obligation in these circumstances is to have regard to 'all the circumstances of the case', and landlords are entitled to intervene in any such proceedings. If the court felt that it was not 'reasonable' for the landlord to regain possession, the court would transfer the joint tenancy to the remaining tenant as a sole tenancy.[3] If the landlord succeeded on that point, the court would leave the joint tenancy intact whereupon a valid notice to quit could be served by the tenant who wished to leave and the remaining tenant would have no defence to possession proceedings, since s/he would have exercised article 8 participation rights in the s53 hearing itself.

In relation to unmarried joint tenants, the appropriate mechanism would be to make an application under the TLATA s14. This grants the court an expansive jurisdiction to regulate and/or reallocate trust property. However, its drawback, relative to FLA s53, is that it does not grant landlords any rights to intervene in the proceedings.

Conclusion

The rule in *Monk* [1992] 1 AC 478 was a source of obvious unease even to the judges who created it (see Lord Browne-Wilkinson at 491). It remains to be seen if our courts can be convinced that the rule is not compatible with article 8. But it is perhaps unfortunate that neither parliament nor the courts have taken the opportunity to address and mitigate the iniquities of the rule in more direct terms.

■ Ian Loveland is a barrister at Arden Chambers, London, and Professor of Public Law at City University.

1 The rule is often referred to among housing officers as a 'McGrady notice', after the initial confirmation of the point offered in *Greenwich LBC v McGrady* [1983] 46 P & CR 223; (1982) 81 LGLR 288.
2 See *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; *Bellinger v Bellinger* [2003] 2 AC 467.
3 Housing Act (HA) 1985 s84(2) regarding secure tenancies and HA 1988 s7(4) regarding assured tenancies.

PUBLIC LAW

Recent developments in public law


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

Standing

■ **R (Grierson) v Office of Communications (OFCOM) and Atlantic Broadcasting Ltd and others (interested parties)**
[2005] EWHC 1899 (Admin)
The claimant was a managing director and shareholder in a company that was refused a broadcasting licence by the Office of Communications (OFCOM). The respondent argued that the claimant lacked standing because he had no interest independent from the company (applying *Durayappah v Fernando* [1967] 2 AC 337). Stanley Burnton J accepted that rules on standing had moved on since 1967, and that the derivative nature of the interest was not conclusive against the claimant. However, it was relevant, as was the fact that neither the company nor anybody else had brought a challenge. The judge applied a flexible approach to standing: the more important the issues and stronger the merits, the more prepared the court will be to grant leave. However, the challenge had no reasonable prospect of success and permission was refused.

DELAY

■ **R (Hampson) v Wigan MBC and Greenbank Partnerships Ltd**
[2005] EWHC 1656 (Admin)
The claimant was a resident in the area of the defendant local authority. The claimant sought judicial review of the defendant's decision to grant planning permission for five inter-related developments.

An issue arose about whether the application for judicial review, which had been brought within three months of the grant of planning permission (although only just) had been made promptly in accordance with the requirements of Civil Procedure Rule (CPR) 54.5(1). Richards J held that it had. He said that, in applying the requirement of promptness, the court would exercise a degree of caution, particularly in the light of the doubts expressed in *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23, regarding the compatibility of the requirement of promptness with article 6 of the European Convention on Human Rights. The judge took into account the fact that a pre-action protocol letter was sent before the decision was made, so that the council and the developer were aware that there was likely to be a legal challenge. Commencing proceedings was delayed as a result of the claimant's application for public funding from the Legal Services Commission. While there was some short delay by the claimant's solicitors in making that application, it was not such as should debar the claimant from bringing the proceedings. Once the application was made, things moved as quickly as they could reasonably be expected to progress.

Richards J also took into account that he was not satisfied that there was serious prejudice to the council or developer arising from the delay. General concerns raised about possible loss of grant funding for the development were not particularised. In addition, the developer assumed financial liabilities in the knowledge that a legal challenge was likely. The fact that a successful challenge would cause delay and adverse financial consequences for the developer was not a sufficient reason to exercise the court's discretion against the claimant.

■ **R (Lambeth LBC) v Secretary of State for Work and Pensions**
[2005] EWHC 637 (Admin)
Claimants often try to revive an out of time decision by requesting a reconsideration or by presenting new facts. This case discusses the circumstances in which this might give rise to a new challenge. In 1998 the secretary of state decided to recover overpayments of housing benefit subsidy from Lambeth. The payments were to be spread over ten years. Following a successful challenge to recovery brought by other local authorities Lambeth tried, in 2004, to persuade the Department for Work and Pensions to stop recovery in its case and to pay back the amount already recovered. The defendant refused to do so.

A preliminary question was whether there was a reviewable decision at all in 2004, or whether the claimant was really trying to review the 1998 decision – which was well out of time. Stanley Burnton J considered that this did not allow a 'formulaic or straightforward answer'. The question was:

> *... whether in substance a fresh decision has been made or ought to have been made. A claimant cannot circumvent or avoid the requirements of CPR Part 54.5 or of section 31(6) of the Supreme Court Act simply by requesting reconsideration of an earlier decision.* [para 38]

A new decision might arise where there were fresh facts calling for reconsideration. However, where the only change is a non-retrospective change in legislation or policy, then that does not, in general, justify treating a refusal to alter a previously undisputed decision as a new decision. It is not irrational to refuse to reopen a decision in those circumstances. Even where the court does find that there is a fresh decision, this does not mean that the first decision has to be ignored: it forms an essential part of the background.

The judge gave guidance on the approach that ought to be taken where this question arises: 'in cases where it is not clear whether a separate reviewable decision has been made, it is better to assume that it has, and to examine its lawfulness in the light of the previous valid decision, rather than to dismiss the claim for judicial review summarily' [para 40]. On the assumption that there was a new decision, the substantive claim was dismissed since the defendant's assessment was not irrational.

■ **R (Noble Organisation Limited) v Thanet DC and (1) Rosefarm Estates plc (2) Rank Group plc (interested parties)**
[2005] EWCA Civ 782
In this case the claimant's challenge was held to be an impermissible attempt to challenge an out of time, earlier decision. In 1997 and 2002, the defendant council granted outline planning permission for a business park and a leisure park respectively. In neither case did the council require an environmental impact assessment (EIA), and it had decided (in a screening decision made in 2000) that the leisure park did not need one.

In 2004, the council approved the reserved matters for the leisure park. Again, it did not require an EIA. In reaching that decision, it compared the impact of the reserved matters with that of the earlier permissions. In part, its reasoning was that since no EIA had been required then, none was needed now. The claimant complained that the outline planning permission was unlawful because there ought to have been an EIA. Therefore a decision based on it was also unlawful.

The Court of Appeal rejected this reasoning. The earlier decisions were valid unless and until they were quashed. The council was, therefore, entitled to take them into account and the claimant's argument was an impermissible collateral challenge. The position would have been different if the council had relied on the reasoning in the earlier decisions. However, it had not done so. The council had relied simply on the fact of the earlier decisions.

PROPORTIONALITY

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

[2005] EWCA Civ 105

The Court of Appeal has given further guidance on the court's role in reviewing decisions for proportionality. Although the judgment relates to the specific statutory context of an adjudicator's decision, it contains an important discussion of the approach to be taken following *Daly v Secretary of State for the Home Department* [2001] UKHL 26.

The claimants were each liable to be removed on immigration grounds. They each challenged a decision by the Home Secretary to remove them on the ground that to do so would be a disproportionate interference with their article 8 rights. They appealed to an adjudicator, then to the Immigration Appeal Tribunal (IAT) and then to the Court of Appeal.

The court rejected the argument that the adjudicator was confined to a *Wednesbury*-type review but, equally, they were not entitled to decide the question on the merits. Laws LJ, who gave the judgment of the court, drew a distinction between policy questions and matters other than policy. On matters of policy the court should, on democratic grounds, accord to the decision-maker an area of discretionary judgment.

The courts are also likely to recognise that government is better equipped than the court to judge how needful the policy is to achieve the aim in view. So where policy is the subject-matter in hand, principle and practicality alike militate in favour of an approach in which the court's role is closer to review than appeal: where a degree of deference does no more than respect the balance to be struck between the claims of democratic power and the claims of individual rights.

Even here the court is not confined to a *Wednesbury* standard of review. It will require a 'substantial reasoned justification of the policy' [paras 53–4].

In these cases, the main policy judgment had been struck by the Immigration Rules themselves. It followed that there had to be an exceptional case before article 8 could require that it be considered outside the rules. The adjudicator had to work within that framework and had to take the policy judgments expressed by the rules as a given.

However, when it came to the adjudication of particular instances, these considerations do not apply and there is no need to give any margin of discretion to the Home Secretary's decision. The adjudicator then had to make a direct decision whether or not the case was so exceptional as to require a departure from the rules.

This decision was in a specific statutory context where the adjudicator had a power to make his/her own fact findings. However, the Court of Appeal spoke in wider terms and, at paragraph 62, made clear that this general approach applied to other courts.

ULTRA VIRES

■ **R (Heath) v Home Office Policy and Advisory Board for Forensic Pathology**

[2005] EWHC 1793 (Admin)

In 1991, the Home Secretary established the Advisory Board for Forensic Pathology (the board) to maintain the quality and standards of the profession of pathology and, in particular, to operate a register of those suitable to undertake post-mortem examinations of those who have died in an apparently unusual or violent way. The board operates under a constitution that had been accepted by the Home Secretary, and which contains provision for the admission and removal of pathologists to the register and for dealing with complaints against those on the register.

The claimant was a forensic pathologist. Complaints were made to the board by other doctors who had been expert witnesses in criminal proceedings in which the claimant had been an expert witness for the prosecution. The board's complaints procedure was implemented and resulted in the matters being referred to a disciplinary tribunal. It was then found that there had been defects in the referral process which could not be cured, so the referrals were abandoned and the process was recommenced. The claimant challenged the decision to adopt and issue fresh referrals and the consequent decision of the board to refer the complaints to a disciplinary tribunal.

The claimant's first ground was that the Home Secretary had acted ultra vires in setting up the board and the scheme, including the disciplinary and complaints procedure, because the Home Secretary had no statutory authority for doing so and had not established that it fell within the royal prerogative.

Newman J dismissed this ground. He held that it was incorrect to assume that if the acts were not within the royal prerogative, they were null and void. If they were not within the prerogative they were to be regarded as 'executive action'. It was not necessary for the court to decide between the two. In either case the Home Secretary had power to act.

The claimant also argued that the referrals were ultra vires because he had not been given notice of the complaints within 28 days of them being received, as required by the scheme. He argued that, the first referrals having been abandoned, it was not possible for the board to give notice within 28 days. Therefore the complaints could not be dealt with. This ground was also dismissed. Newman J held that it was absurd to suggest that failure to comply with the notice requirement would make it impossible for a hearing to take place or for a complaint to be considered any further. To do so would elevate a purely procedural provision - designed to give early notice of a complaint and so minimise the potential prejudice to a pathologist in the preparation of his defence – to a condition precedent to jurisdiction arising. Because the board could not comply with the strict notice requirements (as a result of the first referrals being set aside), all it had to do was to provide the claimant with 28 days' notice to respond.

Comment: Strictly speaking 'prerogative power' describes powers that are held only by the Crown (eg, to grant pardons or declare war). However, it is often also used to describe acts by the Crown that are without any statutory authority but which arise because the Crown has legal personality.[1] Examples are the establishment of ex gratia compensation schemes (see, eg, *Elias* below). Anybody can give away money and this is not solely the province of the Crown and government ministers (although raising the money may prompt different questions).

