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 July issue: Friday 13 June

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2003 Annual General Meeting
of the Legal Action Group

The AGM will be held on
Wednesday 16 July 2003 at 7pm
at LAG's offices

(The AGM is open to any member of LAG Education & Service Trust Ltd)

AGENDA

1. To receive and consider the report of the directors, statement of accounts and balance sheet, and auditor's report for the year to 30 September 2002.
2. To elect an auditor for the ensuing year.
3. To authorise the directors to fix the remuneration of the auditor.
4. To elect directors in place of those who have retired voluntarily or by rotation.
5. To transact any other formal business which may properly be transacted at an Annual General Meeting.
6. Any other business.

Legal Action Group | working with lawyers and advisers to promote equal access to justice

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LAG Education and Service Trust Ltd. Reg Co No 1095065 (Eng). Reg Charity No 265703. VAT Reg No 480 845819

Reconciling rights in criminal justice

A series of seminars to explore the tension between victims' and defendants' rights

Central London
3pm to 6pm or 6.30pm

LAG is holding a series of seminars as part of a project funded by the Esmée Fairbairn Foundation's programme, Rethinking crime and punishment. The seminars are sponsored by Clifford Chance.

Aimed at academics, policy-makers, legal practitioners and others with an interest in criminal justice, these events will provide an opportunity to analyse the relationship between victims' and defendants' rights, and to discuss whether a reconciliation can be achieved.

Monday 2 June	***Seminar one:***	**Unravelling the political context**
Monday 16 June	***Seminar two:***	**Analysing recent changes**
Monday 30 June	***Seminar three:***	**Involving victims in sentencing**
Thursday 10 July	***Seminar four:***	**What rights should victims have?**

The events are free of charge and places are limited, so we advise you to reserve early by:

e-mailing: hcasey@lag.org.uk or
leaving a message on 020 7833 7431.

Legal Action Group | working with lawyers and advisers to promote equal access to justice

Reg Charity No 265703

contents
June 2003

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editorial
Out of sight, out of mind?

The ideal of the Community Legal Service (CLS) was constructed around an important assumption: that a member of the public facing a legal problem would be driven by a sense of grievance or injustice to 'just ask' for advice. If someone had the misfortune to go to an agency that could not help, a 'seamless referral network' would ensure his/her effortless arrival at a suitable advice provider. The idea that anyone might lose interest or confidence on the way does not seem to have been seriously contemplated, still less the possibility that a person might fail to ask for advice in the first place.

But there is now a growing body of research, confirming the experience of practitioners on the ground, that highlights important differences between the advice-seeking behaviour of various population groups. The first periodic survey of legal need among adults in England and Wales, conducted by the Legal Services Research Centre, found that certain social characteristics make people more likely to 'lump' a legal problem, that is, take no action to solve it. The findings suggest that nothing is done to attempt to resolve around one-fifth of problems – and that people in receipt of benefits, those without educational qualifications, and members of ethnic minority groups are more likely to be among those taking no action.

Anecdotal evidence from advice and youth work agencies suggests that many young people are also reluctant to engage in the legal system, and are wary of legal advice agencies and solicitors. A combination of reasons lies behind this: lack of awareness of rights, fears about the confidentiality of mainstream advice services and a sense of alienation and disaffection may all be key factors. Those who work with young people emphasise the complex relationship between rights-based problems and the practical, personal and emotional issues often encountered in the transition to adulthood. It follows that there is a lot of sense in developing models of delivery that allow all these problems to be dealt with under one roof.

Innovative youth projects combining rights advice with a range of information and counselling services have demonstrated that advice services which are integrated into trusted venues achieve a high level of success in reaching their target group. Successful models in London include the Eaststreet project, which provides an holistic information, advice and counselling service, and the Streetwise Community Law Centre, which is attached to a multi-functional youth project. These organisations have also been able to forge strong links with the government's Connexions Service, and have worked to develop the role of its personal advisers as 'problem noticers' for young people.

Mainstream legal and advice agencies, such as law centres and citizens advice bureaux, have also successfully pioneered a wide range of outreach projects that work in partnership with local organisations – community centres, black and ethnic minority groups, schools, colleges and health centres, as well as various youth projects. These multi-agency approaches can work well – because they combine the accessibility of client-specific services with the technical expertise of specialist advice providers.

Projects like these offer inspiration to anyone trying to develop advice services for hard to reach groups. Embedding advice into social or health facilities that are already well trusted may prove more effective than relying on mainstream providers that deliver a uniform service from a single location. In the longer term, this approach could lead to better integration of advice provision into planning for the needs of these groups, and recognition of the importance of advice as a core public service.

LAG believes that one of the biggest challenges for the CLS is to ensure that advice services reach the 'lumpers' – often those who experience the worst degree of social exclusion. The evident success of holistic approaches to advice for marginalised young people and other excluded groups should be looked at very carefully; these ideas may well have wider application – for example, to black and ethnic minority communities, or to older people. Many of the projects funded by the CLS Partnership Initiative Budget are experimenting with similar approaches, and – if successful – could be used as a blueprint for reaching different population groups.

In the doom-ridden world of legal aid, there is now talk of the possible collapse of the 'judicare' system. This pessimism may prove premature – but if the role of private practice firms is to be thrown into question, the needs of users must have primacy in determining what should follow. In LAG's view, the CLS can only claim to be helping people avoid or climb out of social exclusion if it succeeds in reaching all population groups. Clearly, it requires more than a 'seamless referral network' to help those who keep their legal needs out of sight.

news

RCJ Citizens Advice Bureau faces closure

The Royal Courts of Justice Citizens Advice Bureau (RCJ CAB) may have to close because the Association of London Government (ALG) has decided to end its £58,000 annual grant. The ALG has said that it wants to concentrate its funding on the outer London boroughs. At the same meeting, in April 2003, the grants committee agreed to carry on funding four inner London law centres which had faced large cuts to their ALG awards. Three of the law centres would have faced closure if the ALG had not revised its decision (see March 2003 *Legal Action* 3 and 5).

Responding to the ALG's decision to discontinue its funding, Joy Julien, the RCJ CAB's director, explained that the bureau advises litigants in person and clients from every London borough, and most cases involve benefits, housing, bankruptcy and family breakdown.

She pointed out: 'Our clients are among the most socially excluded in London. Many of the people we see have simply failed to link to any local service, and only receive advice or real help when they arrive at the court and are directed to the CAB service. The RCJ CAB is the last chance for those clients to receive proper advice and, where they have a tenable case, to receive access to justice.'

The ALG awarded the four law centres the following amounts:

- £90,000 (a £6,000 cut) to North Kensington Law Centre;
- £105,000, (a £57,445 increase) to Hammersmith & Fulham Law Centre;
- £130,000, (a £20,000 increase) to Central London Law Centre; and
- £60,000, (a cut of more than £36,000) to Paddington Law Centre.

Although Paddington Law Centre still faces a significant cut, it has been reported that a joint funding arrangement between the ALG and Westminster City Council may be possible. The final decision has been deferred until 11 June 2003 (see page 8 of this issue).

LAG welcomes model tribunal procedure rules

Responding to the draft model rules of procedure for tribunals published by the Council on Tribunals, LAG welcomed the council's initiative but expressed concern about several of its proposals for case management. LAG's main concerns included the following:

- The detailed requirements for witness statements would provide a near insurmountable barrier for applicants with limited literacy skills or a poor command of English.
- It is inappropriate for applicants bringing cases against the state to face the threat of costs orders; in cases against private parties, there should be clear limits on when costs could be awarded.
- The detailed rules on expert reports would increase the costs of case preparation and would be too onerous for many types of report, for example, those from GPs.

Draft model rules of procedure for tribunals, is available at: www.council-on-tribunals.gov.uk. For a copy of LAG's submission e-mail: nardill@lag.org.uk.

New director for LAG

Legal Action Group has appointed Alison Hannah, currently head of finance and administration at the Osteopathic Centre for Children, as its director. Alison is a solicitor, and, from 1973 to 1976, was a caseworker at the National Council for Civil Liberties (now Liberty).

Commenting on her appointment, Alison said, 'I am delighted to have been appointed director of LAG. It is an organisation I have known and respected since I qualified as a solicitor in 1979 – and its role is just as necessary now as it was then.' Alison will take up her post on 23 June 2003.

LSC publishes details for award of civil contracts

At the end of April, the Legal Services Commission (LSC) informed its suppliers that, contrary to its previous announcement in January, it will be holding a bid round for civil and family contracts from April 2004. All solicitors with private practice general civil contracts must register on the bid panel by 2pm on 1 October 2003, for both controlled and licensed work. If practices fail to sign up, they will not be able to do any publicly funded work after March 2004. Practitioners should note that practices with two category 3 cost assessments since 1 November 2001, will not be eligible.

Not for profit agencies (NFP) do not need to register unless they want to develop their legal aid contracts. Both NFP and private practices will need to register with the panel if they want to add new areas of law or expand contracts in existing categories.

Bid panels will be split into two in each Community Legal Service Partnership area; Panel A is for organisations already practising in the area, and Panel B is for organisations wishing to set up there. If there are more new bidders and existing suppliers asking for contracts in an area than the LSC considers appropriate, the regional director may run a competitive bid round.

The criteria used to decide which organisations are offered contracts include:

- the extent that bids meet priorities identified in the Regional Legal Services Committee's report and contracting strategy;
- the availability of funds;
- the proposed location;
- the method of delivery and other features of the service;
- the experience of caseworkers and supervisors (including panel membership); and
- value for money.

Copies of the briefing paper on civil contracts from 1 April 2004, the rules for the award of general civil contracts from April 2004 and a bid form to register on the 2004 bid panel, are being sent to all civil contracted suppliers and their umbrella bodies. These documents will be available at: www.legalservices.gov.uk. Copies of the bid form can also be obtained from the relevant LSC regional offices.

news

Justice calls for new equality laws

Unified and modernised equality laws were called for by 'Equal protection: Working for a Single Equality Act', a conference organised by Justice, the National Aids Trust and the Trades Union Congress in May. Attendees heard that existing anti-discrimination legislation is problematic for a number of reasons: the provisions are inconsistent, difficult to access, and rely on specific litigation which is burdensome on individuals and fails to change organisations. Also, there is a hierarchy of protection which acts to perpetuate, rather than eliminate discrimination.

A number of prestigious speakers, including representatives of the Commission for Racial Equality, the Disability Rights Commission (DRC) and the Equal Opportunities Commission endorsed the call for reform. The conference explored different visions for the future of equality legislation. Anthony Lester QC described the process of framing his Equality Bill, which is currently being debated in parliament.

Some concerns were expressed that a single Act would soften the focus of existing legislation, and safeguards would be needed to ensure that gains made by the establishment of the DRC were not lost. One attendee pointed out that legislative reform was all very well, but no-one should lose sight of the needs of vulnerable workers, and maintained that what matters is that the law has to be effective in the workplace and elsewhere.

The conference recognised that nothing would be achieved unless there was political commitment to reform. While the government is committed to the creation of a single equality commission, it does not believe that there is a need to reform the current statutory provisions. Indeed, the implementation of the latest European Union discrimination directives via delegated legislation adds to the complexity and inaccessibility of the law. The government is also extremely concerned not to add to the regulatory burden on employers. However, several speakers pointed out that a single comprehensive and comprehensible anti-discrimination code should simplify the law for businesses.

Justice, 59 Carter Lane, London EC4V 5AQ. Tel: 020 7329 5100.

Peers hear Criminal Justice Bill campaign concerns

As part of a joint campaign on the Criminal Justice Bill (CJB), LAG, together with the Bar Council, Law Society, Justice and Liberty, organised a meeting to discuss aspects of the CJB that give them serious concern in the House of Lords in April. Over two dozen peers attended the meeting entitled, 'Criminal justice reform: a bill too far?' Lord Brennan QC chaired it and the panel of speakers raised a number of issues:

- Professor Ed Cape, of the University of the West of England, regretted that the CJB's primary aim seemed to be obtaining convictions – rather than ensuring that justice was done. He outlined worries about the CJB's proposals for disclosure, hearsay evidence and evidence of bad character, all of which appeared to make it easier for the prosecution to obtain convictions.
- Peter Rook QC maintained that juries are a fundamental part of the British system of justice, and provide a truly independent tribunal. The idea of removing jury trial for complex cases, such as fraud, was misconceived. In the view of the Criminal Bar Association, better case management and a simplification of fraud law would speed up the trial process for such cases.
- Marcel Berlins, author and journalist, argued that relaxation of the double jeopardy rule would lead to the re-opening of predominantly high profile cases. 'Trial by media' might well result, and judges' directions to juries would not be able to overcome the likely prejudice to a defendant from publicity surrounding a case. A particular concern was the wide range of offences for which the double jeopardy rule would be relaxed.

The CJB begins its passage through the House of Lords in early June; peers' contributions at the April meeting suggested they will be giving the CJB careful scrutiny there. The bill now contains 187 pages of government amendments, including significant changes to the sentencing regime for serious offences.

LAG gives evidence to LCD committee asylum inquiry

In its first submission to the select committee on the Lord Chancellor's Department, LAG argued that the operational needs of the Home Office (HO) had too much influence on the immigration and asylum appeals system. A shortage of specialist, high quality immigration practitioners to advise and represent appellants at appeals was another major reason for disquiet.

In LAG's view, the HO had undue involvement in the appeals process in several respects:

- The requirement on an appellant to lodge appeal papers with the HO or British post abroad, rather than with the Immigration Appellate Authority (IAA).
- The fact that the IAA has to serve appeal determinations on the HO rather than an appellant, where s/he is a failed asylum-seeker.
- The strong influence of HO policies on the immigration appeal procedure rules – for example, the new 'statutory closure date' designed to speed up appeals, and the fast track appeals introduced for detained asylum-seekers.
- The fact that the IAA appears to capitulate readily to HO demands – such as its request for a blanket adjournment of all cases involving Iraqi asylum-seekers in March 2003.

LAG also expressed dismay at the government's introduction of non-suspensive appeals for asylum-seekers from listed countries, and questioned how adjudicators could assess credibility in such cases.

The committee can be contacted at the Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. Tel: 020 7219 8198. Further information is also available at: www.parliament.uk/parliamentary_committees/lcdcom.cfm.

For a copy of LAG's submission e-mail: nardill@lag.org.uk.

LEGAL SERVICES

From LAB to LSC – Steve Orchard looks back

'Managing change' was the theme of the interview with Steve Orchard, which was published in *Legal Action* when he first took on the role of head of the Legal Aid Board (LAB) in 1989 (see December 1989 *Legal Action* 8). Now, almost 14 and a half years later, **Linda Tsang** talked to Steve Orchard just before he left his post as chief executive of the Legal Services Commission (LSC), which replaced the LAB in 2000.

Looking back at the LAB

Steve Orchard is in a reflective mood. Going back to the days of the LAB, he says: 'We had been very lucky that for quite a long time at the beginning of my tenure, legal aid was quite low profile politically and in the media, and we recognised that things would ultimately have to change and we started thinking about what the changes should be way back in the early 1990s, and I think by and large we got those changes in successfully. But, inevitably, whenever you change anything, it's never popular with everyone, you can't please all the people, but I think that we have operated out of the best of motives, and of course you are never entirely a free agent, there are always competing pressures from all directions, so I sometimes felt we were between a rock and a hard place.' And he admits that: 'Of course, you never have enough money to do everything that you want to do and so have to prioritise, so that's what we have done.'

A 'one size fits all' approach?

But what the LSC sees as priorities may differ from the view of the profession and pressure groups such as Legal Action Group. In response to a criticism that there is a perception of a 'one size fits all' approach, he counters: 'I don't accept the one size fits all charge – if you look at the differences in what has been done in relation to some legal issues such as, for example, clinical negligence, family, immigration and mental health, then these can only be done by those with a specialist health contract with the LSC, but other areas of law can be done much more widely. It's about striking the balance between access and quality and trying to get the balance right – if you get too tough on quality, you lose out on access and if you allow unlimited access to everyone, you won't get good quality.'

However, Steve Orchard concedes that the charge of 'one size fits all' could be relevant in relation to the system of auditing and contract management, he says: 'In the early days, there was bound to be an element of that because we had to audit virtually everyone in the first couple of years, and at that time we were also trying to satisfy our own auditors who look over my shoulder.' That approach has now changed and Steve Orchard says that there is a much lighter touch. He adds: 'But the fact is that we did find some pretty horrendous things – it's public money we are dealing with and I have been personally accountable for that public money for 14 and a half years – there's no excuse for not being able to justify on the file the money being claimed from the taxpayers.'

And as the LSC has an independent appeals mechanism, he argues: 'We are not unreasonable, there's always room for legitimate debate and discussion with individual firms. There has been a lot of criticism, but it fails to understand the context in which the profession – and the LSC – have to work when rapidly growing and significant sums of money are at stake.' And it is, of course, money that is at the centre of the LSC's – and Steve Orchard's role. Over his tenure, Steve Orchard has had to manage not only change, but also choices about where the money goes.

LAG promoted the idea of a legal services commission as early as 1974, with a remit which included a public legal education programme. Steve Orchard's view is that: 'if you have a fixed amount of money – then you have to decide what the best uses for that are. The LSC has moved away from a casework service of one client, one adviser, and done some imaginative things since we have had the statutory power – and I am not convinced that a public education programme is worth taking money away from other areas. I think the LSC has a wide enough remit to be able to make choices – but we can't lurch from one thing to another overnight.'

Reviewing the LSC's development and priorities

Steve Orchard says: 'Up to April 2000, we were funding almost exclusively casework – we have now moved money into specialist help and telephone advice. We are also funding training contracts and places on the Legal Practice Course (LPC), and grants to umbrella organisations such as the Advice Services Alliance, and Federation of Information and Advice Centres, so there has been a move away from the old-style funding that has to happen over time – and I am sure that that evolution will continue.'

The other area where there is a need to prioritise is the use of private practice or the not for profit (NFP) sector. He says: 'There is a range of possibilities. At the moment, overwhelmingly, legal aid is delivered by private practitioners, almost 100 per cent – although the LSC has increased the amount of funding to the advice sector. Family law advice is almost exclusively provided by private practitioners, and that has the huge advantage that it can cover virtually every largish area because solicitors' offices are there, and a lot of those firms still do legal aid, but the downside is that they only do relatively small bits, so it is easy for them to give it up.

But if you go for the publicly-employed model – the advantage is that you can control the costs absolutely, you just have more queuing, but then you don't have the same locational coverage, although you can afford to employ them full-time. My view is that it might be appropriate for particular areas of law at some point in the future, it is not a panacea.' He adds: 'Not for profit funding has risen from £11m to £49m in three and a half years, so there has been a massive injection of cash under contract. That is additional money but it comes with conditions – to do work which is identified and prioritised by local community legal services partnerships – the LSC has never been prepared to dole out money to the NFP organisations for it to do what it wants.'

The other area of competition for funding is the perennial one between criminal and civil legal aid. He comments: 'Civil and criminal both complain that they are the poor relations when it comes to funding. The fact is that expenditure on criminal legal aid has risen dramatically over the last four years for a number of reasons, and I don't blame the lawyers for that. Most of that rise has been driven by decisions in the magistrates' courts, increased sitting days, more long and expensive cases such as drug trafficking and fraud, and that expenditure is likely to continue to go up significantly. The issue is what is driving that and how the LSC is going to be funded – and if it continues to go up outside our control, then at some point it will start to impinge on the civil side. For example, in 2002, the figure was

£1.9 billion, whereas, in 1999, it was £1.55 billion, up about £350m, and most of that rise has been in crime, and some in immigration.'

As for accusations that there has been 'dumbing down' in relation to legal services, he says: 'I think it's gone in the other direction, I think that the growth in specialist panels run by the Law Society and the growth in groups of lawyers doing different categories of law, such as the Association of Personal Injury Lawyers, Solicitors Family Law Association and Immigration Law Practitioners Association (ILPA), have all had a very positive effect and the quality mark has also made a huge difference.'

External regulation

One idea mooted in terms of external control is for a legal services inspectorate. Steve Orchard is clear in his views on this: 'I have always been totally against it – there is no need for a legal services inspectorate, because it adds no value. We have enough watchdogs already and the LSC has enough bodies that oversee it, ranging from the Lord Chancellor's Department, the National Audit Office, the select committee on the LCD, the Treasury and all the pressure groups, we have watchdogs coming out of our ears and the idea of another one is a joke as far as I am concerned.'

So he is clear about watchdogs, and also on the LSC's watchword, cost-effectiveness. He says: 'It's part of the job to be more cost-effective, but it's inevitable with the changes that have been going on, and some have been deliberately driven by us, that the average cost of cases would go up. The whole story of the increasing cost of cases is a very complex one, but we have been getting to grips with individual case contracts for high cost cases for both civil and criminal at the top end and my successor will have to get to grips with the bottom end.'*

Challenges for LSC's next chief executive

'In the medium term', he says, 'the main challenges are to maintain the quality of the staff in the LSC and their commitment because without that nothing will happen, and if you lose that, you're dead in the water. The key is getting the people that work for you to be committed to you – it's about selling the message and giving them the protection to get on and do it – you can do very little on your own. It's important to maintain credibility with the ministers, in particular, the Lord Chancellor and the senior civil servants and, of course, the confidence of the LSC itself; to get to know and understand the legal profession, where it's coming from, what motivates it and dealing constructively with the representatives from the Law Society, the Bar and all the professional groups; and to demonstrate by meeting key targets that legal aid is delivering value

As to how he has met those trials during his time, he says: 'the challenges have changed – many of them were unheard of when I started in 1989 – it's a different organisation and has a totally different agenda. The two biggest challenges I faced were to get quality on the agenda – and that includes value for money – and to implement the major reforms in 2000 and 2001. I have felt that I have always had the support and commitment of the staff, and have always had a good relationship with ministers and certainly within the LSC itself, but getting value for money is a never-ending process.'

