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LAG AT 40: 'IT'S NOT ABOUT THE LAWYERS; IT'S ABOUT THE PUBLIC'

LAG
the access to justice charity

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

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A battle still to be won

Welcome to the 40th anniversary edition of *Legal Action*. In the year after we were founded, the legal advice and assistance scheme was established and throughout the following decade there was an expansion of legal aid and not for profit (NFP) services. These services ensured an increase in the take up of legal rights by the public. At the time, the founders of LAG might have imagined that this was a kick-start on the road to continuous progress in access to justice policy; however, currently it feels as if the coalition government is trying to turn back the clock almost 40 years on this and related legal reforms.

Over the years, a large part of our work has been assisting practitioners, both in private practice and in the NFP sector, to become more expert in areas of work which are important to poor and other vulnerable people. Yet, mainly due to the internet, there is a widening market for our books among the general public. One impact of the cuts in legal aid and advice services is a continued growth in these sales as people search online for help. This change is something about which we have mixed feelings. We believe that information about the law should be accessible to all, but we know that, often, people need expert support and representation to progress to the point of enforcing the rights they read about.

We have been successful in our role of disseminating information on developments in the law, but as our work as part of the Justice for All alliance on the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 illustrated, LAG's access to justice campaigning has been only partly successful. In the case of the LASPO Act, our lobbying was only successful and/or influential in small parts; however, while it is a struggle to persuade government to widen access to justice, it is a case we will continue to make. In order to do this, the Low Commission on the Future of Advice and Legal Support will be a key part of our policy work in the run up to the next general election, which is expected to be called in May 2015 (see page 8 of this issue).

Across the legal policy landscape, LAG believes that reforms made over the past four decades are under threat. The Welfare Reform Act 2012 will have profound consequences for the poorest people in our society and, among other injustices, will lead to thousands of families being thrown out of their homes because of the cap on housing benefit. The changes to the rules on employment tribunals are likely to have the greatest impact on an employee's ability to claim redress since the introduction of the employment law reforms of the mid 1970s. LAG believes that charging someone, who has been unfairly dismissed or discriminated against, fees of up to £1,250 for his/her case to be heard amounts to a tax on access to justice. This is a matter which LAG and all concerned parties will continually need to pressure the government to repeal.

One of the most progressive legal reforms in recent history was the introduction, in October 2000, of the Human Rights Act (HRA) 1998 by the last government. The HRA faces a threat from Eurosceptic Conservatives in the current coalition government. It would seem that they are contemplating what previously seemed unthinkable, which is the UK's exit from the European Convention on Human Rights ('the convention'). Maybe this is a bluff to placate critics of the Strasbourg Court's decision on prisoners' voting rights, but Chris Grayling, the Justice Secretary, said last month, when questioned by the 'conservativehome' website, that he was 'not ruling ... in and not ruling ... out' quitting the convention. The danger is that the issue of whether or not to remain a signatory to the convention is likely to be conflated with calls to leave the European Union (EU); in fact, whether or not the UK is in the EU, it should adhere to international standards of human rights protection.

In the years since the al-Qaeda atrocities of 11 September 2001 in the USA and related horrifying incidents such as the 7 July 2005 London bombings, states around the world have sought to counter the threat of terrorism. Successive UK governments have introduced a series of laws as part of this effort, but sometimes, while seeking to protect the public, these measures have threatened to undermine the very principles on which our democracy and justice system is founded. The Justice and Security Bill, which is before parliament currently, risks this as it seeks to keep secret evidence from claimants in civil claims against the government: closed hearings in which claimants are excluded from hearing evidence about why the state imprisoned them wrongly or subjected them to any other detriment should have no place in our system of justice.

Since 1972, LAG has fought for laws which protect civil liberties and for equal access to a justice system that gives effective redress to people regardless of their means when those laws are broken. Forty years ago, our founders might have imagined that by now this battle would be won, but instead it continues and, therefore, so will LAG.

MoJ reports rise in tribunals' caseload

The number of tribunal cases has increased by seven per cent compared with the same quarter in 2011, as reported in the latest tribunals statistics from the Ministry of Justice (MoJ). The report shows an increase in the number of cases outstanding across all the largest tribunal jurisdictions, ie:

- by 16% for immigration and asylum;
- by 3% for social security and child support; and
- by 2% for employment tribunals multiple claims.

At 30 June 2012, a total of 775,600 cases were outstanding, which is a three per cent increase compared with the previous quarter.

The report states that the Social Security and Child Support (SSCS) Tribunal represents 55 per cent of the total number of cases received by all tribunals. The number of cases received by the SSCS Tribunal increased by 14 per cent compared with the same quarter in 2011.

'There is no doubt these figures will increase again with the introduction of Universal Credit next year. The lack of legal aid for benefits advice and the other areas of social welfare law could also become a factor in an increase in work load for the tribunal system, as many people will not be able to receive early advice before bringing a case,' said Steve Hynes, LAG's director.

■ *Quarterly tribunals statistics: 1 April to 30 June 2012*, available at: www.justice.gov.uk/downloads/statistics/tribs-stats/quarterly-tribs-q1-2012-13.pdf.

Report reveals impact of reforms to welfare

A study of the impact of the government's welfare reforms reveals that local authorities will be forced to send families out of London as thousands will be unable to afford their rent. The report from Child Poverty Action Group and Lasa examines the effects on London residents and local authorities of the caps placed on local housing allowance from April 2011, the introduction of the benefit cap from April 2013 and under-occupation penalties for families in social housing from April 2013.

The report, which was published last month, was based in part on interviews with local authority officers, advice agencies and partnerships. It found among other things that:

- government impact assessments predict that 124,480 households in London will be affected by the changes;
- while the changes are intended to reduce expenditure on housing benefit, in part by driving down rent levels, there is no sign that rent levels in London are falling;
- local authorities predict that as housing benefit expenditure falls, their costs will rise as they struggle to prevent or deal with increased levels of homelessness;
- many local authorities are actively considering procuring accommodation outside London, but they fear that placing families outside the capital will leave them subject to legal challenge.

Terry Stokes, chief executive of Lasa, said: 'Thousands of Londoners will be adversely affected by these reforms and it's vital that local authorities and frontline advice services work in harmony to support them through these difficult times.' Terry Stokes believes that 'the impacts could undermine employment opportunities to the detriment of health outcomes, educational attainment and more'. He is calling for a co-ordinated response across London in order to 'avoid seeing more debt, more homelessness and more problems for low-income Londoners'.

■ *Between a rock and a hard place: the early impacts of welfare reform on London*, available at: www.cpag.org.uk/sites/default/files/CPAG-briefing-between-rock-hard-place-1012.pdf.

Scottish defence lawyers strike

In the week beginning 19 November, Scottish lawyers staged a series of strikes after the Justice Committee of the Scottish Parliament voted last month for a £3.9m cut in the legal aid budget, which in 2011/2012 was £157.2m. Criminal defence solicitors are particularly concerned about a proposal to require defendants on an income as low as £68 per week to make a contribution to their legal aid costs, which their lawyer will be required to collect.

According to reports in the media the strikes resulted in suspects being taken back into custody as cases were adjourned or postponed. LAG understands that senior Scottish police officers have warned that the criminal justice system is in danger of grinding to a halt if solicitors are unavailable to advise suspects held in custody, following the ruling in *Cadder v HM Advocate* [2010] UKSC 43, 26 October 2010 (the decision in *Cadder* requires suspects to have access to legal advice in the police station).

Commenting after the Justice Committee's vote in favour of the proposals, Oliver Adair, legal aid convenor of the Law Society of Scotland, argued that 'the proposed levels at which an accused person would be expected to make contributions towards the cost of their legal defence is far too low'. He also said that the society believed that the Scottish Legal Aid Board was 'best placed to collect the contributions and that the burden of collection should not fall on individual solicitors'.

■ See: www.guardian.co.uk/law/2012/nov/21/lawyers-scotland-strike-legal-aid.

Attack on judicial review

Justice Secretary Chris Grayling has announced plans to reduce the number of judicial review applications. He argues that in 2011 only one in six applications were granted permission to go ahead and only a small percentage of these are successful.

The *Guardian* newspaper has analysed the statistics from the Ministry of Justice (MoJ) since 2004 and concluded that much of the growth in judicial review applications can be attributed to its use in immigration and asylum cases. According to the report, the number of judicial review applications has grown from 4,207 in 2004 to 11,200 last year.

The MoJ is considering cutting the time limit to bring claims; reducing the number of opportunities currently available to challenge the refusal of permission for a judicial review from four to two; and increasing the court fee for the proceedings.

'We plan to renew the system so that judicial reviews will continue their important role but the courts and economy are no longer hampered by having to deal with applications brought forward even though the applicant knows they have no chance of success. We will publish our proposals shortly,' said Chris Grayling.

■ See: www.justice.gov.uk/news/features/unclogging-the-courts and www.guardian.co.uk/news/datablog/2012/nov/19/judicial-review-statistics.

news feature

YLAL response to Legal Education and Training Review

Heather Thomas and Rachel Francis of Young Legal Aid Lawyers (YLAL) write:

Following an extensive survey of the experiences of its members and the barriers that they face in training and qualifying, YLAL has submitted its response to the Legal Education and Training Review (LETR). The LETR is a comprehensive review of education and training across legal services in England and Wales. Purportedly 'the most substantive review of legal education and training in over 40 years', the LETR is led jointly by the three main regulatory bodies: the Solicitors Regulation Authority (SRA), the Bar Standards Board and ILEX Professional Standards. Through a series of consultations and calls for evidence, the LETR team will use the responses of practitioners and organisations to make specific recommendations to the frontline regulators.

Anecdotally, there is a widespread perception that the current system of education and training is not up to scratch. For example, students often find it necessary to undertake extensive work experience over and above their courses in order to have any prospect of securing that crucial job interview. Conversely, employers often complain that students lack the practical skills they need to get on with the job in hand. The LETR is said to provide a valuable opportunity to remedy these perceived defects.

Based on the views of our members, YLAL has called for a review of the following:

- the cost and quality of the professional courses;
- unpaid work experience and dependence on paralegals; and
- the viability of the vocational stage of training, particularly against a backdrop of hefty debt and low-paid legal aid work.

The professional courses

The prohibitive cost of the professional courses (the Legal Practice Course (LPC) and the Bar Professional Training Course (BPTC)) was a grievance raised by almost all members who responded to our survey. Over half had to rely on financial support from family members to fund the fees. Many reported that without such support, they could not have gone to law school.

Sixty-five per cent of members have had, or will have, over £15,000 worth of debt as a result of their education, with a significant minority of 15 per cent having over £35,000 worth of debt. There was a general feeling that law schools profit from the aspirations of students.

While members were generally positive about current professional courses, questions were raised about the relevance of large parts of the Graduate Diploma in Law, LPC and BPTC to legal aid practice. Many members found that large parts of the core curriculum have no relevance to life as a legal aid lawyer.

A significant number of members suggested that they learnt much more by doing real work than on the LPC or BPTC. Many cited this as a reason in support of work-based learning as a possible alternative training model.

Work experience and paralegals

Eighty per cent of members had found it necessary to undertake additional work experience to further their career in legal aid. Worryingly, however, in the context of social mobility and widening access to the profession, 89 per cent of this work experience was unpaid.

There was also a widespread perception that legal aid providers expect candidates to have 'paralegalled' before they can pursue or progress in a legal career; 61 per cent of members had worked, or are working, as a paralegal. A number of these individuals remained 'stuck' in paralegal positions with little or no career progression, supervision or training.

A recurrent complaint – which applied both to unpaid work experience and to low-paid paralegal work – was that financially it was not always viable to gain the requisite experience necessary to obtain a training contract or a pupillage eventually. One respondent commented that 'pupillages are won and lost on unpaid internships and placements. These trends serve to perpetuate the social inequalities in the legal profession, closing off effectively legal aid work to those from lower socio-economic backgrounds.

The viability of vocational training

A little further up the career ladder, many members felt that it was not viable for them to continue to work for low wages, having built up significant debt during qualification. This had led to some members turning away from legal aid.

While most members reported that their training experiences prepared them adequately for practice, a recurrent complaint was that salaries paid were low in comparison with the debts incurred throughout legal education. A majority of trainee solicitor members were earning between £15,001–20,000 a year, and members noted that the recent decision by the SRA to scrap the trainee solicitor minimum salary will reinforce this problem. When asked whether they would have undertaken their training contract had the minimum salary not been in place, nearly one-third said 'no'.

Members from the junior Bar revealed further difficulties at the early stages of their training. Examples of this included: solicitors not paying for the work undertaken by pupils; accumulation of expenses; and reductions in fees owing to legal aid cuts.

Conclusion

The results of YLAL's survey support our long-standing call for a review of course fees and an increase in financial assistance to students from lower socio-economic backgrounds. The content of the vocational courses should also be better tailored to the requirements of legal aid practice, in recognition of the social value of publicly funded work and the need properly to train candidates for this work. We would also encourage a requirement for legal work experience as part of the qualifying law degree. This would enable individuals to gain experience while capitalising on the financial advantages of being an undergraduate, such as a student loan. The survey results also support the need for further consideration of work-based learning as a means of gaining practical experience, while countering the problems inherent in unpaid work experience.

The LETR publishes its final report and recommendations this month, which will be discussed in a future issue of *Legal Action*.

- Visit: http://letr.org.uk.
- Read YLALs' response in full at: www.younglegalaidlawyers.org/letr_response.


CAROLINE O'DWYER

As LAG reaches its 40th year, its chairperson, Poonam Bhari, and director, Steve Hynes, talk to freelance legal affairs journalist Fiona Bawdon about why the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 changes mean that the group's role as an 'honest broker' is more vital than ever.

LAG at 40: 'It's not about the lawyers; it's about the public'

Anyone old enough to remember the launch of Legal Action Group 40 years ago may be experiencing a 'Life on Mars' moment. Like the detective in BBC1's drama, who has a car accident in 2006 and wakes up in 1973, lawyers could be forgiven for feeling as though they have been catapulted back to the early 1970s, and all the gains in access to justice in the last four decades were just a dream.