Schemes like this are more properly described as the exercise of 'executive power', and were so described in *R v Criminal Injuries Compensation Board ex p P* [1995] 1 WLR 845. Newman J uses this term to describe a scheme for the accreditation of expert witnesses and their subjection to a disciplinary regime. The defendant used its power to regulate the position of third party experts and to affect their ability to practise their profession. This is beyond the powers of private individuals as usually understood, and would usually require some specific statutory or other authority. However, other bodies (eg, *The Jockey Club*, see below) regulate their professions entirely through a contractual disciplinary scheme and it might be said that the same applies here. Although the Home Secretary exerted influence over the way that the scheme operated, it was ultimately up to the experts whether or not they chose to expose themselves to it by wishing to be accredited and carrying out this kind of work. Although he

dismissed the complaint, Newman J held that the defendant's decision would be amenable to judicial review whether it was prerogative or executive action.

Contractual powers

■ **Bradley v The Jockey Club**
[2005] EWCA Civ 1056
A disciplinary committee of the Jockey Club disqualified the claimant from being a trainer for five years for giving insider information. The Jockey Club is not a statutory body, but the rules of membership require members to submit to the disciplinary procedures.

Richards J, with whom the Court of Appeal agreed, held that there was no material difference in this context between judicial review of a disciplinary decision and a challenge to the exercise of a contractual power to discipline. In both cases the court's function was supervisory. It was concerned to ensure that the procedure was fair, without error of law, and that the outcome was within the permissible limits open to the decision-maker.

Common law powers: fettering

■ **R (Elias) v Secretary of State for Defence v Commission for Racial Equality (intervenor)**
[2005] EWHC 1435 (Admin)
The claimant was interned as a British citizen by Japanese forces during the Second World War. She claimed compensation under an ex gratia compensation scheme. Her application was refused because neither she nor her parents or grandparents had been born in the UK ('the birth condition') as the scheme demanded. She succeeded subsequently because the birth condition was unlawfully discriminatory.

However, she also argued that the condition was an unlawful fetter because it restricted consideration of deserving cases which did not meet it. If this had been a statutory scheme, then the claimant accepted that that would have been an end of the matter. The decision-maker's powers would be defined by the scheme, and if that did not include a power to make exceptions then there could be none. However, the claimant argued that the position was different because this was a common law scheme. Common law powers, the argument ran, do not depend on any scheme for their existence but are always available. The scheme was no more than a policy about how the power was to be exercised. If it placed apparent limits on its exercise then the secretary of state could always make exceptions.

The argument was rejected because Elias J held there is no duty always to consider the exercise of common law powers on a request being made to do so. Merely because the government agreed to make payments in certain situations, it did not follow that it was obliged to consider applications from those who did not fall within the rules. The court has to give effect to the scheme in the same way that it would statutory rules.

Frustrating the statutory purpose

■ **R (British Beer and Pub Association and others) v Canterbury City Council**
[2005] EWHC 1318 (Admin)
A body with statutory powers must not exercise them in such a way as to frustrate the statutory scheme under which the powers were given (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). Richards J applied this principle to a local licensing policy under the Licensing Act (LA) 2003. Under the LA, prospective licensees set out their proposed conditions in their application. The application is then granted administratively unless representations are received opposing it. Only then is there a hearing at which the authority may decide what conditions to impose.

The defendant's policy, made under the LA, was over-prescriptive about what restrictions would be expected, and wrongly gave the impression that the authority could prescribe conditions even where there were no objections. Therefore, it might mislead applicants into changing the way that they made applications. They might volunteer unnecessary restrictions in the belief that they had to do so to obtain a licence. This was inconsistent with the scheme of the LA, which was intended to give freedom to the individual applicant.

Richards J held that the policy was unlawful on these grounds. However, he refused relief for two reasons. First, the unlawfulness had been partly cured by an addendum that explained the true position more fully. Second, there had been delay. Even though there was good reason for the delay, great administrative prejudice would be caused by quashing the policy and, therefore, he refused relief as a matter of discretion.

FAIRNESS

■ **R (Dirshe) v Secretary of State for the Home Department**
[2005] EWCA Civ 421
Following changes to public funding for asylum cases, funds are not generally available for a legal representative or interpreter to be present at interviews. The claimant requested that he be permitted to tape record his interview. The Home Secretary refused.

The Court of Appeal held that the opportunity for the applicant to comment on the written record of an interview was of limited value if English was not his first language and, in any event, any challenge to the accuracy of the record would be disadvantaged by the lack of corroboration about what had taken place. There was, therefore, real procedural unfairness if tape recording was not permitted when no representative or interpreter was present on behalf of an interviewee. A tape recording provides the only sensible method of redressing the imbalance which results from the Home Secretary being able to rely on a document (the officer's verbatim record) created for him without an adequate opportunity for the interviewee to refute it.

■ **R (Heath) v Home Office Policy and Advisory Board for Forensic Pathology**
(see 'Ultra vires' above for the facts of the case)
As well as his complaint to the vires of the Home Secretary in establishing the board and the scheme, the claimant also had a number of challenges to the fairness of the board's procedures, in general, and in respect of the complaints against him. He complained that the board's scheme had so many gaps and defects that it was unworkable.

Newman J rejected this. He held that, where a scheme such as this one was concerned with complaints and disciplinary procedures to which it is clear that the parties have agreed by a form of contract, the governing legal principle is that the procedures should be fair. They do not have to cover every matter that might arise, and gaps can be filled by the relevant body bearing in mind that the process must be one which is capable of achieving justice and fairness between the parties in respect of the matters in issue. In the present case, none of the criticisms advanced, individually or cumulatively, made the scheme unworkable.

It is also interesting to note Newman J's general observations regarding judicial review of a screening decision (ie, a decision to refer for disciplinary process and not the disciplinary decision itself). He noted that judicial review at that stage would be rare, and limited to exceptional cases where it is necessary to avoid a miscarriage of justice. Usually, the court will be concerned with the legality of a final decision made by a disciplinary tribunal, and not with monitoring the procedural processes governed by the wide discretion exercised by disciplinary tribunals to rule their own affairs. It is the tribunal's decision, not that of the screening committee, which is determinative of rights and obligations. The prejudice that would result from the giving of notice that a referral to a tribunal had been made was inescapable but would last only so long as the tribunal's

decision is delayed, and could be reduced by the tribunal hearing taking place promptly.

■ **Kanssen v Secretary of State for the Environment, Food and Rural Affairs**

[2005] EWHC 1024 (Admin)

This case is noted because it illustrates the uncertain boundary between fairness and substance. It is for the court to judge whether a procedure has been fair but, in general, it can interfere with the substance of a decision only if it is irrational. The claimants were Travellers who camped on forestry land owned by the defendant. They claimed that the defendant ought to have made welfare enquiries before deciding whether or not to evict them. They relied on the proposition that the defendant had to take reasonable steps to acquaint itself with the relevant facts.[2] The defendant argued that it had no expertise or statutory functions in this area, and that it was enough to notify the appropriate authorities.

Owen J agreed with the defendant and, in so doing, held that the relevant standard for him to apply was that of *Wednesbury* unreasonableness. It could not be said that any reasonable body in the defendant's position could make the enquiries and, therefore, the claim failed. But it might equally be said that the duty to make enquiries was an aspect of the defendant's duty of fairness. If so, then it would be for the court and not the defendant to judge whether the procedure was adequate.

LEGITIMATE EXPECTATION

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

[2005] EWCA Civ 744

The respondent was an Iraqi Kurd who sought asylum in the UK on 4 December 2001. The Home Secretary refused the application in December 2001; that decision was upheld by an adjudicator, in June 2002, and permission to appeal to the IAT was refused in July 2002.

In the meantime, two other asylum-seekers (M and A), whose asylum claims were materially identical to that of the respondent's, had applied for judicial review of decisions refusing them asylum. The respondent had also issued judicial review proceedings at that time (February 2003), but his case was stayed pending the outcome of M and A's claim. In March 2003, shortly before their case was to be heard by the Court of Appeal, the correct policy was brought to the Home Secretary's attention who then agreed to grant M and A refugee status. The respondent's advisers then wrote to ask the Home Secretary to reconsider his claim. By the time the Home Secretary came to reconsider the claim, in January 2004, the policy had changed as a result of the political changes in Iraq. His asylum claim was refused, in accordance with the new policy. The respondent successfully applied for judicial review and the Home Secretary appealed.

The Home Secretary accepted that the previous policy had not been correctly applied at the relevant times. However, the Home Secretary contended that, applying *Ravichandran* [1996] Imm AR 97, he was entitled to decide the claim in January 2004 by reference to the circumstances at that date. He argued that there was no legitimate expectation that the respondent must be granted refugee status as he had not previously been aware of, let alone relied on, the existence of the policy.

The Court of Appeal dismissed the Home Secretary's appeal. It held that the failures of the Home Office were 'startling and prolonged'. At all stages of the process of the asylum claim, including making representations to the adjudicator and the IAT, officers of the Home Office had relied on arguments that were contrary to the Home Secretary's policy. It then took ten months for the Home Secretary to make a decision on the request for reconsideration of the case, despite frequent reminders being sent by the respondent's advisers, and no explanation was given for that delay.

Pill LJ reviewed the authorities about legitimate expectation, unfairness and abuse of power. He said that there plainly was a legitimate expectation in an asylum-seeker that the Home Secretary will apply his policy on asylum to the claim. It is not relevant whether the claimant knows of the policy. The respondent's case was based on a claim of unfairness amounting to an abuse of power. In the present case, serious errors of administration had resulted in 'conspicuous unfairness' to him. Pill LJ took into account that the errors made by the Home office in failing to apply the correct policy were 'gross' – fairness required that the same treatment be given to the respondent as to M and A – and an early decision was required given the length of time for which his asylum claim had been under consideration. There was no countervailing public interest and, indeed, there was a public interest in those applying asylum policies being aware of the policies.

Dyson LJ agreed, adding that whether the frustration of a legitimate expectation is so unfair as to amount to an abuse of power will depend on a number of factors. These include:

- the extent to which the decision in question lies in the field of pure policy, in respect of which the court will adopt a less intrusive approach; and
- whether holding the public body to its promise or policy has only limited temporal effect and whether it has implications for a large class of persons; the degree of unfairness.

Both judges emphasised the unusual circumstances of this case. In the present case, it was relevant that the conduct complained of was persistent and related to a country which would have been expected to be at the forefront of the Home Secretary's deliberations, rather than a single error in an obscure field, and there was no explanation for it.

The court did not consider that it was appropriate to declare that the respondent was entitled to refugee status. The appropriate relief was a declaration that he is entitled to the grant of indefinite leave to remain in the UK.

■ **R (Dolatabadi) v Transport for London**

[2005] EWHC 1942 (Admin)

The claimant used his car to transport a disabled person, Mr Melville, around London. Mr Melville qualified for an exemption from the congestion charge and was entitled to specify two exempt cars. One of those cars was the claimant's. Mr Melville mistakenly ticked the wrong box on his renewal form so that, unknown to the claimant, he was not exempt from the charge. The claimant received penalty charge notices and refused to pay them.

The claimant asserted that the defendant had created a legitimate expectation that the matter had been resolved. Once the claimant realised that there had been an error regarding registration of his car for exemption, he contacted the defendant. Its staff told him, on the telephone, that his car registration number was on the system and no further action was required. As no further form was sent to Mr Melville, the claimant assumed it was not necessary for a new form to be completed correctly. When he received penalty charge notices, he wrote to the defendant and explained the circumstances. The penalty charge notices were cancelled. However, further penalty charges were incurred in the period between the claimant making representations about the initial charges and receiving clarification from the defendant about the requirement to complete a new registration form.

Collins J held that the defendant's conduct had created a legitimate expectation that the claimant would not incur penalties. It was clear that the claimant qualified for a discount and that the form had been wrongly com-

pleted by Mr Melville. It was also clear that the claimant believed he was entitled to use the car to assist Mr Melville without being penalised. The defendant cancelled the initial penalty charges, which led the claimant to believe that he would not be penalised in the future. The misinformation given to the claimant, coupled with the failure to respond properly to his letters, created a legitimate expectation. The claimant acted to his detriment as a result.