The ability to deal with criticism is also a major challenge in the role. Steve Orchard says: 'Some criticisms are always justified, and some are completely off the wall. What bothered me most – and still does, although it is improving – is the ability to deliver good customer service – undoubtedly for two to three years, during the reform programme, all efforts were focused on the changes, but it will go on getting better. It's not a quick fix.'

LSC's strategic direction

As for wider, more general criticisms about a strategic and imaginative failure on the part of the LSC, Steve Orchard's view is that: 'People will want to follow a different agenda, and have a different view of the world, and particularly of what legal aid is for. Ultimately, the strategy is driven by ministers and by the Lord Chancellor, so you follow that particular strategic agenda or go and find another job, it's as simple as that. It is always possible to get more money – it has to come from somewhere. The biggest cost driver is criminal legal aid – and that is often driven by new policies – so one would hope that as new policies emerge and involve legal aid, that funding will be provided by those who make the policies.'

And he argues that: 'there has been imagination in carrying the strategic agenda through – I doubt whether many people would have the imagination to fund LPC courses or training contracts, or to take the initiative in funding the expansion of immigration suppliers through grants and loans, setting up training courses through ILPA, or funding a training and accreditation scheme for young barristers to do advocacy before appellate bodies. That needs imagination and an understanding of strategic direction.'

In retrospect

Looking back to the biggest change that he managed – re-forming the LAB to the LSC – Steve Orchard says: 'That was a major change and a major challenge, but it is a means to an end not an end in itself. I don't believe in legacies. You do the job, you stop doing the job, someone else does it and it will change. I am very philosophical about that.'

* Clare Dodgson, who is currently acting chief executive at Jobcentre Plus in the Department for Work and Pensions, has been appointed as the LSC's new chief executive (see February and March 2003 *Legal Action* 5 and 4).

Caroline O'Dwyer

Steve Orchard: 'I don't believe in legacies ... I'm very philosophical about that.'

LEGAL SERVICES

London law centres campaign against cuts

Over recent months, the Law Centres Federation (LCF) and four inner London law centres – Paddington, Hammersmith & Fulham, Central London and North Kensington – have been involved in a campaign against funding cuts by the Association of London Government (ALG) (see March 2003 *Legal Action* 3). The ALG, after consultation, recently announced a re-think on the proposed cuts (see page 4 of this issue). Here, **Steve Hynes**, director of the LCF, describes the lessons that the federation has drawn from the campaign about the need to promote more effectively the unique work that law centres undertake, and how it has highlighted issues regarding the long-term survival of their work, and the viability of the Community Legal Service (CLS).

Law centres provide access to civil justice through their core function of the delivery of an expert casework service in social welfare law. Law centres have also always sought to work to resolve legal problems through education, group and community work. The LCF argues that it is the combination of expert casework along with legal education, group and community work which is the most effective method of using legal services to tackle social exclusion.

At present, the Legal Services Commission (LSC) funds the delivery of legal services mainly through individual casework. Without other funding, therefore, from bodies like the ALG, law centres risk losing the more holistic approach to legal problems that they have sought to promote since their inception in the early 1970s. In addition, funding that comes mainly from local government pays for important work currently not covered by the LSC, particularly tribunal representation. So, for example, Paddington Law Centre, which is still under threat of a major cut in its ALG grant (see page 4 of this issue) would, if there was a substantial reduction in its funding, no longer be able to represent clients before employment and welfare benefit tribunals. And, it would lose its community link adviser who sees over 6,000 residents a year and refers them to appropriate services.

Elizabeth Woodroffe

The ALG

The ALG was formed after the abolition of the old Greater London Council to take over some of the council's functions, including distributing grants totalling more than £27 million a year on behalf of the boroughs to some 400 voluntary organisations across London. The ALG also seeks to develop services across London's boroughs, and plays an important part in their delivery to Londoners. Its wide scope and high level of resources make it a unique body in England.

Over the past three years, the ALG has undertaken a review of the way that it funds organisations, and as a result of this review it introduced a policy of diverting funding from inner to outer London boroughs. This decision was also in response to political pressure from representatives of the outer London boroughs sitting on the ALG's grants committee. For some time, those representing outer London local authorities have been complaining about the lack of service provision in their respective boroughs, despite their financial contribution to the central 'pot' to make such provision available. Since no authorities are prepared to contribute any more money, any decision to move funds outwards was bound to have some impact on existing services.

LCF's campaign against the cuts

The ALG's grants committee's decision to cut the grants to the four law centres could have led to the closure of at least three. The work of these law centres has been seminal in the development of social welfare legal services in this country, and while we understood the ALG's policy imperative, the LCF could not stand back and let these vital services be crippled by the proposed cuts. At the same time as the ALG announced its cuts, Lewisham Law Centre was facing closure due to a funding cut from its local council.

The campaign against the cuts was coordinated by Noeleen Adams, manager of LCF's London unit, and involved the individual law centres lobbying on their own behalf. Matt Ventrella, also from the London unit, gave advice and assistance to Lewisham Law Centre. Among the individuals and organisations which joined the outcry against the proposed cuts were local councillors, MPs, the Bar Council, the Law Society, trade unions and voluntary sector agencies.

An important aspect of the campaign emphasised the specialist, cross-London borough work that law centres undertake. For example, Central London Law Centre provides specialist legal advice on employment law to low-paid and vulnerable

The Law Centres Federation encourages the development of publicly funded legal services for those most disadvantaged in society and promotes the law centre model as the best means of achieving this. To improve access to justice, we promote good law centre practice and innovation in the delivery of high quality legal services to the community.

people living and working in the central London area. It also provides a unique service to London's Chinese community from its base, which is located near London's Chinatown. In addition, all the threatened law centres participate in county court duty rotas that cover more than one London borough. They provide a full housing law casework service and are able to represent clients in the county court, in contrast to non-solicitor agencies which usually undertake only debt-related housing work in the county court.

In February 2003, the grants committee decided to defer its initial decision to reduce funding to the law centres, and its chair, councillor Raj Chandarana, and the ALG – to their credit, agreed to enter into dialogue with the law centres and the LCF. From these discussions, it fast emerged that there was a lack of understanding, on the ALG's part, about the range and quality of the services that law centres provided. Unavoidably, some of the blame for this falls on the LCF and individual law centres. Sean Canning, director of North Kensington Law Centre, commented that the experience had highlighted the need for law centres to be 'more PR conscious in terms of promoting their work and to show how they differ in the type of services they offer compared to the generalist advice agencies'.

At its meeting at the end of April, the grants committee decided to reverse the planned cuts to the funding for Central London, North Kensington and Hammersmith & Fulham law centres, but reduced its grant to Paddington Law Centre by more than £36,000. In a surprise move, the Conservative party's representative for Westminster City Council moved to block this cut, and called for talks between Westminster and the ALG to discuss possible joint funding. It is therefore hoped that when the committee meets this month (June 2003) that a way will have been found to avert the threatened cut to Paddington. So far, Lewisham Law Centre has succeeded in averting the proposed cut.

LCF through its London unit is seeking to develop new law centre services in every London borough. We intend to realise this ambitious target by working with funders and law centres to expand existing services. Like the ALG we are also, where appropriate, seeking to establish new venues in outer London boroughs such as the new Barnet Law Centre.

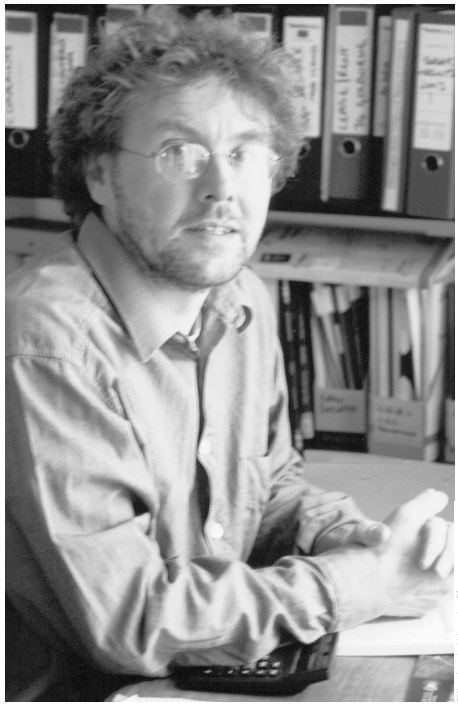
... the campaign emphasised the specialist, cross-London borough work that law centres undertake.

A threat to the CLS?

All four law centres have LSC contracts and quality marks at the specialist level. It would seem that the LSC was consulted over the proposed cuts but, in public at least, there was little that it could do to prevent the ALG from withdrawing the grants other than to point out that the award of its contracts is dependent on service providers' receipt of funding from other existing sources. This raises wider questions about the viability of the CLS and the future of law centres in their current form, particularly in their strategic use of legal services to tackle social exclusion.

For example, under the Legal Help scheme, law centres' advisers can assist individuals facing repossession for rent arrears in the county court. The LSC currently though cannot fund an adviser's attendance at a meeting with a local council to try and sort out problems with the administration of housing benefit which might be the cause of a tenant's rent arrears. Similarly, the scheme will fund the issue of proceedings to enforce maternity rights before employment tribunals, but will not fund a campaign to educate employers and employees about such rights, and so attempt to avert the need for proceedings in the first place.

There has been a welcome increase in casework services in the not for profit sector that are funded by the LSC, but this has now slowed down due to budgetary constraints. However, due to the limitations of LSC funding it is very often the services that are funded in large part by local government and similar sources, which give law centres and the CLS the ability to tackle social exclusion using the necessary mix of casework, education, group and community work. The experience of the London law centres involved in this latest funding crisis highlights the vulnerability of these services to cuts from cash-strapped local government.



Elizabeth Woodroffe

Sean Canning, North Kensington Law Centre, '[law centres need to be] more PR conscious in terms of promoting their work ...'

It seems that central government is committed to a review of the CLS. LCF would suggest that an important matter that this review should consider is how effective local CLS Partnerships have been in securing additional grants from funders other than the LSC. If the pattern of expansion involving other funders is, as we suspect, at best patchy, this would lead to the conclusion that currently the CLS falls short of the comprehensive service necessary to provide access to civil justice and to combat social exclusion.

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law & practice

PRISONERS

Recent developments in prison law



Hamish Arnott, **Simon Creighton** and **Nancy Collins** continue the series of updates on the law relating to prisoners and their rights. This series of articles appears twice-yearly.

PAROLE AND LIFERS

The past six months have seen a number of significant cases seeking clarification on the extent of the application of article 5(4) of the European Convention on Human Rights ('the convention') to life sentenced prisoners. These cases have looked at issues ranging from the award of compensation to prisoners where there has been an acknowledged breach of article 5(4) rights, through to analysis of the obligations that the article places on the authorities in allowing for prisoners' potential release at the earliest opportunity. In general, the courts have taken a very restrictive approach to these issues, imposing far severer limitations on the ambit of the rights under scrutiny than had been anticipated. The first challenge to the interim arrangements for the parole reviews for mandatory lifers following the decision of the European Court of Human Rights (ECtHR) in *Stafford v UK* (2002) 35 EHRR 1121, has been dismissed.

■ **R (Murray) v Parole Board and Secretary of State for the Home Department**
[2003] EWHC 360 Admin
A lifer who had been recalled from life licence some years earlier had a parole review that concluded on 19 April 2002. Although the original decision was for the next review to commence 18 months later, after the proceedings were issued the Home Secretary brought forward the review date so that it would be concluded by September 2003. The claimant sought to challenge this decision, arguing that article 5(4) required the review to take place speedily, and that a delay of 15 months could not be considered 'speedy'. Pitchford J held that it was appropriate for the Home Secretary to have a reasonable period of time to implement the new arrangements and that, on the particular facts of the case, a period of 15 months was not unreasonable. The decision followed an earlier finding by the same judge.

■ **R (Middleton) v Secretary of State for the Home Department**
[2003] EWHC 315 Admin
A mandatory lifer had sought compensation for a delay on the part of the Home Secretary in authorising his release. The Parole Board ('the board') had recommended his release on 15 May 2002, but he was not released until 28 August 2002. He sought damages for unlawful detention for the period between the *Stafford* judgment (which was delivered on 28 May 2002) and his eventual release date. Pitchford J held that the detention was not unlawful in domestic law as the relevant statute, which left the discretion to release with the Home Secretary, remained in place until new legislation could be enacted, albeit that the existing legislation is incompatible with the convention. Given the major change in the law which had taken place and given minor changes in the claimant's personal circumstances during the relevant period, the Home Secretary had to be afforded a reasonable period in which to implement the new requirements imposed on him and had acted reasonably.

While this decision appears to limit severely the prospect of bringing damages claims for delays in the release of mandatory lifers following the *Stafford* judgment, there is still scope for such actions. Shortly after this decision was given, permission was granted to bring a claim in another, similar case where the delay had been for a much longer period. Furthermore, the *Middleton* claim was argued on the grounds that the detention was unlawful as opposed to it simply being a breach of the claimant's convention rights. An argument based on a breach of convention rights leaves open the prospect of a court being required to award compensation to give effect to those rights irrespective of the position in domestic law. Finally, Pitchford J relied heavily on the case of *Walden v Liechtenstein* App No 33916/36, 16 March 2000, ECtHR, as authority for the proposition that the domestic authorities should be given sufficient time to implement changes in domestic law brought about by ECtHR decisions. It is arguable that that case does not provide the authority for such lengthy delays as it concerned the issue of entitlement to pension payments rather than the liberty of the subject, and it was decided against the backdrop of a domestic regime which afforded the authorities a six-month period in which to make changes to domestic law.

The extent to which detainees can seek to recover compensation for detention in breach of article 5(4) was examined in some detail in the sphere of mental health detention in the following case.

■ **R (KB and others) v Mental Health Review Tribunal and Secretary of State for Health**
[2003] EWHC 193 (Admin)
This case was brought by a number of Mental Health Act (MHA) 1983 detainees who had previously been successful in claims that delays in the convening of their tribunals breached article 5(4). The detainees sought compensation for those delays under article 5(5), which imposes a requirement for there to be an enforceable right to compensation in cases where there has been a breach of article 5.

The judgment of Stanley Burnton J reviews in some detail the basis on which compensation should be awarded for breaches of convention rights. He expresses the view that the concept of 'just satisfaction' does not mean that there is an automatic right to compensation for a breach of article 5, simply that the right exists and that compensation should only be awarded, if necessary, on the individual facts of the case. He identified the following matters as being relevant to the decision about whether compensation is necessary to afford just satisfaction:

- if it can be shown that the release would have occurred if the tribunal had taken place on time;
- whether the detainees, as vulnerable people, suffered distress as a result of the cancellation of their tribunals, even though healthy persons may not be able to receive compensation under this head; and
- whether there is sufficient contemporaneous evidence to demonstrate the distress caused.

The prospect of damages being awarded for the loss of an opportunity of having the hearing take place was rejected, as was the argument that exemplary damages could be claimed for the breaches of article 5(4). Overall, the levels of awards made – where granted at all – are described as 'modest', and generally they are much lower than equivalent tortious awards for false imprisonment.

Although *KB and others* was concerned specifically with MHA detainees, the principles will be of great importance to lifers claiming compensation for breaches of article 5(4). Although the ECtHR has tended to make small financial awards when making findings of such breaches (eg, in the region of £1,000–£2,000 in most cases) it is clear that, as a result of this judgment, there is no automatic entitlement to the award of damages domestically.

■ **R (D) v Secretary of State for the Home Department**
[2002] EWHC 2805 (Admin)
This case confirmed that compliance with the key article 5(4) requirements is a matter of both form and substance. The claimant was a discretionary lifer who had served his minimum term (or 'tariff'), and had been detained in a special hospital under a transfer direction. When a Mental Health Review Tribunal decided that he was no longer detainable under the MHA, the referral of his case to the board – the only body which could then direct his release – was a matter of ministerial discretion rather than statutory right. Despite the fact that the Home Secretary's policy was always to make such a referral, the court held that the absence of an automatic right of access to a court-like body that could determine the legality of detention fell foul of article 5(4) (applying *Benjamin and Wilson v UK* App No 28212/95, 26 September 2000). In contrast, the question of whether article 5(4) imposes an obligation for an independent determination of matters falling short of whether to release, such as the period between parole reviews, has been examined in two cases.

■ **R (Spence) v Secretary of State for the Home Department**
[2002] EWHC 2717 (Admin)
A recalled mandatory lifer argued that the Home Secretary should be bound by a recommendation made by the board about the period between his parole reviews. The court rejected this on the grounds that the board has directive powers only in respect of the release of lifers. Any other matters pertaining to the detention of a prisoner, such as attendance on courses or the timing between reviews, fall within the discretionary powers of the Home Secretary. As such, providing the Home Secretary is able to justify the period set between parole reviews with reference to the principles applying to the requirement for reviews to be conducted speedily, there is no breach of article 5(4) in the actual decision remaining with him/her. The Court of Appeal heard an appeal on this case on 27 March 2003, but judgment has not yet been given.

■ **R (Clough) v Secretary of State for the Home Department**
[2003] EWHC 597 Admin
The approach in *Spence* was followed by the court where a discretionary lifer panel had recommended that the claimant should move to open conditions with a further review in nine months, but the Home Secretary had eventually set the review to take place 15 months after the transfer to an open prison. The court held that, as the relevant statutory provisions contained in Crime (Sentences) Act 1997 s28(7) provide that the Home Secretary has the power to refer cases to the board, it cannot therefore be argued that the board should set the period between the reviews. There is sufficient judicial control over the interval between reviews as a result of the two years' maximum period between reviews combined with the opportunity to take judicial review proceedings of any disputed decision. On the facts of this case, the period set by the Home Secretary was held to be reasonable.

The courts have, in the above cases, confirmed a long line of authorities that view the requirements of article 5(4) in fairly absolute terms. This approach is that the article requires that an independent tribunal has the power to direct release, but that any decisions ancillary to release remain a discretionary power of the executive. Although there is little authority from the ECtHR to undermine this interpretation, it remains problematic for lifers as it allows the executive effectively to undermine the potential for release by rejecting boards' recommendations for progressive moves and short review periods. This issue will be examined further by the Court of Appeal, which has granted permission to a challenge brought by an automatic lifer to a failure to provide a place on a course that was deemed necessary by the board to make him an acceptable risk for release on life licence. The issue turns on whether there is a duty on the Home Secretary to make relevant courses available to post-tariff lifers to enable the prospect of release, or whether the system for prioritising places on such courses is wholly discretionary. The application for permission was refused in the Administrative Court (**R (Cawser) v Secretary of State for the Home Department** [2003] EWHC 426 Admin) by MacKay J who considered himself bound by previous authorities, but was granted subsequently in the Court of Appeal which will hear the case in October 2003.

DETERMINATE SENTENCES

Extended sentences

Currently, the general rule is that the length of determinate sentences should be commensurate with the seriousness of the offence (Powers of Criminal Courts (Sentencing) Act 2000 s80(2)(a)). The exceptions are for violent and sexual offences where the court can either impose a longer than commensurate sentence if this is needed to protect the public from the risk of serious harm (s80(2)(b)), or an extended sentence (s85). The latter attaches an extended licence period, to be served after automatic release in the community subject to recall, to the custodial term that would be served otherwise. The power to impose an extended sentence arises where the court is of the opinion that the licence period for what would be the commensurate term would be insufficient to prevent the commission of further offences and to rehabilitate the offender (s85(1)(b)).

In relation to longer than commensurate sentences, the Court of Appeal has held that although the sentence includes a component imposed to protect the public, article 5(4) does not require a further review of the legality of the detention once an offender is no longer serving the punitive element (*R (Giles) v Parole Board* [2002] EWCA Civ 951, see January 2003 *Legal Action* 11). The rationale for the decision (which will be reviewed by the House of Lords in June 2003) was that the sentence remained a single determinate one, the whole period of which fell to be administered just like any other determinate sentence. Recently, the courts have examined for the first time the issues involved when an offender serving an extended sentence is returned to custody.

■ **R (Sim) v Parole Board and Secretary of State for the Home Department**
[2003] EWHC 152 (Admin)
The claimant was serving an extended sentence made up of a 30-month custodial term and a five-year extension period. After his release, he was recalled to prison because of concerns over his behaviour in the hostel where he was living and his drinking. The board that considered his case at an oral hearing decided that the decision to recall was correct. The statutory test required the board to direct release 'if satisfied that it is no longer necessary for the protection of the public that he should be confined' (Criminal Justice Act (CJA) 1991 s44A). The claimant sought a judicial review of the decision. The court considered four main issues, namely, whether:

■ article 5 of the convention was engaged when an extended sentence prisoner was recalled during the extension period;
■ the risk of any kind of offending could be used to justify recall;
■ the test for release unlawfully imposed a burden on a prisoner to show that s/he should be released; and
■ the board could take into account hearsay evidence, and if so had it considered correctly such evidence in this case.