LAG was founded in 1972 by a group of solicitors who were concerned that the poor were not well served by traditional law firms. The aim of the fledgling organisation was to spread information about social welfare law to lawyers and non-lawyers alike, and to find innovative ways of filling the gap in the existing legal provision. At the time, legal aid was very narrowly focused (mainly restricted to divorce and personal injury), with areas like housing and benefits law largely overlooked. It is a scenario which sounds eerily familiar to anyone who has followed the detail of the LASPO Act.

Legal aid from April 2013

After next year's sweeping cuts in legal aid – which will see most areas of social and welfare law removed from scope – the sector (and the people it serves) will have gone almost full circle. From April 2013, clients will be expected to muddle through on their own or cast around for help from the charitable or voluntary sector. All very 1970s. Gone will be the notion which previously shaped much legal aid provision: that early intervention, in the shape of expert legal advice, is the best way of resolving problems. Instead, in many areas of law, legal aid will be removed altogether or available only when a situation has reached crisis point.

LAG director Steve Hynes says: 'It's absolutely bizarre that someone can't get help to get their housing benefit sorted and it's only when they end up in court with a repossession order that they can get legal aid.' He adds: 'Although there have been ups and downs in legal aid, there has basically been 40 years of progress. It is very disillusioning to see a government coming in and, because of short-term financial problems, turn the clock back 40 years.'

LAG's board is chaired by barrister Poonam Bhari, and both she and Steve Hynes agree that the LASPO Act reforms will be a disaster for clients. Poonam Bhari specialises in family work and says that there will be particular problems in her area with cases that do reach court taking far longer to resolve. 'It's going to slow right down. Part of dealing with children cases is trying to avoid delay. A problem with litigants in person is that everything is going to be much slower. The judge will be acting not just in a judicial capacity but will have to explain everything to individuals: the judge's role, what can and can't be done in court, the procedure, the law.' Whereas now judges in a family court can hope to deal with six cases a day, after April 2013, they will be lucky if they get through two, she says.

If there is unanimity about what the changes will mean for clients (even government concedes that there will be reduced access to legal advice), it is less clear what they may mean for LAG itself. Any reduction in legal aid providers means a shrinking of LAG's core base, which is never good news for any organisation. However, the LASPO Act also presents an opportunity for the charity to carve out a more clearly defined role than, at times, it may have had during the last decade or so. Certainly, the need for its services is only likely to increase.

LAG in the post-LASPO world

LAG is in a curious position, whereby the way it is viewed by lawyers reflects how long they have been in practice. Newer entrants will tend to see it primarily as the publisher of extremely useful books and its monthly magazine, *Legal Action*. For others, including some very senior lawyers, it is much more than that, an organisation that evokes feelings of huge respect and even affection. Ed Cape, professor of criminal law and practice at the University of the West of England, Bristol, credits it with inspiring his decision to give up being a social worker and train as a lawyer. Helena Kennedy QC,

Steve Hynes and Poonam Bhari

who began practising at the Bar just when LAG came into being, remembers it as 'such an exciting initiative'.

No organisation can survive on nostalgia alone, as Poonam Bhari acknowledges. She says: 'I have so many lawyers and judges, saying, "Oh yes, I think very fondly of LAG, when I started as a junior lawyer, I look back very warmly ..." We need those very same people to appreciate that we need their support now, in order for LAG to continue to thrive.' She makes no bones about the fact that, despite all the goodwill and popularity of its publications and training courses, along with everyone else in the sector, LAG is feeling the pinch financially. Fundraising remains a very real concern.

During his time as director, Steve Hynes has proved adept at securing grant funding, and one of LAG's major initiatives in its 40th year is a commission, chaired by Lord Colin Low (see page 8 of this issue), into the impact of the cuts, which will report its findings ahead of the 2015 election. Other types of funding have proved harder to secure. Steve Hynes says: 'One of the frustrations I've had in five years as director is we've never been able to raise sufficient money from commercial services to put into permanent posts on research and policy. We've had some brilliant campaigns, but I don't have the flexibility of having permanent research staff, and there's a big demand for independent research around legal services.' All the more so, he adds, now that the well-respected Legal Services Research Centre is about to be subsumed into the Ministry of Justice. 'There is a real role for non-academic organisations to be conducting research. If you want an independent voice, you need that voice backed up by research.'

An immediate priority for Steve Hynes is an empirical study of the impact of the LASPO Act, and he is actively looking for the grant funding for such a research project. In one hard-won concession as the LASPO Bill passed through parliament, a clause was inserted allowing areas of law to be brought back into scope in future. Government has undertaken to review the legislation after a year, and it will be vital that campaigners have their evidence and their arguments marshalled at that stage, he says.

Steve Hynes – who clearly relishes the cut and thrust of political lobbying – says that LAG will have a crucial role as an 'honest broker', whose voice cannot be easily dismissed as special pleading. 'For us, it's not about the lawyers, it's about the public. We're not here to defend lawyers' businesses, we're here to defend access to justice.'

Unlike representative bodies, LAG is not inherently squeamish about the sector being opened up to non-lawyers. Steve Hynes says: 'A line in the sand is quality. We're not wedded to any professional outlook. LAG's always embraced both the not for profit sector and the lawyers' sector, from its earliest days. We are unique in that respect.'

Indeed, where some groups see new entrants as a threat to be fended off, LAG sees an opportunity to be embraced.

Poonam Bhari says: 'With the widening of the legal market, you are going to have different permutations of what is a lawyer and I think all those individuals can be assisted by the information and knowledge that LAG provides.'

LAG also expects that, post-April 2013, there will be substantial demand from litigants in person for its books, accelerating a trend it had already identified. Steve Hynes says: 'We noticed a couple of years ago, that books like *Employment law: an adviser's handbook* were selling well on Amazon. We even had a mum ring up to buy our prison law handbook as a Christmas present for her son, who was in prison.'

All LAG books are already available electronically and, in a significant move, its redesigned website (due to come on line in January 2013) will include 'public facing' information for the first time.

Steve Hynes believes that LAG will be well placed to compete in what is likely to be a crowded market for litigants in person. Its books are cheaper than most of the competition (although typically at around £30–£40, still a considerable investment), and they are accessible enough to be used by those with no legal background (a view endorsed by 'Harry's mum', who gives its *Disabled children: a legal handbook* four stars on Amazon, describing it as 'a must-have').

40 years old and counting

Whatever opportunities there may be for LAG to reinvent and reinvigorate itself as it enters its fifth decade, Steve Hynes and Poonam Bhari are under no illusions about the scale of the difficulties facing people who are left to fend for themselves. Steve Hynes accepts that it will be an uphill struggle convincing politicians that there may be no substitute for early, expert legal advice. His experience of lobbying over the LASPO Bill left him convinced that while some politicians 'just don't care, and don't get it' (when pressed, he identifies former Justice Secretary Kenneth Clarke and former legal aid minister Jonathan Djanogly as having fallen into this camp), others are sincere but hopelessly naive.

Steve Hynes says: 'What's really shocking is the idea that some politicians have, that the state is very benevolent and you can just get what you need by asking. We've got a real "put up or shut up" culture. If you want anything from the state, you really have to argue for it. If you're the parent of a disabled child, your life is going to be a big struggle. No doubt about it. You need support from charities, you need support from lawyers, just to ensure that you get what the state – which is very good at passing laws – says you are entitled to.'


CAROLINE O'DWYER

Fiona Bawdon, a freelance legal affairs journalist, looks at the new commission, to be launched this month, which will examine the provision of social welfare law services following the cuts in advice services and legal aid as a result of the coalition government's austerity programme.

The Low Commission on the Future of Advice and Legal Support

Aims and objectives

Lord Colin Low, the disability rights campaigner and crossbench peer, is to chair a commission charged with producing a blueprint for sustainable social welfare law provision and influencing political thinking in the run-up to the next election. The Low Commission, as it will be known, has been set up by Legal Action Group with funding from the Baring Foundation and others. Its ten commissioners will gather evidence – both oral and written – over a nine-month period and report their findings in December 2013. The aim will be to influence the manifestos of the main political parties ahead of the 2015 general election.

Staff and the commissioners

Richard Gutch, former chief executive of the not-for-profit company Futurebuilders, which was set up to lend state funds to charities, will be secretary to the commission on a part-time basis. Sara Ogilvie, who previously worked at the Administrative Justice and Tribunals Council, will act as its full-time researcher.

Richard Gutch performed a similar role for the National Council for Voluntary Organisations Funding Commission, which reported in December 2010. 'My experience there showed it is really important to make the most of the expertise of your commissioners,' he says. Rather than just coming together for fixed meetings, the aim will be for the commissioners to be as involved in the evidence gathering and research as their other commitments allow (all are acting unpaid).

One of Sara Ogilvie's key initial tasks will be to conduct a mapping exercise of current provision and to monitor the impact of the April 2013 legal aid scope cuts. The commission will then aim to develop a strategy for future provision that can realistically be delivered and supported in the future.

The commissioners include Amanda Finlay, the well-respected former legal services director at the Ministry of Justice, now retired; Steve Hynes, LAG's director; and Pam Kenworthy, legal director of telephone services at Howells LLP. Nine commissioners have been appointed so far, and the aim is to add one more from a health background (see box).

Findings, conclusions and recommendations

Richard Gutch stresses that the recommendations will be pragmatic: there would be no point in spending a year producing a report which just calls for across-the-board restoration of legal aid, he says. Instead, the commission will look afresh at alternatives, which may mean challenging existing assumptions. 'We will definitely need to revisit the role of cheaper forms of provision, such as telephone help. A lot of providers say it doesn't work for the people who need most help, but there is some evidence that the quality of electronic provision in this field just isn't very good.'

The commission will also consider whether, contrary to what many practitioners believe, some vulnerable client groups – such as those with mental health issues or language difficulties – might actually be better served by electronic advice, rather than having to traipse into a solicitor's office and be seen face to face.

Richard Gutch adds that the commission will be inviting comment on all its recommendations and will publish discussion papers as its thinking evolves, ahead of their final publication in December 2013.

Timetable

4 December 2012 Launch of Low Commission

December 2012–June 2013 Evidence gathering, through interviews, meetings, group discussions, invited submissions and desk research. Development of recommendations; publication of discussion papers for comment from interested parties

September 2013 Consultation on draft recommendations

December 2013 Publication of Low Commission final report

May 2015 General Election

Low Commission on the Future of Advice and Legal Support: developing a strategy for access to advice and support on social welfare law in England and Wales

The commission will be chaired by Lord Colin Low CBE

Lord Low is a former law lecturer and was made a life peer in 2006. He lists his interests as 'disability, education, crime and delinquency'. He is vice-president of the Royal National Institute of Blind People, a member of the Special Educational Needs and Disability Tribunal and former member of the Disability Rights Commission.

The Low Commission

His fellow commissioners are the following:

Bob Chapman
Administrative Justice & Tribunals Council, Wales Committee member

Amanda Finlay
(vice-chairperson) former legal services director at the Ministry of Justice

Vandna Gohil
former director Voice4Change and programme manager for Voluntary Action Leicestershire

David Hagg
Chief Executive Officer of Stroud District Council

Steve Hynes
director of LAG

Pam Kenworthy
legal director, Howells Direct (part of Howells LLP)

Vicky Ling
former member Civil Justice Council, management consultant

Susan Steed
New Economics Foundation and Centre for Markets and Public Organisations, University of Bristol

The commission will be supported by Richard Gutch, secretary (above left) and Sara Ogilvie, researcher (above right)

Funders are: Baring Foundation, Barrow Cadbury Trust, LankellyChase Foundation and Trust for London

The Low Commission

Contact the Low Commission at: www.lowcommission.org.uk or http://twitter.com/@low_commission

Fiona Bawdon, a freelance legal affairs journalist and LAG's Immigration and Asylum Law (IAL) Project's research and communications director, looks at the work of the Southampton and Winchester Visitors Group (SWVG), a refugee befriending service, staffed almost entirely by volunteers and run on a shoestring, which has been praised by independent management consultants for doing 'a quite outstanding job' of helping destitute asylum-seekers and providing a model for other groups to follow.

A practical and emotional lifeline for asylum-seekers

Support for the 'otherwise destitute'

Set up in 2001 to befriend refugees held in Winchester prison, SWVG now offers a range of legal and financial support to asylum-seekers living locally. An independent report into SWVG says that it provides a 'practical and emotional lifeline' to refugees who would otherwise be destitute.* Christine Knight, SWVG co-ordinator, who has been with the group since its launch, says that for people in this situation, even small amounts of money can be enough to save them from having to turn to crime or prostitution to survive.

SWVG can pay rent for a small room and up to £25 a week subsistence to clients who have lost entitlement to state benefits after being refused asylum. It can also cover small, one-off expenses, such as for new shoes or repairs to a bicycle, as well as giving 'sofa money' to clients who are staying with friends so they can pay towards the host's expenses.

Although it is almost entirely run by volunteers, SWVG can act more swiftly where the situation demands. Christine Knight tells of a young woman who arrived at its weekly drop-in centre one Friday afternoon, a few weeks ago. 'She was very, very distraught. She had nowhere to sleep that night and had no food – and she asked for our help.'

It emerged that the woman had fled her home country, leaving her baby in the care of an aunt, after being imprisoned and tortured for her religious faith. Her husband and father had also been taken and she now feared that they were dead.

Christine Knight says: 'Separated from her baby, fearing the death of her relatives, traumatised by what she had been through, with no proper portfolio of evidence, she came. She asked for sanctuary, but she was refused asylum. That meant the support she was getting with accommodation and money for food was stopped and she was completely destitute. She knew that she did have the evidence, if she could get the documents she could put in a fresh claim for asylum and that she stood a good chance, but how could she do it, when she was destitute?'

Faced with a client in such desperate need, the SWVG machine swung into action. A place was found for the client in a 'cheap but reputable' bed and breakfast that night and over the weekend (with SWVG and the Red Cross splitting the cost between them). On Monday SWVG moved her into her own room and, after a flurry of telephone calls and e-mails over the weekend, had agreed to pay subsistence. She was also put in touch with a compatriot: a former SWVG client who was able to give 'much needed friendship and support'. By the Tuesday she had an appointment to see an immigration solicitor, and by the end of the week she had been allocated her own personal SWVG visitor, who has seen her at least once a week ever since. Just a few weeks on from her initial contact with SWVG, the client has her own GP, a broken tooth has been fixed, she is having English lessons and, crucially, her legal case is being looked at afresh.