Reasons

■ **R (Wall) v Brighton and Hove CC**

[2004] EWHC 2582 (Admin), [2005] 1 P & CR 33 QBD

The general approach to the duty to give reasons is now well settled. This case applies these principles to a relatively new statutory duty to give reasons for the grant of planning permission. It makes some useful observations on how a committee should go about supplementing reasons and the circumstances in which defective reasons will be quashed. It must be noted that the observations about giving additional reasons in this case are in a context where the duty is to give 'summary reasons' only. By definition, there is more to be said that has not been recorded in the summary decision. The relatively lenient approach here does not necessarily translate to other areas.

The defendant granted planning permission for the demolition of a house. It did not, as required by regulations, give summary reasons for the grant. The claimant brought proceedings for judicial review, after which the defendant's lawyers wrote individually to each of the members of the committee asking them to recall their reasons for making the decision.

Sullivan J held that a failure to give reasons did not, in itself, make the decision void. However, the failure was not so 'nugatory or trivial that the authority can safely proceed without remedial action'. The obligation to give reasons for a *grant* of planning permission had been introduced for the benefit of interested members of the public and to maintain confidence in the planning system.

Sullivan J held that the court had discretion whether or not to quash a decision for an absence of reasons. However, it should quash the decision unless there was some good reason not to do so. The claimant did not have to show prejudice, although this was relevant and there might be some classes of case where there would need to be 'very strong' grounds not to quash the decision for lack of reasons. They included cases where there had been no officer's recommendation, where the committee had not followed a recommendation or where it had included apparently irrelevant material in its discussions.

The authority might supplement the summary reasons that it had given, but could not give new or post facto reasons. If the defendant did consider that it ought to try to correct the position by giving further reasons then 'the proper course would seem to ... be for the officers to take the matter back to committee at the earliest possible opportunity so that the committee can decide, in public session whilst members' recollection is still fresh, what were its summary reasons for granting planning permission'. This would not necessarily lead to a decision not to quash the decision, but would be a relevant factor.

DELEGATION OF FUNCTIONS

■ **Audit Commission for England and Wales v Ealing LBC**

[2005] EWCA Civ 556

The Audit Commission (the commission) appealed against a decision of Walker J that it had unlawfully delegated its functions in categorising Ealing's performance. The Local Government Act 2003 requires the commission to categorise the performance of local authorities. The commission adopted a set of rules for assessing authorities. These included a rule that an authority's score would be governed by reference to its rating in education, social care or financial standing. In respect of social care, the commission adopted the ratings awarded by the Commission for Social Care Inspection (CSCI). CSCI had given a zero rating to Ealing, which automatically caused its commission categorisation to drop from good to poor. Ealing submitted that, in adopting this rule, the commission had fettered its powers and had accepted the dictation from an outside body in applying a predetermined rule, without allowing for exceptions to that rule. Therefore, the commission had acted ultra vires. The council argued that the defendant failed to apply its own mind to its reasons for the zero rating, and to whether those grounds warranted downgrading its overall category. A central complaint was that the final CSCI score reflected a judgment which balanced a score for current performance and a grade for the room for improvement. Ealing did not object to these scores, in themselves, but argued that the weighting given to each element by CSCI in arriving at its final score involved a value judgment by the CSCI. The commission had to reach its own conclusion about overall performance and could not simply rely on that judgment by another body.

The Court of Appeal held that there was nothing unlawful in the approach taken by the commission. The rule reflected the commission's own judgment on how to categorise local authorities. The commission was entitled to adopt the professional judgments of CSCI, which is the specialist inspectorate on social care performance. The ratings awarded by CSCI reflect a view taken about the relative importance of various factors which are weighted to produce the final rating. The commission was familiar with the weightings and must be taken to have been content with them in order to have adopted them. The commission had adopted the weightings as its own. It was entitled to do that.

Delegation – procedure

■ **Kirklees BC v Brook**

[2004] EWHC 2841 (Ch), [2005] 2 P & CR 17 Chd

The defendant sought an injunction under the Town and Country Planning Act 1990 to restrain unauthorised development. The authority to bring proceedings was signed by the defendant's head of planning. He had no delegated authority to take this action. Lloyd J dismissed the application for an injunction on this ground. The judge held that the point could be taken as a substantive defence to the proceedings and did not have to be taken by judicial review. Usually the correct procedure would be to apply to strike out the claim for want of authority. The judge noted that it would have been open to the defendant authority to meet to ratify the decision and that would have cured the defect. However, there was no application for an adjournment for that purpose.

CRIMINAL PROCEDURE – SEARCH WARRANT

■ **Philip Graham Bell v Chief Constable of Greater Manchester Police**

[2005] EWCA Civ 902

The appellant appealed against a decision of the first instance judge dismissing various claims including trespass to property. The appellant claimed that the search of his house had been unlawful relying on the alleged illegality of search warrants. The Court of Appeal rejected this claim in substance but, in any event, said that the proper avenue to challenge the validity of a warrant was by way of judicial review.

Declaration about criminal law

■ **Hampstead Heath Winter Swimming Club and another v The Corporation of London and another**

[2005] EWHC 713 (Admin)

This case involved a decision by the Corporation of London (which manages Hampstead Heath) to close a pond for swimming because of a fear that it would be

exposed to prosecution under Health and Safety at Work etc Act (HSWA) 1974 s3 if a swimmer was injured. The substantive decision was that the council would not be liable (because any risk would be a result of the swimmer's decision to swim and not the condition of the pond). The decision was therefore quashed, being based on an error of law.

However, the case engaged the question of when the court should interpret the criminal law in civil proceedings. There is an exceptional power to grant a declaration about whether or not conduct or a proposed course of conduct is criminal, but the power is rarely exercised (eg, *DPP v Pretty* [2002] 1 AC 800). The question here was also entirely hypothetical, ie, whether the council would be liable if some obstacle in the pond injured a swimmer. Despite this, it was appropriate for the court to interpret HSWA s3 for a number of reasons. This was a genuine dispute and there was no collusive element. There was no other way to test whether or not the council's decision was correct and the Health and Safety Executive had said that it was content for the court to interpret the HSWA.

COSTS

■ **R (Ministry of Defence) v Wiltshire and Swindon Coroner (Craik and others (interested parties))**

[2005] EWHC 889 (Admin), [2005] 4 All ER 40

The coroner sought a protective costs order (PCO) in respect of a judicial review by the Ministry of Defence of the verdict of unlawful killing, returned after a long and expensive inquest into a death from nerve gas poisoning at Porton Down. There was no certainty that the interested parties, who might have been able to deal with the substantive issues raised in the judicial review, would in fact participate. The coroner was able to argue the substantive case and had a statutory indemnity from the local authority in respect of his costs reasonably incurred in the judicial review. However, the coroner was concerned that the local authority would be reluctant to expose itself to substantial costs. The Ministry of Defence argued that to make a PCO in these circumstances was an unwarranted extension of the court's power to grant such orders.

Collins J held that there was no reason, in principle, why such an order should not be made. Although it would be unusual for a public body to be in a position where a PCO would be necessary in the interests of justice, the need might arise in some circumstances (for instance, where an individual had a public law role and there was no costs protection given to him/her by any other body or person). On the present facts, however, no such order was necessary. It would be reasonable for the coroner to take a more active role in the judicial review than was usual in such cases, and he would be indemnified as long as he acted reasonably. The coroner's concerns about whether the authority should have to pay the costs were not material to the court's discretion in respect of the PCO.

■ **Aegis Group plc and others v Commissioners of Inland Revenue**

[2005] EWHC 1468 (Ch)

The claimant applied for judicial review of a section of the Finance Act 2004, having first written a letter before claim in accordance with the judicial review pre-action protocol. The Inland Revenue (IR) replied late (almost two months after the letter before claim). The IR asserted that judicial review was inappropriate, as there were already proceedings brought by the claimant in which the validity of the legislation could be raised. The claimant commenced judicial review proceedings, but the parties subsequently agreed that the issue should be transferred to the existing proceedings. Therefore, the judicial review proceedings were discontinued. The IR sought its procedural costs in respect of the judicial review.

Park J said that, but for one matter, he would have ordered that the IR should recover all of its procedural costs because the application for judicial review was misconceived and would have failed had the proceedings not been discontinued. However, the IR should have replied earlier to the claimant's letter and had offered no explanation for the delay. Nonetheless, the IR should recover 85 per cent of its costs. The judge took into account:

- that the letter before claim did not make clear what the content of the proposed judicial review application was, and so did not easily lend itself to a focused reply contemplated by the protocol; and
- that it was unlikely that, if the IR had replied sooner, it would have made any real difference.

■ **R (A, B, X and Y) v East Sussex CC**

[2005] EWHC 585 (Admin), [2005] 2 CCLR 228

This was a decision by Munby J in respect of the costs orders after judicial review proceedings involving several issues, some of which were the subject of interim orders, a few of which were determined at a substantive hearing, and a number of which were disposed of by consent. The awards made turn largely on the particular circumstances of those cases, but the decision of Munby J makes valuable reading as an example of the application of costs principles in public law proceedings and, in particular, those set out in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258. However, he did also set out some important issues of more general application:

- First, Munby J emphasised the principle set out by Newman J in *R v Hackney LBC ex p S* (2000) 13 October, unreported, QBD (Admin), that substantial legal costs should not be incurred by a process of monitoring and regulating the performance of a public authority. It will rarely be appropriate for a community care user's solicitor to incur costs in participating in the preparation of a community care plan and the provision of services.
- Second, he reiterated the need for proportionality in the approach to resolving costs disputes. Where disputed issues have never been adjudicated on, it will not be appropriate to investigate the substantive merits, at least where that will involve a significant or detailed exercise, in order to decide the issue of costs only.
- Third, the judge declined to penalise the claimants because they refused to enter into mediation. He said that, given the vigour with which every point of law and factual issue was canvassed in court, it was unlikely that mediation would have been successful at an earlier stage. In particular, points of law were raised which would have been difficult to resolve in the absence of a judicial determination. Furthermore, the defendant offered mediation on terms which the claimants were justified in rejecting.
- Finally, Munby J departed from the typical starting point that only one set of costs should be awarded to the successful party in public law proceedings.

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

1 See William Wade and Christopher Forsyth, *Administrative law*, 8th edn, Oxford University Press, pp 214–6.
2 See Michael Fordham, *Judicial review handbook*, 4th edn, Hart Publishing, para 51.1.

EDUCATION

Recent developments in education law



Angela Jackman, **Pat Wilkins** and **Eleanor Wright** continue the twice-yearly series, considering changes and developments in the law relating to education. Readers are invited to send in unreported cases of interest and information relating to current events in this area.

POLICY AND LEGISLATION

Special needs education system

In 1978, the report of the Warnock committee of enquiry into the education of handicapped children and young people (the Warnock report) was published.[1] The report has formed the basis for the current special needs education system. Since the Warnock report, we have all become familiar with working with an inclusive policy based on the tools of assessment and the statements of special educational needs (SEN).

In June 2005, an article by Lady Warnock, the author of the Warnock report, fuelled the debate between inclusion and the effectiveness of the current statementing process.[2] She argued that inclusion in mainstream school may be unsuitable for a large number of pupils, that inclusion was not properly resourced and that the statementing process was unwieldy and bureaucratic. This may herald a government move towards a change in the administration of the SEN system, which may have implications for inclusion and resources.

Funding education negligence claims

At a meeting on 7 July 2005, between Legal Services Commission (LSC) representatives and education practitioners, the LSC stated positively that, in future, it is highly unlikely that funding will be granted for human rights claims based on loss of education, on the basis of clear indications by the courts in *Ali v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382 about the low level of damages. Given recent guidance by the courts in relation to education negligence damages and the current level of costs in such actions, it is also unlikely that most claims would meet the criteria laid down in the *Funding Code*'s guidance. The LSC is, however, willing to look at working with experienced practitioners, particularly in relation to access to justice issues and the steps to be taken to reduce the costs incurred in this type of claim.

Exclusions

The Secretary of State for Education and Skills, Ruth Kelly, has pursed a 'zero tolerance' line on bad behaviour in schools since her appointment. Recent government statistics also record a six per cent increase in the number of permanent exclusions in 2003–2004.[3] This raises concerns that the government's previous commitment to reduce exclusions has fallen by the wayside. Furthermore, it remains the case that disproportionate numbers of Traveller children, African-Caribbean children and pupils with SEN continue to be excluded from schools.