On the first issue, the judge found that article 5 was engaged. *Giles* could be distinguished as the statute made a clear distinction between the custodial term and the extension period, and the latter authorised supervision in

the community rather than immediate custody. On the second issue, the judge held that it was only the risk of further violent or sexual offences, of the type for which the sentence was imposed, that would justify recall.

On the third issue, the judge held that, unlike the position with indeterminate sentences where 'burden of proof' arguments had been raised and failed (for example, *R (Hirst) v Parole Board* [2002] EWHC 1592 (Admin), see January 2003 *Legal Action* 12), during the extension period of an extended sentence the default position was liberty. This meant that for CJA s44A to be compatible with article 5 it had to be read down, in accordance with Human Rights Act (HRA) 1998 s3, so that the board had to be positively satisfied that further detention was necessary for public protection before confirming recall.

On the fourth issue, the judge held that neither article 5 nor the general requirements of fairness would prevent the board from considering hearsay evidence, although there would be occasions where fairness would require an offender to be able to challenge crucial evidence by cross-examination. On the facts of this case, he did not consider that the board had taken material into account improperly, even though it consisted of hostel records that were technically hearsay.

The Home Secretary has appealed against the judge's findings on the first and third issues, and the prisoner has done the same on the decision relating to the fourth issue. The Court of Appeal will be considering the case in October 2003.

Licence conditions

In two recent cases, the courts have considered the extent to which an offender's knowledge can affect a sentence's administration during the period on licence in the community.

■ **R (S) v Secretary of State for the Home Department**
[2003] EWCA Civ 426
This case has confirmed that when a licence is revoked, an offender is unlawfully at large whether or not s/he is aware of the revocation (see January 2003 *Legal Action* 12). Time spent unlawfully at large, within the meaning of Prison Act 1952 s49(2), is not taken into account in calculating release dates once an offender returns to custody.

■ **R (Rodgers) v Governor of HMP Brixton and another**
[2003] All ER (D) 156 (Mar)
In this case, by contrast, the licence given to the prisoner on release specified wrongly the date the licence conditions were due to expire. He was recalled to prison on the basis that he had breached the requirements of supervision after that date, but during the licence period as calculated properly. The court allowed an application for habeas corpus on the basis that the Home Secretary was not entitled to recall an offender during a period after which s/he had been told that supervision had ceased. It appears that this case was decided on the basis that, although the licence period was statutorily defined, the requirement of actual supervision derived from the licence as given to the prisoner (and so is different from the anomalous case of *R v Governor of HMP Pentonville ex p Lynn* 7 December 1999, unreported, HC, where the court held that a legitimate expectation could entitle a prisoner to an earlier release date than that authorised by statute).

■ **R (Uttley) v Secretary of State for the Home Department**
[2003] EWHC 950 Admin
The CJA replaced a parole system where long-term prisoners were released unconditionally at the two-thirds point of the sentence, with the current system where automatic release at the same point is on licence. The Act applied to all those sentenced after it came into force in October 1992, regardless of the date of commission of the offence.

A prisoner challenged this aspect of the legislation on the basis that it breached article 7 of the convention (that prohibits the imposition of a heavier criminal penalty at the time of sentencing than that which existed at the time of the offence). The court, in rejecting the claim, held that the imposition of a licence did not constitute a criminal penalty as its purpose was preventative not punitive, and there was therefore no breach of article 7.

PRISON DISCIPLINE

Following the ECtHR's decision in *Ezeh and Connors v UK* App Nos 39665/98 and 40086/98, 15 July 2002 (see January 2003 *Legal Action* 12), the Prison Service remitted all additional days given as punishment at prison disciplinary hearings since the coming into force of the HRA (2 October 2000). A challenge to the refusal to remit days imposed before that date failed at first instance (see January 2003 *Legal Action* 13). The Court of Appeal in **Rogers v Secretary of State for the Home Department** [2002] EWCA Civ 1944, has refused permission to appeal. The court accepted the argument that the claimant was seeking to circumvent the effect of *R v Lambert* [2001] 3 WLR 206, which decided that the HRA's provisions were not generally retrospective. The prisoner's only remedy is an application to the ECtHR, the Grand Chamber of which has now heard argument in *Ezeh and Connors v UK*, and hopefully will give its decision shortly.

PRISON CONDITIONS

Medical care

While the ECtHR has not found that prison conditions in England per se breach article 3 of the convention (the prohibition on inhuman and degrading treatment), it has made such findings in relation to the treatment of, or lack of proper facilities for, vulnerable groups such as those with mental health problems or disabilities (see *Keenan v UK* App No 27229/95, 3 April 2001 and *Price v UK* App No 33394/96, 10 July 2001). This approach is evident again in the next case.

■ **McGlinchey v UK**
App No 50390/99, 29 April 2003
The applicants were relatives of a woman who died following inadequate care in prison. She was a heroin addict whose nutritional state and general health were not good on detention, and who suffered serious weight loss and dehydration in prison prior to her admission to hospital and subsequent death. This was the result of a week of largely uncontrolled vomiting and an inability to eat or hold down fluids. This situation, in addition to causing her distress and suffering, obviously posed very serious risks to her health.

The court noted the failure of the prison authorities to provide an accurate means of establishing weight loss, and that there was a gap in the monitoring of her condition by a doctor over a weekend when there was a further, significant drop in weight. There was also a failure by the prison to take effective steps to treat her condition, such as by admission to hospital to ensure the intake of medication and fluids intravenously, or to obtain more expert assistance in controlling the vomiting. The court therefore found a breach of article 3. Article 13 (the right to an effective remedy) was also breached as there was (the facts arose before the coming into force of the HRA) no domestic right to compensation for treatment that caused neither physical nor psychological injury. The court awarded €11,500 to the deceased's estate as just satisfaction under article 41

Mother and Baby Units

The fact that the relevant Prison Service Order (PSO) governing Mother and Baby Units (MBUs) contains detailed procedures for admission, but none for exclusion was the subject of criticism by the court in a recent case.

■ **R (CD and AD) v Secretary of State for the Home Department**
[2003] EWHC 155 Admin
In particular, the mother in this case was not given a proper opportunity to respond to allega-

tions against her, and the prison authorities otherwise failed to take into account the best interests of the child. In considering the latter point, the judge stated that sometimes the authorities would have to obtain expert reports, including from social services, before coming to a view. The Prison Service's decision in this case was both unfair procedurally and disproportionate, in that it was not clear that the decision-maker had considered properly whether the legitimate aim of maintaining order in MBUs could be achieved by means short of exclusion. The judge also expressed a hope that the Prison Service would devise a procedure to deal with exclusion from MBUs promptly.

Smoking in cells

■ **R (Ntow) v Secretary of State for the Home Department**
[2003] EWHC 148 Admin
The issue of non-smoking prisoners being forced to share a cell with smokers was considered in this renewed application for judicial review of the prison authorities' decision to place the claimant, an asthma sufferer, in a cell with a smoker. Pitchford J had previously refused permission, having accepted an undertaking from the governor of HMP Wandsworth that the claimant would not be compelled to share a cell with a prisoner who smoked, or to remain in a smoke-filled room. However, the claimant renewed the application, complaining that he had been forced to stay in a smoke-filled cell with a heavy smoker for several days after the undertaking was given.

Henriques J noted that, due to the large amount of prisoner movements and the need for wing spaces to be used to capacity, it is often difficult for staff to accommodate and comply with instructions that a claimant should not be placed in a cell with a smoker. On the other hand, an undertaking given to the High Court was a solemn matter, and it was the governor's responsibility to ensure that it was honoured. Henriques J felt that, if an empty undertaken had been given to the claimant, there was an argument to be canvassed concerning his application. The oral application was adjourned for two weeks. If it proved impossible to honour the undertaking during that time, the court would wish to know why it was given in the first place. It was observed that, on a preliminary consideration of the matter, a person suffering with asthma and a chest condition ought not to be required to share a cell with a heavy smoker, and this was a matter that may be discussed at greater length, if necessary.

Transfers

■ **R (Gilbert) v Secretary of State for the Home Department**
[2002] EWHC 2832 Admin
The prisoner challenged the Home Secretary's refusal to grant him a temporary transfer from the Close Supervision Centre (CSC) at HMP Woodhill to HMP Garth for accumulated visits with his family. The claimant argued that he needed to be transferred to a prison closer to his family due to the medical difficulties suffered by his parents and brother, which prevented them from travelling to visit him at HMP Woodhill. His request for a transfer was refused on the basis that HMP Garth did not meet the levels of security and supervision he required.

Gibbs J rejected the argument that the decision not to transfer the claimant to HMP Garth was erroneous on the basis that the Home Secretary had not consulted the governor of HMP Garth, as required by Standing Order 5, before reaching that decision. Instead, he accepted that the CSC authorities had considered the claimant's transfer request properly. He went on to consider arguments put forward under article 8 of the convention (right to respect for private and family life). He accepted that article 8 was applicable and engaged in the claimant's case. However, he did not accept that the refusal to transfer the claimant was disproportionate or unlawful given the particular circumstances of the case.

In reaching this conclusion, Gibbs J applied the proportionality test set out in the House of Lords decision in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. Applying this test, he noted that the CSC regime was tailored specifically to the claimant's needs, and that equivalent facilities would not be available at HMP Garth. Furthermore, he noted that CSC staff continued to monitor the claimant's needs and progress so that he could be transferred to a suitable prison for accumulated visits, when appropriate.

High security cells

■ **Van der Ven v The Netherlands**
App No 50901/99,
4 February 2003
The ECtHR considered when high security conditions will be found to breach article 3 (prohibition on inhuman and degrading treatment) as the applicant alleged that the detention regime to which he was subjected in a maximum security prison in the Netherlands (an Extra Beveiligde Inrichting (EBI) unit) infringed his rights under articles 3 and 8. In particular, the applicant complained that:
■ visits took place behind a glass partition once a month, during which physical contact was limited to a handshake;
■ telephone calls were limited to two ten-minute calls a week;
■ he was allowed only limited contact with other prisoners and staff, ie, he was allowed to associate with no more than three prisoners at a time, there was no out of cell work or education, and staff were separated from prisoners by armoured glass panels; and
■ systematic strip searches were in force, and he had been subject to intimate searches on a weekly basis, and often more frequently, for three and a half years.
In support of his arguments, he referred to a report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which concluded that prisoners held in the EBI units were subject to a very impoverished regime and suffered harmful psychological consequences.

In considering the applicant's case, the ECtHR observed that detention in a high security prison facility does not in itself raise an issue under article 3. However, article 3 does require that high security prisons detain prisoners in conditions that are compatible with their human dignity, and which do not subject such prisoners to distress or hardship of an intensity exceeding the levels inherent to detention.

The ECtHR found that the situation in the EBI units gave cause for concern especially for long-term prisoners and those subject to routine strip searches. The court was struck by the fact that the applicant was submitted to a weekly strip search, in addition to all the other strict security measures in the EBI. The ECtHR held that the systematic strip searching of the applicant required more justification than the government had provided and that article 3 had been breached. In reaching this conclusion, the court noted that psychological reports were available to the authorities demonstrating that the applicant was experiencing difficulties coping with the regime. Furthermore, it noted that no unauthorised items had been found during strip searches.

Regarding the alleged violation of article 8, the court accepted the government's argument that the restrictions imposed were inherent to the applicant's detention and necessary for the prevention of crime or disorder. The court noted that, in the past, it had been recognised that some measure of control over prisoners' contact with the outside world is called for and is not, of itself, incompatible with the convention: *Kalashnikov v Russia* App No 47095/99, 15 July 2002 (see January 2003 *Legal Action* 13).

Legal visits

■ **R (Canaan) v Governor of HMP Full Sutton and Secretary of State for the Home Department**

[2003] EWHC 98 Admin

A category A prisoner challenged a policy in a high security prison which required prisoners who wanted to hand out or receive privileged documents on legal visits to obtain prior authorisation no later than the day before. If documents were to be handed out they would be screened for illicit items and sealed in the prisoner's presence, and if documents were to be received prior authorisation would ensure that procedures were in place for screening the material entering the prison at the time of the relevant visit. The policy allowed for legal documents to be handed in or out without prior authorisation in exceptional circumstances.

The court held that such a policy was not a disproportionate interference with a prisoner's fundamental right to privileged communication with his/her lawyer in light of the security concerns involved in running a high security prison advanced by the Prison Service. The judge had concerns about a prisoner needing to show 'exceptional circumstances' to get approval on the day of the visit, but felt that if the policy was put in writing and notified to prisoners then such a high threshold would probably be unnecessary in practical terms. It appears from the judgment that the judge was willing to accept submissions on behalf of the Prison Service that the policy to be construed was to be pieced together at the judicial review hearing from contradictory parts of notices produced by the prison, actual practice and statements contained in witness statements produced for the hearing. It is hard to understand how this approach accords with the principle of legality that allows the curtailment of fundamental rights only by clear and express words, and then only to the extent necessary to meet reasonably the ends which justify the curtailment.

Access to cash

■ **Duggan v Governor of Full Sutton Prison and another**

(2003) Times 25 March

Under Prison Rules 1999 SI No 728 r43(3), any cash sent in or earned by a prisoner while in custody should be kept in an account under a governor's control. The court held that this duty created a relationship of debtor and creditor, and did not create a trust which required a governor to invest the money in an interest bearing account before its return a prisoner. There was no breach of article 1 of Protocol 1 of the convention as the public interest justified a rule preventing unrestricted access to cash in prison so long as an account was credited with the equivalent amount. Furthermore, there was no breach of the convention in prisons that maintained a system of privileges which allowed prisoners to have access to different amounts of cash depending on whether they were on the basic, standard or enhanced level of privileges.

■ Hamish Arnott and Simon Creighton are solicitors at Bhatt Murphy solicitors and Nancy Collins is the solicitor at the Prisoners' Advice Service (PAS). The PAS is at Unit 210, Hatton Square, 16/16A Baldwin Gardens, London EC1N 7RJ. Tel: 020 7405 8090.

ASYLUM SUPPORT

Support for asylum-seekers update

Sue Willman continues her series of updates on welfare provision for asylum-seekers and other 'persons subject to immigration control' (PSIC), supplementing LAG's book *Support for asylum-seekers*. The previous update appeared in January 2003 *Legal Action* 16.

POLICY AND LEGISLATION

Nationality, Immigration and Asylum Act 2002

Explanatory notes to the Nationality, Immigration and Asylum Act (NIAA) 2002 have now been published: www.hmso.gov.uk/acts/en/2002en41.htm.

'Late asylum claims' (s55)

After NIAA s55 came into force on 8 January 2003, National Asylum Support Service (NASS) refused support to hundreds of asylum-seekers on the grounds that they had not applied for asylum 'as soon as reasonably practicable' after their arrival in the UK. Approximately 250 asylum-seekers applied for judicial review and were granted injunctions pending the lead case of *R (Q and others) v SSHD* (see May 2003 *Legal Action* 12 and 25). After the High Court found in favour of the six applicants in *Q*, s55 refusals were suspended pending the Court of Appeal's judgment (see below). NASS has changed its policy and procedures following the Court of Appeal's decision and is now refusing only a limited number of asylum-seekers on s55 grounds. NASS Policy Bulletin 75, version 3, reflects the court's decision. Note that NIAA s18 now amends the definition of 'asylum-seeker' to a person who has applied for asylum at a 'designated place'.

Failure to co-operate with enquiries (s57)

NASS may also rely on NIAA s57 to refuse an application for support if it is not satisfied that an asylum-seeker has provided complete or accurate information or co-operated with enquiries. The Asylum Support (Amendment) (No 3) Regulations 2002 SI No 3110 came into force on 8 January 2003, amending the Asylum Support Regulations 2000 SI No 704 (AS Regs). They also amend the NASS application form so that it includes new questions about an applicant's route to the UK and method of entry.

PSIC ineligible for community care help (s54 and Sch 3)

From 8 January 2003, local authorities' powers to provide assistance under Children Act (CA) 1989 s17, and various community care provisions, were restricted in the case of:

- European Economic Area (EEA) nationals;
- non-European refugees;
- asylum-seekers unlawfully present in the UK; and
- failed asylum-seekers who refuse to co-operate with removal directions.

At the same time, they acquired new powers to provide temporary accommodation and return travel with the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 SI No 3078. These regulations empower local authorities to make travel arrangements for EEA nationals and refugees to return to their European country of origin. They introduce a new power to provide temporary accommodation to the family of a dependent child in the above two categories and a person who is unlawfully in the UK, provided s/he has not refused to co-operate with removal directions.

The Home Office has published statutory guidance[1] to local authorities and housing authorities entitled 'Nationality, Immigration and Asylum Act 2002 Section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002'. The guidance describes how local authorities should approach decisions about when the schedule

applies. New NASS Policy Bulletins provide non-statutory guidance to assist its caseworkers in interpreting Schedule 3: Policy Bulletin 76 – 'Asylum support for asylum-seekers and dependants who are nationals of a European Economic Area or who have refugee status abroad' and Policy Bulletin 77 – 'Failure to comply with removal directions'.

Other NIAA developments

Induction centres (Part 4)

The Home Office has been forced to abandon plans to open induction centres in Sittingbourne and in Saltdean, Brighton. It announced that it is still committed to a national network of centres, where asylum-seekers may be required to live for up to 14 days under NIAA s70. However, there is currently only one centre in operation – in Dover.

Accommodation centres (Part 2)

Six proposed sites for accommodation centres have now been ruled out. Planning inquiries are complete into the remaining two proposed accommodation centres at the Defence Storage & Distribution Centre in Bicester, and at RAF Newton and recommendations have been made to the Office of the Deputy Prime Minister. A new site has been identified at HMS Daedalus in Gosport, piloting a smaller model, for up to 400 single men.

Asylum and immigration issues (Part 5)

The Home Office has begun to implement NIAA Part 5 and various policy and procedural changes. Changes which advisers should be aware of include:

- The policy of granting exceptional leave to remain to asylum-seekers not qualifying for refugee status ended on 1 April 2003. New categories of leave to stay in the UK known as 'humanitarian protection' and 'discretionary leave' will be granted under the powers in the Immigration Act 1971 which allow the grant of leave outside the Immigration Rules.[2]
- Judicial review of immigration appeal tribunal decisions is being replaced by statutory review with a 14-day time limit (s101).
- Time limits and procedures for immigration and asylum appeals are amended by the Immigration and Asylum Appeals (Procedure) Rules 2003 SI No 652.

Tax credits

Child tax credits and working tax credits were introduced on 6 April by the Tax Credits Act 2002 (see April 2003 *Legal Action* 38 and May 2003 *Legal Action* 29. The Tax Credits (Immigration) Regulations 2003 SI No 653, which came into force at the same time, list the PSIC who are entitled to claim tax credits. A member of a couple (who is entitled to claim tax credits) may now receive tax credits for the whole household even if his/her partner is a PSIC (reg 3(2)). Regulation 5 provides for transitional protection for asylum-seekers transferring from income support to child tax credit. The regulations also provide for an asylum-seeker who is recognised as a refugee to claim tax credit backdated to the date when s/he claimed asylum. The claim must be made within three months of receiving notice of the Home Office's decision.

ASA and NASS statistics

The Asylum Support Adjudicators (ASA) heard 3,813 appeals in the year ending 31 March 2003, a 78 per cent increase. Of these, 1,373 appeals were withdrawn by NASS and 894 were invalid; 34 per cent of appeals determined were allowed and 35 per cent were remitted to NASS for reconsideration.

A total of 91,880 asylum-seekers and dependants were supported by NASS at the end of December 2002, according to the latest Home Office asylum statistics. Of these, 37,810 were receiving subsistence-only support, the rest were in NASS accommodation. In the final quarter of 2002, over 50 per cent of new NASS applications were from nationals of Iraq, Zimbabwe, Somalia and Afghanistan respectively.

NASS inquiries

The Home Office has commissioned an independent review of the organisation, management and staffing within NASS. The recommendations are due by the end of May 2003.[3]

The Home Office has announced the results of an independent inquiry into Landmark Liverpool Ltd, an accommodation provider which used two dilapidated Liverpool tower blocks to house asylum-seekers on behalf of NASS. NASS has received many complaints about overcrowding and the poor quality of the accommodation, about the failure of Landmark to take any remedial action, as well as allegations of harassment of asylum-seekers who complained. The inquiry found that many of the allegations could not be proven because asylum-seekers in Landmark accommodation were reluctant to provide evidence. It found that when asylum-seekers were eventually moved out of the tower blocks, neither NASS nor Landmark paid sufficient attention to their needs or rights. Dispersal to Landmark should be limited until rectification notices were complied with. The more general recommendations include revising performance standards and making evidence of social housing management skills compulsory for companies seeking a contract with NASS. There should be a new complaints procedure, protecting the asylum-seeker's confidentiality. The Home Office has accepted all the recommendations.

Hard cases support

Under Immigration and Asylum Act (IAA) 1999 s4, failed childless asylum-seekers may be eligible for support if they have a meritorious judicial review or have signed an undertaking agreeing to leave the UK. It was incorrectly reported in the previous update that NASS no longer requires undertakings. Although NASS does not require an undertaking to be signed by asylum-seekers from Zimbabwe or Iraqi Kurds, it still requires one in other cases. This may be challengeable by judicial review. The NASS 'hard cases' support section can be contacted on 020 8633 0212.