As well as good links with a local immigration law practice, SWVG also runs a Legal Justice Project, which means clients with particularly complex cases or where all legal avenues appear to have been exhausted can seek help from Jo Renshaw, a partner at Oxford-based Turpin & Miller. (Turpin & Miller was the winner of the 2012 Legal Aid Lawyer of the Year award for firm of the year.)

A model to emulate

Over 80 per cent of SWVG's £94,000 annual income – made up of grants, donations and proceeds from fundraising events – goes directly to clients. The group has around 60 volunteers, of whom 49 act as befrienders, and just two paid, part-time staff (who work a total of 20 hours a week).

Despite such limited paid resources, the report praises the group's core leaders for putting 'extraordinary care and attention' into its day-to-day stewardship. Its governance 'combines lightness of touch with meticulous attention to detail. There is an underlying sense of order and structure that is not overbearing and restrictive, and a strong focus on keeping the group's work financially and managerially sustainable'.

* *Investing in the future. An evaluation of the work of Southampton and Winchester Visitors Group*, Julian Powe and Stella Smith, SWVG, report funded by the Bromley Trust, 2012, available at: http://swvg-refugees.org.uk.

Legal Action Group's Immigration and Asylum Law Project, launched last month, aims to monitor and, where possible, mitigate the impact of legal aid cuts in this area and promote a more balanced debate about immigration and asylum in the media. Readers are encouraged to submit evidence and concerns relevant to IAL to: fbawdon@lag.org.uk.

Housing repairs update 2012

In this annual review, **Beatrice Prevatt** details policy, legislation and case-law concerning housing disrepair from November 2011 to date.

POLICY AND LEGISLATION

Decent homes standard

Decent homes must meet the current statutory minimum standard for housing: they must pose no category 1 hazards, be in a reasonable state of repair, have reasonably modern facilities and services and provide a reasonable degree of thermal comfort.

On 5 July 2012, the *English Housing Survey: HOMES 2010* was published, which reviews the state of the housing stock.[1] Among other findings, it reports that the proportion of dwellings failing the decent homes standard has declined steadily from 35 per cent in 2006 to 27 per cent in 2010. The largest improvements were evident in the local authority sector. The main reason for the improvements has been the reduction in the proportion of homes failing the thermal comfort criterion (from 17 per cent to ten per cent) over this period. Of the 5.9 million non-decent homes in 2010, 1.3 million (21 per cent) failed because of disrepair.

The proportion of homes with damp problems fell from ten per cent in 2001 to seven per cent in 2010, due mainly to a fall in the incidence of problems caused by penetrating damp. The private rented sector showed the most noticeable improvement from over 21 per cent of homes affected in 2001 to around 13 per cent in 2010. Serious condensation and mould growth were the most common type of damp problems, and affected four per cent of homes in 2010. This percentage has remained almost constant since 2001, which may appear surprising given that, between 2001 and 2010, considerable progress has been made in improving heating and insulation in dwellings. However, the report suggests that this may be because of marked fluctuations and increases in fuel costs, which would be likely to increase the incidence of condensation because households may struggle to heat their homes adequately and so may be more reluctant to use extractor fans or to open windows.

On 28 September 2012, the UK coalition government's Spending Review confirmed the earlier Budget announcement of £982.7 million in allocations to be shared among 41 local authorities to tackle non-decent homes for the years 2013/14 and 2014/15; in addition, £443 million is being allocated through the Homes and Communities Agency (HCA) to council landlords across England. The Greater London Authority will distribute £540 million to councils in the capital.

Legal aid: funding reforms

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which received royal assent on 1 May 2012, puts the government's proposals for reform of legal aid into effect from 1 April 2013. Disrepair remains in scope for tenants and lessees facing a 'serious risk of harm to the health or safety of the individual' (Sch 1 Part 1 para 35(1)): the 'harm' may be temporary, and 'health' includes physical and mental health (Sch 1 Part 1 para 35(4)).

However, many disrepair claims will be out of scope, in particular, damages-only claims. These will have to be funded privately or under a conditional fee agreement (CFA), save if they are brought as a counterclaim in rent arrears possession claims, when they will remain in scope as civil legal services in relation to the eviction from an individual's home (Sch 1 Part 1 para 33(1)(b)).

The exclusions for claims for breach of statutory duty and in relation to damage to property have been disapplied for disrepair claims (Sch 1 Part 1 para 35(2) and Sch 1 Part 2 paras 6 and 8), so that claims based, for example, on the Defective Premises Act (DPA) 1972 will now be in scope; however, the exclusion in relation to negligence claims remains. There is no specific exclusion in respect of claims in nuisance, so it appears that actions for pest infestations and water ingress from other flats let by the same landlord will be in scope provided they pose a serious risk of harm to the health and safety of the tenant, or a member of his/her family or are raised by way of a counterclaim in rent arrears possession claims.

Sections 44 and 46 of the LASPO Act end the recoverability of success fees and insurance premiums from the losing defendant in cases funded by way of CFAs. The Act also provides for regulations to prescribe a cap on the success fees expressed as a percentage of specified damages. Previously, the government indicated that the success fee would be capped at 25 per cent in personal injury cases.

Uplift in damages

It had been proposed that general damages in personal injury cases should be increased by ten per cent to compensate claimants partially for the reduction in the damages they will receive as a result of the success fee in CFAs being taken from their damages. In *Simmons v Castle* [2012] EWCA Civ 1039, 26 July 2012, the Court of Appeal ordered that general damages awards should increase by ten per cent for any judgment delivered after April 1 2013. While *Simmons* was a personal injury case, the court noted that this uplift should apply to all claims in nuisance or tort if the tort causes suffering, distress or inconvenience to any individual. This ruling appeared to exclude contractual claims, including disrepair claims under Landlord and Tenant Act (LTA) 1985 s11.

Following representations, the judgment was revised to clarify that the ten per cent uplift is to be given to general damages in all civil claims for 'four types of damage in relation to both tort and contract cases, namely "pain and suffering and loss of amenity", "physical inconvenience and discomfort", "social discredit", and "mental distress"' (*Simmons v Castle and Association of British Insurers and Association of Personal Injuries Bar Association (interested parties)* [2012] EWCA Civ 1288, 10 October 2012 paras 48 and 50). This judgment also clarified that the ten per cent uplift would not apply to claims funded under CFAs signed before 1 April 2013.

Supplementary legal aid scheme

It had also been proposed that successful claims funded by legal aid would also face a 25 per cent deduction from damages for the benefit of the legal aid fund. The proposal was made to ensure that legal aid did not become a more attractive funding route to privately funded CFAs in the light of the proposal that success fees should come out of the damages awarded. These funds were to be used for a supplementary legal aid scheme to supplement the legal aid costs of other cases. However, ministers have decided not to proceed with implementation of the scheme from April 2013 as envisaged originally, but have not ruled out such a scheme as an option for the future.

Localism Act 2011

The Localism Act (LA) includes provisions to extend the repairing obligation in LTA s11 to flexible, secure and assured tenancies granted by registered providers with a fixed term of seven years or more (LA s166).

Housing regulation

On 1 April 2012, the Tenant Services Authority (TSA) was abolished with its functions taken over by the Regulation Committee of the HCA. From this date, social housing landlords in England have had to meet a new set of regulatory standards.[2] The new regulatory framework for registered social housing providers includes a number of changes from those used previously by the TSA, in particular, reflecting the new distinction between the regulator's economic and consumer regulation roles. Consumer regulation is applicable to all registered providers, including local authority landlords and private registered providers such as not for profit housing associations.

However, the regulator no longer has an active role in monitoring providers' service performance. Under the new arrangements for regulation, others, such as tenant panels, MPs and elected councillors, will have a more prominent role in scrutinising landlords overall (see below).

- The Tenant Involvement and Empowerment standard requires registered providers to ensure that tenants are given a wide range of opportunities to influence and be involved in the management of repair and maintenance services, such as commissioning and undertaking a range of repair tasks, as agreed with landlords, and sharing in savings made. It also requires registered providers to provide tenants with accessible, relevant and timely information about the progress of any repairs work.
- The Home standard requires that registered providers must ensure that tenants' homes meet the decent homes standard and continue to maintain their homes to at least this standard, and meet the standards of design and quality that applied when the home was built, and were required as a condition of publicly funded assistance, if these standards are higher than the decent homes standard. However, registered providers may agree with the regulator a period of non-compliance with the decent homes standard, where this is reasonable.

Regulated providers must also provide a cost-effective repairs and maintenance service to homes and communal areas that responds to the needs of, and offers choices to, tenants, and has the objective of completing repairs and improvements right first time. They must also meet all applicable statutory requirements that provide for the health and safety of the occupants in their homes.

Non-compliance with the standards would amount to maladministration. The widening of the scope of the standards may, therefore, afford tenants more redress than was the position previously.

Ombudsman complaints

The LA provides that local housing authorities in their capacity as providers of social housing, will fall within the remit of the Housing Ombudsman (s181). As a result, from 1 April 2013 onwards, complaints against local authorities, in their role as social landlords, will be considered by the Housing Ombudsman rather than the Local Government Ombudsman.

From 1 April 2013, a complainant will have to pass through a filter before being able to complain to the Housing Ombudsman. Housing Act (HA) 1996 Sch 2 para 7A(1) as amended by the LA provides that a complaint to the Housing Ombudsman is not 'duly made' unless it is made in writing by a designated person by way of referral of a complaint to the designated person. A designated person is defined in HA 1996 Sch 2 para 7A(3) as an MP, a local councillor for the district in which the property concerned is located or a 'designated tenant panel' for the social landlord.

However, some direct access to the ombudsman has been retained as follows:

- where the complainant has exhausted the internal complaints procedure of the housing provider and eight weeks have elapsed since those procedures were exhausted; or
- the ombudsman is satisfied that a designated person has refused to refer the complaint; or
- a designated person has agreed that the complainant can complain to the ombudsman directly (HA 1996 Sch 2 para 7B as amended by the LA).

It remains to be seen whether this new filter will reduce the number of complaints made to the ombudsman.

The LA also introduces a new power for the secretary of state to authorise the Housing Ombudsman to apply to a court or tribunal for an order that a determination made by the ombudsman may be enforced as if it were an order of a court (HA 1996 Sch 2 para 7D as amended by the LA). Before making such an order, the secretary of state must consult with representatives of approved schemes, social landlords and tenants and such other persons as the secretary of state considers appropriate.

Solving disputes in the county court

On 9 February 2012, the government published its response to the consultation, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*.[3] The small claims limit for housing disrepair is to remain at £1,000, but it proposes that the fast track limit is to be increased to £10,000. This will mean that damages-only disrepair claims will be small claims if they are less than £10,000. Once the LASPO Act changes are in force, damages-only claims will be ineligible for public funding in any event.

However, the change to the small claims limit will mean that damages-only claims for less than £10,000 will no longer be eligible for funding under a CFA either, as no costs will be recoverable. It remains to be seen whether this will lead to a large increase in the number of small claims, or (perhaps more likely) to many tenants, who have lived with disrepair for a number of years, simply not pursuing their claims.

CASE-LAW

Practice and procedure

■ Sim v Latymer Court

[2011] EWCA Civ 1492, 7 November 2011

Ms Sim was the long leaseholder of her flat. Her front door was broken down by the police when seeking to trace a leak into the flat below hers. She applied in the High Court for a mandatory injunction requiring the block's management company to reinstate the door. The claim was resisted on the basis that there was a triable issue concerning whether the company or the police were liable. The judge decided that any claim should proceed in the ordinary way in the county court and refused the injunction sought. He ordered Ms Sim to pay costs assessed at £500. The Court of Appeal refused permission to appeal against the costs order as it had no prospects of success.

■ Chowdhury and another v Woodman

[2012] EWCA Civ 690, 14 May 2012

The claimant landlady served a HA 1988 s21 notice on the defendant assured shorthold joint tenants and sought possession. A district judge made a possession order and a circuit judge dismissed an appeal. The tenants sought permission to bring a second appeal, arguing that:

- they had not been served with information about the protection of their deposits;
- the landlady had not been able to let the property to them because she was a bankrupt and/or did not have the mortgage lender's permission to let; and
- there were claims for damages for harassment and disrepair.

The Court of Appeal refused permission to appeal. It held that:

- the judge had found as a fact that the

deposit information had been served;
■ the tenants were estopped from denying their landlady's title to let; and
■ the possible counterclaims for damages were no defence to the claim for possession.

Comment: Notwithstanding this decision, it is arguable that although not a defence to the possession proceedings, counterclaims should be heard at the same time as possession claims where there are issues of credibility to be determined.

Liability

Contractual liability

■ Bernard and another v Meisuria

[2011] EWCA Civ 1382,
2 November 2011

The claimants had been tenants of the defendant private landlord. They brought a claim for compensation for the landlord's breach of his obligations to repair their drains. Their case was that rats had entered from the broken drains and that the rats and fleas had infested the house. At trial, a judge awarded the claimants damages of £20,000 (see January 2011 *Legal Action* 20).

The landlord sought permission to appeal to the Court of Appeal on the basis that the expert evidence could not have enabled the judge to find the claim proved on the balance of probabilities. Permission to appeal was refused. The judge had assessed the evidence and reached a conclusion which was open to him. There was no real prospect of upsetting his decision on an appeal.

■ Newman v Framewood Manor Management Company Ltd

[2012] EWCA Civ 159,
21 February 2012

The claimant was a long lessee of a flat in a block which contained common recreation facilities, including a swimming pool and jacuzzi. The lessor was a management company with all the lessees as shareholders. The claimant claimed, among other things, that in breach of the obligation in the lease to repair the recreational facilities, the lessor had blocked off the doorway to the swimming pool, because of problems of condensation, and replaced the jacuzzi, which had fallen into disrepair, with a sauna.