Pupil referral units

The Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2005 SI No 2039 came into force on 1 September 2005. They revoke and replace the Education (Pupil Referral Units) (Application of Enactments) (Amendment) Regulations 1996 SI No 2087 in relation to England. They also modify the application of enactments to pupil referral units in relation to England. The regulations specify the primary and secondary legislation that now apply to pupil referral units, and those which do not.

CASE-LAW

Special educational needs

■ **R (Southwark LBC) v (1) SENDIST (2) Animashaun (3) Oyedipe**

[2005] EWHC 1123 (Admin)

This was an appeal by the local education authority (LEA) against the Special Educational Needs and Disability Tribunal's (SENDIST's) decision to uphold an appeal by D's parents against Part 4 of the statement of SEN. The LEA contended that D should attend one of its special schools for pupils with severe learning difficulties and/or Autistic Spectrum Disorder (ASD). D's parents wanted D to attend an independent special school for young people with ASD. D's parents were successful at the SENDIST. On appeal to the court, the LEA contended that:

■ First, the SENDIST's decision that the school chosen by D's parents could meet D's SEN was based on no proper or, alternatively, insufficient evidence. The LEA put forward that the SENDIST had reached its decision without documentary evidence from D's parents' chosen school and that no members of staff from it had given evidence. Stanley Burnton J indicated that he would usually expect the SENDIST to require at least the prospectus of the schools named in the statement of SEN and those put forward by an appellant. If schools' prospectuses were not available, then the SENDIST should require either written statements or oral evidence from members of the schools' staff or from their proprietors. In this case none of this information had been available to the SENDIST at the hearing. However, the SENDIST did have before it evidence from D's mother and from two professionals – the educational psychologist for D's parents and the supervisor of D's home-based, applied behavioural analysis programme. All three had visited the school in question.

In these circumstances, Stanley Burnton J concluded that he could neither make a finding that there was no evidence before the SENDIST nor that no reasonable tribunal could have made the finding of fact made by the SENDIST.

■ Second, in reaching its decision, the SENDIST had taken into account irrelevant factors, namely, that the secretary of state had approved the school and/or that all pupils there were statemented and funded by LEAs. There are two statutory procedures under which it may be lawful for a child with SEN to be educated at an independent special school:

– under Education Act (EA) 1996 s347(1), which provides that the secretary of state may approve an independent school as suitable for the admission of children for whom statements are maintained under s324; and

– under EA 2002 Part 10, which provides for the registration of independent schools.

A child with SEN may, therefore, be educated at an independent school provided that it is registered and that the secretary of state consents. Stanley Burnton J commented that neither registration under EA 2002 nor approval under EA 1996 is sufficient evidence for a SENDIST that a school is suitable for a particular child. The same would apply to evidence that other LEAs had agreed to the education of other children with statements of SEN at the school.

■ Third, the SENDIST had failed to make a critical finding of fact in relation to the use of Makaton signing, namely, whether D's class teacher at the LEA school would use it. Stanley Burnton J found that although training D's proposed teacher at the LEA school to use Makaton signing was an issue before the SENDIST, it was not a material issue in so far as the decision of the suitability for either school was concerned; a material issue was the use of, rather than the training for, Makaton signing. There was overwhelming evidence that Makaton signing was generally used at D's parents' chosen school, but its use at the LEA school was exceptional. Stanley

Burnton J dismissed the LEA's appeal.

■ **Slough BC v (1) Mr and Mrs C (2) Special Educational Needs and Disability Tribunal**

[2004] EWHC 1759 (Admin)

This was an appeal by Slough against a SENDIST's decision of 7 May 2004 relating to 'IC', a five-year-old boy who has global development delay and associated learning difficulties. In May 2002, the LEA issued a statement of SEN in respect of IC. The LEA described the special education provision in Part 3 of the statement, including that provision for IC would 'most appropriately' be arranged in a special school. In Part 4 of the statement, the LEA specified the type of school, ie, 'a special school' and named the particular school known as 'A' school. IC's parents did not appeal against the statement of SEN and he attended A school.

In April 2003, IC's parents removed him from A school to undertake an intensive, individualised programme, which was delivered by an independent organisation, and designed to facilitate IC's entry into mainstream school. In November 2003, IC's parents made a request to the LEA under EA 1996 Sch 27 para 8 to substitute 'S', a mainstream primary school, for A school in Part 4 of the statement of SEN. The LEA refused the request because it considered that S school was not appropriate. IC's parents appealed to SENDIST. The appeal was allowed. The tribunal ordered that Part 4 of the statement be amended to refer to a '"mainstream school, namely [the S school]"'. The LEA appealed.

The central issue in the appeal was the relationship between EA 1996 s316 and EA 1996 Sch 27 para 8. The case of *MH v (1) Special Educational Needs and Disability Tribunal and (2) Hounslow LBC* [2004] EWCA Civ 770 had provided guidance on how EA 1996 s316 together with EA 1996 s316A related to the provisions of EA 1996 Sch 27 para 3 (parental preference for a particular school to be specified in an original statement of special needs). The guidance did not extend to the interaction of EA 1996 s316 with EA 1996 Sch 27 para 8, which related to the parents' request that a particular school be substituted for the school specified in the original statement of SEN. That latter issue arose in the present case.

The court held that EA 1996 Sch 27 para 8 had very limited scope. The provision was only concerned with the change of the name of a school specified in Part 4 of the existing statement. The power to change the name of a school does not carry with it a power to change the type of school. The distinction between the type of, and name of, a school runs throughout the statutory scheme. This is particularly clear in EA 1996 s324(4), where the type of, and name of, a school are referred to in separate provisions. They are separate aspects of the 'special educational provision' referred to in s324(3)(b). If para 8 had been intended to confer a power to change both the name and type of a school, then it would have referred to both. This is supported by the fact that the power of the SENDIST, on appeal, is expressed only in terms of ordering an LEA to substitute the name of the school specified by a parent. In contrast, under EA 1996 s326(3)(b), there is a power on an appeal against the making of a statement or amending a statement, for the SENDIST to order the LEA to 'amend the statement, so far as it … specifies the special education provision'. This is by reference to EA 1996 s324(3)(b), which includes both type of, and name of, school.

If the type of school specified in the statement of SEN is a special school, it would make no sense to require the LEA to change the school's name from a named special school to a named mainstream school; that would create an inconsistency within the statement, and require a child to be educated at a school which did not fit in with the rest of the SEN provisions specified in the statement. Such a consequence is avoided by recognising that para 8 is concerned with a very limited exercise to which s316 has no application. There would be a similar inconsistency even if it were held that the power to change the school's name implied with it the power to amend the type of school specified in the statement. On the wording of para 8, it seems clear that whatever the SENDIST's power in relation to Part 4 of the statement of SEN, the tribunal does not have the power to amend Parts 2 or 3 of the statement on an appeal. It would be unsatisfactory if the type of school was required to be amended to a mainstream school even though the educational provision in Part 3 of the statement was directed to a special school. Section 316 of the EA 1996 is engaged when the statement is first made under s324. At that stage, there is a live issue about the type of school so that the duty to educate at a mainstream school, except where specified conditions are met, is directly relevant. Since the type of school is not an issue when decision is made under EA 1996 Sch 27 para 8, there is no reason why s316 should apply.

If the limited scope of para 8 is accepted, then this restricts its usefulness as a means of securing a change to an existing statement of SEN. For example, if a statement specifies a primary school as the type of school, the procedure under para 8 will not be suitable as a means of affecting change from the named school on transfer to a secondary school: reassessment and review provisions are capable of dealing with these situations. The SENDIST had made an error in deciding the appeal in the favour of IC's parents on the basis that s316 applied. Therefore, the tribunal's decision was quashed.

Comment: The implication of this decision for parents and children is that there is no speedy procedure for determining named school if parents and the LEA disagree. Parents will have to go through the lengthy reassessment and SENDIST appeal procedures.

School admissions

■ **Governing Body of the London Oratory School v Schools Adjudicator and (1) Secretary of State for Education and Skills (2) Governing Body of Peterborough Primary School**

[2005] EWHC 1842 (Admin)

This was the second round in the dispute about the right of London Oratory School to include an interview in its admission process. In *Governing Body of the London Oratory School and others v Schools Adjudicator* [2004] EWHC 3014 (Admin), the governors succeeded in an application for judicial review of the adjudicator's decision to uphold objections to the use of interviews, on the basis that the guidance prohibiting interviews in the School Admissions Code of Practice is not binding, and the adjudicator had failed to address arguments put forward by the school. The issue was not remitted back to the adjudicator as there was only one decision that the adjudicator could lawfully take, namely to dismiss the objection, and because of the disruption which further uncertainty would cause in the school's admission process.

In June 2005, the adjudicator agreed to consider fresh objections. The governors applied for judicial review under Education (Objections to Admission Arrangements) Regulations (E(OAA) Regs) 1999 SI No 125 reg 9.

The court held that the duty of the adjudicator is to decide whether an objection should be upheld, and to make that decision on the merits where practicable. If it is impracticable to decide on the merits because of the delay caused by legal proceedings or otherwise, the adjudicator can decide not to uphold the objection. This would be a decision for the purposes of E(OAA) Regs reg 9. However, in this case, there was no surviving decision

from the previous year on the merits or otherwise. The purpose of reg 9 is to avoid the repeated need for a school to meet the same objections. However, the overall purpose of the regulation is that objectors should, where practicable, be able to obtain a decision on the merits.

Comment: A third round will, no doubt, follow.

Negligence

■ **Shaw v Redbridge LBC**

[2005] EWHC 150 (QB)

When the claimant was 13 years old, she was involved in an incident in which she said that she was indecently assaulted by a group of boys. She complained to a teacher but did not tell her parents. The court accepted the teacher's evidence that he had told her to do so, and that it was reasonable for him to believe she would do so. She became increasingly unhappy at, and gradually stopped attending, school. She also developed a serious psychiatric illness. She claimed that the LEA was vicariously negligent, in particular as a result of the teacher's failure to inform her parents of the assault and to consult with them. The court considered a preliminary issue regarding the existence and nature of any duty of care, and whether it had been breached.

The court accepted the findings in *Bradford–Smart v West Sussex CC* [2002] EWCA Civ 7 about the nature of the duty of care. The question was whether teachers who followed a reasonable body of professional opinion would have refrained from contacting the claimant's parents or, alternatively, whether she should have been referred for counselling.

The court held that it was not foreseeable that the claimant would fail to tell her parents, and would suffer damage as a result. The school was, therefore, not liable.

■ **Devon CC v Stuart Clarke**

[2005] EWCA Civ 266

This was a claim for damages for an educational psychologist's failure to diagnose the claimant's dyslexia, and to recommend his placement in a special school. The claim succeeded in the county court. The judge held that, but for these failures, the claimant would have attended a special school for three years. He was awarded damages for the loss of specialist education including £25,000 for loss of earnings. The LEA appealed.

The Court of Appeal held that the judge was entitled to find for the claimant on the basis of a clear, causative link between the negligence and the loss of remedial teaching. The evidence demonstrated that the majority of pupils with similar problems who attended a special school derived benefit. Claimants in such cases must prove that remedial teaching would probably have made a 'real difference', as opposed to a 'measurable difference'. The judge was correct to make a lump sum award for loss of employment and earnings. The sum awarded was within the permissible range on the basis of *Phelps v Hillingdon LBC* [2001] 2 AC 619.

The claimant's costs were reduced by 30 per cent, as many of his allegations against a number of professionals were not proved. It was stated that such claims are not to be seen as a charter for claimants to make allegations against all of the professionals involved in their education, secure in the knowledge that they could recover all their costs provided they succeeded against one.