Resources

NASS has an on-line directory with phone and fax contact details for all of its departments at: www.ind.homeoffice.gov.uk/default.asp?Pageid=2762. The long-awaited index of ASA decisions is now available at: www.asylum-support-adjudicators.org.uk/decisions/index.shtml.

Community care guidance

The Department of Health has issued guidance on the correct approach to assessing adult asylum-seekers with community care needs. The guidance is contained in 'Fair access to care services – Guidance on eligibility criteria for adult social care', which forms part of Local Authority Circular LAC(2002)13.

CASE-LAW

Benefits

Meaning of 'on arrival'

Some asylum-seekers with outstanding asylum claims are entitled to income support because they claimed asylum 'on arrival' in the UK before 3 April 2000 within the meaning of Income Support (General) Regulations 1987 SI No 1967 reg 70(3A).

In **CIS/2702/2000**,[4] a Somali asylum-seeker passed through immigration control in Gatwick airport without claiming asylum and was refused income support on the ground that she had not claimed asylum 'on arrival'. She argued she was under the control of an agent who would not allow her to claim asylum at that stage. She left the airport to go to her sister's and claimed asylum at Croydon on the next working day. The commissioner rejected her appeal. He decided she had not

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applied for asylum 'on arrival' because she had not presented herself to an immigration officer before she left the port of arrival and so failed the 'perimeter test'. The commissioner has granted leave to appeal to the Court of Appeal.

Asylum and interim support under IAA s95

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

[2003] EWCA Civ 364[5]

In a politically sensitive judgment, the Court of Appeal dismissed the Home Secretary's appeal against the High Court judgment. Collins J had decided that the Home Secretary acted unlawfully in rejecting six claims for NASS support, primarily on the ground that the procedure followed was unfair. JCWI and Liberty were permitted by the Court of Appeal to make a joint oral and written intervention.

The correct test

The court decided that the test under NIAA s55(1) was, 'On the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity of claiming asylum and to the asylum-seeker's personal circumstances, could the asylum-seeker reasonably have been expected to claim asylum earlier than he or she did?'.

Articles 3, 8 and 6

If this test is not met, s55(5) provides that an asylum-seeker must satisfy NASS that support is necessary to avoid a breach of the European Convention on Human Rights ('the convention'). The court considered that a refusal to provide support can constitute 'treatment' under article 3, but there was a high threshold for 'inhuman and degrading' treatment. This would not be met unless it is clear that charitable support has not been provided and an individual is incapable of fending for him/herself such that his/her condition verges on the degree of severity described in the Diane Pretty case (*Pretty v UK* (2002) 35 EHRR 1):

Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 …

The court held that article 8 might be engaged but added little to article 3 because homelessness or destitution alone would not be sufficient to show a breach.

It was decided that, as long as NASS now implements an improved procedure for assessing claims, the availability of judicial review to challenge a decision would avoid a breach of article 6. It was not necessary to have a right of appeal to an independent fact-finding tribunal such as the ASA.

The procedure

The court found the main reasons why the decision-making procedure was unfair were that:

- the purpose of the interview was not clearly explained at the outset;
- the interviewer and the decision-maker were not the same person;
- the guidance provided to the decision-maker was incorrect and the asylum-seeker's mental and physical state should have been taken into account, as well as the influence of any agent; and
- adverse findings on credibility were not put to the applicant to allow him/her an opportunity to explain.

ASA decisions

■ **R (Secretary of State for the Home Department) v Chief Asylum Support Adjudicator**

[2003] EWHC 269 Admin

NASS discovered after six months of providing an asylum-seeker with support that she should have been receiving interim support from the local authority instead. It wrote to her withdrawing support.

The adjudicator decided that NASS could not withdraw support from an asylum-seeker whom it had been supporting in error, but should have discontinued it under AS Regs reg 20. The High Court overturned the adjudicator's decision and decided that support could be withdrawn where an asylum-seeker had never been entitled to it.

Dispersal

ASA 01/06/0368 concerned an asylum-seeker who was divorced from her husband and who refused to travel outside London, where he lived. He had arrived in the UK before the rest of the family and been granted indefinite leave. She argued that dispersal would prevent her children's daily contact with their father and so interfere with their article 8 rights to respect for family life. The ASA remitted the appeal to NASS for consideration of whether the father could afford to maintain contact, stating:

provided that the father is able to visit the children at weekends, during school holidays, and bank holidays, there is no interference with the family life of the appellant or his children. If however, his earnings are so limited that he would effectively be prevented from visiting his children then there may be an interference under Article 8 …

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

[2003] EWHC 97 Admin, 21 January 2003

A 22-year-old Jamaican national, who had lived in London since she was 10, had made an application to the Home Office that to remove her from the UK would interfere with her rights under article 3 of the convention. She then applied to NASS for support for herself and her baby, asking it to pay the rent on her secure council tenancy. When NASS decided to accommodate her in another part of the UK, away from family and friends she applied for a judicial review. The High Court quashed NASS's decision.

Collins J found that article 8 was engaged because the adverse effect of dispersal on Ms Blackwood's health, increasing her dependence on social and mental health care services, would directly affect her psychological well-being and that of her child. Respect for private and family life and home included physical and psychological integrity.

Interim support

Amounts of interim support

■ **R (Satu) v Hackney LBC**

[2002] EWCA Civ 1843[6]

In the High Court, the applicant had unsuccessfully challenged the level of interim support paid to her, which is well below the NASS rate. She appealed and argued that the extension of the interim scheme until 2004 was outside the powers of the IAA. The Court of Appeal rejected her arguments but she is applying for permission to appeal to the House of Lords.

Payment of interim support in arrears

■ **R (Szoma) v Southwark LBC**

[2003] EWHC 356 Admin, [2003] All ER (D) 230 (Feb)[7]

A policy decision by a London council to start paying interim support to asylum-seekers two weeks in arrears was upheld by the High Court. However, Wall J allowed the claimant's application in part, deciding that the council's failure to compensate Mrs Szoma for the benefit she lost due to the change was unlawful.

Housing issues

Homelessness and local connection

■ **Al-Ameri v Kensington & Chelsea RLBC; Osmani v Harrow LBC**

[2003] EWCA Civ 235[8]

An asylum-seeker living in NASS accommodation in a dispersal area does not acquire a local connection there for the purposes of the homelessness provisions of the Housing Act 1996. The Court of Appeal has allowed these appeals by former asylum-seekers against the county courts' decisions that they acquired a local connection in the dispersal areas.

The court held that residence

in NASS accommodation is never to be regarded as residence of an applicant's own choice and so could not amount to a local connection, following the test laid down in *Mohamed v Hammersmith & Fulham LBC* [2001] 3 WLR 1339, HL. It is understood that Harrow is appealing to the House of Lords.

Community care

Permission to apply for judicial review has been granted in a number of applications challenging decisions by local authorities which have relied on NIAA s54 and Sch 3 to refuse CA or community support.

■ **R (K) v Lambeth LBC**
[2003] EWHC 871 (Admin)[9]
K is the separated spouse of an EEA national who was refused help under CA s17. She argued that there was an error in statutory construction, that the decision interfered with her rights as an EEA national and that to refuse her support would breach her rights under articles 3, 8 and 14 of the convention. Silber J dismissed her application on 16 April, granting leave to appeal to the Court of Appeal, expedited but limited to the Human Rights Act (HRA) 1998 grounds.

Human Rights Act

Damages claims

■ **R (Mambakasa) v Secretary of State for the Home Department**
[2003] EWHC 319 (Admin)[10]
An Angolan refugee claimed damages under HRA s8 arguing that the Home Office's delay in processing his application for family reunion with his mother and three children interfered with his rights under article 8. Although the High Court decided there had been no article 8 breach, the judgment includes obiter guidance on the approach to assessing damages under article 8. Richards J suggested that payments made under the Home Secretary's ex gratia scheme, and those recorded in the annual reports of the Parliamentary Ombudsman provide a useful basis of comparison. Leave to appeal to the Court of Appeal has been granted.

■ **R (Gezer) v Secretary of State for the Home Department**
[2003] EWHC 860 Admin
Mehmet Gezer, a Turkish Kurdish asylum-seeker had been dispersed by NASS to a Glasgow housing estate where he and his family experienced racial violence including a knife attack by a group of men. Their son was bullied at school and the harassment was so bad that they became afraid to go out and eventually returned to London where their support was initially cut off. Moses J regretfully rejected the damages claim on the ground that the treatment the family was subjected to was not treatment by the government or its agents, and so the decision to disperse could not constitute inhuman and degrading treatment within article 3.

■ Sue Willman is co-author, with Stephen Knafler and Stephen Pierce, of *Support for asylum-seekers, a guide to legal and welfare rights*, LAG, 2001, £30. Readers are encouraged to send in news of recent developments to sue.willman@hflaw.org.uk or Hammersmith & Fulham Community Law Centre, 142–144 King St, London W6 0QU.

1 See: www.asylumsupport.info/withholdingandwithdrawing.htm.
2 See HB/CTB Circular A11/2003 for guidance on the effect of the changes on housing/council tax benefit.
3 *Hansard* HC Written Statements Col 90, 7 March 2003.
4 North Islington Law Centre, Ranjiv Khubber, barrister.
5 See www.courtservice.gov.uk/judgmentsfiles/j1638/q_vs_home.htm.
6 Ranjiv Khubber, barrister.
7 Diane Astin, solicitor, McMillen, Hamilton, McCarthy solicitors.
8 Lewis Nedas, solicitor, Shelter and Jan Luba QC and Stephen Reeder, barristers.
9 JCWI and Ranjiv Khubber, barrister.
10 Sonal Ghelani, Hackney Law Centre and Duran Seddon, barrister.

HEALTH

National Health Service reform and accountability



In the latest of their occasional series on health care law (see June 2000 *Legal Action* 17, September 2000 *Legal Action* 25, March 2001 *Legal Action* 21 and September 2001 *Legal Action* 18) **Jean Gould**, **John Halford** and **Jon Woolf** consider a number of recent reforms which affect the structure of the National Health Service (NHS), delivery of mixed packages of health and social care and regulation of the health care professions. A common aim of all these changes is greater accountability to patients and to the public, and this article assesses to what extent this is likely to be achieved.

THE NEW NHS

The white paper, *The new NHS*, was published in 1997, and has led to considerable structural changes, introduced through a series of major pieces of legislation, ie:

■ the Health Act (HA) 1999;
■ the Health and Social Care Act (HSCA) 2001; and
■ the NHS Reform and Health Care Professionals Act (NHS RHCPA) 2002.

The NHS Act (NHSA) 1977 remains the main source of health powers and duties, but has been amended significantly by the new Acts. In addition to the more publicised aspects of health reforms, targets for waiting lists, for reduction of deaths from cancer and coronary diseases and so on, two key aims are evident.

The first is the reorganisation of the NHS to reduce the purchaser/provider split characterised by the emergence of NHS trusts and GP fundholders in the early 1990s as a result of the NHS and Community Care Act (NHSCCA) 1990. The second is an attempt to increase openness and accountability within the NHS after a number of inquiries, especially that following the horrifying deaths of child heart patients in Bristol.[1] Below the authors describe the character of these changes and assess their potential impact on patients' legal rights.

Summary of the new structure

The responsibilities of the eight regional offices of the NHS executive have been passed to regional directors of health and social care for London, the South, the North, and the Midlands and Eastern. They will oversee the development of both health and social care in their regions. Most old style health authorities have been disbanded and there are now 28 strategic health authorities (SHAs), a far smaller number covering larger areas. As their name implies, they have no direct commissioning role, but are intended to ensure that government policy is implemented in their areas.

The commissioning and some provision of health care, particularly primary care, now falls to primary care trusts (PCTs). The functions of both PCTs and SHAs are set out in the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002 SI No 2375. The main responsibilities of the Secretary of State for Health for the delivery of the NHS are exercisable by PCTs, but a few, such as giving directions to trusts, approval and termination of pilot schemes, etc are reserved to the SHA (see SI No 2375 Schs 1–4 for further details).

The other main providers of publicly funded health care are the NHS trusts, covering hospital trusts, ambulance trusts, mental health trusts and so on. NHS trust functions are set out in the

NHSCCA. The requirement for consultation with community health councils (CHCs) on their establishment and dissolution is set out in the National Health Service Trusts (Consultation on Establishment and Dissolution) Regulations 1996 SI No 653. Concerns have been expressed that these arrangements are not to be replicated when CHCs are abolished.

Additionally, HSCA Part III enables a PCT or NHS trust to be designated as a care trust. Such a trust can be established by a joint application by a NHS body and local authority to the secretary of state, or in Wales to the Welsh Assembly. Prior to making such an application, the relevant partners are required to consult jointly 'such persons as appear to them to be affected by the proposed application' (see Care Trusts (Applications and Consultation Regulations 2001 SI No 3788 reg 4). A care trust will carry out the health-related functions of a local authority as well as those of a PCT or NHS trust (see NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 SI No 617 (as amended) regs 5 and 6).

At the time of writing, only four care trusts exist, but potentially they could result in a considerable shift of power from local authorities to health trusts, as they would effectively be responsible for the delivery of most community care services. Partnership arrangements can also be imposed by the secretary of state or the Welsh Assembly where either a social services or health body is a 'failing body', ie, one which is not exercising any of its functions adequately (see HSCA s46(1)).

Patient and public involvement

Community health councils in England and the Association of Community Health Councils in England and Wales are to be abolished by NHSRHCPA s22. However, CHCs in Wales will be retained. The abolition will take effect in relation to individual CHCs from 1 October 2003. The plan to abolish CHCs was proposed initially in the Health and Social Care Bill, in 2000, but was opposed successfully. Subsequent lobbying has led to more extensive measures being put in place to provide channels for public participation and accountability of health institutions to those they serve. These are described in the following sections.

Local authority overview and scrutiny committees

The Local Government Act (LGA) 2000 established overview and scrutiny committees (OSCs) to review and hold to account the actions of executive cabinet committees in the new local government structure. Their duties are extended to scrutinising health functions by HSCA s7. Broadly, an OSC's responsibilities are to:

- Review and scrutinise any matter relating to the planning, provision and operation of health services in the area of the relevant local authority (joint, cross-authority OSCs can also be set up). In doing so, an OSC must have regard to guidance issued by the secretary of state under LGA s38, invite interested parties to comment on the matter under scrutiny, and take account of relevant information available, particularly that provided by a local patients' forum (see below).
- Respond to proposals on which a NHS body is required to consult, namely, a 'substantial development' or 'substantial variation' in health provision. This is subject to exceptions set out in Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 SI No 3048. Generally, this obligation mirrors the old duty to consult with CHCs.

Perhaps the most problematic aspect of OSCs is that, unlike CHCs, they will inevitably be associated with the local authorities of which they are a part. Given that local authorities, PCTs, NHS trusts and SHAs are expected to work in partnership to deliver a range of services, it seems likely that OSCs will be at pains to avoid an adversarial relationship developing with any particular NHS body. This will not always be in patients' interests.

Most practitioners in this field will have dealt with queries about the long-running disputes between local authorities and health authorities concerning responsibility for meeting the needs of individuals, especially on their discharge from hospital. Such disputes are often not made public and it will usually fall to an affected individual or his/her family to take action to resolve them. Pressure for scrutiny of the actions of health bodies of a more independent nature than the OSCs can offer led to the establishment of the Commission for Patient and Public Involvement in Health ('the commission') and patients' forums.

Commission for Patient and Public Involvement in Health

The commission is established under NHSRHCPA s20. It has broad functions designed to increase the accountability of NHS bodies to their patients and to act as a watchdog. Under the Commission for Patient and Public Involvement in Health (Functions) Regulations ('Commission Regs') 2002 SI No 3007, these functions include:

- advising the secretary of state, Commission for Health Improvement (CHI), National Care Standards Commission and the National Patient Safety Agency about arrangements for public involvement in, and consultation on, health matters;
- advising the above bodies, and the Health Service Commissioner and NHS Litigation Authority about arrangements for the provision in England of independent advocacy services, and the views on these matters expressed by patients' forums and voluntary sector organisations that it regards as representing the interests of patients and carers;
- staffing, advising and assisting, and facilitating the co-ordination of activities of patients' forums;
- advising and assisting providers of independent advocacy services in England; and
- setting and monitoring the implementation of quality standards for patients' forums and independent advocacy services.

The commission has a potentially powerful and wide-ranging remit. However, the extent to which the democratic deficit, which the government has recognised as a problem in the NHS, will be better addressed by this new structure will depend on the commission's responsiveness to local concerns expressed through voluntary organisations, patients' forums and OSCs. Its independence from central government is likely to be an important factor.

Unfortunately, the regulations governing its functions require that its annual work programme is subject to approval by the secretary of state, and may be varied only with his/her agreement or as s/he may determine (Commission Regs reg 2). This will inevitably place significant limits on its independence, and thus its effectiveness as a body capable of representing the interests of the public to the government. The commission is a public body for the purposes of the Freedom of Information Act (FIA) 2000 (see FIA Sch 1). It will also be subject to judicial review and the Human Rights Act (HRA) 1998, as will patients' forums.

Patients' forums

Broadly speaking, these bodies will replace local CHCs in England, although their powers and responsibilities are both broader, particularly in relation to proactive development of greater community involvement along with inspection and monitoring of primary care, and narrower in the sense that they are not statutory consultees in the way that CHCs were. There will also be many more of them.[2]

At the time of writing, no regulations have been published concerning the detailed functions or composition of patients' forums. Section 15 of the NHSRHCPA provides for the establishment of such forums for every NHS trust and PCT in England, with members appointed by the commis-

sion. Further details will be in the regulations, but at least one person must be a member or representative of a voluntary organisation representing patients or carers. In the case of a PCT patients' forum, one member of the forum of each constituent hospital or other NHS trust must be included on the PCT forum. Additionally, any organisation identified by the commission as representing 'members of the public in matters relating to their health' must have at least one member on the forum.

The functions that are common to both levels of patients' forum include:

- Monitoring and reviewing the range and operation of trust services, and providing advice, making reports and recommendations to the trust on those services.
- Making available advice and information to patients and carers, obtaining their views about the range and operation of services, and in turn reporting those views to the trust.
- Referral of any relevant matters about which they are concerned to the relevant OSC or to the commission. Trust services include the performance of health-related functions of a local authority under partnership agreements (see above).

PCT patients' forums have additional functions, ie:

- providing independent advocacy services;
- providing advice and information about making complaints to patients and carers;
- representing the public's views to OSCs;
- facilitating consultation by promoting the involvement of members of the public in the PCT's area, and making available advice and information about such involvement; and
- monitoring how successfully all levels of health bodies achieve public involvement.

These significant powers are potentially supported by NHS RHCPA s17, which allows for the making of regulations to govern the entry and inspection of all NHS bodies by forums in order to carry out their functions. Thus, patients' forums have the potential to act as a powerful lobby for greater accountability in the NHS. However, the model adopted through these reforms is a top-down one with the secretary of state sanctioning the work programme of the commission, which in turn appoints members of the patients' forum. It remains to be seen whether this model will prove capable of turning the tide of NHS lack of accountability, and the isolation/victimisation of whistleblowers which is prevalent in the health service currently.

Quality control and clinical governance

The HA imposes a 'duty of quality' on both SHAs and NHS trusts. Specifically, under s18, they are to make arrangements for 'the purpose of monitoring and improving the quality of health care which it provides to individuals'. Like many of the target duties which reoccur throughout the legal framework of the NHS, this will be difficult to enforce through judicial review proceedings (see June 2000 *Legal Action* 17). However, the duty is linked to the establishment of the CHI. Its functions include carrying out reviews and investigations of health bodies. The NHSRHCPA has amended the HA to enable the CHI to carry out inspections and notify the secretary of state of 'unacceptable poor quality' or 'significant failings' and recommend the taking of 'special measures' (see HA ss20–23 and Sch 2 (as amended)).

The system broadly parallels the Social Service Inspectorate (SSI), and like it will also work with the Audit Commission. The government has said that there will eventually be a merged Commission for Healthcare Audit and Inspection. Like other regulatory bodies the CHI is, in theory at least, open to challenge by way of judicial review when deciding whether or not to investigate matters of concern and how its investigations are conducted.

Investigations and inspections in the health field raise obvious privacy issues. While, in general, individual patient information will not be subject to inspection where an individual is identifiable, disclosure of such confidential information is possible in circumstances where the CHI considers that there is serious risk to the health and safety of patients arising out of the issues under investigation, and subject to other provisos (see HA s23).

Having produced over 250 reports which are available on its website (www.chi.gov.uk), CHI has just published its first overview report, *Getting better? A report on the NHS*. It concludes that the NHS, as a whole, is getting better, but that 'the improvement in NHS services is not yet affecting frontline delivery of services on a large enough scale to impact on most members of the public'. It identifies, in particular, problems in the environment and standards of services for people with mental health problems. It also suggests that the concentration on short-term waiting targets and financial targets is diverting attention from improving the quality of care.