The lessor defended on the basis of an exoneration clause, which stated that the lessor 'shall not be liable or responsible for any damage suffered by the lessee … through any defect in any fixture, conduit, staircase or thing in or upon [Framewood Manor] or any part thereof … or through the neglect or fault or misconduct of any servant, agent, contractor or workman whatsoever employed by … [the lessor] in connection with [Framewood Manor] except insofar as any such liability may be covered by insurance effected … by the [lessor]' (para 9). The judge held than the exoneration clause ruled out liability for defects not covered by insurance.

The Court of Appeal overturned this ruling. It held that the exoneration clause only applied where the lessor was sued on the basis of vicarious liability. If the judge were right, the procedural provisions for giving notices of breach would be completely circumvented and rendered otiose. The lessor expressly undertook certain repairing covenants. It would be very odd indeed if, under later provisions of the lease, the lessor was exonerated from liability for breaching those covenants unless it had taken out insurance. Furthermore, the word 'damage' in the exoneration clause covered physical damage, but did not include a claim for loss of amenity. The court found that the judge was correct not to award specific performance, because a sauna had been fitted at considerable expense and the cost of installing a new jacuzzi would be excessive and disproportionate when compared with the loss of amenity. See also below under 'Quantum'.

■ Faidi and Faidi v Elliot Corporation

[2012] EWCA Civ 287,
16 March 2012

The claimants were tenants of a flat. The defendants were tenants of the flat above, who had laid wooden flooring throughout. The landlords had agreed to the works and made it a condition of the works that appropriate sound insulation was installed. The claim was brought on the basis that the defendants were in breach of the obligation in their lease to keep the floors covered with carpet and underlay, with the result that noise was penetrating into the claimants' flat. No issue was taken concerning the lack of privity of contract between the parties, with it being conceded that the obligation about the laying of carpets was directly enforceable between the parties in the county court. The judge dismissed the claim on the basis that there had been a waiver of the requirement to lay carpets as this would have been inconsistent with permitting the installation of the new timber floor and underfloor heating.

The Court of Appeal dismissed an appeal. The landlords had expressly consented to the defendants' works, which had necessarily envisaged that no carpeting would be laid over the new floor. The covenant was no longer capable of enforcement in respect of that flat.

■ Daejan Properties Ltd v Campbell

[2012] EWCA Civ 875,
19 June 2012

A tenant occupied a maisonette on the top two floors of a five-storey converted house. The lease contained a landlord's repairing covenant 'to keep the roof and outside walls of the premises in good repair and condition and to paint the exterior of the premises once in every seven years', and a corresponding obligation on the tenant to pay 40 per cent of the cost by way of service charges (para 6). 'Premises' was defined as only the maisonette and not the whole building (para 5). The High Court allowed an application by the landlord for a declaration that the 'premises' should be treated as applying to the whole house, on the basis that that is what the parties must be taken to have meant as this would enable the landlord to recover a proportion of the costs of repair of the whole building (para 10). If this was not the position, the tenant would only have been liable to pay 40 per cent of the costs of redecoration of her maisonette and nothing towards the rest of the building. The Court of Appeal has granted the tenant permission to appeal against that ruling.

Access

Protection of Freedoms Act 2012 Sch 2 para 12(1) has repealed section 8(2) of the LTA. The subsection gave a landlord a right to enter tenanted premises for the purpose of viewing their state and condition. However, it only applied to tenancies at a low rent, namely, less than £80 per annum in London and less than £52 per annum elsewhere. The repeal came into effect on 1 July 2012. The obligation under LTA s8(1) to let and keep tenancies at a low rent fit for human habitation is unaffected.

■ Beaufort Park Residents Management Ltd v Sabahipour

[2011] UKUT 436 (LC),
21 November 2011,
April 2012 Legal Action 45

The terms of a lease required the tenant 'to permit the lessor and its surveyors or agents with or without workmen and others at all reasonable times to enter upon the flat for the purpose of examining the state and condition thereof' (para 16). The tenant reported a leak and the lessor appointed its director (who was also the company secretary) as its agent to investigate. There was a history of difficulties between the tenant and the director, and the tenant refused access on the basis that he did not accept that the director had any authority or was suitably qualified to enter and inspect the leak; he was prepared to admit any other agent of the landlord. The landlord applied for a declaration that the tenant was in breach of the lease. A Leasehold Valuation Tribunal declined to make the declaration.

The Upper Tribunal allowed the landlord's appeal. The director was the company's agent and the tenant was obliged to give him access for the purposes stated in the lease.

Tortious liability

Nuisance

■ Siveter v Wandsworth LBC

[2012] EWCA Civ 351, 16 February 2012

The claimant was a council tenant. Her home was rendered uninhabitable by an infestation of poultry mites. She claimed that the mites had spread from a pigeon's nest resting on a cupboard outside her flat, into the cupboard and through an opening into her flat. The council had arranged to have the nest removed, but the cupboard itself had not been inspected or sprayed. The judge rejected a claim that the landlord was liable for compensation on the basis that the council had acted reasonably in removing the nest and spraying the area even though it had not sprayed inside the cupboard.

The Court of Appeal allowed an appeal and remitted the case to the county court for the assessment of quantum. The expert evidence was that, in addition to the nest removal, the cupboard should have at least been inspected and, probably, treated. It was inevitable and foreseeable that if left uninspected and untreated, the infestation would migrate from the cupboard and throughout the flat.

Defective Premises Act 1972

■ Hannon v Hillingdon Homes Ltd

[2012] EWHC 1437 (QB), 9 July 2012

The tenant of a council house removed the banisters on one side of the internal staircase in the house. Some years later, the claimant, a workman for one of the council's contractors, lost his footing on the staircase and, in the absence of the banisters, fell and sustained an injury. The council later reinstated the banisters, and recharged the tenant for the cost of the work. It denied liability for the injury. The council's first defence was that the stairs without a banister were so obviously dangerous that any reasonable workman would have refused to work in the house. When this defence failed, it argued that the duty of care imposed by DPA s4 did not apply because either:

- the banisters were not part of the 'structure' (para 27); or
- the council had been under no duty to repair the banisters (by replacing them) because they had been removed by the tenant; and/or
- the council had had no notice of the defect.

The High Court found the council liable. The banisters were part of the structure. The layout of the house was such that the staircase was an essential feature of the house, which was necessary to complete its intended appearance, stability, shape and identity, and the banisters were an integral part of the staircase. Accordingly, the obligation to repair was owed and the failure to replace the banisters was a relevant defect given that it had been removed after the tenancy commenced, which was the material time under the DPA. The definition of 'relevant defect' does not embrace a consideration of whose fault it was that the relevant defect came into existence. There had been sufficient home visits by council staff and agents to the property so that the council was deemed to know, or ought to have known, of the defect.

■ Drysdale v Hedges

[2012] EWHC B20 (QB), 27 July 2012

A landlady let a house with three steps leading up to the front door. In the course of moving her belongings into the house, the tenant slipped on the steps (which were wet after rain) and fell sideways over the edge of the steps and into the basement area in front of the house. She was seriously injured and brought a claim for damages.

The High Court held that the landlady was not in breach of any repairing obligation under the tenancy agreement or under DPA s4 because neither the step nor its painted surface were in disrepair. As neither the tenancy agreement nor the DPA applied, the landlady simply owed a common law duty of care. Although the step had been painted with semi-gloss paint, there had been no breach of duty because the paint was for exterior use and the container gave no warning not to use it on steps.

Occupiers' Liability Acts

■ Kirkham v Link Housing Group Ltd

[2012] CSIH 58, 4 July 2012

The claimant was a tenant of a housing association. She tripped on the raised edge of a paving slab which was one of a series forming a path from the front door of her house to the pavement. Until she fell, neither the tenant nor the landlord had known that the path needed repair. She claimed damages for breach of her tenancy agreement or for breach of the duty of care in the Occupiers' Liability (Scotland) Act 1960. A judge dismissed the claim.

The Court of Session dismissed the tenant's appeal. There had been no breach of the tenancy agreement because the path was not a common part, and therefore liability to repair only arose once the landlord had knowledge of the need for repair. The claim for breach of duty of care failed because the tenant had not led evidence of the reasonable standard of care practiced by other landlords which would demonstrate that her landlord had failed to match that standard.

■ Alexander v (1) Freshwater Properties Ltd (2) Place (trading as Place Construction)

[2012] EWCA Civ 1048, 27 July 2012

The front door to a block of flats had a self-closing device. It did not work properly and a notice had been posted on the door asking that those leaving should pull it shut. A handle was available for this purpose on the outside of the door. A builder removed the handle to clean it. The claimant caught her fingers in the door when closing it and sued the landlord and the builder for compensation for personal injury under the Occupiers' Liability Act 1957 and negligence. A judge decided that the landlord was 25 per cent liable and the builder 75 per cent liable.

The Court of Appeal adjusted the proportions to 50/50. The landlord had known of both the failure of the self-closing device and the removal of the handle, but had failed to take reasonable alternative measures to allow the door to be closed safely. The builder had been negligent in allowing the door to stay without a handle for so long when it posed an obvious risk of injury. There was no good reason to attribute greater responsibility to the builder than to the landlord.

Quantum

In keeping with the decision in *Simmons v Castle* (see above under 'Uplift in damages') it appears that from 1 April 2013 general damages in disrepair claims should be increased by ten per cent. Advisers negotiating damages now in cases where trials would not occur until after this date should therefore seek an additional ten per cent in damages, presumably by either uprating rental figures by ten per cent and then calculating damages, or by calculating the likely award and then uprating this by ten per cent. It is likely that this will be a further incentive to calculate general damages by reference to diminution in rental value given that it will be clear how to uprate such an award, whereas inherently global awards are more arbitrary.

■ Newman v Framewood Manor Management Company Ltd

[2012] EWCA Civ 159, 21 February 2012

The facts of this case are noted under 'Contractual liability' above.

The Court of Appeal held that sums awarded for loss of amenity are, for reasons of policy, in general low. It awarded damages of £3,500 for the loss of use of the jacuzzi, made up of £1,000 for the period of around 2.5 years to trial and £2,500 for the future loss. It also awarded £1,000 for blocking the doorway to the swimming pool at a rate of £20 per week; this was to compensate not just for the

claimants having to walk an extra short distance, but also for the aggravation and inconvenience of having to walk outside rather than having an inside entrance.

■ **Woolf v North London Homes**

Clerkenwell and Shoreditch County Court, 19 April 2012[4]

The claimant was an assured shorthold tenant of a two-bedroom flat in the attic of house from 28 November 2008, but left in January 2011. She complained of disrepair from the commencement of the tenancy, including a leak to the bath, a leaking toilet and a burst pipe, and an intermittent hot water supply. These defects were remedied, but from 2009 onwards there was a bad smell of damp, the front door would not lock properly, the bathroom window was rotten and a pane fell out, the roof was leaking and the building suffered from subsidence. The defects were confirmed by the evidence of an environmental health officer and the tenant's surveyor. The landlords defended the claim on the basis that the tenant had refused access and made various allegations against her, including that she was an alcoholic, had deliberately damaged the property, kept dogs at the property, left vast quantities of nappies outside the premises and had caused the attendance of the police.

All of these allegations were rejected by the judge, who found that there was significant disrepair from the time when the claimant moved in, which worsened over time until March 2010 when the claimant's surveyor inspected. During 2009, the premises had defective windows and were subject to damp. The judge awarded damages at 20 per cent of the rent of £1,450 per month for the 15 months from the beginning of the tenancy until March 2010, and 30 per cent of the rent for the eight months thereafter, making a total of £7,830 for disrepair. She also awarded £2,500 in respect of special damages on the basis that the claimant had suffered some loss; however, she did not accept some of the more exotic items in the schedule of special damages for which the claimant had no receipts. Total damages awarded were, therefore, £10,330.

■ **Anane Addo v Sehmi**

Croydon County Court, 21 June 2012[5]

In a possession claim, the tenant counterclaimed for disrepair she had suffered at the two-bedroom house that she rented between June 2008 and the end of July 2010. There was isolated damp in the property from the start of the tenancy, which was aggravated in March 2009 when a water pipe burst. Thereafter, there was damp and mildew in the majority of the rooms in the property, in single patches mostly about a metre square in each room. On 6 April 2009, Croydon Council served a notice on the landlord requiring him to investigate the damp and mould growth. No works were done, with the landlord saying that he was too poor to carry them out and blaming the tenant (whose housing benefit was stopped by Croydon while the disrepair remained outstanding).

The tenant was awarded £8,100 damages for disrepair, being 60 per cent of the rent of £900 per month from May 2009 until the end of July 2010.

Local Government Ombudsman

Complaint

■ **Brighton and Hove City Council**

10/021/844, 12 December 2011

Following flooding in January 2010 caused by a burst water pipe in his loft, a vulnerable tenant moved out while repair works were undertaken. The works should have been completed by July 2010, but were not finished until late summer 2011, when the tenant returned home. The tenant was offered temporary accommodation, namely, a single room with shared facilities, but felt that it was unsuitable as it was full of drug addicts and alcoholics. He also refused a permanent move as he wished to return home after the repairs. The tenant had stayed with a friend for 18 months, sleeping on a sofa.

The Local Government Ombudsman decided that there had been maladministration causing serious injustice and recommended £3,000 compensation. As a result of the complaint, the council put in place a 14-point action plan to deal with the handling of temporary decants from council properties.

Housing standards

A round up of recent cases was reported in July 2012 *Legal Action* 46 and 47. Accordingly, only the latest cases are reported below.

■ **Sandwell Council v Singh Barham**

Sandwell Magistrates' Court, 1 June 2012

The defendant was a private landlord. On inspection of a house he had let, the council found decayed, single-glazed timber windows, dangerous electrics, no constant supply of hot water or heating, damp and mould growth, and loose and uneven paving. It served an improvement notice under the HA 2004. The council then prosecuted for non-compliance with the notice. The defendant pleaded guilty at Sandwell Magistrates' Court and was fined £4,000 with costs of £1,723.

■ **Hillingdon LBC v Uddin**

Uxbridge Magistrates' Court, 3 July 2012, October 2012 Legal Action 36

The defendant was a private landlord. He was prosecuted by the council for two offences. First, he had rented out a garden shed as living accommodation in breach of an enforcement notice. Second, he had failed to comply with the conditions of a house of multiple occupation (HMO) licence on another of his properties.