Comment: This case confirms that the method of dealing with special damages claims in education negligence claims is by way of a lump sum, which will be in a fairly low range. The courts appear determined not to follow the personal injury multiplier/multiplicand method which, in the appropriate case, might result in a higher award. The court's findings in relation to costs are understandable, but they increase yet further the difficulties for claimants in actions of this nature.

Higher education

■ **Higham v University of Plymouth**

[2005] EWHC 1492 (Admin)

This was a judicial review application in respect of a decision to terminate a medical student's registration following various adverse findings of a disciplinary committee, including hostility to staff members and falsely claiming to have a PhD, such that his actions fell below the degree of honesty expected of a medical practitioner. The claimant challenged this decision on the basis that terminating his registration was unnecessary to protect patients, students or staff, that it was disproportionate, and that the decision was taken without proper consideration of alternative sanctions.

The court held that it must treat the disciplinary committee's decision with respect given its qualifications and the fact that it had seen and heard the witnesses. The committee's findings of fact, in conjunction with the standard and cogency of the reasons given for those findings and conclusions, left no doubt that it was entitled to conclude that the claimant would constitute a risk to patients. The decision had been taken with proper consideration being given to alternative sanctions: these had been discussed within the committee. Furthermore, its final decision had been reviewed by the vice-chancellor, who had also considered the reasonableness of the decision of the majority that exclusion was appropriate, as opposed to the view of the minority that a lesser penalty should be imposed. On that basis, the decision to expel the claimant was inevitable. Since it was necessary for the protection of future patients and their rights, the decision could not be disproportionate.

■ **R (Salman) v Barking and Dagenham LBC**

(2005) 14 April, Lawtel

The claimant challenged her LEA's refusal to provide full funding for a course at a privately funded institute. She had, initially, been informed – on the basis of a mistake by her LEA – that funding would be provided. She therefore enrolled on the course. On discovering its mistake, the LEA agreed to her first year's fees and to make a further payment to reflect inconvenience to her. However, it refused to fund the full course. The claimant rejected the LEA's offer. She challenged the decision not to fund the full course on the basis of a 'legitimate expectation' argument. After the issue of proceedings, the institute became publicly funded. On that basis, the LEA's offer had satisfied any financial loss that the claimant might have suffered as a result of the original withdrawal of the offer. The only issue, therefore, was about costs.

The court held that it had to consider whether, when the proceedings were issued, there was a bona fide claim for relief. It also had to consider whether the LEA had acted lawfully in making the offer that it did, having regard to its previous agreement to consider funding. The LEA's offer was generous. However, the decision letter had suggested, for the first time, that the claimant should have mitigated her loss by moving to another course where funding would have been available.

The court held that the LEA was not entitled to make a decision on that issue without first exploring it with the claimant. She was entitled to remain where she was until the LEA had made the decision. The decision letter was, therefore, unlawful. It followed that the claimant was entitled to challenge the decision by issuing the proceedings. She was, therefore, entitled to her costs of the action.

Comment: This decision follows established authority in relation to entitlement to costs in cases where judicial review claims are settled or resolved after the issue of proceedings, but before permission has been granted. As this is an issue which arises regularly, it is helpful that the basic principles to be considered by the court have been further clarified.

Corporal punishment

■ **R (Williamson and others) v Secretary of State for Education and Employment and others**

[2005] UKHL 15

The claimants (head teachers, teachers and parents of pupils in an independent school) applied for a declaration that the extension of EA 1996 s548, which bans corporal punishment in all schools, was incompatible with their rights to freedom of religion and freedom of education under the European Convention on Human Rights ('the convention'). The claimants argued that a large body of the Christian community has fundamental beliefs – including a belief that part of the duty of education requires that teachers should be able to stand in the place of parents and use physical punishment where appropriate – and that s548 did not apply where parents expressly delegated their common law right to discipline their child to a teacher.

The House of Lords held that s548 is valid. The plain purpose of the provision is to prohibit the use of corporal punishment by all teachers in all schools. The claimants' suggested interpretation would defeat this aim by making the prohibition optional at the choice of parents. There is a difference between freedom to hold a belief and freedom to express or manifest that belief: the latter right is qualified. The convention is engaged on the basis that, if parents authorise their child's school to administer corporal punishment, that is a manifestation of their belief, and s548 does interfere materially with parental rights under articles 2 and 9. The interference was however 'necessary in a democratic society … for the protection of the rights and freedoms of others'. The statutory ban pursued a legitimate aim in protecting and promoting the well-being of children. The means chosen to achieve this aim were not disproportionate, and parliament was entitled to act on this as an issue of broad social policy. Therefore, the claimants' rights under the convention had not been violated.

Exclusions

■ **R (SB) v Head Teacher and Governors of Denbigh High School**

(2005) EWCA Civ 199

The facts of this case are set out in September 2004 *Legal Action* 22. The claimant, 'B', appealed to the Court of Appeal. She had a resounding success before Brooke LJ, Mummery LJ and Scott Baker LJ.

The court held that B had been unlawfully excluded as she had been sent away from school for a disciplinary reason, namely, for not complying with the school uniform policy. She had not returned to school for the same reason. The school, 'D', had limited her article 9 right under the convention to manifest her religious beliefs. Therefore, it had to justify this limitation, which was caused by the manner in which the school enforced its uniform policy.

The court was critical of the school. It found that the school had failed to give sufficient weight to B's religious beliefs, and had approached the issue incorrectly. D's approach had required pupils to obey its uniform policy rather than to acknowledge that B had a recognisable right in English law, which required the school to justify any interference with that entitlement.

In conclusion, the court held that the school had unlawfully denied B the right to manifest her religious beliefs. It had also denied her access to suitable and appropriate education in breach of article 2 of Protocol 1 of the convention. The court went so far as to outline the issues that schools need to consider when deciding whether a uniform policy, of the same nature as in the particular case, is acceptable. The school is appealing to the House of Lords.

■ **R (I) v Independent Appeal Panel for G Technology College**

(2005) 15 March, HC, LawTel

I was permanently excluded from G College following a serious assault on another pupil. I had previously been excluded for 19 days for an earlier incident. The Independent Appeal Panel's (IAP's) decision letter failed to provide detailed reasons for the verdict that upheld the exclusion. The letter merely stated that the permanent exclusion was in response to serious breaches of the college's behaviour guidelines. It went on to say that, furthermore, I's continued attendance at the college would result in serious health and safety issues for other pupils and for him. Further correspondence ensued following the decision. The clerk to the IAP set out the factual background that had been considered by the panel in reaching its decision. I still contended, however, that the IAP had failed to give sufficient reasons.

Mr Justice Bean held that the decision letter had failed to provide sufficient reasons, and had given no indication of the matters which had been taken into account or what weight had been attached to those issues. In particular, it was unclear whether the earlier exclusion had been taken into account. The subsequent correspondence had not provided sufficient clarification of the IAP's decision. Therefore, the decision was quashed and the matter remitted to a differently constituted IAP.

■ **R (X) v Y**

(2005) 1 September, CA, LawTel

Z was permanently excluded from school following an allegation that he hit X over the head with a metal bar. The governing body reinstated him due to evidence that he had been the victim of bullying. X sought a judicial review, and named Z as an interested party. It was argued that the governing body had failed to comply with statutory regulations regarding the nature of the investigations required for incidents of this nature.

Before the hearing of the judicial review application, the governing body rescinded the decision to reinstate Z as it had failed to follow statutory guidance or to gather sufficient evidence. X and the governing body agreed a consent order that quashed the decision to reinstate Z. The order stated that a new IAP should be convened which would properly take into account statutory guidance on the evidence required in these circumstances. Z objected to the consent order on the ground that quashing his reinstatement would cause him hardship and result in disruption to his education. Z proposed the alternative remedy of an injunction preventing him and X from having contact in school.

The Administrative Court rejected Z's arguments. In a short judgment, the court quashed the decision to reinstate Z and ordered a de novo hearing before a new IAP. Z appealed the decision. He argued that the judge had failed to give reasons for the decision and, thus, the court should consider afresh his arguments on hardship and his proposal for injunctive relief.

The Court of Appeal dismissed Z's appeal. It held that by reference to the context of the proceedings, it was possible to understand the judge's reasoning even though the judgment was brief. It also decided that the governing body had failed to follow statutory guidance in a case of serious violence. Furthermore, it was in the public interest that the matter should be investigated transparently, so that parents and pupils could feel confident about the school and its use of the sanction of permanent exclusion. The court also held that injunctive relief was a matter for judicial discretion and was not, in any event, a suitable alternative remedy.

■ **R (S) v (1) Head Teacher and Governing Body of Almondbury Junior School (2) Kirklees MBC**

[2004] EWCA Civ 1041

S, who attended a mainstream school, was the subject of a statement of SEN. S was being integrated into the school day, but was excluded at lunchtimes due to his behavioural difficulties. S's mother, P, applied for judicial review to challenge the decision to exclude S at lunchtimes. She also sought an order compelling

the LEA to amend S's statement of SEN to reflect the exclusion. P argued that the lunchtime exclusions were unlawful as they were unstated. In the alternative, she argued that if they were not unstated exclusions, they still failed to comply with S's statement of SEN which did not make provision for part-time education.

The Court of Appeal dismissed the application. It held that the reason for the lunchtime exclusions was the lack of professional supervision during lunch breaks and, thus, the risk that S posed to himself and others on account of his disruptive behaviour. The court concluded that if his progress continued, there was no indication that he would not be allowed to remain in school during lunch breaks. The court also held that the school had tried to provide S with full-time education, taking into account his difficulties and their impact on other pupils and staff. It lay within the school's management functions to establish how best to facilitate S's integration and, at the same time, avoid disruption to both S's and other pupils' schooling.

■ Angela Jackman is joint head of the Public Services Law Department at Fisher Meredith, solicitors, London, where she specialises in both education law and community care law. She is secretary of the Education Law Practitioners Group (ELPG) and a member of the Advisory Centre for Education. Pat Wilkins is a partner at education law specialists Bennett Wilkins, solicitors, London. She has advised the Legal Services Commission (LSC) on franchise standards for education law practitioners and sits on the LSC's review body. She is the current chair of the ELPG and was one of its founder members. Eleanor Wright is joint head of the Public Services Law Department at Fisher Meredith, solicitors, where she specialises in education law and civil litigation. She is treasurer of the ELPG.

1 Department of Education and Science, 1978.
2 Published by Philosophy of Education Society of Great Britain.
3 Department for Education and Skills public announcement, 23 June 2005.

DISCRIMINATION

Discrimination law update – Part 2

The aim of this six-monthly update is to highlight proposed legislative changes and key case-law developments, and to offer some practical guidance to advisers and practitioners on the implications of any such changes to everyday practice. **Catherine Rayner** also gives practical guidance on how judgments may impact on casework and representation. Comments from readers are welcomed and advisers are encouraged to submit details of cases for inclusion. Part One of this update was published in October 2005 *Legal Action* 31.

POLICY AND LEGISLATION

Disability Discrimination Act 2005

The Disability Discrimination Act (DDA) 2005 makes significant changes to the DDA 1995. The Act comes into force in December 2005, except for the public sector duties, which are planned to come into force in December 2006. The key changes are set out below.

The definition of disability

This is extended specifically to include and cover people who have cancer, HIV infection or multiple sclerosis (see DDA 1995 Sch 1 para 6A). People suffering from various cancers, HIV infection and multiple sclerosis will be deemed to be disabled from the point of their diagnosis. This replaces the previous requirement for the claimant to prove both that the progressive condition had an effect on his/her ability to do normal day-to-day activities and was likely to have a substantial adverse effect.

The meaning of disability and mental illness

The requirement to prove that a mental illness is clinically well recognised before it counts as an impairment, which has been integral to the DDA 1995, is removed. Problems have arisen when people with severe mental illness have not had clear diagnosis, or have had conflicting diagnoses.

The positive duty of local authorities

A new positive duty on all public authorities to have regard to the need to eliminate unlawful harassment and discrimination against disabled people is introduced. Public authorities must promote positive attitudes to disabled people; encourage the participation of disabled people in public life; and promote equality of opportunity between disabled and other people. The purpose is to ensure that local authorities mainstream disability equality into the way that they carry out their functions, and to ensure that systematic and institutionalised discrimination is tackled effectively.