The work of another quango established by the HA – the National Institute for Clinical Excellence (NICE) – has already attracted controversy. The NICE is a specialist health authority and advises the NHS on the clinical and cost-effectiveness of treatment options and drugs. Its recommendations are not binding on health bodies. However, it is unlikely that treatment which NICE had considered but decided not to approve would be provided to patients. An argument that such treatment should be made available could only hope to succeed in wholly exceptional circumstances. Conversely, a patient seeking access to treatment that has been endorsed by the NICE has no enforceable right to it, though the endorsement will be a weighty, relevant consideration for the PCT or NHS trust taking the ultimate decision.

INQUIRIES, INQUESTS AND THE HUMAN RIGHTS ACT 1998

Notwithstanding CHI's establishment, the secretary of state retains his/her discretionary power to set up independent inquiries under NHSA ss2 and 84. Typically, these are used to ensure that matters of grave public concern, such as multiple instances of neglect or malpractice, receive independent scrutiny and that recommendations are made for change to avoid reoccurrence in future. A new development, however, is the use of the HRA to challenge decisions about the establishment of such inquiries and their conduct.

For example, in *R v Secretary of State for Health ex p Wagstaff* (2000) 56 BMLR 199, QBD, relatives of victims and the media succeeded in a challenge to the initial decision to hold the Harold Shipman inquiry in private. The court decided that there was a presumption in favour of holding a public hearing and that, in this case, the decision not to do so was irrational. Furthermore, the decision constituted unjustified government interference with the claimants' freedom of expression in contravention of article 10 of the European Convention on Human Rights ('the convention'). Interestingly, although the court did not go on to decide the lawfulness of the decision by Lord Laming not to make public funds available for the legal representation of the victims' families, it indicated obiter that, had it done so, the claim would have been allowed.

A similar argument fared less well in *R (Howard and Wright-Hogeland) v Secretary of State for Health* [2002] 3 WLR 788, in which the claimants challenged unsuccessfully decisions not to hold full public inquiries into extremely serious medical malpractice on the part of two doctors,

Clifford Ayling and Richard Neale. Concessions were made early on to allow victims and their families to attend throughout, and for the inquiries to be chaired by independent persons. However, the media were to be excluded from both. Scott Baker J commented 'The ambit of an inquiry is primarily a political question …' adding that, unlike inquiries mandated by parliament under Tribunals of Enquiry (Evidence) Act 1921 s2, there was no presumption in favour of an inquiry established by the secretary of state being held in public. As for article 10, the judge held that there would be nothing to prevent the claimants from sitting through the whole inquiry and passing on what they had heard to third parties. The concessions meant that their freedom to receive or impart information was not compromised. Article 10 did not create an enforceable right to require public authorities to make new means available for the dissemination of information.

The extent to which decisions about the scope of inquiries, in general, are constrained by the HRA is to be examined by the House of Lords later this year in *R (Amin) v Secretary of State for the Home Department* [2002] 4 All ER 336, which concerned the murder of a young Asian man by his racist cellmate. As in the Shipman case, the victim's family pressed for a full public inquiry, but relied primarily on article 2 of the convention. The Court of Appeal held that article 2 was engaged in the circumstances giving rise to an obligation to undertake an effective investigation into a death capable of identifying not only individual responsibility but, more importantly, defects in the system which had failed to safeguard life. However, the court considered it was met by a combination of an internal Prison Service inquiry and a Commission for Racial Equality investigation, neither of which would be in public nor allow for much participation by the victim's family. The linked case of *R (Middleton) v West Somerset Coroner* [2002] 4 All ER 336, considered the extent to which a coroner's inquest could amount to an effective investigation for the purposes of article 2, here in relation to a suicide in custody. Again, article 2 was found to be engaged. It followed that the coroner ought to have offered the jury the option of adding a 'neglect' rider to its verdict to flag up failures on the part of the authorities.

The potential impact of the House of Lords judgment in *Amin* and *Middleton* on health care cannot be overstated. Like those in custody, patients receiving care from the NHS are in a vulnerable position as a direct result of their relationship with a powerful arm of the state. When a patient dies in questionable circumstances, article 2 is likely to be triggered. In turn, the investigation of the death will need to be considerably more thorough and transparent than has traditionally been the case with coroners' inquests. Whether the coroners' system is itself capable of the necessary adaptations without fundamental legislative reform remains to be seen.[3] In parallel with the litigation, the government has been conducting its own review of the system, taking into account the findings of the Bristol, Alder Hey, and Shipman public inquiries (see:www.coronersreview.org.uk/background.shtm).

INTERNAL COMPLAINTS AND REVIEWS

The missing piece of *The New NHS* jigsaw in terms of accountability to patients is reform of the complaints procedure.[4] The existing procedure is described in detail in June 2000 *Legal Action* 17. There have been few changes since that article was published, despite the recommendations of a Department of Health (DoH) evaluation in 1991,[5] and an earlier study by the Public Law Project.[6] Indeed, if anything, the position is more muddled with new bodies such as PCTs yet to be integrated satisfactorily into the present system. Proposals for reform have been postponed pending review of arrangements for compensation for clinical negligence.[7]

There has, however, been change in the special review panel procedure now found in 'Continuing care: NHS and local council's responsibilities', HSC 2001/015. Its sole focus is disputes about eligibility for NHS continuing care or care packages combining both continuing health and social care. Panels are further confined to determining whether decisions are in accordance with local procedures, and that local criteria have been applied correctly. The legality of the criteria may not be questioned. The review procedure has four stages:

- The review is requested either by a patient, his/her family, or any carer.
- An attempt should be made to resolve the dispute informally, typically, by the officer designated to maintain the procedure.
- If this is unsuccessful, an 'independent' panel should usually be established except where a patient 'falls well outside the eligibility criteria' or a 'case is clearly not appropriate for the panel to consider'. A written explanation should be given when a panel is not established. Panels, the guidance explains, will consist of an independent chair, and representatives from a local PCT, the local authority and health authority (possibly now the affected PCT or SHA). The extent to which such a panel can be considered truly independent is questionable.
- The panel will make a non-binding recommendation after seeking relevant documentation, the views of key parties and independent clinical advice. It is not envisaged that patients, or family members of carers will have direct contact with the panel members.

The expectation is that a panel's recommendations will be followed. The outcome of a review, and reasons for the ultimate decision must be communicated in writing to all parties involved.

Review panels have not proved effective in addressing the problems which arise out of the application of eligibility criteria, perhaps unsurprisingly given their narrow remit. The Health Service Commissioner has recently produced a special report, *NHS funding for long term care*, in which she finds widespread failure to review local eligibility criteria in line with the *Coughlan* judgment,[8] a need to undertake this exercise immediately and to identify and offer compensation to individuals who have wrongly paid for care which should have been provided free (see April 2003 *Legal Action* 30).

COMPLAINTS TO THE PROFESSIONAL BODIES

On 1 April 2003, the Council for the Regulation of Health Care Professionals ('the council') assumes its full responsibilities under NHSRHCPA Part 2.[9] Broadly, the function of the council is to oversee the existing bodies which regulate the health professions, such as the General Medical Council (GMC). In recent years, such bodies have been criticised by patients who have pointed increasingly to the bodies' lack of independence, transparency and public accountability in their internal workings. The DoH's pre-legislative consultation document commented, in August 2001, that: 'As a result, a damaging perception has arisen that the existing arrangements have sometimes placed professional self-interest before the interests of patients'.[10] The Administrative Court, in a line of cases starting with *R (Toth) v General Medical Council (No 1)* [2000] 1 WLR 2209,[11] has confirmed that such perceptions are not unfounded. The new legislation is in the main a response to the Bristol Royal Infirmary inquiry report, *Learning from Bristol: the report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995*, which recommended an overarching regulatory body so that the 'fragmentation of responsibilities' that had arisen in the past could be avoided. The report also rec-

ommended that the council be independent of both the professions and government so that it could serve the public interest and that the public could be fully involved in regulating the health care professions.[12]

The regulatory bodies to be supervised by the council are the GMC, the General Dental Council, the General Optical Council, the General Osteopathic Council, the General Chiropractic Council, the Royal Pharmaceutical Society, the Nursing and Midwifery Council and the Health Professions Council.[13]

Each regulatory body must cooperate with the council which may make directions about a regulatory body's rules (s27). The council has power to investigate the performance of regulatory bodies (s26), and will consider complaints about the way in which such a body has exercised any of its functions. Complaints concerning individual health professionals should continue to be made initially to the relevant regulatory body, but the council has powers to refer disciplinary cases for appeal to the High Court where the final decision of the initial regulatory body should not have been made or is ' unduly lenient' (s29). The court may dismiss or allow the appeal, substitute its own decision for the quashed one, or remit the case back. The council must refer the case to the High Court within four weeks from the end of the period that a practitioner has to appeal the decision of his/her regulatory body.

It is hoped that supervision by the council of the regulatory bodies and its right of appeal will increase the independence, consistency and transparency of disciplinary decision-making. However, individual complainants may still have difficulty hurdling various screening barriers which prevent complaints coming before a regulatory body's professional conduct committee. It is settled law that practitioners can rely on the procedural protections contained in article 6 of the convention (the right to a fair hearing when civil rights and obligations are being determined), but the position of complainants is more complicated and precarious.[14] Complainants have difficulty in engaging article 6 on their own behalf because unlike practitioners they often have no right or obligation that is being determined by the regulatory body. However, when Lightman J considered the general principles behind the GMC's regulatory functions in *Toth (No 1)*, he strengthened the position of complainants and clarified the GMC's public law obligations in respect of screening complaints:

> *The general principles underlying the Act [the Medical Act 1983] and Rules are that (a) the public have an interest in the maintenance of standards and the investigation of complaints of serious professional misconduct against practitioners; (b) public confidence in the GMC and the medical profession requires, and complainants have a legitimate expectation, that such complaints (in the absence of some special and sufficient reason) will be publicly investigated by the PCC [Professional Conduct Committee]; and (c) justice should in such cases be seen to be done. This must be most particularly the case where the practitioner continues to be registered and to practise* (at p2289) (authors' emphasis).

It is submitted that such general principles apply to all those regulating health professionals, including the new council. These principles reinforce the recommendations of the Bristol Royal Infirmary inquiry.

Conclusion

The emerging pattern is one of increasing regulation of health care by various bodies established by legislation. Aggrieved patients and their supporters will find themselves directed towards the relevant body charged with scrutinising the relevant aspect of health care and provision. This raises two significant issues. The first is the practical problem of access to legal remedies for individuals. The plethora of regulatory bodies and the need to exhaust alternative remedies before applying for judicial review make it more likely that litigants will have to consider applying for such review of a regulator's decision rather than the determination or action of a health body responsible for an initial wrong. This sort of satellite litigation inevitably leads to longer delays to the proper airing of grievances, can become unduly complex, and generally presents more hurdles for patients seeking justice.

The second issue is a constitutional one. The developments outlined in this article represent a potentially significant shift of power in favour of executive bodies rather than reinforcing the judiciary's supervisory role. Arguably, the need for judicial scrutiny in order to provide the effective protection of individuals' rights is greater than in other areas of public law because of the combination of the considerable discretion given by parliament to health bodies, and the lack of electoral accountability of health trusts.

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1 *Learning from Bristol: The Department of Health's response to the report of the public inquiry into children's heart surgery at Bristol Royal Infirmary 1984–1995*, DoH, 2002.
2 The Association of Community Health Councils in England and Wales estimates that there will be 600 in England as opposed to 184 CHCs. See *Staffing for patients' forums – a discussion paper*, ACHCEW, October 2002, available at: www.achcew.org.uk/ Natplanindex.htm).
3 A differently constituted Court of Appeal has expressed scepticism recently about this in *Sacker v HM Coroner for West Yorkshire* [2003] EWCA Civ 217, 27 February 2003.
4 See *The NHS plan: a plan for investment, a plan for reform*, Cmd 4818, DoH, 2000, and *Involving patients in healthcare: a discussion document*, DoH, 2001.
5 *NHS complaints procedure – national evaluation*, DoH, 2001.
6 *Cause for complaint? – an evaluation of the effectiveness of the NHS complaints procedure*, Public Law Project, 1999.
7 *Hansard* HC Written Answers col 743, 15 May 2002.
8 *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, (1999) 2 CCLR 285, CA. The Health Service Commissioner's special report is available at: www.ombudsman.org.uk.
9 See the National Health Service Reform and Health Care Professions Act 2002 (Commencement No 2) Order 2002 SI No 2478.
10 *Modernising regulation in the health professions* is available at: www.doh.gov.uk/modernisingregulation.
11 See also, *R (Richards) v GMC* CO/2430/2000, 18 Dec 2000 and *R (Holmes) v GMC* [2002] EWCA Civ 1823.
12 The report is available at: www.bristol-inquiry.org.uk.
13 The Health Professions Council regulates art therapists, chiropodists/podiatrists, clinical scientists, dieticians, medical laboratory officers, occupational therapists, orthoptists, prosthetists and orthotists, paramedics, physiotherapists, radiographers and speech and language therapists.
14 There might be circumstances where a regulatory health body could contribute towards an effective investigation when such an investigation is required by articles 2 or 3 of the convention.

MENTAL HEALTH

Mental health law update

Robert Robinson reports on recent case-law and other developments in mental health law. Readers are invited to submit summaries of significant unreported cases.

CASE-LAW

Medical treatment

■ **R (B) v Ashworth Hospital Authority**

[2003] EWCA Civ 547

The complaint made by the detained patient was that, although classified as suffering from mental illness for the purpose of his detention under Mental Health Act (MHA) 1983 ss37 and 41, he was being treated on a personality disorder ward at Ashworth Hospital.[1] This not only placed him under a more restrictive regime than that on the mental illness ward from which he had been transferred, but it gave rise to an issue of principle: whether a detained patient can be treated without consent for a form of mental disorder other than that for which s/he is detained. The purported authority for the treatment was MHA s63 which authorises forms of treatment for mental disorder, other than those specified in ss57 and 58, to be given without consent, provided only that the treatment is given under the direction of a patient's responsible medical officer.

The Court of Appeal held that, in the absence of his consent, it was unlawful to treat B's personality disorder. In rejecting the hospital's submission that MHA Part IV covers any medical treatment for any mental disorder from which a patient is suffering, whether or not s/he is classified as suffering from that disorder, Dyson LJ said:

… the Act is no more concerned with non-classified mental disorders than it is with physical disorders. The Act is concerned with mental disorders which are treatable and which justify detention for their treatment. In these circumstances, I do not find it at all surprising that Part IV does not define the mental disorder for which medical treatment may be given without the patient's consent as the classified disorder.

It follows from this that the purpose of classification, and of re-classification either by a patient's responsible medical officer or a mental health review tribunal (MHRT), is to identify those mental disorders which justify a patient's continued detention and for which compulsory treatment may be given.

In effect, this decision overrules an earlier Court of Appeal decision in *R (Hagan) v Mental Health Review Tribunal* [2000] Lloyd's Rep Med 119, with the consequence that, in the words of Simon Brown LJ, 'the question of re-classifying patients to include other disorders will assume a far greater importance than hitherto it has had'.

■ **South West London and St George's Mental Health NHS Trust v W**

[2002] EWHC 1770 Admin

Crane J was asked by the NHS trust to make a declaration that the transfer under MHA s47 of a prisoner to hospital, which was effected very shortly before his release date, was lawful. The case turned on whether W's psychopathic disorder satisfied the treatability test: 'that [treatment in hospital] is likely to alleviate or prevent a deterioration of his condition': s47(1)(b).

The proposed treatment in W's case was 'a period of assessment and stabilisation followed by a phased discharge to the community'. It was said that this would be likely to prevent the deterioration in his condition that would have followed an unsupported discharge to the community. The judge reviewed the authorities and in particular *Reid v Secretary of State for Scotland* [1999] 2 AC 512. He found that 'transfer to hospital involving admission, nursing, medical and psychological supervision, and staged discharge under medical supervision, is capable of amounting to "treatment",' and that the Home Secretary was entitled to conclude that the treatment was likely to alleviate or prevent a deterioration of W's condition. Accordingly, the declaration was made.

■ **R (N) v Dr M and others**

[2002] EWCA Civ 1789

The Court of Appeal dismissed the patient's appeal against the judgment of Silber J (see December 2002 *Legal Action* 14) in which he upheld the lawfulness of medical treatment given without consent under the certificate of a second opinion appointed doctor (SOAD) under MHA s58. The Court of Appeal held, following *Herczegfalvy v Austria* (1993) 15 EHRR 437, that where a detained patient lacks capacity to make a decision about treatment, the administration of which without consent would breach article 3 of the European Convention on Human Rights ('the convention'), its lawfulness depends on showing 'convincingly' that the proposed treatment is 'medically necessary'.

Conditional discharge

■ **Secretary of State for the Home Department v Mental Health Review Tribunal and PH (interested party)**

[2002] EWCA Civ 1868

The Court of Appeal upheld the decision of Elias J (see December 2002 *Legal Action* 13) that conditions imposed by a MHRT in conditionally discharging a restricted patient under MHA s73 were not unlawful.[2] In particular, the court found that:

If a patient is discharged from detention, that is still an effective discharge, even though he may be required to reside in another institution which qualifies as a 'hospital'.[3] So long as he is not detained there, the tribunal has lawfully discharged him (per Keene LJ).

In relation to the particular conditions imposed, which included that PH should reside in accommodation 'with appropriate security' and that he 'shall not leave the accommodation without an escort', the Court of Appeal held that it was a matter of fact whether implementation of those conditions would constitute a deprivation of liberty for the purpose of article 5 of the convention, as opposed merely to restricting his freedom of movement and thus not engaging article 5.

The evidence before the Court of Appeal was that the purpose of the conditions imposed on PH's discharge was to protect him and to facilitate rather than inhibit his freedom. He was aged 77 and had been detained in Broadmoor for 44 years, and it was thought that he might become disorientated if allowed out on his own. On this basis, the court was satisfied 'that the conditions imposed would not involve his transfer from one state of detention to another state of detention' (per Keene LJ), and as such they were not conditions which could not be attached lawfully to the patient's discharge.

One implication of this decision is that a restricted patient who is not confined to a locked ward or other restricted environment and who enjoys considerable freedom to go out on leave may not in fact be detained. Such a patient could lawfully be discharged from liability to detention under the MHA without having to leave hospital. If appropriate, a residence condition could be imposed so that a patient would remain in hospital informally under the terms of a conditional discharge.

Hospital managers

■ **R (Frederick T-T) v The Hospital Managers of the Park Royal Centre**

[2003] EWCA Civ 330

The Court of Appeal considered the powers of hospital managers to discharge unrestricted patients. The specific provision is MHA s23(4) which states that the managers' power of discharge 'may be exercised … by three or more members'. The facts were that on the patient's application to the managers there was a 2:1 majority in favour of discharge, but the detention was upheld because the managers believed it was necessary for all three to agree if discharge was to be ordered.

The court upheld the managers' interpretation of s23, that where a panel hearing an appeal consists of three members a decision to discharge must be unanimous. If in a particular case a panel consisted of more than three members, a majority of at least three would suffice.

Tribunal procedure

■ **R (S) v Mental Health Review Tribunal and the Department of Health**

[2002] EWHC 2522 (Admin)

Stanley Burnton J rejected the claimant's contention that Mental Health Review Tribunal Rules 1983 SI No 942 (MHRT Rules) rule 11 is incompatible with article 5(4) of the convention. Article 5(4) provides that 'Everyone who is deprived of his liberty … shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Rule 11 of the MHRT Rules requires a patient to undergo a preliminary medical examination by the medical member of a tribunal before a hearing, failing which the hearing cannot proceed. It was argued on behalf of the patient, who believed that all psychiatrists viewed him unfavourably, that rule 11 was incompatible with his convention right to an independent and impartial judicial determination of his detention.

Stanley Burnton J found that there was no necessary incompatibility. Incompatibility would only arise, as in the case of *DN v Switzerland* App No 27154/95, 29 March 2001, ECtHR, if prior to hearing the evidence the medical member has formed a concluded opinion on the outcome, or if s/he expresses views, whether to the other members of the panel or to the parties, that 'give rise to a reasonable apprehension that he has a preconceived concluded opinion'. Of interest to tribunal advocates is the following passage from the judgment:

It is imperative that the medical member of the tribunal keeps an open mind until the conclusion of the hearing, and is seen to do so … Furthermore, if during the course of the hearing, it appears that there is a factual conflict between the medical member and the patient, for example, as to what was said by the patient to the medical member, and that conflict may be material to the decision of the tribunal, the tribunal must consider whether it can properly continue to hear the patient's application.

Aftercare

■ **R (W) v Doncaster MBC**

[2003] EWHC 192 Admin

This is the most recent in the long line of cases in which conditionally discharged restricted patients have challenged a public authority for allegedly failing to discharge the duty under MHA s117(2) to provide aftercare services. As in previous cases, it was alleged that the failure prolonged the patient's stay in hospital, thus giving rise to a claim for unlawful detention under article 5.

This is a first instance decision by Stanley Burnton J and it follows recent Court of Appeal decisions on the nature of the duty in such circumstances.[4] The judge summarised the law in the following way: 'the authority is normally bound before actual discharge to endeavour to put in place the arrangements required by the tribunal as conditions of a conditional discharge, or which the tribunal … (in accordance with the judgment in *IH*) provisionally decides should be put in place.' On the question whether the duty arises before a tribunal's decision to discharge, the judge concluded that there is no duty to put in place aftercare arrangements before a tribunal's decision, although he agreed with the view of Kennedy LJ in *IH* that 'at least in embryo, plans should be available before a tribunal hearing takes place'.