Uxbridge Magistrates' Court imposed fines of £6,600 and £5,400 respectively. He was ordered to pay costs of £3,377.

■ **Reading BC v Sheikh and Jarvis Properties**

Reading Magistrates' Court, 9 July 2012

The first defendant was a private landlord of a registered HMO in the council's area. The second defendant was the landlord's managing agent for the property. An inspection by the council's officers, made following a resident's complaint, revealed that:

- 11 people were living at the property instead of the permitted seven;
- the fire alarm system was not working;
- other fire safety provisions, such as fire doors and emergency lights, were not being maintained;
- fire safety notices were positioned incorrectly and did not direct occupiers to exit via a safe route;
- an internal shower room extractor fan was not working and electrical wires were exposed; and
- the shower and the toilet in the top-floor shower room were blocked up due to a failed macerator unit, resulting in foul water filling up both the shower tray and toilet, and leaking through to the ceiling below.

At Reading Magistrates' Court, the agents were fined over £20,000 for failing to manage the HMO properly, to comply with health and safety conditions in the HMO licence and to provide information. The landlord was fined £500 with legal costs of £200 after pleading guilty to failing to provide requested information.

■ **Liverpool City Council v Kassim**

[2012] UKUT 169 (LC), 11 July 2012

The council served a prohibition notice to prevent the use of residential accommodation on the ground that the heating system provided could not prevent an Housing Health and Safety Rating System hazard arising from 'excess cold'. The prohibition notice prevented the use of the property until such time as the landlord had installed a fixed, permanent, whole-flat heating system, which had to be programmable, capable of being controlled by the occupants, efficient and affordable to run. The landlord appealed to a Residential Property Tribunal (RPT) for the notice to be quashed on the basis that, since it was issued, he had double glazed all the windows and fitted electric panel heaters with timer switches and

thermostats. The council contested the application on the basis that the heating system was not affordable. The RPT quashed the prohibition notice on the basis that the affordability of the heating system to a tenant was not a relevant consideration.

The Upper Tribunal set aside the decision and remitted the case for rehearing. The Upper Tribunal made no order as to costs.

■ Oadby and Wigston BC v Rose

Leicester Magistrates' Court, 19 July 2012

The defendant landlord let a property which was in an incomplete and unsafe condition. In July 2010, the tenant complained that she was living in a building site as there was a half-built extension. She also complained that there were problems in the property, including dangerous electrics, a bathroom sink falling off the wall and damp caused by a leaking roof. On inspection, there were found to be two category 1 hazards and two category 2 hazards for the purposes of HA 2004 Part 1. Major works remained outstanding six months after the landlord was contacted about the defects. On a prosecution brought by the council, Leicester Magistrates' Court fined the landlord £1,500 and ordered him to pay £2,000 costs.

■ Health and Safety Executive v Jamil

Central Criminal Court, 20 July 2012

A self-employed builder undertook building work as part of which he enclosed the flue ventilating a boiler. The carbon monoxide generated by the boiler caused the deaths of an elderly couple residing in the house.

The defendant builder pleaded guilty to breaching regulation 8(1) of the Gas Safety (Installation and Use) Regulations 1998 SI No 2451. He was fined £75,000 and ordered to pay £25,452 in costs, in addition to a 12-month community order requiring him to undertake 150 hours of community service.

■ Hillingdon LBC v Singh Brar

Uxbridge Magistrates' Court, 20 July 2012

The council served an enforcement notice, which in September 2010 was upheld on appeal, requiring the defendant landlord to restore an outbuilding (that he was letting) to its original use as a garage and to restore the subdivided main house to a single home.

On a prosecution for failure to comply with either requirement, the defendant pleaded guilty. At Uxbridge Magistrates' Court he was fined £10,000 and ordered to pay £4,300 costs.

■ Portsmouth City Council v JL Homes Ltd

Portsmouth Crown Court, 10 August 2012

After receiving complaints from students renting a house from the defendant company, a council inspection found the following:

- one bedroom was too small to be used as sleeping accommodation;
- three bedsit rooms were too small to be used for sleeping and cooking;
- the cooking facilities were sub-standard; and
- the three bedsits and the cooking facilities could only be reached by an outside metal staircase.

On a prosecution brought by the council, the company denied failing to comply with two housing prohibition orders and failing to provide the council with a copy of a tenancy agreement. It was found guilty at the magistrates' court on all three counts and fined £3,000 for each offence with costs of almost £3,000. It appealed against one conviction for failing to comply with a housing prohibition order, the conviction for failing to provide the tenancy agreement and all three fines.

Portsmouth Crown Court dismissed the appeals and upheld the convictions and fines. Costs were increased to £4,500.

■ Vaddaram v East Lindsey DC

[2012] UKUT 194 (LC), 13 August 2012

The council served a prohibition notice and an improvement notice in respect of a flat on the basis that there was inadequate means of escape from any fire and there was an increased risk of fire as the tenants had to use portable electric heaters. The landlord's appeal against the prohibition order was dismissed by a RPT. He appealed on the grounds that he had undertaken further works, the premises met the Building Regulations 2010 SI No 2214 requirements, and the Local Authorities Coordinators of Regulatory Services (LACORS) guidance on fire safety (which had not been before the RPT) was satisfied.

The Upper Tribunal conducted a rehearing and allowed the appeal with costs. The LACORS guidance was highly material and should have been put before the RPT by the council.

■ Health and Safety Executive v MacDonald

Westminster Magistrates' Court, 15 August 2012

The defendant was a private landlord. His tenant, her partner and their young daughter inhaled large quantities of carbon monoxide leaking from a faulty gas boiler in the flat. They were saved from further harm after a carbon monoxide alarm sounded in a flat above, but they needed hospital treatment. The defendant pleaded guilty to failing to ensure that a gas fitting was in safe condition and failing to carry out an annual inspection.

At Westminster Magistrates' Court, he was sentenced to six months' imprisonment, suspended for two years, ordered to carry out 200 hours' community service and ordered to pay £8,211 in costs.

1 Available at: www.communities.gov.uk/documents/statistics/pdf/2173483.pdf.
2 The regulatory framework for social housing in England from April 2012, available at: www.homesandcommunities.co.uk/sites/default/files/our-work/regfwk-2012.pdf.
3 The government response is available at: https://consult.justice.gov.uk/digital-communications/county_court_disputes.
4 Edward Fitzpatrick, barrister, London and Christopher Brown, solicitor and partner at Alban Gould Baker & Co, London.
5 David Renton, barrister, London and Daisy Bruce, solicitor at Braidwood Law Practice Solicitors, Croydon.

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The author would like to thank the colleagues at notes 4 and 5 for the transcripts or notes of judgments.

Improving the law on residential service charges

In this article, Justin Bates looks at the findings and recommendations of a recent report by the London Assembly on residential leasehold service charges and offers some practical advice for those advising long leaseholders – both in the private and social sector – to try and ensure that leaseholders are protected against unreasonable service charges and are properly informed about their rights.[1]

Introduction

Between July 2011 and March 2012, the Planning and Housing Committee of the London Assembly carried out a review of service charges paid by leaseholders in London. The final report, *Highly charged. Residential leasehold service charges in London*, outlined a number of common problems and made a variety of recommendations. While the report focused on the position in London, the issues raised are of equal relevance throughout the country.

Leasehold as a way of life

The London Assembly estimates that there are already over 500,000 leaseholders in London, paying over £500m in service charges each year. These numbers will only increase. The Mayor's London Plan forecasts 320,000 new homes being built over the next ten years, with the majority of these being leasehold flats (para 1.15). In addition, the 'reinvigoration' of the right to buy is likely to lead to more long leases being granted by local authorities (see Housing (Right to Buy) (Limit on Discount) (England) Order 2012 SI No 734, in force from 2 April 2012, increasing the maximum discount to £75,000).

The Leasehold Valuation Tribunal (LVT) exists to resolve disputes about service charges. (It has concurrent jurisdiction with the county court on most issues: see generally Landlord and Tenant Act (LTA) 1985 s27A and *Phillips v Francis* [2010] L&TR 28, 24 March 2010.) Between 2005 and 2010 in London, it saw a more than 54 per cent increase in the number of cases issued or transferred from the county court.[2]

What is a service charge?

In general terms, most long leases (and some tenancies) oblige the freeholder/landlord to carry out certain tasks and functions in relation to the building, for example, repair the structure and exterior, arrange insurance, etc. The leaseholders/tenants are then obliged to reimburse those costs via the payment of a service charge. The primary statutory regulation of such costs is found in the LTA 1985. All variable service charges[3] must be reasonably incurred and reasonable in their amount (LTA 1985 s19). There is a statutory consultation process that the landlord should carry out before incurring costs above a specified sum (LTA 1985 s20). Leaseholders are entitled to inspect the invoices etc which show what costs were incurred and must be informed of their statutory rights with each service charge demand (LTA 1985 ss21 and 21B).

Transparency in service charges

At the root of many (if not most) service charge disputes is a perceived lack of transparency in the service charge demands. This is usually the result of one (or more) of three specific problems. The service charge demand can be too detailed, with so many heads of actual or anticipated expenditure that the leaseholder cannot understand where items of expenditure begin and end. Alternatively, the demands may be so brief as to give no indication about what they relate to. Separately, there is often a suspicion on the part of leaseholders that the landlord is receiving a commission from a service provider which has resulted in an increased service charge demand.[4] Clearly, if a leaseholder cannot understand the demand (or does not trust the accuracy of the demand), s/he may query why s/he has to pay it.

Leaseholders are at a significant disadvantage when it comes to accessing the information needed to understand their service charge bills. In some cases, the lease provides its own requirements as regards information to be furnished with any service charge demand. It may be that the budget must be provided (and sometimes even certified by the landlord and/or his/her agent and/or a surveyor and/or an accountant) before any 'on account' demand can be made. Furthermore, the lease may provide for a certificate at the end of the year. The failure to provide such documentation may well entitle a tenant to argue that the demands are not contractually valid (see, for example, *Leonora Investment Company Ltd v Mott MacDonald Ltd* [2008] EWCA Civ 857, 23 July 2008 and *Redrow Homes (Midlands) Ltd v Hothi* [2011] UKUT 268 (LC), 7 July 2011).

In some cases, leaseholders may be able to rely on an Ombudsman service. The Housing Ombudsman deals with complaints about social housing providers and has had occasion to criticise landlords that fail to explain their service charge demands adequately (see, for example, *Complaint 200801375*, 30 July 2010). Some managing agents also subscribe to an Ombudsman service.

In most cases, however, leaseholders must fall back on their statutory rights. These include a right to a 'summary of relevant costs' for the previous accounting period (LTA 1985 s21). This must set out the costs which have been incurred by the landlord during that time and which have been or will be passed on to the tenant. If there are more than four leasehold properties in the building, then the summary must be certified by a qualified accountant (LTA 1985 s21(6)). Once a summary has been provided, the leaseholder may inspect the accounts, receipts and other supporting documents (LTA 1985 s22). It is a criminal offence for a landlord to fail to comply with these requirements (LTA 1985 s25) (The offence may be prosecuted by the local housing authority. To the author's knowledge, in London, only Westminster City Council actively prosecutes this offence.)

It is widely recognised that these provisions are ineffective to protect leaseholders. First, they place the onus on the leaseholder to request a summary, rather than on the landlord to provide one. Second, a criminal penalty is of limited practical use as it does not mean the service charge does not have to be paid. In response to these failings, Commonhold and Leasehold Reform Act (CLRA) 2002 s152 substantially reformed LTA 1985 s21 by introducing a new obligation on landlords to provide a written statement of account within six months of the end of the accounting period to which it related. Under new LTA 1985 s21A, if a landlord failed to comply with its accounting obligations, a leaseholder would be able to withhold paying a relevant part of the service charges until the landlord did comply.

Following sustained lobbying from local housing authorities and registered social landlords, the government announced in 2005

that the reforms contained in section 152 would not be brought into force.[5] A consultation paper was published in July 2007 proposing a revised set of accounting provisions.[6] Those amendments were contained in Housing and Regeneration Act 2008 Sch 12. The statements of account were abolished without ever coming into force and the appropriate national authority (the Secretary of State or the Welsh Ministers) was empowered to make regulations about the information which leaseholders should be entitled to receive from their freeholders. Neither the 2002 nor the 2008 reforms have ever been brought into force, leaving leaseholders with only the original LTA 1985 s21 to rely on.

The London Assembly suggested that the government consider a further review of the legislation, with a view to enacting a revised version of CLRA s152. This was considered to be a 'priority' (para 4.35). As yet, no such review has been announced.

Dispute resolution

The London Assembly noted the inequality of arms that exists in the LVT, with landlords frequently employing lawyers but leaseholders having to represent themselves or rely on various pro bono schemes (para 5.11). Although the LVT has very limited costs powers, many leases allow the landlord to recover legal costs via the service charge. A recent Court of Appeal decision has further strengthened the position of landlords in this regard: *Freeholders of 69 Marina, St Leonards-on-Sea v Oram and another* [2011] EWCA Civ 1258, 8 November 2011; [2012] HLR 12.

The London Assembly urged greater use of mediation in service charge disputes and suggested that the government consider making mediation compulsory in such cases (Recommendation 6). Furthermore, in an attempt to address the inequality of arms, it was recommended that the LVT should develop protocols to ensure that leaseholders are not disadvantaged (Recommendation 4). It is unclear what is envisaged here and, in light of recent Upper Tribunal cases such as *Birmingham City Council v Keddie and Hill* [2012] UKUT 323 (LC), 25 September 2012, it is difficult to see how the LVT could lawfully do so.

Both these recommendations seem unlikely to be taken up by the government. Rather, the trend seems to be towards increasing judicialisation of the LVT and its process.[7] The most realistic option seems to be to educate better leaseholders about the extent of their rights and the evidence needed to uphold them.

Reading and understanding the lease

It is trite law that a landlord who seeks to recover service charges from a tenant must be able to point to a clear provision in the lease entitling him/her to these costs (see *Gilje v Charlegrove Securities Ltd* [2001] EWCA Civ 1777, 4 October 2001; [2002] L&TR 33). It is striking how often landlords – both in the public and private sector – attempt to levy a service charge for items that are not provided for under the lease. When construing the lease: 'It is for the landlord to show that a reasonable tenant would perceive that the [lease] obliged him to make the payment sought ... Such conclusion must emerge clearly and plainly from the words used ... If consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as 'proferror'' (*Earl Cadogan v 27/29 Sloane Gardens Ltd* [2006] L&TR 18, 7 April 2006 para 20).