DDA 1995 s49A sets out the general duty on public authorities to promote disability equality. The Act defines a public authority as including 'any person certain of whose functions are of a public nature'. This is a wide-reaching duty, and advisers should note that it is likely to cover a very broad range of organisations, from health authorities and primary care trusts, to schools, colleges and the police.

In addition to the general duties, there are also specific duties with which the public bodies covered must comply. Regulations which are yet to be implemented (the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005) will require that listed public bodies must draw up and publish a Disability Equality Scheme, showing how they intend to fulfil their obligations under the Act. Guidance on the process for doing this, and the matters to be taken into account by the authority, can be found in the Disability Rights Commission's (DRC's) draft code of practice on the DDA 2005 – *The duty to promote disability equality: statutory code of practice: England and Wales*.*

Other amendments are the extension of the prohibition on discriminatory job advertisements to third parties, such as newspapers and magazines, which are currently not covered; the extension of the Act to cover qualification bodies providing general qualifications such as A-levels (the relevant qualifications covered will be specified in regulations); and the repeal of provisions concerning group insurance schemes. Under the new Act, a provider of group insurance services to employees of a particular employer will be regarded as a provider of services for the purposes of the Act and, therefore, liable for any act of discrimination that it may commit against disabled employees of the employer.

CASE-LAW

Equal pay

The question of how to approach objective justification in indirect discrimination in the context of equal pay cases has been considered by the Court of Appeal in the case of **Home Office v Bailey and others** [2005] EWCA Civ 327.

In this case, the approximately 2,000 applicants in an equal pay claim were administrative staff in the Prison Service, of whom about 50 per cent were female and 50 per cent were male. They compared themselves with prison officers who were predominantly male.

The work done by both groups was rated as equivalent under the Prison Service job evaluation scheme. However, the employers argued that, while there was a difference in remuneration between the two groups, this was not due to discrimination but to a historic difference in pay bargaining arrangements, and that this was a material factor for the purposes of Equal Pay Act (EqPA) 1970 s1(3), capable of justifying the apparent discrimination. In order to decide the question, the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) had to take account of two apparently conflicting decisions of the European Court of Justice (ECJ).

The question for the EAT was whether the approach in **Enderby v Frenchay Health Authority and**

Secretary of State for Health [1993] IRLR 591, or the approach in **R v Secretary of State for Employment ex p Seymour-Smith and another** [1999] IRLR 253, was to be preferred when assessing whether there was or was not a prima facie case of discrimination. The ET considered that there was a prima facie case of disparate treatment and thus the obligation to objectively justify the disparity arose. The EAT disagreed and allowed the employer respondent's appeal.

The employer argued that, on the basis of *Enderby*, there are three distinct situations in which a prima facie case of discrimination is made out in an equal pay case. The first is where there is a barrier, requirement or condition which is demonstrated to have a disparate impact on women. The second is where the bargaining arrangements are not transparent. The third is where it can be demonstrated that the disadvantaged group is predominantly female whereas the advantaged group is predominantly male. In this case, it was the third situation which was most relevant but, said the employer, it did not apply. While the advantaged group was predominantly male, the disadvantaged group was neither predominantly male nor predominantly female, but half and half. The EAT agreed with the employer that this was the correct approach and, applying it to the case, found there was no prima facie case of discrimination and thus no need for the employer to objectively justify the difference in pay.

The claimants appealed to the Court of Appeal, which allowed their appeal. The court did not think it was necessary to distinguish between the cases where there was a requirement or a condition and those cases where there was none. In each situation, what the ET had to do was consider whether an apparently gender-neutral practice might, in fact, be discriminatory. Provided an ET was satisfied that the statistics it was asked to consider were valid and appropriate, there was no reason why the *Seymour-Smith* approach could not be used, even in a case where there was no requirement or condition.

A claim for equal pay depends on a comparison of work being done by people of different genders. This may be by way of like work or work of equal value but, in either case, the claimants must be able to show that they are in the 'same employment' as their chosen comparator. In addition, the ECJ has decided that a complainant must be able to show that the alleged pay inequality derives from a single body, which is capable of correcting that inequality (see **Lawrence v Regent Office Care Ltd** [2003] ICR 1092).

Both these issues have recently been considered by the Court of Appeal. In **Robertson and others v Department for Environment, Food and Rural Affairs** (DEFRA) [2005] EWCA Civ 138, workers in one government department (DEFRA) compared their pay with that of workers in a different government department.

The first question was whether or not the workers were in the same employment. They were clearly employed by government, but their contracts of employment were with different departments. Mummery LJ, giving the judgment for the court, noted that the statutory comparison could be made between men and women who are employed by different employers, as well as between those who work for the same employer. What is important is that the men and women are 'in the same employment' or are treated as being 'in the same employment' for the purposes of the EqPA. The court also has to consider whether or not there is a single source of inequality, and there will be cases where inequality is attributable to one body while the employers are two different bodies. In order to assess this, the court may have to consider more than the individual contracts of employment, and take account of circumstantial matters such as where the work is done, and for whom, and who pays the wages in fact.

However, in this case, the court found that there was no single body to which any potential inequality in pay could be attributed, or which could remedy any such inequality. The pay levels, while derived from central government, were negotiated and controlled by the separate government departments.

Comment: While advisers will note the importance of the wider approach suggested here, particularly in organisations where contracted workers, agency staff and permanent staff from different organisations work together, often on different wage levels and different contractual arrangements, they should also note that the potential restrictions that the single-source argument places on the operation of the EqPA are significant. It will be particularly relevant for advisers dealing with women contract workers, in areas such as catering and cleaning, to consider which body is responsible, in fact and law, for the level and rate of pay of workers. The questionnaire procedure should be used where possible, particularly to ascertain the nature of agreements and arrangements for pay between agencies providing staff and the organisations using them.

One of the key principles of the EqPA is that a woman who is employed doing like work with a man shall be paid an equal salary. The term 'like work' has been interpreted broadly by the courts, and a commonsense approach has generally been taken. The EAT has followed this tradition in the case of **Sita UK Ltd v Hope** 8 March 2005, EAT/0787/04/MAA, dismissing the employer's argument that a woman who did more work than a man who subsequently filled her post could not claim to have done like work and, therefore, his higher rate of pay was justified.

Ms Hope was made redundant from her post in a redundancy exercise and a man was appointed to fill essentially the same role. His salary was higher than she had been paid. As well as claiming sex discrimination, Ms Hope claimed that she was entitled to compare her previous work with his present work.

The employer argued that, because she had not had a deputy, she had had to do more work, and thus the jobs could not be considered to be like work for the purposes of the legislation. The EAT rejected this, noting that to find in favour of such a proposition would defeat the object of the legislation. The EAT also found sex discrimination in the process of redundancy, and dismissed the employer's second argument that the man's higher salary was the result of red circling. While this method of pay protection on a transfer can be a material factor defence, this depends on there being no sex discrimination. In this case, the EAT had upheld the ET's finding of discrimination, and thus the employer's defence could not succeed.

Comment: Advisers should note that the EAT in this case clearly recognised that the purpose of the legislation was important in considering the question of like work. The job that the woman did in this case was clearly similar enough to that done by the man, even if she had additional tasks.

Bonus payments and maternity leave

In **Hoyland v ASDA Stores Ltd** 22 February 2005, EAT/0058/04, the EAT considered the application of the Maternity and Parental Leave etc Regulations (MPL Regs) 1999 SI No 3312 to the payment of an annual bonus, which was based on the sales achieved by the whole workforce over the course of the year. Was it lawful to pay a woman, who was absent on maternity leave for part of the year, a pro rata bonus? The EAT decided that it was and that the reduction in the bonus was neither sex discrimination nor pregnancy-related detriment.

The applicant has been employed by ASDA since 1998. In the year the bonus applied, she took 18 weeks' ordinary maternity leave (OML) and a further period of eight weeks' additional maternity leave.

The ASDA bonus was paid annually to all employees. It was intended to reward employees for good attendance and not individual productivity. Pro rata reductions were made in respect of part-time employees and in respect of staff absences of more than eight weeks. Mrs Hoyland complained that the reduction of her bonus was both sex discrimination and discrimination because she had taken maternity leave. She argued that during the 18-week period of the OML, at least, she was entitled to equal treatment with male colleagues and the receipt of a full bonus.

To decide the matter, both the ET and the EAT considered the nature of the bonus payment. Was this a discretionary bonus or was it a payment which was a benefit regulated by the woman's contract within the meaning of Sex Discrimination Act (SDA) 1975 s6(6)? Both the ET and the EAT found that it was a contractual benefit, and thus the claimant could not rely on SDA s6(2) because of the exclusion of money benefits 'regulated by the woman's contract of employment' (see SDA s6(6)). While it was described as discretionary, in fact, it was paid as an entitlement to everyone who satisfied the qualifying requirements.

The EAT also rejected the argument that the payment of the bonus pro rata was contrary to the Equal Treatment Directive (Directive 76/207) and EC Treaty article 141. Mrs Hoyland had relied on the judgment of the ECJ in **Lewen v Dender** [2000] ICR 648, in which Ms Lewen was excluded entirely from a Christmas bonus because she was on parenting leave at the time of payment. This was a one-off payment by the employer, and the only condition was that the employee was at work when it was awarded. The ECJ noted that the position would be different if the national court were to classify the bonus at issue as retroactive pay for work performed in the course of the year. Then an employee would be placed at a disadvantage if the employer refused to pay even a pro rata bonus, simply because the contract of employment was suspended at the time when the bonus was actually paid. This would clearly ignore the time that the person absent on parenting leave had, in fact, worked during the course of the year.

The effect of this judgment, and that of **Gillespie v Northern Health and Social Services Board** [1996] IRLR 214, ECJ, is that a woman who is absent on maternity leave during a period when a bonus becomes payable to workers is entitled to be paid a bonus, but a pro rata reduction can be made in respect of any period during which she is absent due to maternity leave.

The EAT also agreed that Mrs Hoyland had not been subjected to a detriment, contrary to the MPL Regs, by receiving only a reduced bonus. The central question was whether the bonus was a sum payable to Mrs Hoyland by way of 'wages or salary' within MPL Regs reg 9(3). The ET found that it was. As well as the nature of the discretion to pay, the ET placed particular emphasis on the fact that it was paid via the payroll with the basic wages and was subject to deduction of national insurance and tax.

The EAT rejected the argument that the failure to pay the bonus was a detriment within the meaning of Employment Rights Act (ERA) 1996 s47C on the basis that, if it were, the exclusion of terms and conditions about remuneration by way of wages or salary in ERA s71(5) and MPL Regs reg 9(2) and (3) (see above) would be meaningless. However, it was accepted by the ET that the failure to pay the full bonus in respect of the fortnight of compulsory maternity leave was a detriment, and thus Mrs Hoyland was entitled to the payment of £5.20.

Part-time workers

The rights of workers not to be discriminated against because they are part-time is set out in the Part-Time Work Directive (Directive 97/81). The Equal Treatment Directive (Directive 76/207) sets out the obligations of community members regarding equality of treatment between men and women in the workplace. In **Wippel v Peek und Cloppenburg GmbH und Co KG** 4 December 2004, C-313/02, on reference from the Austrian High Court, the ECJ has considered the application of the directives in the context of a 'work on demand' contract.

Ms Wippel was offered work by the respondent company as and when she was required. No work was guaranteed and Ms Wippel could, and did, refuse to work on occasions. She had no fixed hours of work and her salary fluctuated month on month.

In Austria, the usual working week for full-time workers is set as a matter of law at 40 hours and eight hours a day. In addition, full-time workers are guaranteed certain rights related to pensions and benefits. There are no such comparable arrangements for part-time workers.