What Stanley Burnton J said about the duty under s117 does not detract in any way from the clear requirement in some cases, before a tribunal can properly decide to discharge a patient, for there to be evidence about what aftercare will in fact be provided when s/he leaves hospital.[5]

Stanley Burnton J also commented on the scope of MHA s139(1) which, unless the act was done in bad faith or without reasonable care, confers protection from liability in civil and criminal proceedings on those purporting to be acting in the exercise of functions under the MHA. He expressed the view that the section should be read so as not to apply to breaches of convention rights.

Nearest relatives and article 8

As long ago as 1999, the UK government entered into a friendly settlement of a case before the ECtHR on the basis that the provisions of MHA ss26 and 29 are in breach of article 8 of the convention. The terms of the settlement included an undertaking to amend the MHA so as to enable a detained patient to apply to the court 'to have the nearest relative replaced where the patient reasonably objected to a certain person acting in that capacity' (*JT v UK* App No 26494/95, [2000] 1 FLR 909). The government has done nothing to put matters right and in **R (M) v Secretary of State for Health** CO/4744/2002, Maurice Kay J was asked to grant a declaration of incompatibility under Human Rights Act (HRA) 1998 s4 in a similar case.

The facts were that the patient alleged she had been sexually abused in childhood by her adoptive father, who under MHA s26 was her nearest relative. As a consequence, there was no relationship of trust between her and her adoptive father and she did not wish to see or communicate with him again. But she had no right to have him replaced by someone who would be acceptable to her. Maurice Kay J found that the automatic appointment of the adoptive father as nearest relative, and the statutory consequences that result from that appointment constituted a continuous interference with the patient's private life which was not justified under article 8(2). Furthermore, he found that it was not possible to construe MHA ss26 and 29 compatibly with article 8. Accordingly, he granted a declaration to that effect.

Prisoners and the MHA

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

[2002] EWHC 2424 Admin

The claimant, who was diagnosed as suffering from bipolar affective disorder, was released from prison on licence at the halfway stage of his sentence. During the licence period, he was admitted to hospital under MHA s3 because of concerns about his mental state and behaviour. Three days later, his licence was revoked by the Home Secretary and he was recalled to prison, without regard to the fact that he was a patient liable to be detained in hospital for treatment. S challenged both the recall, which was subsequently approved by the Parole Board ('the board'), and the Home Secretary's failure to transfer him back to hospital under MHA s47 once his mental health needs were known.

Maurice Kay J, affirming the established practice that detention under the MHA takes precedence over recall to prison, found that the recall decision was flawed because it was made without consulting the doctors at the hospital where S was liable to be detained. He also found that it was incumbent on the Home Secretary to consider a transfer to hospital under s47 once it was known that S had been a detained patient at the time he was recalled.

The relationship between the powers of the board and those of the MHRT in respect of transferred prisoners has been considered in two recent cases.

■ **Benjamin and Wilson v UK**

App No 28212/95, (2002) Times 9 October

The ECtHR decided that the current arrangements for technical

lifers are in breach of article 5(4) because the MHRT does not have the power to discharge a technical lifer.[6] The final decision on discharge rests with the Home Secretary. The court found that the applicants were effectively denied a review by a judicial body with competence to decide on the lawfulness of their detention and to order release if it was not lawful.[7]

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

[2002] EWHC 2805 (Admin)

The reasoning in *Benjamin and Wilson* was extended by Stanley Burnton J to transferred discretionary lifers detained under MHA ss47 and 49. Under the current arrangements, a discretionary lifer who is detained in hospital after the expiration of the penal period of the life sentence must first persuade a MHRT that s/he should be discharged from liability to be detained, applying the MHA criteria. If that application is successful, the Home Secretary will refer the case to the board for a decision on the need for continued detention under the life sentence. In the meantime, the patient remains detained under the MHA. Stanley Burnton J described the regime in the following terms:

Under the law as presently understood and applied … a discretionary life prisoner who has served the minimum period of his detention but who remains also compulsorily detained under the MHA has no statutory right to apply to the Parole Board, or to require the Secretary of State to refer his case to the Board under section 34(5) of the [Criminal Justice Act 1991], for it to review the lawfulness of his continued detention.

Two points were taken by D under article 5(4): first, that because the referral to the board is made at the discretion of the Home Secretary this is inconsistent with the detained person's entitlement to an effective review; and second, that because the application to the MHRT and the referral to the board are made consecutively, there will not in practice be a 'speedy' hearing. The judge accepted both arguments and found that the current regime breaches article 5. He went on to say that existing legislation cannot be read in such a way as to avoid incompatibility with article 5. Accordingly, he made a declaration of incompatibility under HRA s4.

Damages for tribunal delays

■ **R (KB and others) v MHRT and Secretary of State for Health**

[2003] EWHC 193 (Admin)

Stanley Burnton J awarded damages to a number of claimants whose article 5(4) right to a speedy hearing had been breached (see December 2002 *Legal Action* 13 for the decision on liability). He identified two main effects of delay which are relevant to the assessment of damages in such cases. The first is whether the delay in a tribunal hearing an application results in a patient's discharge being postponed. The second is whether the delay, and particularly where it results from hearings being cancelled at short notice, has caused frustration and distress to a detained patient. In this connection, he acknowledged 'the generally vulnerable condition and circumstances of mental patients who are compulsorily detained'. However, he also said that:

even in the case of mentally ill claimants, not every feeling of frustration and distress will justify an award of damages. The frustration and distress must be significant: 'of such intensity that it would in itself justify an award of compensation for non-pecuniary damage'.[8] In my judgment, an important touchstone of that intensity … will be that the hospital staff considered it to be sufficiently relevant to the mental state of the patient to warrant its mention in the clinical notes.

Approaching the individual cases in this way, the highest award the judge made was £4,000, in a case where he found both that the effect of the delay was that the patient would have been discharged at an earlier date, and that the multiple cancellations of hearings had affected his mental state adversely. Other awards were of £750 or £1,000. In two cases no damages were awarded because the delays were short, and there was no evidence that they had caused distress or otherwise adversely affected the claimants.

Mental incapacity: Inherent jurisdiction

■ **Re S (Adult Patient) (Inherent Jurisdiction: Family Life)**

[2002] EWHC 2278 Fam

A local authority sought a declaration that it was lawful, as being in his best interests, to remove a mentally incapacitated man from the care of his father. Previous cases have established that, in such circumstances, article 8 rights give way to best interests considerations, the court being concerned to 'assure … the entitlements of individuals to the benefits of what is benign and positive in family life' (*Re F (Adult: Court's Jurisdiction)* [2001] 1 Fam 38, per Sedley LJ). Without dissenting from this general principle, Munby J said that in cases where the choice is between the mentally incapacitated adult being cared for at home or being placed elsewhere:

the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.

He emphasised, however, that there is in law no presumption to this effect; and that in proceedings concerning mentally incapacitated adults there is nothing analogous to the threshold criteria under the Children Act 1989.

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1 For the purpose of admission and continued detention under MHA ss3, 36, 37, 38, 47 or 48, the patient must be classified as suffering from one or more of the following forms of mental disorder: mental illness, severe mental impairment, psychopathic disorder, mental impairment. The MHA provides for re-classification while the detention continues if the patient is suffering from a form of mental disorder other than the one(s) specified.
2 The Home Office argued that the conditions effectively amounted to a transfer to another hospital under MHA s9 which, by virtue of s41(3)(c)(ii), requires the authorisation of the Home Secretary.
3 'Hospital' is given an extended meaning by MHA s79(5).
4 See *R (K) v Camden and Islington Health Authority* [2002] QB 198 and *R (IH) v Secretary of State for the Home Department* [2002] 3 WLR 967.
5 See, in particular, *R (H) v Ashworth Hospital Authority and R (Ashworth Hospital Authority) v Mental Health Review Tribunal* [2002] EWCA Civ 923 (discussed in December 2002 *Legal Action* 12).
6 A 'technical lifer' is someone who has been sentenced to life imprisonment, but is treated as if s/he were subject to MHA ss37 and 41.
7 Meaning substantive lawfulness under article 5, as elucidated in *Winterwerp v Netherlands* (1979–80) 2 EHRR 387.
8 See *Silver v UK* (1983) 6 EHRR 62.

SOCIAL SECURITY

Housing benefit law update


This twice-yearly series by **Bethan Harris** and **Jan Luba QC** is designed to keep readers up to date with legislation, case-law and other recent developments in housing benefit (HB) law. The authors would be pleased to receive case-reports or other information about housing benefit matters suitable for inclusion. The last article in the series appeared in December 2002 *Legal Action* 15.

REGULATIONS AND ORDERS

■ **Social Security Amendment (Carer's Allowance) Regulations 2002 SI No 2497**

With effect from 1 April 2003, these regulations incorporate the change of name of invalid care allowance to carer's allowance into the HB (General) Regulations 1987 SI No 1971 ('the 1987 Regs').

■ **Social Security (Paternity and Adoption) Amendment Regulations 2002 SI No 2689**

Amend the 1987 Regs to reflect the introduction, from April 2003, of statutory paternity and adoption pay and leave, and the implications for when a person is treated as engaged in remunerative work (1987 Regs reg 4), sums disregarded in calculation of income (reg 29), child care charges (reg 21A) and calculation of earnings (reg 28(1)).

■ **HB and Council Tax Benefit (CTB) (General) Amendment Regulations 2003 SI No 48**

With effect from 10 February 2003, the office designated for receipt of HB claims may be designated by means other than the claim form (by amendment to the definition of 'designated office'), and where a person is claiming incapacity benefit his/her HB claim form may be sent to the Department for Work and Pensions (DWP) office from which s/he is claiming incapacity benefit.

■ **HB and CTB (General) Amendment (No 2) Regulations 2003 SI No 308**

Amend 1987 Regs reg 68 to provide for the date on which changes of circumstances, occasioned by the abolition of working families' tax credit and disabled person's tax credit and the introduction of working tax credit and child tax credit, are to take effect for the purposes of determining HB entitlement.

■ **HB and CTB (State Pension Credit) Regulations 2003 SI No 325**

These regulations are made under the State Pension Credit Act 2002 (see December 2002 *Legal Action* 15) and take effect on 6 October 2003. The 1987 Regs are amended to give effect to the new scheme of pension credits, including new provisions for determining the applicable amount for a person who has attained pensionable age and the replacement of the current provisions on income and capital with new regs 21–44.

■ **HB (General) Amendment Regulations 2003 SI No 363**

These regulations tidy up the 1987 Regs as a consequence of the expiry of the transitional HB scheme for payment of housing support charges. On 1 April 2003, the scheme was replaced by the Supporting People Programme, a new method of providing housing support for vulnerable people by way of grant from the Office of the Deputy Prime Minister (ODPM), administered by local authorities under Local Government Act 2000 s93.

■ **Social Security (Working Tax Credit and Child Tax Credit) (Consequential Amendments) Regulations 2003 SI No 455**

These amendments to the 1987 Regs are consequential on the replacement of disabled person's tax credit and working families' tax credit with the new working tax credit and child tax credit, and come into force from 7 April 2003. (The DWP has published *A guide to the new tax credits* on the relationship between tax credits and HB/CTB, available at: www.dwp.gov.uk.)

■ **Social Security and Child Support (Miscellaneous Amendments) Regulations 2003 SI No 1050**

From 5 May 2003, HB and CTB (Decisions and Appeals) Regs 2001 reg 7 (decisions superseding earlier decisions) is amended. The power to supersede on grounds of change of circumstances will be limited to such changes since the original decision had effect. Where the change of circumstances relied on is a change in HB or CTB legislation, the superseding decision will take effect from the date the change in legislation came into force. Provision is made in relation to appeals decided against an appellant pending the outcome of a test case (Child Support, Pensions and Social Security Act (CSPSSA) 2000 Sch 7 para 17(4)(b)). That decision will be superseded in the event of a successful outcome for a claimant in a test case.

CASE-LAW

The full text of Social Security Commissioners' decisions is available at: www.osscsc.org.uk. All references below are to the HB (General) Regs 1987 unless otherwise stated.

Circumstances in which a person is treated as not liable to make payments in respect of a dwelling (reg 7)

■ **CH/3008/2002**

The claimant had a fixed term assured tenancy under Housing Act 1988. By the time the fixed term had expired, ownership of the property had been transferred to the claimant's sister. The claimant remained in occupation. The local authority decided that there had been an overpayment of HB relying on reg 7(1)(a) (tenancy not on a commercial basis) and reg 7(1)(l) (liability created to take advantage of the HB scheme). The appeal tribunal upheld the decision.

On further appeal, Commissioner Jacobs held that when applying regs 7(1)(a) and (l) it was essential to ask the question: under what tenancy or arrangement did the claimant occupy the dwelling? The tribunal should have considered whether at the expiry of the fixed term the tenancy was surrendered, and if so what arrangement took its place, or whether the tenancy continued as a statutory periodic tenancy. If the latter, the failure to make use of the provisions for increasing the rent or for recovery of possession could be relevant to whether the tenancy was on a commercial basis. If the sisters had allowed the statutory periodic tenancy to come into existence when it could have been prevented, it might be possible to find that liability under the tenancy was created to take advantage of the HB scheme. The appeal was remitted to the appeal tribunal for the legal relationship to be investigated.

Long leases (reg 10(2))

■ **R (Latif) v Social Security Commissioners and others**

[2002] EWCA Civ 1981, 19 December 2002

The claimant occupied premises under a 25-year lease. Despite the fact that reg 10(2)(a) precludes HB awards in respect of leases over 21 years, the council paid benefit. Years later, it realised its mistake and terminated benefit. Although £34,000 had been overpaid, no recovery was sought. The claimant appealed to an appeal tribunal against the decision to end the award. The tribunal upheld the authority's decision and both the tribunal chair and the social security commissioner refused permission to appeal to a commissioner. The claimant sought judicial review of the refusal of permission. Maurice Kay J dismissed the application (see December 2002 *Legal Action* 17). Sullivan J (sitting as a single judge of the Court of Appeal) refused permission to appeal from that dismissal. It was plain that reg 10(2)(a) applied, as the lease was for over 21 years. The council had been entitled to review its determination as one made in 'ignorance or mistake of fact' under reg 79. There was

accordingly no prospect of success on any further appeal.

Restricted rents – rent officer determinations (reg 12A)

■ **R (Cumpsty) v Rent Service**
[2002] EWHC 2526 Admin, 8 November 2002

The claimant's rent was restricted under reg 12A following a rent officer's determination and subsequent re-determination of the 'local reference rent'. (Both were carried out using the formula in place prior to the November 2001 amendments). The claimant contended that the rent officer had used too wide a geographical area in determining 'locality' for the purpose of assessing the local reference rent. He wished to dispute the determinations by an appeal to a tribunal, but it had no jurisdiction (see CSPSSA Sch 7 para 6(2)(c)). He sought judicial review of the rent officers' decisions and contended that the absence of an appeal amounted to breach of his rights to a fair and impartial hearing under article 6 of the European Convention on Human Rights ('the convention').

Pitchford J dismissed his claim. Applying *R (Saadat and others) v Rent Service* (2002) HLR 613, the rent officer conducting the re-determination had not misdirected himself or reached an irrational view of the appropriate 'locality' (the judgment contains helpful guidance about the factors that should be considered). He held that the determination by the rent officer was so critical to the award of HB that it triggered the fair procedure requirements of article 6. However, the combination of a right to a re-determination by a different rent officer and the supervisory jurisdiction of the High Court in judicial review, was sufficient to comply with article 6. Nevertheless, the process would not satisfy the test of 'fairness' unless the reasons for the rent officer's determination were made available to the claimant so that he could formulate grounds on which to apply for a re-determination or seek judicial review. Although permission to appeal was granted on the article 6 point, no appeal was pursued. The claimant in the instant case had secured statements of reasons at each stage.

Continuous good cause for a late claim (reg 72(15))

■ **CH/2659/2002**

The claimant requested a backdated award of HB. She had not claimed earlier because she thought wrongly she had too much capital, and had been distracted by the illness and subsequent death of her mother who lived in Jamaica. The local authority refused to backdate her claim. Her appeal to the appeal tribunal was dismissed.

On further appeal, Commissioner David Williams held that the tribunal had applied the correct test. The test for good cause was that in *R (S) 2/63(T)*, ie, 'some fact which, having regard to all the circumstances (including the claimant's health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did'. The Court of Appeal confirmed that test in *Chief Adjudication Officer v Upton*, unreported, 10 March 1997. That decision also confirmed that the application of the test to the facts was itself a matter of fact, which could be appealed to an appeal tribunal, but not to a commissioner.

It was best practice for a tribunal to remind itself and the parties of the key test in *R (S) 2/63* and, if asked to give reasons, to show how it had applied the test. The comment on the law after *Upton* in *Housing benefit and council tax benefit legislation*, 13th edn, Child Poverty Action Group, 2000, p360 was correct.

Continuous good cause for a late claim and mental disability (reg 72(15))

■ **CH/0393/2003**

The claimant was mentally disabled. She did not have an appointee, but received support in order to live as independently as possible. When the time came to renew her HB claim, the support had broken down and the claim was made late. The local authority decided that she had not shown good cause for delay in claiming. The appeal tribunal dismissed her appeal.

On further appeal, Commissioner Jacobs held that the local authority should have taken into account how a reasonable person of the claimant's age would have reacted. In this context, the claimant's age meant her mental age, not her chronological age. The tribunal had not made a finding which was soundly based about the claimant's mental age. Even though she was represented competently, because the claimant was vulnerable, the duty on the tribunal to take an inquisitorial approach was particularly high.

Recovery of overpayments (reg 98)

■ **CH/0216/2003**

The claimant appealed against a decision to recover an overpayment of HB. She argued that there was a recoverable overpayment only where a decision had been revised and not where, as in her case, it was subject to a superseding decision. She relied on the wording of reg 98. She also argued that a computer-generated document was insufficient evidence of the overpayment decision, and that she had not received proper notification in accordance with 1987 Regs Sch 6.

Commissioner Jacobs held that the words 'revised or further revised' in reg 98 meant 'replaced' and, therefore, included both revision and supersession. *R (IS) 2/96* was not authority for the proposition that a computer-generated document was insufficient evidence of a valid overpayment decision. The issue in each case was whether the document was sufficient, alone or with additional evidence. In this instance it was. The defects in notification had not caused the claimant to suffer 'substantive harm' and therefore, applying *Haringey LBC v Awaritefe* (1999) 32 HLR 517, the notification was valid.

Recovery of overpayment – official error and joining of parties (1987 Regs regs 99 and 101, HB and CTB (Decisions and Appeals) Regs 2001 SI No 1002 reg 3)

■ **CH/3679/2002**

The claimant lived with his daughter. Her mother was his landlady. The local authority decided that the claimant was not entitled to HB, applying reg 7(1)(d) (tenant responsible for landlord's child) and 7(1)(l) (liability created to take advantage of HB scheme), and that there had been an overpayment. The appeal tribunal dismissed the claimant's appeal.

Commissioner Christine Fellner allowed his further appeal. The claimant's landlady should have been treated as a party to the appeal. She was a 'person affected' by the decision appealed against, being a 'person from whom the relevant authority determines that an overpayment is recoverable' under HB and CTB (Decisions and Appeals) Regs 2001 SI No 1002 reg 3. This was on the grounds that, under 1987 Regs reg 101, an overpayment could be recovered from a person to whom payment may be made if s/he had misrepresented a material fact which resulted in the overpayment being made. The original application was supported by a 'rent proof' signed by the landlady which the local authority alleged was false. The landlady was a 'person to whom direct payments could have been made', although they were not in fact made to her.

The tribunal's decision was also set aside on the ground that the local authority now conceded that so far as reg 7(1)(d) was concerned, its use of outdated forms was an official error. The forms the claimant was asked to complete, in November 1999 and October 2000, did not ask a question about the relationship of anyone else in the house to the landlord, a matter that

became relevant after amendments to reg 7 came into force on 25 January 1999. (Note that the new version of reg 101, in force since 1 October 2001, only applies to make a non-claimant liable to recovery of an overpayment if HB has been paid to that person.)

Discretion to recover HB overpayment (regs 100 and 101)

■ **CH/2443/2002**

The claimant claimed HB while working for another local authority. She failed to disclose her income, acting on the advice of another council employee engaged in a conspiracy for which at least one person was convicted and imprisoned. The HB authority sought to recover the overpayment from the claimant. She argued that the housing benefit review board (HBRB) and, when the case was transferred to an appeal tribunal, the tribunal could exercise the discretion on whether or not to recover the overpayment under reg 100. Her appeal to an appeal tribunal was dismissed.

On her further appeal, Commissioner David Williams held that whether or not HBRBs could exercise such a discretion might still be unclear, but appeal tribunals could not. It may be appropriate for a tribunal to draw the attention of a local authority to facts that might be relevant to any discretionary decision, but neither an appeal tribunal nor a commissioner could exercise the discretion.

The claimant also argued that, under reg 101, recovery should be made from her employer. It was held that, as the duty to notify changes of circumstances under reg 75 applied to a claimant and not to his/her employer, there was no occasion to consider whether regulation 101 could apply to make recovery from an employer.