The London Assembly expressed the view that there was very poor understanding of the terms (and significance) of the lease both by leaseholders and freeholders. Leaseholders rarely prioritised the terms of the lease when purchasing their flat and freeholders showed little interest in publicising the service charge conditions. It was suggested that the Law Society should review the conveyancing protocol to put greater emphasis on the service charge provisions and bringing them to the attention of the purchaser (Recommendation 9).

The reasonableness protection

It is important to note that there is no general 'reasonableness' jurisdiction which a leaseholder can invoke. A service charge is payable to the extent that it was 'reasonably incurred' (LTA 1985 s19(1)(a)) and where the services or works are of a 'reasonable standard' (LTA 1985 s19(1)(b)). The case-law on these issues has largely developed in favour of landlords. In particular, in determining whether a cost is reasonably incurred, one does not consider whether or not there were cheaper ways of achieving a particular end, but, instead, whether the method actually chosen by the landlord was within the range of reasonable decisions (see *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173, 8 May 2001; *Regent Management Ltd v Jones* [2010] UKUT 369 (LC), 15 October 2010; *Southall Court (Residents) Ltd v Tiwari* [2011] UKUT 218 (LC), 16 June 2011). The landlord must, however, consider the financial impact on the lessees and, if necessary, consider spreading costs over a period of years (see *Garside and Anson v RFYC Ltd and Taylor* [2011] UKUT 367 (LC), 15 September 2011).

Furthermore, the tenant is only required to contribute towards works or services to the extent that, in effect, they represent value for money. If the standard of works or services is too low when compared with the sums charged, the landlord should reduce the service charges by an appropriate amount (see *Yorkbrook Investments Ltd v Batten* [1985] 1 EGLR 100). In any reasonableness dispute it is vital that the tenant obtains comparative quotes or other evidence to show what the reasonable cost should be.

Conclusion

It has been over ten years since the last substantive reform of service charge law in England and Wales. As the London Assembly noted, there are growing calls for reform, both from landlords and from tenants. It has produced a balanced and careful report, outlining the problems which leaseholders face in understanding and upholding their rights. Given the ever increasing number of leaseholders in England and Wales, it is remarkable that the government has so little interest in this sector (see *Hansard* HC Ministerial Written Answers col 7W, 28 March 2011).

1 *Highly charged. Residential leasehold service charges in London*, London Assembly, March 2012, available at: www.london.gov.uk/sites/default/files/Highly%20charged%20report%20March%202012.pdf.
2 Residential Property Tribunal Service submission to the London Assembly, see note 1, para 2.7.
3 As defined in LTA 1985 s18; in broad terms, charges which vary according to the costs incurred by the landlord. This is not always easy to identify, see *Coventry City Council v Cole* [1994] 1 WLR 398; (1993) 25 HLR 555; *Home Group Limited v Lewis* LRX/176/2006, 3 January 2008; *Chand v Calmore Area Housing Association* Ltd LRX/170/2007, 25 July 2008; *Re: Appeals by (1) Southern Housing Group Ltd (2) Family Housing Association (Wales) Ltd* [2010] UKUT 237 (LC), 15 July 2010.
4 Particularly on insurance policies, although the recent 'Property nightmare: the truth about leaseholds' programme on Channel 4 suggested that a number of local authorities have undisclosed 'profit share' agreements with their contractors.
5 *Accounting for service charge monies: the way forward*, Government News Network, Reference: 118995P, 29 July 2005.
6 *Commonhold and Leasehold Reform Act 2002. A consultation paper on regular statements of account and designated client accounts*, Department for Communities and Local Government, July 2007.
7 See *Consultation on the proposed Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013*, Tribunal Procedure Committee, June 2012, available at: www.justice.gov.uk/ downloads/about/moj/advisory-groups/tpc-pc-consultation.pdf. The consultation closed on 6 September 2012.

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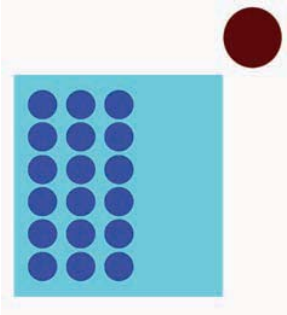
Discrimination law update



Catherine Rayner looks at recent policy and legislation relevant to discrimination law and reviews the latest, significant cases dealing with practice and procedure, contract workers and discrimination and equal pay.

POLICY AND LEGISLATION

These are not good times for those who have suffered discrimination. The government austerity measures are leading to severe cuts in specialist advice services around the country, and the Red Tape Challenge is leading to the removal of safeguards and procedural tools for discrimination claimants to the employment tribunal (ET). The government has also announced direct cuts in the Equality and Human Rights Commission (EHRC) budget, including replacement of the EHRC helpline with a new Equality Advisory Support Service from October 2012. Further details of government proposals on the EHRC can be found in the government document *Building a fairer Britain: reform of the Equality and Human Rights Commission. Response to the consultation* (May 2012).[1]

The government has also consulted on a range of measures for reform of tribunals including the introduction of an issue fee and a reduction in the compensation cap for unfair dismissal. The consultation closed on 23 November 2012.[2]

The key changes proposed in the area of discrimination law of which to be aware are as follows:

- The statutory questionnaire procedure set out in Equality Act (EqA) 2010 s138 will be repealed as will the wider powers of the ET to make recommendations in discrimination cases set out in EqA s124(3)(b).[3]
- The third party harassment provisions set out in EqA s40 will be repealed using the first available statutory vehicle.[4]

Future articles will deal with these repeals when they take effect. In the meantime, advisers should continue to use the existing procedure.

CASE-LAW

Practice and procedure

Since it is probable that more and more claimants before the ET will be litigants in person, the cases on practice and procedure which give guidance on how to manage a claim and what to be aware of will be of greater importance. This article focuses on guidance from some recent cases.

Employment Tribunals (Constitution and Rules of Procedure) Regulations (ET(CRP) Regs) 2004 SI No 1861 Sch 1 reg 20 provides that an ET can order that a party to proceedings pay a deposit as a condition of continuing with his/her claim if the ET judge considers that the contentions have 'little reasonable prospect of success'.

In **Spring v First Capital East Ltd** UKEAT/0567/11/LA and UKEAT/0569/11, 20 July 2012, the Employment Appeal Tribunal (EAT) considered whether an order by the ET that a claimant pay a £250 deposit to continue with his claim for unfair dismissal and age discrimination was unfair. The claimant was a bus driver whose employment was terminated on the last day of his being 64, for reasons of retirement. He claimed that he had been discriminated against on the ground of age, arguing that although the employer had complied with all the statutory notices and requirements, had complied with procedures and had given an apparently valid reason for refusing the request to work past retirement age, this was simply an excuse for getting rid of the claimant. The claimant argued that he was a whistle-blower, who was a thorn in the side of the employer and that this was the real reason for his dismissal by the purported fair reason of dismissal. The ET considered that the claim for age discrimination had little prospect of success and ordered a deposit. The claimant appealed on the ground that his contention comprised a valid argument before the ET.

In the EAT, the Honourable Mr Justice Supperstone, sitting alone, agreed that the argument was a valid one but upheld the judgment of the ET on the basis that there was no evidence produced by the claimant to support his contention, and that on the face of it the ET was simply faced with a fair, although unwanted, retirement. What is required is that the court has a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim. The judge in this case had heard evidence at a pre-hearing review to assist in making his decision and had balanced the possibility of the claimant's contentions being true against undisputed facts on the other side. It was not unfair to make the deposit order.

A key difficulty dealt with by the EAT in the next case is the status of the list of issues. For many litigants and advisers, the statement of case will be a description of the events which the claimant relies on as indicating that there has been discriminatory treatment. Increasingly, the ET will hold a case-management discussion to determine what the issues in a case are. This discussion is of key importance to claims, as it is the point at which a judge will try to frame the complaint in legal language. Claimants need to be very careful to cover all possible claims, and will need to think about direct and indirect discrimination, victimisation and harassment as well as the question of comparators.

However, claimants and their advisers must remember that it is the ET1 form which is the statement of a claim, and if this document adequately reflects the claims, a later statement of issues in legal language cannot remove a claim, provided that it is not conceded or dismissed. As noted by the Honourable Mr Justice Underhill in *Wilcox v Birmingham CAB Services Limited* UKEAT/0293/10/DM, 23 June 2011, 'where the parties agree issues the tribunal is not required to accept uncritically every detail of the formulation' (para 21).

However, what the ET must not do is make findings against a respondent without him/her having an opportunity to address the issue. This requires that the respondent knows the detail of the complaint being made against him/her. In **United Learning Trust v Rose** UKEAT/0220/12/LA, 21 August 2012, the EAT considered the balancing act which an ET, considering a complex race discrimination claim, had carried out and the importance of lists of issues and further and better particulars.

Ms Rose, a science teacher at the respondent's Lambeth Academy, made a number of claims of race discrimination. Like many litigants, her ET1 set out the complaint in a narrative and general way, and failed to give any real details of the case which the respondent had to meet. The claimant was ordered to further particularise her claim and

did so in a 73-paragraph, 12-page document. This set out a variety of claims and narrative, including claims against a Mr Petch. The claimant referred to inconsistent treatment and to less favourable treatment but did not indicate which treatment was said to be less favourable. At the hearing she was represented and her advocate produced a schedule of issue.

The ET dismissed all but one aspect of race discrimination. The issue which formed the basis of the successful claim was described in the particulars as arising from an unsatisfactory lesson observation by Mr Petch which the claimant had responded to but had received no reply. The respondent appealed, arguing that it had not been aware that this was a claim of race discrimination. The EAT agreed, finding that as the matter had not been raised as an issue, the ET had erred in law in determining a matter which was not properly before it. The claim had been unclear and the treatment in question was not said to be inconsistent or less favourable; the claimant's witness statement was unclear on the nature of the allegation and it had not been cross-examined on.

The EAT does note the difficulty for ETs in dealing with complex claims of discrimination, but says that, in justice to both sides, it must be clear by the time of the hearing which specific allegations are said to be instances of direct discrimination.

The clarity of the issues before the ET was considered by the EAT in **North Bristol NHS Trust v Harrold** UKEAT/0548/11/CEA, UKEAT/0549/11/CEA and UKEAT/0550/11/CEA, 19 September 2012, in the context of an application for an adjournment made during the course of a hearing. The respondent applied to adjourn the hearing of a discrimination and victimisation claim because it argued that it had not understood the nature of the protected acts being relied on, and it wanted to call further witnesses. The ET refused the application and went on to make findings of victimisation against it. The respondent appealed and the EAT considered the ET's judgment.

The EAT records that there had been difficulties with identifying the claimant's claims, and some confusion as to the protected acts relied on and a claim regarding a hypothetical comparator. The claimant's case had been recast during the course of the hearing, which the respondent objected to, but which the ET allowed. The ET refused to adjourn, however, because on the basis of evidence in letters to the respondent, which were produced in the ET documents, allegations of discrimination, which the respondent must have known were protected acts, were clearly made. The EAT considered that the respondent's representative would have been able to deal with the point at the hearing, and thus there was no unfairness by the ET in refusing an adjournment.

Advisers dealing with disability discrimination will be aware that many disabled claimants, and particularly those with a depressive illness, will find the ET process extremely stressful, and that they may have real difficulty in preparing and/or attending. The circumstances in which an adjournment should be granted for reasons of ill health, in a disability case in particular, have been considered by the EAT in **Iqbal v (1) Metropolitan Police Service (2) Metropolitan Police Authority** UKEAT/0186/12/ZT, 7 September 2012. Mr Iqbal had brought claims of discrimination based on race, age, sex and disability. His claim was listed for hearing. In the run-up to the hearing, he sought an adjournment on the ground that he needed further information. He did not apply on the ground of ill health and his request was refused. The hearing started and the judge indicated that the panel would spend the first day reading. The respondents stated in open court that if they succeeded in defending the claims they would make an application for costs in the region of £30,000, but that if the claimant withdrew before the evidence started they would not pursue the matter. The claimant then stated that he was suffering from depression and that he was having difficulty even bringing his papers to the ET because he was disabled and had a blue badge but could not park close enough to the ET. Arrangements were made for a parking space and for help bringing his papers to court. The following day, he arrived late and made an application for an adjournment, on the basis of his ill health. The ET judge noted that the claimant stated that he felt depressed, was very low and had trouble sleeping. The judge also noted that the claimant referred to 'the occupational health report' and stated that he thought it referred to his prescription for anti-depressants. However, the ET refused the adjournment on the basis that it was not in the interests of justice, and noted that the ill health issue had not been raised beforehand, and that the claimant had produced no medical evidence to support the application. The claimant withdrew his case and then appealed against the refusal of the adjournment to the EAT.

The EAT considered that the reference to 'the report' was a reference to an occupational health report that was in the trial bundle, and that this constituted medical evidence which the ET ought to have taken into account. The EAT notes the difficulty of applications for adjournment on medical grounds made during the course of the hearing. The overriding objective and natural instinct of the ET will be to proceed with the hearing; however, the correct process is to follow the guidance in *Teinaz v Wandsworth LBC* [2002] EWCA Civ 1040, 16 July 2002; [2002] IRLR 721, at paragraphs 21–22:

A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved.

The ET should have considered a short adjournment to enable medical evidence to be obtained. In this case, the refusal of the adjournment led to the claimant withdrawing his case. The effect of the successful appeal was to negate that withdrawal, and to enable the claim to be relisted.