Relying on the fact that over 90 per cent of part-time workers are women, Ms Wippel claimed that she had been treated less favourably than full-time workers because of the lack of guaranteed hours and benefits. She claimed the difference between the pay she had received and the maximum pay that she would have received had she worked the maximum amount that could have been allocated to her. The ECJ was asked to consider, among other things, whether Ms Wippel could be considered a worker so that the relevant directives on part-time workers would apply and whether it was correct for Ms Wippel to compare herself to a full-time worker in these circumstances.

The ECJ confirmed that since Ms Wippel was undertaking a contract which laid down rules concerning working conditions, within the meaning of Directive 76/207 article 5(1), she was a worker for the purposes of the directives, regardless of the work on demand nature of the arrangements. In addition, the rules came within clause 4(1) of the Framework Agreement annexed to Directive 97/81, but the mere fact that there were financial consequences did not bring it within EC Treaty article 141 or Directive 75/117.

However, the ECJ considered that whether Directive 97/81 applied to Ms Wippel, in particular, depended, first, on whether the worker would be considered to have a contract of employment under national law, collective agreements and other member states' practices and, second, on whether the hours worked, calculated either weekly or on an annual basis, were in fact less than the full-time equivalent and, third, on whether the member state had specifically excluded casual workers from the provisions.

The second question for the ECJ concerned the correct legal comparison. The ECJ considered that Ms Wippel could not make a valid comparison between herself and a full-time worker, and referred to the guidance within the Framework Agreement, which defines a comparator as: 'a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills'. Where there is no such person the comparison is to be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

The ECJ pointed to the differences in the nature of the contractual arrangements for Ms Wippel and full-time workers. Not only were the full-time workers' hours of work fixed, but they could not refuse to work as Ms Wippel could. Because of these differences the comparison between full-time and part-time work was invalid in this case.

Comment: Advisers representing agency and casual workers

may have some difficulty with the logic of this judgment. The purpose of Directive 97/81 is to ensure that workers are not treated less favourably because they work part-time. Less favourable treatment may be less advantageous contractual terms, including statutory protections and guarantees. It is somewhat self-defeating, therefore, to require the same contractual provisions to exist before a valid challenge can be made. However, this case dealt with a very particular type of contract and it is certainly arguable that the ECJ's judgment is restricted and specific to those contracts.

In a case concerning British Airways, **Cross and others v British Airways Plc** 23 March 2005, EAT/0572/04/TM, the EAT has considered indirect discrimination in the context of a retirement age of 55. Part of the case concerned the meaning of a normal retirement age, but the case also raised the question of whether the application of the retirement age was sex discrimination.

Mr Cross worked for British Caledonian Airways Ltd until the company merged with British Airways in 1988 and his contract changed to include a compulsory retirement age of 55. When his employment terminated on reaching 55, he claimed unfair dismissal and sex discrimination.

The ET found that the dismissals were fair and that there had been no discrimination, although it did find that there was provision, criterion or practice applied and that there was adverse impact. It accepted the employer's justification defence.

The EAT upheld the decision. In particular, the EAT considered that the ET was right to consider all aspects of the evidence when making an assessment of adverse impact, including the statistics available to it. On the question of the justification defence, the EAT rejected the claimants' argument that the employer could not rely solely on costs arguments to justify discrimination. While it is right that member states cannot rely on arguments of budgetary considerations alone to justify a social policy which is discriminatory, this is not true for a private employer. In any event, here the ET had not erred in law because it had not relied solely on the costs issue.

Practice and procedure

When drafting claims of discrimination, it is not sufficient simply to refer to a generalised allegation of discrimination if a claim of indirect as well as direct discrimination is intended. While applications for amendment can be made, claimants run the risk of being out of time.

In **Ali v Office of National Statistics** [2005] IRLR 201, a claimant who alleged race discrimination was held not to have included sufficient particulars in his originating application to enable him to add a claim without an application to amend.

Mr Ali won his race discrimination claim at the ET. The EAT overruled the ET and remitted the claim, at which point Mr Ali sought to amend his claim to include indirect discrimination. At rehearing, the ET allowed an amendment on the basis that this was a clarification or relabelling of pleaded facts, but the EAT and the Court of Appeal disagreed. The Court of Appeal stated that direct discrimination and indirect discrimination are different heads of claim, requiring the pleading of different facts and matters. Mr Ali had failed to assert indirect discrimination as a head of claim and had not referred to any requirement or condition he relied on. Thus, there was no basis for such a claim on the face of the pleadings, without an amendment. However, the Court of Appeal also noted that, in this case, the information on which the indirect discrimination claim would be based had only come to light in the course of the hearing, and thus an application for an amendment at that stage would, in its view, have been successful. It dismissed the appeal but remitted the matter to the ET for a decision on whether to allow an amendment or not.

Comment: This decision underlines the increased formality required in pleadings in discrimination cases and serves as a warning for those who draft generalised pleadings. Since it is arguable that the new freestanding harassment claim is significantly different from direct discrimination, it will be advisable to make clear in all pleadings what the precise heads of claim are, and that a separate claim is being made for harassment, victimisation or indirect discrimination as well as direct discrimination as appropriate. While this has always been best practice, many unrepresented claimants will not be as clear about the fine legal distinctions as the judges of the Court of Appeal, and advisers who become involved at a later stage should therefore consider whether any amendment is necessary at the earliest possible stage.

Damages in discrimination

When an ET makes a finding of sex discrimination, SDA s65 states that it may award a remedy 'as it considers just and equitable' from a list of three remedies: an order declaring discrimination has occurred, an order for compensation and recommendations for the respondent to undertake specified actions. It may award any or all of the remedies.

The level of, and the heads of, compensation include any type of compensation which a county court could have awarded under SDA s66, and include injury to feelings awards. An award of compensation may be made against either the person responsible for the discrimination directly or the employer of the individual. In many cases, the courts have held both the perpetrator and the employer liable, with a division of the liability between them.

In the case of **Peter Way and Intro-Cate Chemicals Ltd v Angela Mary Crouch** 3 June 2005, EAT/0614/04/CK, the EAT had to consider whether the ET had legitimately exercised its power, under s65, in making an award for compensation jointly and severally against both the first respondent, who had himself committed the act of discrimination, and the second respondent, the employing company.

Peter Way dismissed the claimant, Ms Crouch, when she ended her relationship with him. The ET found that this was an act of sex discrimination since, but for her gender, they would not have had a relationship and she would not have been dismissed for ending it.

Mr Way appealed. He argued that the ET was prevented from making such an award on the basis of joint and several liability because of Civil Liability (Contribution) Act (CL(C)A) 1978 s6(1). The EAT rejected this argument on the basis that the CL(C)A had been in force at the time the SDA was introduced and, thus, parliament must have been presumed to have taken account of it. Had parliament wanted to exclude the power to make awards jointly and severally, it would have made this clear. The statutory language made it quite clear that the ET, in cases of sex discrimination, is entitled as a matter of law to make an award on a joint and several basis. It also noted that the same would be true of other discrimination statutes and regulations. However, in giving guidance, it noted that an ET making such a decision should be clear of its reasons for doing so, since it would not be appropriate in all cases. The types of case where it may be appropriate would be ones where there was a particular responsibility or culpability on the part of each tortfeasor.

■ Catherine Rayner is a barrister specialising in employment law at Tooks Court Chambers, London.

* The draft code of practice can be obtained from the DRC and is also available at: www.drc-gb.org/thelaw/publicsectordutycodes.asp.

HOUSING CASE NOTE

Dealing with the roofless and potentially vulnerable client: steps needed to challenge adverse medical opinion successfully

Stuart Richardson v Birmingham City Council 56M 0231A, unreported

Facts: The client had sleep apnoea and type 2 diabetes (where he was not dependent on insulin). His condition led to respiratory and heart failure in 1998, from which time he was prescribed a Continuous Positive Airway Pressure (CPAP) machine for use every night. Two GPs had said recently that it was necessary, as his condition was so severe.

He and his wife became homeless when they lost their tied accommodation. They applied to the local council, Birmingham, as homeless under Housing Act (HA) 1996 Part VII. They were found not to be in priority need as the client was not vulnerable – but without a supply of electricity he could not use his CPAP machine. They asked for a review but temporary housing pending the outcome was refused.

An injunction was obtained from the Administrative Court. Birmingham was relying on advice from a group called Nowmedical that use of the CPAP treatment was not necessary. By the time of the hearing of the later appeal in the county court, a report had been obtained from the client's consultant saying that there was a risk of respiratory failure if the treatment stopped for a prolonged period of, for example, a week.

Decision: The client appealed and sought continued interim housing from the county court. At the hearing, the circuit judge held that the advice of Nowmedical should be regarded with caution and ordered continued interim housing.

Comment: The Nowmedical group's website says that it has doctors who can provide a service to the housing departments of local authorities for use in homelessness cases. For £30 per case, it provides advice within one day for, among other things, HA 1996 s184 letters and offers significant savings on authorities' temporary housing expenses. These services are likely to appeal to local authorities which find themselves with difficulties:

- coping with the necessary enquiries into vulnerability;
- providing suitable interim housing (the cost locally for Birmingham City Council, and the London boroughs that are housing people in Birmingham, seems to be around £150–£300 a week);
- managing growing pressure on staff arising from a lengthy waiting list of those seeking rehousing.

Where adverse decisions have been reached on vulnerability, the client may be roofless. Advisers will then be faced with an urgent situation similar to that described above. They should seek full disclosure of the homelessness file, including notes of telephone conversations with any medical advisers, and should press for details of the instructions and any documents given to the medical advisers, and any contact made by the medical advisers and the client's doctors.

The client's instructions should include full details of relevant history. For example, past episodes of homelessness could shed light on the risks involved. GP's and consultant's details are essential and any correspondence from doctors, hospitals, or concerning disability benefits such as incapacity benefit may be useful.

If there is some disability arising out of a particular illness, it may not be apparent to a layperson. This is where a search of the internet – linking the illness with the disability – may give results: for example, linking the words 'food allergy' and 'epileptic fits' or, as in this case, 'heart failure' and 'sleep apnoea'.

The client's permission will be needed to contact his/her GP and/or specialist. An initial telephone call requesting a brief report addressing the issues should be made: is the patient vulnerable due to age, mental illness, physical disability or some other special reason? The client's instructions are unlikely to be enough, even if forcefully argued by the adviser, and especially if the authority has obtained medical advice.

Then the appropriate remedy needs to be considered in the light of the stage reached in the homelessness application – counsel's advice here can be useful. If there is no homelessness decision, or a review has been requested but the eight weeks allowed has not passed, then an application for an injunction for temporary housing must be made to the Administrative Court. Where the statutory time limit has passed or an unfavourable review decision has been issued then application will be to the county court by way of an additional appeal.

Pre-action protocol requirements for judicial review will apply, so a detailed letter setting out the background, the issue (referring where possible to relevant statutory provisions, guidance and case-law), what is required from the local authority and by what time limit, with full details of the solicitors instructed, is to be sent in all but the most urgent cases. In the same way a letter before action in the county court may avoid legal proceedings. Attempts should then be made to find out whether the authority's position has changed before legal action is taken.

Judging whether someone is vulnerable is a composite assessment of all the circumstances. In assessing whether a client can cope with homelessness without harm, his/her ability to find and maintain accommodation is not decisive: *R v Camden LBC ex p Pereira* (1998) 31 HLR 317, and rigidly following guidance for judges given in that case may also be insufficient.

Over-reliance on medical advice, such as that considered above, may amount to the authority fettering its discretion. It may not have made adequate enquiries if such advice is not based on the client's medical records and/or an examination, or if no enquiry is made of his/her own GP or consultant. A lack of relevant qualifications on the part of a medical adviser, or a failure to examine the client, or consult his/her medical records or GP/specialist, or give adequate reasons, may mean there is insufficient information on which the authority can base its judgment: *R v Newham LBC ex p Lumley* (2001) 33 HLR 11 QBD and *Homelessness code of guidance for local authorities* (Office of the Deputy Prime Minister, July 2002) paras 3.16 and 8.15 – 8.17. Similarly, if the client has not had an opportunity to respond to unfavourable advice then the authority may not have adequately carried out its enquiries: para 3.12. Where there is a conflict of medical opinion the authority will need to resolve it, if possible, or show its reason for taking the less favourable view.