(Note that reg 100 has been repealed, but provision for the discretion on whether to recover an overpayment is made in Social Security Administration Act (SSAA) 1992 s75).

Overpayment – recovery and offsetting (regs 101–104)

■ **Secretary of State for Work and Pensions v Chiltern DC**

[2003] EWCA Civ 508, 26 March 2003

This was the secretary of state's appeal from two aspects of commissioner's decision *CH/4943/2001* (noted at December 2002 *Legal Action* 18). The litigation arose from a local authority's decision to recover overpaid HB from a housing association which had received it (by way of direct payments). The appeal was allowed on two issues.

First, the commissioner had been wrong to hold that a landlord could not appeal a decision (made under SSAA s75(3) and 1987 Regs reg 101) about the identity of a person from whom a recoverable overpayment should be recovered. On a true construction of the HB and CTB (Decisions and Appeals) Regulations 2001 SI No 1002, the decision made on the exercise of the discretion – whether to recover from a claimant, landlord or some other payee – was appealable by the person from whom recovery was sought.

Second, the commissioner had been wrong to hold that an authority could not end a current HB award until it had the information necessary to apply any off set against overpayment required by reg 104. He ought to have considered and applied reg 67, which stipulated when a benefit period would end. If reg 67 applied, there was no power to extend the benefit period while gathering information necessary to operate the reg 104 off set.

The judgment on the first point has been welcomed warmly by landlords (see *Housing Today* 25 April 2003 p15). The judgment on the second issue has been criticised as potentially misconstruing the commissioner's actual decision (see [2003] 173 *Welfare Rights Bulletin* 16).

Fair hearing – article 6

■ **CH/3594/2002**

The claimant requested a backdated award of HB, which the council refused. Her appeal to the appeal tribunal was unsuccessful. She appealed to the commissioner on grounds which included that she had not received the council's written submission until a few minutes before the appeal tribunal hearing began, and had not had time to study it.

Commissioner David Williams held that the tribunal's chair, who was aware of the failure to provide the submission in advance, should have checked with the claimant that she was in a position to proceed with the appeal and should have recorded that fact. Under Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991 reg 49, there must be a minimum period of 14 days' notice of the hearing. That provision applied to submissions and evidence as well as to the notice of time and date, although the appeal tribunal could redress any unfairness by ensuring that all the evidence and submissions were presented orally. It was also open to a party to waive the unfairness.

The tribunal hearing was unfair in accordance with the principle of equality of arms under article 6 of the convention, and was therefore set aside.

Relevance of the Verification Framework to decision-making

■ **CH/5088/2002**

The local authority appealed to the commissioner against a decision of an appeal tribunal on whether the claimant's capital exceeded the threshold at which an award for HB could be made. The local authority argued that the appeal tribunal had accepted evidence that did not comply with the Verification Framework.

Commissioner Jacobs held that appeal tribunals should apply the law and not the framework. The framework was an

administrative arrangement that provided a sensible approach to decision-making by local authority officers by giving rigid rules about what evidence was acceptable, with the aim of reducing fraud. The approach that appeal tribunals should follow was that laid down in commissioners' decisions. There were no limitations on the admissibility of evidence other than relevance, and proof of relevant facts could be provided in any form. A claimant's oral evidence was acceptable, even if not corroborated, although lack of corroboration was relevant in assessing the evidence, as was the failure to provide documentary support if that should be available. There was nothing inconsistent in the use of the framework by decision-makers and a different approach in appeal tribunals. The appeal was allowed on different grounds.

Claims for judicial review: costs

■ **R (Reiner) v Hackney LBC**
[2002] EWCA Civ 1725, 12 November 2002

The claimant applied for HB. The circumstances relating to his accommodation caused the council to be suspicious of the claim. It declined to determine the claim without further information. The claimant considered that he had supplied sufficient information to enable a decision to be made, and brought proceedings for judicial review to compel a determination. In those proceedings, at the permission stage, the council filed a witness statement spelling out its concerns. A 20-page witness statement from the claimant with 50 pages of exhibits challenged this. Utilising that and other information, the council determined the claim. The claimant pressed his claim for costs of the proceedings contending that they had gained him the relief he sought (a determination) on the information essentially available throughout.

Burton J (see [2002] EWHC 2076 Admin), applying the guidelines of Scott Baker J (for costs in discontinued judicial review proceedings as approved in *Brawley v Marczynski* [2002] EWCA Civ 756), rejected the suggestion that the claimant had 'succeeded', and made no order about costs. The claimant made a renewed application for permission to appeal to the Court of Appeal. Tuckey LJ dismissed that application. There had been no arguable error by the judge in the exercise of his discretion.

OMBUDSMAN'S REPORTS

Summaries of recent ombudsman's reports are available at: www.lgo.org.uk.

Recovery of overpayment

■ **Investigation Nos 01/A/01770 and 01969**

A finding of maladministration was made against Islington LBC's procedures for recovery of HB overpayments. Notification letters failed to comply with the regulations, were unclear and at times nonsensical.

Recovery should not have started before the claimants had an opportunity to appeal, and the council failed adequately to reply to letters querying overpayments. Recommendations included compensation for the claimants, and that the authority should report back to the ombudsman in six months' time on improvements to overpayment notification letters.

Delay in conducting a review

■ **Investigation No 01/C/16190**

A finding of maladministration was made against Liverpool City Council. The claimant requested a review of a decision that an overpayment was recoverable. The council took 21 months to conduct the review. The ombudsman expressed the view that 28 days should be the target.

■ Bethan Harris and Jan Luba QC are barristers specialising in housing law with the housing team at Two Garden Court Chambers, London, EC4.

CIRCULARS

The Department for Work and Pensions (DWP) Circulars provide a useful explanation (although not necessarily the definitive analysis) of new HB and CTB legislation and information on current practice. Where relevant, the contents of circulars are incorporated into the DWP's HB/CTB Guidance Manual. The following are some of the circulars published on HB and CTB since November 2002. For a list of circulars prior to that date, see December 2002 *Legal Action* 18. They are available on the DWP website: www.dwp.gov.uk.

HB/CTB A32/2002	Handling of misconceived appeals.
HB/CTB A33/2002	Involvement of Registered Social Landlords in the Verification Framework Scheme.
HB/CTB A34/2002	Pension Credit and the impact on HB and CTB IT systems: Welsh Assembly Learning Grant.
HB/CTB A1/2003	Annual uprating of social security benefits from April 2003.
HB/CTB A2/2003	HB Rapid Reclaim: a streamlined reclaiming process for those who reclaim benefit within 12 weeks of their previous entitlement, aimed at removing barriers to taking up temporary work.
HB/CTB A3/2003	HB and CTB (General) Amendment Regs 2003 SI No 48.
HB/CTB A4/2003	New form HCTB1, National Savings Certificates and DWP contact list.
HB/CTB A5/2003	Replacement of the Transitional HB Scheme, under which HB met support charges for vulnerable groups, with the Supporting People Programme funded by the ODPM.
HB/CTB A6/2003	HB (General) Amendment Regs 2003 SI No 363.
HB/CTB A7/2003	Supporting People Programme (expiry of the Transitional HB Scheme).
HB/CTB A8/2003	Involvement of Registered Social Landlords in the Verification Framework Scheme.
HB/CTB A9/2003	Sangatte arrivals.
HB/CTB A10/2003	Invalid Care Allowance/Carer's Allowance and entitlement to Carer Premium: UK property valuations.
HB/CTB A11/2003	Replacement of Exceptional Leave to Remain with Humanitarian Protection and Discretionary Leave from 1 April 2003.
HB/CTB A12/2003	Service Level Agreements between Jobcentre Plus, the Pension Service, the Appeals Service and the Inland Revenue, setting out minimum standards of liaison and benefit administration.
HB/CTB A13/2003	Supporting People Programme (see HB/CTB A5/2003 above): provision of HB information to Supporting People administering authorities.
HB/CTB A14/2003	New HB/CTB claim form – HCTB1.
HB/CTB A15/2003	Preparations for the introduction of the Pension Credit from 6 October 2003.
HB/CTB A16/2003	Impact of the Pension Credit on HB/CTB.

HOUSING

Recent developments in housing law


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

POLITICS AND LEGISLATION

Housing Bill

In parallel with the Office of the Deputy Prime Minister's (ODPM) consultation exercise (see May 2003 *Legal Action* 33), the select committee on the work of the office has launched its own scrutiny of the bill (OPDM Committee press notice, 7 April 2003). The committee's work on the bill is outlined on its dedicated web pages at: www.parliament.uk/bills/draftbills/draft_housing_bill_final.cfm.

Homelessness (Scotland) Act 2003

The Act received royal assent on 9 April 2003. It will enable the enlargement of the categories of 'priority need', and the removal of both 'intentional homelessness' and 'local connection' from the statutory homelessness provisions in Scotland (see November 2002 *Legal Action* 22).

Anti-social behaviour orders (ASBOs)

The availability of ASBOs in the county court from April 2003 has required new arrangements for public funding of legal services to defendants. The Legal Services Commission (LSC) proposes to make the necessary changes in the 10th amendments to the LSC Manual due for issue in August 2003. The LSC has invited comments on its proposals, by 20 June 2003, (to Ruth Symons, LSC Policy and Legal Dept, DX 328 London Chancery Lane). An outline is given in 41 *Focus* March 2003, p06.

Disrepair protocol

On 1 May 2003, the LSC advised housing practitioners that the long-awaited *Pre-action protocol for disrepair* was anticipated for inclusion in the 33rd set of amendments to the CPR. That would mean adoption from summer 2003 at the earliest. Amendments to LSC Guidance to reflect the new protocol would not be incorporated until December 2003 (in the 11th amendments to the LSC Manual). Progress on the protocol will be reviewed in 'Repairs round-up' in *Legal Action* in the autumn.

PUBLIC SECTOR

Secure tenancies

Possession claims after the death of a tenant

■ **Sharp v Brent LBC**

14 April 2003, CA

Ms Sharp lived in a flat which her mother rented from Brent. In February 2000, following her mother's death, Ms Sharp applied to succeed as the tenant under the provisions of HA 1985. Brent rejected that application, contending that Ms Sharp had lied about her entitlement to become a tenant by succession. Ms Sharp did not accept that she had deceived Brent, but did accept its entitlement to find that she did not meet the necessary criteria. Accordingly, a possession order was made by consent. Ms Sharp then applied for housing as a homeless person. Brent made an offer of suitable accommodation which Ms Sharp rejected, claiming that the flat where she had lived with her mother was suitable accommodation, and that the property offered was unsuitable because it required her to move. Brent rejected that contention and upheld that decision on a HA 1996 s202 review. HHJ Latham allowed Ms Sharp's s204 appeal, finding that the decision letter was irrational and that it confused the statutory scheme for succession of tenancies under HA 1985 with HA 1996 Parts VI and VII. He also found that the eviction of Ms Sharp from her mother's flat breached her rights under European Convention on Human Rights ('the convention') article 8. He remitted the matter for a further s202 review.

The council appealed successfully. There was no confusion in the decision letter between Brent's obligations under Parts VI and VII, and the purported deceit by Ms Sharp in relation to her application to succeed to the tenancy under HA 1985. Second, the mother's flat was Ms Sharp's home for the purposes of article 8 of the convention, and so Brent was wrong to argue that the article 8 issues were not relevant considerations for the judge. The requirement of her to vacate that property, albeit with an offer of a new home, was on its face an interference with her article 8(1) rights. Ms Sharp did have a marginal complaint of interference, but Brent's decision, on the facts of the case, was well-justified for the fulfilment of democratic rights and for the protection of the rights and freedoms of others (see article 8(2)). Accordingly, the judge fell into error in finding that Brent's decision was a violation of article 8. Finally, the judge further erred by 'blending' together HA 1996 Parts VI and VII. The duty of a local authority under s193 may be discharged by the allocation of housing under Part VI. However, the court was not entitled to reach the view that, in reviewing the housing authority's decision under s204, a different result might have been reached had considerations been made under Part VI. The judge in the present case was not entitled to evaluate Brent's decision as falling under Part VI since he had no jurisdiction to go into such matters. His decision was only on the legality of the decision letter about the suitability of the housing offered. Accordingly, there was no foundation for the challenge to the decision letter.

■ **R (Gangera) v Hounslow LBC**

[2003] EWHC 794 Admin, 11 April 2003

The claimant entered the UK as a visitor from Tanzania in 1989. He went to live with his parents at premises rented by them from Hounslow under a joint weekly secure tenancy. His father died in 1995 and his mother then succeeded to the secure tenancy. She died intestate in November 2001. The council's housing department told the claimant that he was not entitled to succeed to her tenancy and asked him to vacate. In December 2001, a deportation order was made against the claimant and he applied for leave to remain in the UK relying on article 8 of the convention. On 23 January 2002, the council served notice to quit at the premises and on the public trustee. In April 2002, a possession claim was issued in Brentford County Court. In May 2002, the claimant requested that the council's social services department provide support and financial assistance. The possession claim was adjourned and the council undertook an assessment of the claimant under National Health Service and Community Care Act 1990 s47. However, the social worker who conducted the assessment took the view that the claimant fell into the lowest priority group within the council's eligibility criteria and was entitled to be provided with information and guidance, but did not attain the threshold for entitlement to accommodation under National Assistance Act 1948 s21. In December 2002, the possession claim was transferred to the Administrative Court and the claimant issued fresh proceedings for judicial review.

Moses J granted permission to apply for judicial review, but refused the application for a number of reasons:

■ In view of HA 1985 ss87 and 88(1)(b), the claimant could not succeed to his parents' joint tenancy. On the death of his father,

the claimant's mother became the sole tenant as a result of the principle of survivorship within s88(1)(b). Accordingly, although the claimant was another member of the tenant's family, since the tenant, his mother, was herself a successor as defined in s88, he was not qualified to succeed her owing to s87.

■ The provisions prohibiting the claimant from succeeding to his mother's secure tenancy did not infringe article 14 of the convention read with article 8. Parliament had to strike a balance between security of tenure and the wider need for systematic allocation of a local authority's housing resources in circumstances where those resources are not unlimited. The striking of such a balance was pre-eminently a matter of policy for the legislature. The court should respect the legislative judgment about what was in the general interest unless that judgment was manifestly without reasonable foundation (see *Mellacher v Austria* (1989) 12 EHRR 391 and *Poplar Housing Association v Donoghue* [2002] QB 48).

There was no basis for contending that the statutory scheme amounted to a disproportionate interference with a person's right to respect for his/her home. For article 14 purposes, there was no dispute that there was a difference of treatment between Mr Gangera and two other comparators. First, if his mother had been the sole tenant from the commencement of the tenancy he would have been entitled to succeed. Second, where there is no spouse, and a secure tenant was not formerly a joint tenant, the tenant's nephew by marriage could succeed to the secure tenancy so long as he fulfilled the requirement of residing with the tenant for a period of 12 months ending with the tenant's death. However, Moses J found that the chosen comparators were not in an analogous situation to the complainant's position and were not true comparisons. The legislation did not discriminate against the claimant on the basis of his status. The difference in treatment followed from the fact of the previous succession, not from the status of the claimant.

■ The fact that the court is required to intervene when a landlord seeks to enforce rights of possession does not lead to the conclusion that the court is bound, in each case, to consider whether an order for possession would, in the circumstances of an individual case, be disproportionate and contrary to article 8. In proceedings between private parties, when a court enforces a possession order without considering proportionality, it does not act incompatibly with convention rights because it is merely giving effect to a domestic system of law which itself is not disproportionate. So long as the system as a whole is compatible with the convention, it is not for the court to arrogate to itself a discretion in other cases. It is not open to an individual, such as the claimant, to resurrect arguments about necessity and proportionality in an individual case. Courts are not required to adjudicate on compatibility in each case.

Mr Gangera was not entitled to raise the public law arguments under article 8 and about rationality as a defence in possession proceedings. He fell within the same category as *Michalak v Wandsworth LBC* [2002] EWCA Civ 271, [2003] 1 WLR 617, and could, therefore, only rely on his rights enshrined in article 8 and arguments about rationality by challenging the council's decision in judicial review proceedings following service of the notice to quit.

The contention that the claimant was entitled to be provided with accommodation to meet his needs under s21 was premature. There was nothing disproportionate or irrational in the council's decision to institute possession proceedings without any further assessment of his needs other than that undertaken in June 2002.

Possession claims – tenant's notice to quit

■ **Wandsworth LBC v Bankole**

17 March 2003, Wandsworth County Court[1]

Following a relationship breakdown, the defendant's former partner and joint tenant, Miss J, left the premises and served a notice to quit on the landlord. It had been prepared by the landlord for the tenant's signature but at the top of the notice, Miss J had hand-written 'Miss J only'. The notice was dated 19 January 2001 and purported to terminate the tenancy on 22 January 2001. It also contained a 'saving clause' providing in the alternative for termination 'at the expiration of the week of the tenancy which shall expire next after the end of 28 days from the service of this notice'.

The landlord wrote back to Miss J, stating that the dates were wrong on the notice and requesting a further one. No further notice was provided. Subsequently, the landlord issued proceedings based on the expiration of the notice to quit, relying on the 'saving clause'.

HHJ Behar found that the common law requires that for a notice to quit to be valid it must be clear. He found that, first, the hand-written note suggested that Miss J did not intend to terminate the tenancy. Second, notwithstanding the 'saving clause', the expiration date was not clear, as indeed the landlord itself had originally decided. The notice was, therefore, invalid.

Possession claims – drugs

■ **Perth and Kinross Council v Gillies**

2002 Hous LR 74

The defendant, a secure tenant, was convicted of supplying cannabis. The council sought possession on the ground that he had been using the property for an illegal purpose. The defendant contended that he got on well with other tenants, that the drug offence was not particularly serious and that drugs were not particularly endemic in the area.

A sheriff made a possession order. The ground had been made out and it was reasonable to make a possession order. The offence was serious as it involved commercial dealing. The fact that drug dealing was not yet a problem in the area made it all the more important 'to nip the problem in the bud'.

Assured tenants

Possession claims after transfer of housing stock

■ **Knowsley Housing Trust v Revell; Helena Housing Ltd v Curtis**

[2003] EWCA Civ 496, (2003) Times 17 April[2]

Local authority landlords served notices seeking possession under HA 1985 s83 on a number of secure tenants and began county court possession claims. They then transferred their housing stock to registered social landlords. As a result of the stock transfers, the landlords were no longer within the landlord condition (HA 1985 s80(1)). The tenancies ceased to be secure. As a result of HA 1988 s1(1), they became assured tenancies. The tenants contended that, subject to HA 1988 s8(1)(b) (the power to dispense with notices), the court had no jurisdiction to entertain the possession proceedings unless the current landlords served s8 notices. The landlords applied to the court to dispense with the need for s8 notices and contended that it was appropriate for the dispensation to be granted in all of the cases, without having regard to the particular circumstances of individual cases. The judge accepted those submissions and granted the dispensation sought. The tenants appealed.

The Court of Appeal allowed the appeals. The court had no jurisdiction to entertain the claims unless s8 notices were served, or the court exercised the power to dispense with notice under s8(1)(b). The discretion was wide enough to allow substitution of the new landlord as claimant, and dispensation of the s8 notice where the reality was that the new landlord relied on the same breach of the same term and the relief sought was no

different. However, it was not legitimate for a court to dispense with s8 notices without some consideration of any objection which might be taken by a tenant by reference to the facts of his/her case (see *Kelsey HA v King* (1996) 28 HLR 270, CA). If the landlords wished to continue with the possession proceedings, they would have to comply with CPR 19.4 to obtain an order for substitution and apply to amend the pleadings, or consider commencing fresh proceedings. The cases were remitted to a district judge for a hearing to determine whether it was right to dispense with notice. Such consideration should not be handled on a without notice basis or with no hearing. The issue should be reviewed at the same hearing as the possession claim.

Possession claims against sub-tenants

■ **Alamo Housing Co-operative Ltd v Meredith and others**

[2003] EWCA Civ 495, (2003) Times 21 April

Islington LBC, as freehold owner, let certain properties to Alamo, a housing association. Alamo sub-let them. The lease between the council and Alamo was for a term of two years, but permitted Islington to serve notice to determine Alamo's interest 'except for the purpose of enabling eviction if required by the council'. Islington served notices to quit on Alamo which then served notices to quit on the sub-tenants. After the expiry of the council's notices to quit, Alamo took possession proceedings. The sub-tenants argued that when proceedings were commenced, Alamo did not have a sufficient interest in the properties to entitle it to possession as against the sub-tenants. A district judge gave judgment for Alamo on that preliminary issue. The sub-tenants appealed.

The appeals were dismissed. The effect of the exception was to confer on Alamo a continuing right to possession for the purpose of evicting the tenants (see *Manchester Airport plc v Dutton* [2000] 1 QB 133 and *Countryside Residential (North Thames) Ltd v A Child* (2001) 81 P&CR 10).