The ET has a general power to strike out a claim or part of a claim at any time, under Sch 1 reg 27(7) of the ET(CRP) Regs. A claim may be struck out because it is scandalous, unreasonable or vexatious or has no reasonable prospects of success. Applications are usually made in advance of a hearing, but in **Timbo v Greenwich Council for Racial Equality** UKEAT/0160/12/SM, 2 October 2012, the EAT considered an application to strike out the claimant's case, made and granted part way through a hearing, at the close of the claimant's evidence and before

hearing from the respondent. The claimant was a qualified lawyer employed by the respondent as an equalities officer. During the claimant's probationary period her supervisor changed and she had a number of difficulties with executive members, one of whom was alleged to have told her that she would have to go, and that the organisation was for 'our people' (para 6). When she was told her probationary period was to be extended, she looked at her file, and found no information at all about the probationary period. She raised a grievance and was suspended, told a complaint about her conduct had been made and summarily dismissed. She brought a claim for race and sex discrimination.

The claimant's evidence was vigorously attacked by the respondent, and her credibility was seriously damaged by her cross-examination. The respondent applied successfully, on the third day of the hearing, for the case to be struck out as having no reasonable prospects of success.

The EAT was critical of the ET's decision, pointing out that strike out part way through a case will usually only be appropriate in exceptional or frivolous cases. The EAT also noted the exceptional difficulties faced by claimants in proving discrimination cases, and the possibility that a claimant who has some valid claims may lose credibility by ascribing all his/her misfortune to discrimination by a respondent. The EAT commented that:

By half time such an employee's credibility may be severely dented. It is nevertheless the usual practice of tribunals to hear all the evidence and determine such cases on their merits to see whether there is any underlying truth in the allegations. This is the correct and appropriate course where there is a crucial core of disputed fact which is not susceptible of determination except by hearing and evaluating evidence (para 50).

Comment: This guidance is essentially a reminder to an ET that it should hear both sides of an argument before dismissing a claimant's case.

In **Government Communications Headquarters v Bacchus** UKEAT/0373/12/LA, 6 August 2012, the claimant claimed disability discrimination rising out of anxiety and depression. The claimant refused to co-operate with the obtaining of a psychiatric report by the respondent, declining to attend any of three experts put forward by the respondent, while obtaining his own psychiatric report. The respondent applied to strike out on the ground of his unreasonable conduct, but the ET refused, while accepting that his conduct was unjustified. It decided to hear the claim with no expert psychiatric evidence from either side.

The EAT found that this was an error of law. The correct approach for an ET is to consider whether or not the respondent had been able to properly prepare its case without a psychiatric examination report, the correct test being set out in *Lane v Willis* [1972] 1 WLR 333, 1 January 1972. Had the ET considered this test, it ought to have found that the respondent could not properly prepare. The ET ought to have issued an 'unless order', requiring the claimant to attend the expert psychiatrist or the claim would be struck out.

Contract workers and discrimination

Agency workers are protected from discrimination by the principal in a relationship, if they are within EqA s41. This replaces section 4B of the Disability Discrimination Act (DDA) 1995, as amended. The section states that a principal must not discriminate against a contract worker:

- in the terms on which the work is offered;
- by not allowing a person to do, or to continue to do, the work;
- in the way the principal affords the worker access to benefits; or
- by subjecting the worker to any other detriment.

A principal is a person who makes work available for an individual who is employed by another person and is supplied by that other person in furtherance of a contract to which the principal is a party. This is a common agency arrangement. In **Camden LBC v (1) Pegg (2) Randstad Care Ltd (3) Hays Specialist Recruitment Ltd trading as Camden Agency for Temporary Supply** UKEAT/0590/11/LA, 13 April 2012, Ms Pegg was supplied to Camden Council by Randstad Care Ltd trading as Beresford Blake Thomas Ltd (BBT) as a temporary school travel planner in September 2008. She was paid by BBT but worked under the direction of the council. In the summer of 2009, Ms Pegg started to suffer poor mental heath, and Camden Council terminated her contract in August 2009. Ms Pegg claimed that the council had discriminated against her on the ground of her disability. The ET agreed, finding that she was within the relevant sections of the DDA 1995 protecting a contract worker.

The respondent appealed, arguing that despite the specific contract worker provision, in order to be protected by the contract worker provisions, Ms Pegg had to be in employment within the meaning of DDA 1995 s68(1). This section defined employment as 'employment under a contract of service or of apprenticeship or a contract personally to do any work'. The respondent argued that the work done by the claimant for Camden Council could not fall into the required category, because she was able to refuse any assignment and therefore there was no obligation on her personally to do the work.

The EAT rejected the argument. It noted that the ET had made a number of specific findings about the contract, and the way that Ms Pegg worked. Of key importance, it found that, once she had agreed to carry out the assignment, she did do the work personally. The EAT rejected the suggestion made by the council that Ms Pegg's ability to reject an offer of a contract meant that when she did accept a contract, she was still excluded from the protections. The EAT noted that it is part and parcel of agency work that any particular assignment may or may not be accepted. It pointed out that once the claimant accepted an assignment, she owed an express and contractual duty to do the work personally, and thus was clearly within the provisions. The EAT also noted that the arrangements under which Ms Pegg came to work for Camden Council are common arrangements, and that it must have been the intention of parliament for the specific protection of contract workers to apply in cases such as hers.

If a contract is illegal, then the courts will not enforce it as a matter of public policy. This most often arises in employment cases where one or both parties seek to avoid tax and national insurance (NI), but the claimant is then unfairly dismissed. The court will not give aid to a claimant unless s/he is innocent of the illegality. See, for example, *Hall v Woolston Hall Leisure Ltd* [2000] EWCA Civ 170, 23 May 2000; [2001] ICR 99. However, in discrimination cases, the arguments before the ET are often not about a contract, but about a tortious act. The question the courts than have to consider is whether or not the public policy argument also stretches todeny a remedy to a person who has been discriminated against within the context of his/her work, but who is working illegally. In **Hounga v Allen** [2012] EWCA Civ 609, 15 May 2012, Ms Hounga claimed that she had been unfairly dismissed and discriminated against on the ground of race, among other matters, by the family that had brought her from Nigeria to work for them as a domestic family help.

Ms Hounga was described by the court as a young, illiterate Nigerian girl, who had worked in the house of a member of the respondents' family in Nigeria, before being asked to come to England and work for another member of the family. The ET found that Ms Hounga came to the UK on a six-month visa, which did not give her the right to work, and that in order to obtain a passport and contract papers, she swore an affidavit giving a false date of birth and a name that was the respondents' family name. On entry to the UK she lied, saying she was coming to visit her grandmother.

The ET considered her claims, and while it

dismissed the unfair dismissal claims, on the basis that the contract was tainted by illegality, it upheld the discrimination claims. It made findings of fact about the abuse that she was subjected to by the family, and considered the respondents to be disingenuous. It considered that the illegality that infected the contract itself was not inextricably tied up with the discrimination. The respondents appealed to the EAT and then to the Court of Appeal.

The key test for illegality in discrimination cases is set out in *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] EWCA Civ 1065, 30 July 2004; [2005] ICR 231. That case concerned a maths teacher who had applied for work, falsely stating that he did not need a work permit. In fact he had been told by the Home Office that he could not work in the UK without a work permit. He was dismissed after eight months and brought a claim for race discrimination. The Court of Appeal dismissed his appeal, the ET and the EAT having rejected his claims. Lord Justice Mummery, giving judgment, referred to *Hall* and said that: '... the defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim' (para 2).

In this case, the question of whether the act of discrimination was inextricably bound up with the illegality was considered by the ET and the EAT, both of which determined that on the facts it was not. The EAT distinguished *Vakante* and considered that there was a key difference between the illegality in *Vakante* and *Hounga*, stating at paragraph 48 of its judgment in *Hounga* that:

The differences between the Vakante *case and the present one are clear because in this case, the focus has to be on the respondent's conduct in dismissing and evicting [Ms Hounga]. Such conduct of [Mrs Allen] is not connected with or inextricably linked with the illegal conduct by which [Ms Hounga] entered this country and worked here. [Ms Hounga's] position as a servant of the respondent working and living illegally in this country was not inextricably linked with the act of eviction or dismissal. In any event applying Mummery LJ's approach, [Ms Hounga's] involvement in the illegality was much less than that of the respondent. We have come to the conclusion that the employment tribunal were entitled to take the view that this case does not fall within what Mance LJ considered to be 'quite extreme circumstances before the test will exclude a tort claim'. Indeed by allowing [Ms Hounga] to recover compensation for this claim, the employment tribunal would not in Peter Gibson LJ's words in the* Hall *case be 'appearing to condone' the illegal conduct of [Ms Hounga]. We have come to the conclusion that the employment tribunal was entitled to uphold this claim and so we reject this ground of appeal*.

The Court of Appeal disagreed. It considered that the contract was illegal at its start, and that the only difference in the cases was that the respondents in *Hounga* were responsible jointly for the illegality at the outset. The Court of Appeal looked at the fact that the claimant's illegal status made her particularly vulnerable to abuse from her employers, as an indicator of the closeness of her illegality with the claim. Lord Justice Rimer found that:

... Ms Hounga's dismissal discrimination case was dependent upon the special vulnerability to which she was subject by reason of her illegal employment contract: she was relying on the facts that she was an illegal immigrant, had no right to be employed here, effectively had no rights here at all and so could be treated less well because of her inferior situation. In making good her dismissal discrimination case she was therefore directly invoking and relying upon the fact that she was here illegally and had been working illegally for the Allens. She was making a direct link between the discriminatory treatment of which she complained and the circumstances in which she came to be, and was, employed by the Allens. To the question whether her discrimination claim arose out of, or was clearly connected or inextricably bound up or linked with her own illegal conduct, the answer is, I consider, obviously 'yes'. ... If this court were to allow her to make that case, and so rely upon her own illegal actions, it would be condoning her illegality. That is something the court will not do (para 61).

Comment: Advisers who deal with vulnerable and marginalised workers are all too aware of the pressures which lead vulnerable and desperate people to seek work in the UK, with doubtful legal status. While the public policy of preventing illegality in contracts of employment is laudable, and offers a disincentive to exploitation, this judgment may well have the effect of removing vulnerable people from any protection from exploitation or discrimination. The message for many vulnerable and exploited workers in the marginalised sectors of the economy, is that anti-discrimination legislation will offer them no protection.

Equal pay

In a judgment handed down on 24 October 2012, the Supreme Court has ruled that women with claims for equal pay can issue their claims in the county court. In **Birmingham City Council v Abdulla and others** [2012] UKSC 47, 24 October 2012, it ruled that there is no reason why they have to take their claim to the ET. The practical result of this is that women who may not have been able to make a claim in the ET because of the strict six-month time limit for filing a claim, can take advantage of the longer six-year time limit in the county court.

The claimants had brought claims in the county court because they had been unable to meet the strict ET six-month limit, but then faced an application for strike out by Birmingham City Council under section 2(3) of the Equal Pay Act 1970. This section allows cases to be struck out where the court considers that the claims 'could more conveniently be disposed of separately by an employment tribunal'. With great logic and insight, the Supreme Court judged that since the effect of a strike out would be to end any possible claim for equal pay for these women, it would not be more convenient for them for it to be disposed of in the ET. The ET would not be able to deal with them, because they were out of time, and the women would be left with no remedy.

Their lordships further determined that since parliament had allowed for equal pay claims to be brought in the civil courts as well as in the ET, it must have accepted that the six-year time limit would apply to these women.

Comment: The practical effect of this is that any woman who realises that she has a claim for equal pay, perhaps as a result of publicity, may now be able to claim in the county court, provided that the inequality that is complained of existed within the last six years. In some local authorities, the changes in terms and conditions of employment to remove inequality may mean that claims are still out of time. Advisers should ensure that any woman who may have a claim is referred for specialist advice as soon as possible, and that protective county court claims are filed if there is doubt over the time limit.

1 Available at: www.homeoffice.gov.uk/publications/equalities/government-equality/EHRC-consultation-response.
2 *Ending the employment relationship: consultation,* September 2012, available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1037-ending-the-employment-relationship-consultation.
3 See *Equality Act 2010: employment tribunals' power to make wider recommendations in discrimination cases and obtaining information procedure. Government response to the*

consultation, October 2012, available at: www.homeoffice.gov.uk/publications/about-us/consultations/equality-act-wider-enforcement/consultation-response.

4 See *Equality Act 2010: employer liability for harassment of employees by third parties. Government response to the consultation*, October 2012, available at: www.homeoffice.gov.uk/publications/about-us/consultations/third-party-harassment/consultation-response.

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Quiet enjoyment?

Andrew Arden QC, **Rebecca Chan** and **Sam Madge-Wyld** discuss how the rights of occupiers of residential property to live undisturbed in their homes and the legal remedies available when their peace is threatened are likely to be affected by Housing Act (HA) 1996 Part 7 and Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 s144.

Introduction

Preparing the seventh edition of *Quiet Enjoyment*, first published in 1980, it was striking how little seemed to have changed since the previous edition, now ten years ago, especially given the rise in private renting over this period and what has been, in other respects, a massively changed legal environment (primarily because of the Human Rights Act (HRA) 1998).

Partly this reflected a decision not to cover anti-social behaviour, into which the sixth edition had begun to delve but which had so evolved in the meantime that it was decided that it merits its own book, which eliminated the main area of change.[1] Partly, though, it is because the law seems to have 'bedded down', in the sense that housing practitioners today are so familiar with the basic law on harassment and illegal eviction that there is little difference whether they are advising landlords or tenants; it is a 'given' that, with few exceptions, a court order is needed to evict a tenant and that cutting off, for example, utilities or taking other, extra-legal action to try to force tenants to leave is illegal.

This is not to say that there are not frequent instances of eviction and harassment, as the cases which continue to crop up in the county courts demonstrate, but they tend to involve small landlords acting irrationally and/or ignorantly or 'trying it on' but not very skilfully, rather than commercial landlords with several properties or the buy-to-rent sector.

It does not seem likely, however, that this – even relative – calm will continue. Universal benefit caps, the increased use of the private sector in discharge of homelessness duties, the continued rise in private renting and much less available publicly funded advice are likely to stir up the waters. While it is premature to identify how these pressures will manifest themselves in law, there are, it seems to us, two areas which can already be identified as liable to get attention.