Seeking interim relief in the form of accommodation can be achieved by telephone attendance on the duty judge. Armed with an appropriate injunction, which will include a date by which documents are to be lodged and served, the adviser will effect service of the order. Often the adviser will have waited for some time to obtain the order and so normal office hours will have passed. Therefore, it is important that the adviser tells the homeless department that s/he is proceeding and obtains the relevant out-of-hours telephone numbers. The next day can then be set aside for completing all the documentation for the court and service.

■ Peter Bourne is a housing solicitor at Community Law Partnership, Birmingham, which represented the client in this case.

LAG Books ■ Courses ■ Subscription information

COURSES

AUTUMN 2005 PROGRAMME

Actions Against the Police: Advanced

Tuesday 8 November 2005

£225 + VAT 6 hours CPD Course grade: A
Trainers: Fiona Murphy, Mark Scott and Heather Williams

Bringing an Appeal to the Social Security Commissioners

NEW

Tuesday 15 November 2005 (half-day) pm

£149 + VAT 3 hours CPD Course grade: B/I/A/U
Trainers: Andrew Bano and Howard Levenson

Supervision Skills in Civil Cases

Thursday 17 November 2005

£185 + VAT 6 hours CPD Course grade: I
Trainers: Brenda Bloch, Maxine Klein and Vicky Ling

Introduction to Mental Health Review Tribunals

Monday 28 and Tuesday 29 November 2005

£425 + VAT 12 hours CPD Course grade: I
Trainers: William Armstrong (Chair), Phil Fennell, Dr Rob Ferris, Simon Foster, Bill Jackson, Robert Robinson and Lucy Scott-Moncrieff

Parole Board Oral Hearings

Thursday 1 December 2005

£225 + VAT 6 hours CPD Course grade: B/I
Trainers: Hamish Arnott, Nancy Collins and Simon Creighton

All courses take place in central London unless otherwise stated

Courses information

CONTINUING PROFESSIONAL DEVELOPMENT
LAG is accredited with the Law Society, the Bar Council and the Institute of Legal Executives.

COURSE GRADES
Law Society accredited courses are graded as follows:
B – Basic/Introductory
I – Intermediate
A – Advanced
U – Updating course

CONCESSIONARY RATES
Concessionary rates may be available for certain individuals and organisations. For more information on these, contact the Training Department (tel: 020 7833 2931 or e-mail: courses@lag.org.uk).

Local Authority Decision-making in relation to Family Support and Child Protection Services

Friday 2 December 2005

£225 + VAT (£399 when booked with other one)
6 hours CPD Course grade: A
Trainers: Bridget Lindley and Sue Murray

Police Station Practice: Update

Tuesday 6 December 2005

£100 + VAT 3 hours CPD Course grade: I/U
Trainer: Ed Cape

Advanced Judicial Review

Thursday 8 December 2005

£225 + VAT 6 hours CPD Course grade: A
Trainer: Jonathan Manning

Local Authority Decision-making for Children who are in Care or Accommodation

Friday 9 December 2005

£225 + VAT (£399 when booked with other one)
6 hours CPD Course grade: A
Trainers: Bridget Lindley and Sue Murray

DATES FOR YOUR DIARY!

Community Care Law Reports *practitioner seminars*

Tuesday 6 December 2005
6.30 pm–8 pm
Garden Court Chambers, London WC2A

1.5 CPD hours, FREE to subscribers
£25 + VAT to non-subscribers to *Community Care Law Reports*

***Speakers*:**

Mr Justice Collins:
Community Care and the Administrative Court

Jerry White (Local Government Ombudsman):
Community Care and the Local Government Ombudsman

LAG in association with Garden Court Chambers and Doughty Street Chambers

Practical Equality and Diversity for the Bar

OPTION A: Thursday 10 November and Thursday 17 November 2005

5.45 pm–8 pm

Venue: Central London

CPD hours: 2 for one seminar; 4.5 for attendance at both
Fee: £90 + VAT (covers attendance on both dates)

OPTION B: Thursday 8 December and Thursday 15 December 2005

PLEASE NOTE THAT THESE DATES ARE NON-TRANSFERABLE

For more information, please contact LAG
tel: 020 7833 2931; e-mail: courses@lag.org.uk; or at: www.lag.org.uk

orders

Course Booking

Please photocopy for each booking

Title

Date

Cost £ (Minus 10% to *Legal Action* subscribers)

plus VAT (@ 17.5%) £

Total £

Do you wish to claim CPD hours? Yes ☐ No ☐

Dietary or other special requirements

Cancellations and substitutions
All cancellations must be made in writing. If your booking is cancelled more than two weeks before the course, the full fee, less £30 + VAT administration charge, will be refunded. We regret that no refund is possible if notice of the cancellation is received less than two weeks before the course date. Substitutions may be made at any time by contacting the courses department with details. Our acknowledgment/admission letter is transferable.

For further information contact:
Training Department on 020 7833 2931

Book/Law Reports Order

Title(s)	Qty.	£

Postal rates and delivery times
UK: £2.95 on all orders. Delivery within 10 days.
Europe: £6 for one copy. £2.50 for additional copies. Delivery by Airmail within 10 days to EU countries. Estimated delivery time for non-EU countries: 10–15 days.
Rest of world: Quote available on request. Delivery can take up to 30 days.

Subtotal £

plus p&p £

Total £

- Parcels may be delivered by Securicor or other courier service within office hours. Please supply shipping address where delivery can be signed for.
- Delivery times are estimated and cannot be guaranteed.

Money Back Guarantee: If you are not satisfied with any Legal Action Group book, then you may return it within 30 days for a full refund, provided that it is in saleable condition.

For further information contact:
Books Department on 020 7833 7424

Legal Action Subscription

(New subscribers only)

Annual rates (12 issues)		(tick)
Standard rate	£99	
Additional copy rate (If mailed to same address)	£63	
Concessionary rates		
Full-time student/unemployed	£39	
Trainee lawyer/pupil barrister/ part-time student	£51	

Sent to home address only and with personal payment. Students and trainees: please supply course/firm/pupillage details and expected date of qualification.

For further information call:
020 7833 2931

Membership of LAG

To receive more information on LAG membership tick here ☐

Complete overleaf →

orders

Please complete for all orders

Payment details

☐ I enclose a cheque payable to Legal Action Group for

£

☐ Please charge my credit card account Visa/Mastercard (delete as applicable)

£

☐☐☐☐/☐☐☐☐/☐☐☐☐/☐☐☐☐

Expiry Date

Signature

(If the address below is different from the registered address of your credit card, please give your registered address separately)

☐ Please invoice me Ref

(Only applies to organisations and at LAG's discretion)

Name and address

BLOCK CAPITALS PLEASE

Name

Occupation/position

E-mail (in CAPs)

Firm/organisation

Address

Postcode

Tel

Fax

LAG does not sell, trade or rent your personal information to others. Your details will be added to the LAG database in order to process your request and to keep you up to date with relevant details of our courses, publications and membership services. If you do NOT wish to receive any further information or offers from LAG whether by post, telephone or e-mail, tick the box ☐ 113P

Return booking form(s) with payment to:
Legal Action Group
242 Pentonville Road
London N1 9UN
Tel: 020 7833 2931

Orders can be faxed on: 020 7837 6094

LAG
working with lawyers and advisers to promote equal access to justice

← Complete overleaf

LAG Books ■ Courses ■ Subscription information

BOOKS

Actions against the police

Police Misconduct
legal remedies 4th edn
NEW
John Harrison, Stephen Cragg and Heather Williams
April 2005 ■ Pb 0 905099 91 5 ■ 760pp ■ £37

Community care

Community Care and the Law 3rd edn
Luke Clements
May 2004 ■ Pb 1 903307 19 8 ■ 758pp ■ £37

Crime

Defending Young People
in the Criminal Justice System 3rd edn
COMING SOON
Mark Ashford and Alex Chard
February 2006 ■ Pb 1 903307 34 1 ■ c900pp ■ c£48

Identification
investigation, trial and scientific evidence
Paul Bogan
August 2004 ■ Pb 1 903307 25 2 ■ 502pp ■ £37

Reconcilable rights? Analysing the tension between victims and defendants
Edited by Ed Cape
April 2004 ■ Pb 1 903307 31 7 ■ 148pp ■ £15

Defending Suspects at Police Stations 4th edn
Ed Cape with Jawaid Luqmani
2003 ■ Pb 1 903307 21 X ■ 912pp ■ £42

Employment

Maternity and Parental Rights 3rd edn
COMING SOON
Camilla Palmer, Joanna Wade and Katie Woods
February 2006 ■ Pb 1 903307 40 6 ■ c500pp ■ c£27

Employment Law
An adviser's handbook 6th edn
NEW
Tamara Lewis
September 2005 ■ Pb 1 903307 36 8 ■ 804pp ■ £28

Employment Tribunal Claims
tactics and precedents
NEW
Naomi Cunningham
March 2005 ■ Pb 1 903307 33 3 ■ 440pp ■ £25

Employment Tribunal Procedure 3rd edn
Judge Jeremy McMullen QC, Rebecca Tuck and Betsan Criddle
December 2004 ■ Pb 1 903307 29 5 ■ 758pp ■ £37

Discrimination Law Handbook
Camilla Palmer, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey
2002 ■ Pb 1 903307 13 9 ■ 1264pp ■ £45

Gypsy and Traveller law

Gypsy and Traveller Law
Marc Willers and Chris Johnson (eds)
August 2004 ■ Pb 1 903307 26 0 ■ 488pp ■ £29

Housing

Leasehold Disputes
a guide to Leasehold Valuation Tribunals
Francis Davey and Justin Bates
August 2004 ■ Pb 1 903307 27 9 ■ 256pp ■ £20

Homelessness and Allocations 6th edn Revised
Andrew Arden QC and Caroline Hunter
2003 ■ Pb 1 903307 23 6 ■ 696pp ■ £42

Housing Law Casebook 3rd edn
Nic Madge
2003 ■ Pb 1 903307 10 4 ■ 1264pp ■ £39

Quiet Enjoyment 6th edn
Andrew Arden QC, David Carter and Andrew Dymond
2002 ■ Pb 1 903307 14 7 ■ 320pp ■ £29

Defending Possession Proceedings 5th edn
Jan Luba QC, Nic Madge and Derek McConnell
2002 ■ Pb 1 903307 06 6 ■ 688pp ■ £42

Human rights

Human Rights Act Toolkit
Jenny Watson and Mitchell Woolf
2003 ■ Pb 1 903307 15 5 ■ 256pp ■ £22

European Human Rights Law
Keir Starmer QC
1999 ■ Pb 0 905099 77 X ■ 960pp ■ Reduced from £35 to £25

Immigration

Support for Asylum-seekers
A guide to legal and welfare rights 2nd edn
Sue Willman, Stephen Knafler and Stephen Pierce
August 2004 ■ Pb 1 903307 24 4 ■ 788pp ■ £39

Law reform

Beyond the Courtroom
A Lawyer's Guide to Campaigning
NEW
Katie Ghose
September 2005 ■ Pb 1 903307 35 X ■ 393pp ■ £20

Practice and procedure

Inquests
A practitioner's guide
Leslie Thomas, Danny Friedman and Louise Christian
2002 ■ Pb 0 905099 97 4 ■ 544pp ■ £29

Parole Board Hearings
Law and Practice
COMING SOON
Simon Creighton and Hamish Arnott
January 2006 ■ Pb 1 903307 42 2 ■ c300pp ■ £24

Public law

Judicial Review Proceedings
A practitioner's guide 2nd edn
Jonathan Manning
February 2004 ■ Pb 1 903307 17 1 ■ 720pp ■ £34

LAW REPORTS

Community Care Law Reports

Subscriptions:
One-year subscription (2006): Parts service: £250

Order online with your credit card – www.lag.org.uk