Possession claims and the Disability Discrimination Act 1995

■ **North Devon Homes Ltd v Brazier**

[2003] EWHC 574 (QB), 28 March 2003

Ms Brazier was an assured tenant who suffered from a paranoid psychosis, possibly schizophrenia. Her landlord served a notice under HA 1988 s8 alleging breach of the tenancy agreement which contained a covenant not to cause nuisance, annoyance, inconvenience or harassment to neighbours or to the public. In the subsequent possession claim Mrs Brazier admitted that she had been involved in persistent anti-social behaviour, including shouting at neighbouring residents, keeping neighbours awake at night by banging and shouting and using foul language, and making rude gestures to neighbours. Her landlord accepted that she was a disabled person within the meaning of Disability Discrimination Act (DDA) 1995. Her disability arose from a 'mental impairment, which has a substantial and long term effect on her ability to carry out normal day-to-day activity'. A recorder found that she was unable to prevent herself from behaving in a manner which was a breach of the tenancy agreement and made a possession order.

David Steel J allowed her appeal. The effect of DDA s22(3)(c) is that it is unlawful to discriminate 'by evicting the disabled person or subjecting him to any other detriment'. He rejected the landlord's contention that it was not evicting Ms Brazier. After considering *Clark v Novacold Ltd* [1999] ICR 951, CA, he held that it was an issue of fact whether the breach of the terms of the tenancy was caused by disability. If it was, then Ms Brazier, as a disabled person, could not be treated less favourably than someone who was not similarly disabled. David Steel J stated that any fair reading of the material demonstrated that the overwhelming preponderance of her bizarre and unwelcome behaviour was attributable to her mental illness. He rejected the landlord's contention that the discrimination was justified on the basis that eviction was necessary in order not to 'endanger the health or safety of any person' (s24(3)), as there was no evidence of any actual physical risk. Although unlawfulness under the DDA was not a bar to a landlord seeking a possession order under the HA 1988, the fact that the eviction was unlawful and not justified was a highly relevant consideration for the s7 discretion of whether or not to make a possession order. The DDA contains its own code for justified eviction, which requires a higher threshold than the HA 1988. It was not appropriate to make an order for possession.

PRIVATE SECTOR

Unlawful eviction

■ **Scott v Thomson**

2003 SLT 99, Court of Session, Ex Div

Ms Scott was evicted by her landlord's son who changed the locks while she was away on holiday. She sought police assistance, but was unable to regain entry. She took proceedings against the landlord for damages under Housing (Scotland) Act 1988 ss36 and 37 (the Scottish equivalent to HA 1988 ss27 and 28). A sheriff awarded damages, but the decision was overturned by the sheriff principal because the expression 'acting on [the landlord's] behalf' in s36 was ambiguous and should be read as imposing liability only where a landlord instigated or at least connived at his agent's illegitimate activities. Ms Scott had failed to prove this.

The Court of Session allowed her appeal. The sheriff principal's approach was misconceived and unnecessary. The expression 'acting on his behalf' was clear and unambiguous and encompassed anyone who was acting either as direct agent of the landlord, or as someone employed to do a particular act, or to undertake the management of the property with no particular fetter. The sheriff had found that throughout the time that the property was owned by the landlord, his son had absolute authority to manage and administer it as he saw fit. He could have been acting for no one but the landlord.

Long lessees

Extended leases and enfranchisement

■ **Money v Westholme Investments Ltd**

21 February 2003, CA

Mr Money, a long lessee, served a notice of claim for an extended lease under Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993 s42 and paid a deposit of £14,300 demanded by the freeholder under Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 SI No 2407 Sch 2 para 2. He then sold his lease with the benefit of the s42 notice to Westholme Investments Ltd. Westholme completed the acquisition of the lease extension and received the benefit of the deposit paid to the freeholder. Mr Money sought the return of the deposit from Westholme.

The Court of Appeal held that Mr Money was entitled to the return of the deposit from Westholme. His obligations were assigned to Westholme. The payment of the deposit was such an obligation. If already paid by the vendor, as in the present case, the purchaser was obliged to indemnify the vendor for that payment.

HOMELESSNESS

Intentional homelessness

■ **Okuneye v Newham LBC**

[2003] EWCA Civ 254, 29 January 2003

In March 2001, Ms Okuneye's landlord obtained an order for possession ending her assured shorthold tenancy. She applied as a homeless person to Newham. It asked her landlord whether the tenancy had been renewable, and he replied 'yes', provided that the rent was paid. However, he failed explicitly to say why the appellant had been evicted. The appellant sought advice from a housing advice centre, which informed Newham that the landlord had wanted the property back in order to sell it, not because there were rent arrears. Newham decided, on review, that the appellant was intentionally homeless. HHJ Bradbury dismissed a HA 1996 s204 appeal.

The Court of Appeal refused permission to appeal. First, it could not be said that it was perverse to take the view that failure to pay rent was a major contributing factor in the landlord seeking possession. Second, the appellant had had adequate opportunity to deal with this point, both in interview and on review. There was no real prospect of success on a further appeal.

■ **Hijazi v Kensington & Chelsea RLBC**

7 May 2003, CA

Mr Hijazi had been evicted for failure to pay rent on his private tenancy. The council decided that he had become homeless intentionally. In support of his request for a review of that decision, he submitted a medical report outlining his depression and other psychiatric problems. The doctor indicated that Mr Hijazi was incapable of managing his affairs. The council decided, on review, that he had been capable and his homelessness was intentional.

On appeal, Mr Hijazi contended that the review decision letter failed to give adequate (or any) reasons for rejection of the medical advice. HHJ Knowles allowed the review officer to put in a witness statement explaining how, and for what reasons, the decision had been reached. The appeal was dismissed.

The Court of Appeal dismissed a second appeal. While such a witness statement ought not to be considered where it added to, or supplemented, the reasons given in a review decision (see *R v Westminster CC ex p Ermakov* (1996) 28 HLR 819), the statement in this case simply elucidated the reasons already given. It had been properly adduced in evidence.

Reviews

■ **R (Taylor) v Commission for Local Administration**

1 May 2003, Admin Court

The claimant received notice of a decision of intentional homelessness. The notification advised that any request for a review (HA 1996 s202) should be made within 21 days. The claimant put in a 'holding request' for a review to which the council responded by outlining its review procedure. The claimant then made a formal complaint containing serious allegations about the conduct of the council's officers. The council investigated but rejected those complaints. It treated the statutory review as not having been pursued. The claimant complained to the ombudsman that there had been maladministration by the council. Although the ombudsman's investigation upheld his complaints in part, it rejected criticism that the council should have issued a review decision containing notice of the right of appeal to a county court (s204).

Hooper J dismissed a claim for judicial review of the ombudsman. It was clear that the council had not thought it was conducting a review, but rather was investigating a formal complaint about the conduct of officers. The ombudsman had not erred in finding that no notification of the right to appeal had been necessary.

Appeals

■ **Ekwuru v City of Westminster**

[2002] EWCA Civ 1735, 12 November 2002

In August 1998, the appellant applied to the council for assistance as a homeless person. In May 2000, the council notified him of a decision that he was intentionally homeless. That was upheld on review, in August 2000, and an appeal to the county court was dismissed in November 2000. In October 2001, the council conceded in the Court of Appeal that the review had been defective and, accordingly, the appeals in the county court and Court of Appeal were allowed and the review decision quashed: see [2001] EWCA Civ 1497.

A second review decision was issued in November 2001. The appellant appealed to the county court. The council conceded that the review decision was defective and withdrew it. The appeal was discontinued with the council ordered to pay the costs.

A third review decision was issued in February 2002. On the appellant's appeal, the council indicated that it was prepared to withdraw that decision and conduct a fourth review. The appellant rejected that offer and asked that the county court vary the third review decision to one of 'not' intentionally homeless in exercise of the power in HA 1996 s204(3).

Recorder Davies QC held that it was for the authority to make the factual decisions. She quashed the third review decision and accepted an undertaking from the council to conduct a fourth review. The appellant sought permission to appeal, contending that the power to vary ought to have been exercised when a council had failed three times to reach a lawful review decision.

Aldous LJ granted permission for a second appeal (CPR 52.13) so that the Court of Appeal could consider what approach the county court should take to the extent of its power to vary in such circumstances.

Accommodation pending appeal

■ **R (Daley) v Kingston-upon-Thames RLBC**

14 April 2003, Admin Ct[3]

The claimant lost a s204 appeal in the county court, but obtained permission from the Court of Appeal to bring a second appeal. The council declined to exercise its discretion under s204(4)(b) to continue provision of accommodation pending the further appeal. In the absence of a right of appeal (see s204A), and given the lack of prospects of success with a claim for judicial review (see *R v Brighton & Hove ex p Nacion* (1999) 31 HLR 1095), that adverse decision was not challenged. The claimant then applied to the council for a community care assessment of his need for residential accommodation. The council declined to carry out such an assessment referring to an earlier refusal by the claimant of a detoxification and rehabilitation programme. Maurice Kay J granted permission to apply for judicial review and an interim injunction requiring accommodation pending assessment.

Comment: This provides a useful alternative route to accommodation pending appeal if provision is refused under s204(4), and an appeal under s204A is not available or is unlikely to succeed (see *Francis v Kensington & Chelsea RLBC* [2003] EWCA Civ 443, see May 2003 *Legal Action* 35). The equivalent assistance for those with children can be sought under Children Act 1989 s17.

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

1 Sean Pettit, barrister, London.
2 Tony Fearnley, Stephensons, solicitors, St Helens and Martin Littler, barrister, Manchester.
3 Jane Pritchard, Flack & Co, solicitors, London and Stephen Knafler, barrister, London.

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LEGISLATION UPDATER

CHILDREN

Protection of Children and Vulnerable Adults and Care Standards Tribunal (Amendment No 2) Regulations 2003 SI No 1060

Amend the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002 SI No 816 to make provision for the conduct of appeals to the tribunal against certain decisions of the Chief Inspector of Schools in England. In force 30 April 2003.

Adoption (Bringing Children into the United Kingdom) Regulations 2003 SI No 1173

Impose requirements and conditions in respect of a person who is habitually resident in the British Islands and who:

- brings, or causes another to bring, a child who is habitually resident outside the British Islands into the UK for the purposes of adoption by the British resident;
- at any time brings, or causes another to bring, into the UK a child adopted by the British resident under an external adoption effected within the period of six months.

Also revoke the Adoption of Children from Overseas Regulations 2001 SI No 1251. In force 1 June 2003.

CRIME

Terrorism Act 2000 (Code of Practice on Video Recording of Interviews) (Northern Ireland) Order 2003 SI No 1100

Appoints 18 April 2003 as the date on which the revised code of practice on the video recording with sound of interviews by police officers of persons detained in a police station in Northern Ireland under the Terrorism Act (TA) 2000 comes into operation. 'Police station' includes any place which the Home Secretary has designated under TA Sch 8 para 1(1) as a place where a person may be detained under TA s41. The revised code supersedes the code of practice brought into force on 19 February 2001 by the Terrorism Act 2000 (Code of Practice on Video Recording of Interviews) (Northern Ireland) Order 2001 SI No 402.

EDUCATION

Education (Prohibition from Teaching or Working with Children) Regulations 2003 SI No 1184

Revoke the Education (Restriction of Employment) Regulations 2000 SI No 2419 and make provision for:

- the supply of information to the secretary of state;
- procedures for giving a direction under Education Act 2002 s142;
- the grounds on which a person subject to such a direction may seek to have it varied or revoked; and
- the procedure for appeals and reviews of such directions. In force 1 June 2003.

EMPLOYMENT

Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) Regulations 2003 SI No 500

Make provision relating to statutory paternity and adoption pay in respect of adoptions from overseas. The regulations should be read together with the Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations 2003 SI No 499, which provide for Parts 12ZA and 12ZB of the 1992 Act to have effect, with the modifications specified in the regulations, to cases which involve adoption, but not the placement of a child for adoption under the law of any part of the UK. In force 6 April 2003.

HOUSING

National Assistance (Residential Accommodation) (Additional Payments, Relevant Contributions and Assessment of Resources)(Wales) Regulations 2003 SI No 931

Make provision in relation to residential accommodation provided under National Assistance Act 1948 Part 3 for expectant and nursing mothers, or persons aged 18 or over who by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them. In force 7 April 2003.

National Assistance (Residential Accommodation) (Disregarding of Resources) (Wales) Regulations 2003 SI No 969

Make provision about the resources which are to be disregarded for the purposes of provision of residential accommodation by local authorities under Health and Social Care Act 2001 s21. Subject to one exception, a person's capital up to the capital limit specified in the National Assistance (Assessment of Resources) Regulations 1992 SI No 2977 is to be disregarded. In the excepted case, when the person is someone with whom the local authority has agreed to enter into a deferred payment agreement, it shall also disregard the value of that person's main or only home. In force 1 April 2003.

Housing (Right to Buy) (Designated Rural Areas and Designated Region) (England) Order 2003 SI No 1105

Designates certain parishes in the District of Kennet as rural areas for the purposes of Housing Act 1985 s157. Also designates the District of Kennet as the designated region for the purposes of that section in relation to dwelling houses in those rural areas. In force 14 May 2003.

IMMIGRATION

Special Immigration Appeals Commission (Procedure) Rules 2003 SI No 1034

Specify the procedure to be followed in proceedings before the Special Immigration Appeals Commission. In force 1 April 2003.

Nationality, Immigration and Asylum Act 2002 (Commencement No 4) (Amendment of Transitional Provisions) Order 2003 SI No 1040

Amends Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003 SI No 754 Sch 2 para 2(2) which relates to Immigration Act (IA) 1971 s3C (continuation of leave pending variation decision). This order corrects the date referred to in that transitional provision from 1 April 2002 to 1 April 2003, as that is the date that the amendment to the IA takes effect.

Immigration (Passenger Transit Visa) Order 2003 SI No 1185

Made under Immigration and Asylum Act 1999 s41 and requires transit passengers to hold a transit visa. A transit passenger is a person who, on arrival in the UK, passes through to another country or territory without entering the UK and is either a citizen or national of one of the countries listed in Schedule 1 or holds a travel document issued by the purported 'Turkish Republic of Northern Cyprus', the former Federal Republic of Yugoslavia, the former Socialist Republic of Yugoslavia or the former Zaire.

However, a person will not be a transit passenger in accordance with the order if that person has a right of abode under the Immigration Act 1971, is an EEA national or, in the case of a national or citizen of the People's Republic of China, holds a passport issued by either the Hong Kong Special Administrative Region or the Macao Special Administrative Region. In force 2 May 2003.

SOCIAL SECURITY

Social Security and Child Support (Miscellaneous Amendments) Regulations 2003 SI No 1050

Amend the Social Security (Claims and Payments) Regulations 1987 SI No 1968 in respect of benefit payments. Also amend the Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991, the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 SI No 1002 and the Child Support (Maintenance Assessment Procedure) Regulations 1992 SI No 1813 in respect of decision-making.

Social Security (Incapacity Benefit) (Her Majesty's Forces) (Amendment) Regulations 2003 SI No 1068

Amends the Social Security (Incapacity Benefit) Regulations 1994 SI No 2946 by inserting a new reg 7C which prescribes the

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days to be included when calculating, for the purpose of ascertaining the weekly rate of incapacity benefit, the number of days for which a person discharged from Her Majesty's forces after 3 May 2003, who was on sickness absence from duty while in the forces, has been entitled to short-term incapacity benefit. In force 5 May 2003.

Social Security (Removal of Residential Allowance and Miscellaneous Amendments) Regulations 2003 SI No 1121
Provide for the cessation, from 6 October 2003, of the payment of a residential allowance to recipients of income support (IS) or income-based jobseeker's allowance (IBJSA) who are residing in residential care homes or nursing homes. Also provide for the cessation, from 6 October 2003, of the payment of special amounts to recipients of IS or IBJSA who are in residential accommodation as defined in Income Support (General) Regulations 1987 SI No 1967 reg 21(3) or who are residing in accommodation provided under the Polish Resettlement Act (PRA) 1947.

Also amend the Social Fund Cold Weather Payments (General) Regulations 1988 SI No 1724 to provide that, from 6 October 2003, those who are residing in residential care homes, nursing homes, residential accommodation or accommodation provided under the PRA shall not be entitled to a cold weather payment under those regulations.

Social Security and Child Support (Miscellaneous Amendments) (No 2) Regulations 2003 SI No 1189
Amend the Social Security and Child Support (Miscellaneous Amendments) Regulations 2003 SI No 1050 reg 6 regarding tax credits. In force 4 May 2003.

Social Security (Hospital In-Patients and Miscellaneous Amendments) Regulations 2003 SI No 1195
Amend the Social Security (Hospital In-Patients) Regulations 1975 SI No 555 in respect of specified benefits and other regulations in respect of income support, housing benefit, council tax benefit, jobseeker's allowance, state pension credit and child support maintenance calculations.

SOCIAL SERVICES
Local Authority Adoption Service and Miscellaneous Amendments (Wales) Regulations 2003 SI No 710
Provide a new regulatory framework for Welsh local authority adoption services. In force 30 April 2003.

Health and Social Care Act 2001 (Commencement No 5) (Wales) Order 2003 SI No 939
Appoints 1 April 2003 as the day on which the Health and Social Care Act 2001 ss53–55 come into force in Wales. The provisions allow for changes to the way that local authorities charge for residential accommodation under National Assistance Act 1948 Part 3.

Carers and Disabled Children Act 2000 (Commencement No 2) (England) Order 2003 SI No 1183
Brings into force in England on 30 April 2003 provisions of the Carers and Disabled Children Act 2000 which are not already in force in England.

In particular, brings into force s3, which provides that regulations may be made to introduce a voucher scheme, whereby a local authority may issue vouchers which enable a carer to take a short term break, and the care s/he usually provides to the person cared for will be provided by someone else while the carer is away.

Community Care (Delayed Discharges etc) Act (Qualifying Services) (England) Regulations 2003 SI No 1196
Specify certain services and require local authorities to provide those services free of charge to the person to whom the service is provided, and make certain other provision in relation to the timing of the requirement to provide them for free. In force 9 June 2003.

Carers and Disabled Children (Vouchers) (England) Regulations 2003 SI No 1216
Make provision for local authorities to set up voucher schemes, whereby the carers of disabled adults or the person with parental responsibility for disabled children can have a break from caring, during which the person they care for can be provided with alternative care. In force 29 May 2003.

REPORTS UPDATER

The following Home Office reports are available from Research Development and Statistics Directorate, Communication Development Unit, Room 275, Home Office, 50 Queen Anne's Gate, London SW1H 9AT, and available at: www.homeoffice.gov.uk/rds.

Youth homelessness and substance use: report to the drugs and alcohol research unit (Home Office Research Study 258), Dr Emma Wincup, Gemma Buckland and Rhianon Bayliss.

One problem among many: drug use among care leavers in transition to independent living (Home Office Research Study 260), Jenni Ward, Zoe Henderson and Geoffrey Pearson.

Substance use by young offenders: the impact of the normalisation of drug use in early years of the 21st century (Home Office Research Study 261), Richard Hammersley, Louise Marsland and Marie Reid.

National evaluation of CCTV: early findings on scheme implementation – effective practice guide (Home Office Development and Practice report 7), Scarman Centre National CCTV Evaluation Team.

Training in racism awareness and cultural diversity (Home Office Development and Practice Report 3).

New publications from the Joint Committee on Human Rights (JCHR) available at: www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm, and TSO.
- **The case for a Human Rights Commission, vol II.**
- **A Human Rights Commission: structure, functions and powers.**
- **The case for a Children's Commissioner for England**.

CONSULTATION PAPERS

The Attorney-General has published a consultation paper, *Pre-trial witness interviews by prosecutors*, suggesting that prosecuting lawyers meet with witnesses before a trial to assess the credibility of their evidence. Copies of the paper are available at: www.cps.gov.uk, or tel: 020 7271 2440. The deadline for comments is 21 July 2003.

The Lord Chancellor's Department (LCD) is inviting public, judicial and legal professionals' views on the relevance and importance of the traditional dress worn in courts by judges, barristers, solicitors, court clerks and court ushers. Copies of *Court working dress in England and Wales* are available from all courts in England and Wales, at www.lcd.gov.uk, or contact Victoria Children, tel: 020 7210 1349. The deadline for comments is 14 August 2003.

The LCD has published a summary of responses to the consultation paper *In the public interest?* The paper was launched in July 2002 to examine:
- the possible implementation of legislation opening up the conveyancing and probate markets;
- multi-disciplinary practices and other new business structures for providing legal services;
- the possible extension of legal professional privilege to non-lawyers; and
- the QC system.

There were 185 substantive responses to the consultation, which closed on 22 November 2002. A copy of the summary is at: www.lcd.gov.uk.

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Judicial Review: advanced practice and procedure

Wednesday 11 June 2003 (one-day)
Lecturers: John Halford and Conrad Haley
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Legal Resources on the Internet: an introduction

Thursday 12 June 2003 (afternoon)
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Community Care Law: an update

Thursday 19 June 2003 (one-day)
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Rent Arrears and Housing Benefit

Tuesday 24 June 2003 (one-day)
Lecturers: Jane Ballantyne and Colin McCloskey
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Wednesday 25 June 2003 (one-day)
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Introduction to Employment Tribunals: practical steps in handling claims

Thursday 26 June 2003 (one-day)
Lecturers: Elaine Heslop, Catherine Rayner and Isabel Manley
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Discrimination in Employment: an update

Tuesday 1 July 2003 (one-day)
Lecturers: Tess Gill, Elaine Heslop, Karon Monaghan, Camilla Palmer and Mary Stacey
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Wednesday 2 July 2003 (one-day)
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