HA 1996 Part 7 accommodation

It is fairly well known that the Protection from Eviction Act (PEA) 1977 does not cover certain occupiers (PEA s3A). Such 'excluded' tenants and licensees not only have no security of tenure but their landlords do not even have to obtain a court order before evicting them (PEA s3); nor need they be given notice of a minimum of four weeks and in a prescribed form (PEA s5 (subject to transitional provisions for pre-HA 1988 tenancies)) – although they do still have their contractual and/or common law rights to notice to quit or notice as appropriate.

This category of occupation excluded from the protection of the PEA was extended by case-law to those accommodated pending enquiries under what is now HA 1996 Part 7: see *Mohamed v Manek and Kensington and Chelsea RLBC* (1995) 27 HLR 439 (under HA 1985 Part 3) and *Desnousse v Newham LBC* [2006] EWCA Civ 547, 17 May 2006; [2006] QB 831; [2006] HLR 38. *Manek* was decided before, and *Desnousse* decided after, the coming into force of the HRA. It is with this latter category of occupation that this discussion is concerned, although there are also other compatibility issues as between the PEA and the European Convention on Human Rights ('the convention').[2]

In *Manek*, the authority arranged temporary bed and breakfast accommodation at a privately owned hotel pending homelessness enquiries; enquiries were completed within three days of the application when it was concluded that the occupier was not in priority need; the accommodation was terminated with effect from one week after it had been made. The occupier obtained an injunction to prevent his eviction, from which the authority appealed. It was held that the authority was not the owner for the purposes of the PEA (see below); in any event, occupation was not 'as a dwelling' because it was only a temporary arrangement pending enquiries: it could not have been the intention of parliament that

there should be grafted on to this public and temporary obligation an extension of at least four weeks drawn from another statute dealing with the private rights and duties of landlords (licensors) and tenants (licensees).

Given the facts, it may be thought that the decision was not altogether surprising. In *Desnousse*, however, the occupier was accommodated in a self-contained flat (providing her own bedding and kitchen equipment) for nearly six months pending enquiries which, ultimately, led to a finding of intentionality. The flat was also privately owned but managed by a housing association. The court refused to grant an injunction to prevent her eviction on the basis that it was bound by *Manek* to conclude that the PEA did not apply to interim accommodation provided under Part 7, from which decision she appealed.

The appeal relied on a number of changes since *Manek*, including the failure of the court in *Manek* to take account of the overall statutory framework, ie, the fact that there are explicit exclusions in PEA s3A, not including HA 1996 Part 7 accommodation, the requirement that all Part 7 accommodation be suitable (HA 1996 s206), the House of Lords' decision in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, 11 October 2001; (2001) 33 HLR 85 as to the meaning of the word 'dwelling'[3] and – most relevantly for present purposes – the HRA.

None of these arguments succeeded. While it was accepted that the flat was the occupier's home, the interference was justified because, inter alia, the eviction was, even if not by the authority, under the control of the authority (which authority could be trusted to act lawfully and responsibly);[4] there were also rights to review and appeal under Part 7 which protected the occupier; and the authority's duties would be seriously impeded by the delay and expense which would be caused by an obligation to obtain a court order.

Whether or not *Desnousse* would survive scrutiny by the Supreme Court on any of the other grounds of challenge,[5] it plainly cannot survive the decisions in *Manchester City Council v Pinnock* [2010] UKSC 45, 3 November 2010; [2011] HLR 7 and *Hounslow LBC v Powell* [2011] UKSC 8, 23 February 2011; [2011] HLR 23. In particular, the latter was accommodation provided under Part 7: although not 'temporary' in the sense that it was pending enquiries or following a decision that the applicant was homeless intentionally – so that it could, in theory, be distinguished on that ground – the reasoning in both cases applies to whatever may be said to qualify as a person's home (which it was accepted was the case in *Desnousse*).

So far as concerns proceedings by a public authority – local authority or private registered provider of social housing co-operating under Part 7 (see *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, 18 June 2009; [2010] 1 WLR 363; [2009] HLR 40) – it is now axiomatic that article 8 of the convention will afford the occupier the right to raise the proportionality of the eviction and, if this is correct, it is submitted that it would be unlawful for the public authority to seek to evict without taking court proceedings to enable a proportionality test to be raised, at least where the occupier wishes to do so: '[a]ny person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8' (*Pinnock* (see above) at para 45).

The only qualification here is if the authority can argue that occupation is so brief that it does not amount to use as a home – a difficult exercise when the underlying premise is homelessness – but probably not impossible, insofar as the convention does not confer any right to housing and, as such, cannot be said to presume that everyone has a home somewhere; rather, 'sufficient and continuous links' have to be shown.[6] Nonetheless, most homelessness cases involve occupation for months and it is unlikely that many would fail on this ground.

Slightly trickier is the problem that arises when, as is common, the owner for PEA purposes, ie, in practice the landlord, is neither the local authority nor any other registered provider of social housing. That raises the issue of 'horizontal effect,' ie, the extent to which article 8 may be said to apply to eviction proceedings by a private person or body. While this was 'reserved' in *Pinnock* (at para 50), it does not seem to us that there can be any real issue about this – after all, the 'privacy' cases involved both article 8 and non-public bodies;[7] and decisions such as *Ghaidan v Godin-Mendoza* [2004] UKHL 30, 21 June 2004; [2004] 2 AC 557; [2004] HLR 46 domestically and *Zehentner v Austria* App No 20082/02, 16 July 2009, at Strasbourg, likewise involved private individuals. See also *Kay v Lambeth LBC* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465; [2006] HLR 22:

> *As Mr Sales for the First Secretary of State explained, the article 8(1) right to respect for the home does not distinguish between public authorities and private landlords and landowners. Private landlords and landowners too must obtain an order from the court, and the court itself is a public authority* (para 64).

In any event, if the eviction is in practice at the behest of the public authority, it can be said to be as much an interference as if the authority was itself bringing the proceedings.

The final question is the route to challenge. Plainly, judicial review is available; in addition, however, it is at the least strongly arguable that HRA ss7 and 8 allow a claim to be made in the county court, as the appropriate court, bearing in mind that by County Courts Act 1984 s38, it has jurisdiction to grant an injunction in proceedings even where no other relief is claimed. In *Kay* (see above), Baroness Hale said:

> *We are also agreed as to the procedural route whereby a challenge to the general law may be made. The Human Rights Act 1998, section 7(1), provides that a person who wishes to rely upon his convention rights may do so either in a freestanding action or by defending an action brought against him by a public authority. In those very rare cases where a person may be evicted from his home without any court order at all, a challenge would have to [be] raised* ***by way of a freestanding action*** *or judicial review* (emphasis added) (para 188).

The LASPO Act

By section 144 of the LASPO Act, it is a criminal offence where a person:
(a) is in a residential building as a trespasser having entered it as a trespasser;
(b) knows or ought to know that s/he is a trespasser; and
(c) is living in the building or intends to live there for any period.

The concern is that landlords will use section 144 to bypass litigation. Of course, the offence does expressly provide that it is not committed where a tenant or licensee remains in his/her property after the tenancy or licence has ended (under section 144(2)), but this raises a question of law in which, in the context of harassment and eviction, the police have traditionally resisted getting involved. (Compare *Cowan v Chief Constable for Avon and Somerset* [2001] EWCA Civ 1699, 14 November 2001; [2002] HLR 44, in which the Court of Appeal held that the police did not owe a tenant a duty of care to prevent his unlawful eviction.)

Both the Ministry of Justice (MoJ) and the Crown Prosecution Service (CPS) appear concerned about this.[8] The latter's guidance explains that:

> *... the offence cannot be committed by a person holding over after the end of a lease or license (even if the person leaves and re-enters the building) ... In certain circumstances, such a person may be alleged by the landlord to be a trespasser. This express provision is designed to ensure that the offence does not apply in*

these cases. The offence only captures those whose original entry and occupation of the building was unauthorised.

As welcome as the CPS guidance is, it is unlikely that a police officer, in the heat of an unlawful eviction, is going to have time or the resources to consult the guidance or unravel the rights of occupation. It is more probable that officers will revert to the usual refrain that 'it is a civil matter' and, in some cases, effectively carry out the eviction at the behest of the landlord by arresting and releasing on police bail with a condition of non-occupation of the property in question. What is also worrying is that bodies with what might be called a presumption of propriety, ie, social landlords, will be able to get the police to do their bidding in this respect quite easily. (Compare with *Desnousse* (see above), ie, that local authorities can be trusted to act lawfully and responsibly.)

Abuse of the LASPO Act is not confined to the eviction of former tenants and licensees, for even trespassers can enjoy article 8 rights and, as such, be entitled to an independent determination of proportionality. Thus, in a recent case, a private registered provider called in the police the day before proceedings were due to be resumed against a squatter; released on police bail with such a condition, the squatter – understandably – did not attend the proceedings and, in short, the eviction was complete without the involvement of any court.

In this sort of case – where public authorities such as the landlord and the police co-operate so as to evict – there is a fairly strong argument of unlawful action on their part: they will, between them, have in practice secured an eviction which will bypass the article 8 entitlement, and it is highly unlikely that Strasbourg (at any rate) will allow the two public authorities to break down their actions into discrete components so as to avoid responsibility, ie, the landlord says it did nothing more than report a criminal offence while the police say they did nothing more than arrest and impose bail conditions.

Illegality of a different order would also seem to arise where a person abuses the new provisions to get – or try to get – the police to arrest someone who is protected by the PEA,[9] for the complaint will be an act 'likely to interfere with the peace or comfort of the residential occupier or members of his household' (PEA s1(3); s1(3A)(a)), which will be a criminal offence in itself if done 'with intent to cause the residential occupier ... to give up the occupation of the premises ... ; or to refrain from exercising any right or pursuing any remedy in respect of the premises ...' (PEA s1(3)) or which the landlord 'knows, or has reasonable cause to believe, ... is likely to cause the residential occupier to give up the occupation of the ... premises or to refrain from exercising any right or pursuing any remedy in respect of the ... premises', at any rate unless 'he proves that he had reasonable grounds for doing the' act (PEA s1(3A) and (3B)).

Aside from this, the occupier will usually have recourse to civil proceedings. Wherever a landlord has instigated removal of the tenant by asking the police to arrest him/her, it is likely at the least that s/he will have breached the covenant of quiet enjoyment. The police may also be liable: in *Naughton v Whittle and Chief Constable of Greater Manchester Police* Manchester County Court, 30 November 2009; July 2010 *Legal Action* 29, Greater Manchester Police (following an out of court settlement) paid the tenant £2,500 for his wrongful arrest and for assisting the landlord in the tenant's unlawful eviction.

Nor should it be forgotten that LASPO Act s144 applies as much to landlords as to any other person. It is not unheard of for a private landlord to take back possession of property unlawfully and occupy it as his/her own home. This would also be an offence under section 144 even if there are other cases, such as where the landlord passes the property to a relative or grants a new tenancy, where the new occupier may not know (nor ought to have known) that s/he has entered and is occupying as a trespasser.

Conclusion

For many occupiers, the days ahead are unlikely to be enjoyable; for housing lawyers, certainly not quiet.

1 Forthcoming from LAG by Andrew Dymond.
2 For example, and leaving aside horizontality (see note 7 below), hostels run by local authorities and other registered providers of social housing are excluded: this is incapable of being compatible with the procedural requirements of article 8 as upheld in the principal cases (*Pinnock and Powell*). Nor can it be justified by 'management requirements': if an occupier needs to be removed swiftly, an injunction preventing occupation pending a hearing can be sought.
3 In effect, lowering the definition threshold.
4 Not exactly what might be called a classic Strasbourg approach!
5 In that case, the occupier left between hearing and judgment, so that no issue of appeal arose.
6 *Buckley v UK* App No 20348/92, 29 September 1996; (1996) 23 EHRR 101; this test continues to be followed and was adopted domestically in *Harrow LBC v Qazi* [2003] UKHL 43, 31 July 2003; [2004] 1 AC 983; [2003] HLR 75.
7 In particular, see *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; [2006] EWCA Civ 1776, 21 December 2006: 'The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to convention rights. In this way horizontal effect is given to the convention' (per Lord Phillips CJ at para 25).
8 See MoJ Circular No 2012/04 *Offence of squatting in a residential building*, available at: www.justice.gov.uk/downloads/legislation/bills-acts/circulars/squatting-circular.pdf, and CPS Legal Guidance *Trespass and nuisance on land*, available at: www.cps.gov.uk/legal/s_to_u/trespass_and_nuisance_on_land/#a10.
9 Ie, who is a residential occupier under section 1(1): 'a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises'.

Andrew Arden QC, Rebecca Chan and Sam Madge-Wyld are barristers at Arden Chambers, London and co-authors of *Quiet Enjoyment: Arden and Partington's guide to remedies for harassment and illegal eviction*, 7th edition, LAG, September 2012, £40.

Recent developments in housing law

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

POLITICS AND LEGISLATION

Homelessness and locality

Housing Act (HA) 1996 s208(1) prevents a local housing authority from using accommodation outside its own district to perform any of its Part 7 (Homelessness) functions, unless the provision of in-district accommodation is not reasonably practicable. Even if that proviso applies, any out-of-district accommodation must be 'suitable': HA 1996 s206. The secretary of state has exercised his powers under section 210(2) to add 'location' as an aspect of suitability which a local housing authority in England must take into account: the Homelessness (Suitability of Accommodation) (England) Order 2012 SI No 2601.[1] Article 2 requires that the local housing authority must specifically consider:

(a) where the accommodation is situated outside the district of the local housing authority, the distance of the accommodation from the district of the authority;

(b) the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the person or members of the person's household;

(c) the proximity and accessibility of the accommodation to medical facilities and other support which – (i) are currently used by or provided to the person or members of the person's household; and (ii) are essential to the well-being of the person or members of the person's household; and

(d) the proximity and accessibility of the accommodation to local services, amenities and transport.

The criteria in articles 2(b)–(d) also apply to determining the suitability (or otherwise) of in-district accommodation.

The content of the Order was finalised after a consultation exercise. In its response to the results of the consultation, the government said that it:

... has made it clear that it is neither acceptable nor fair for local authorities to place households many miles away from their previous home where it is avoidable. Given the vulnerability of this group it is essential that local authorities take into account the potential disruption such a move could have on the household. This Order will strengthen existing legislation in that it states the specific matters local authorities must take into account when considering the suitability of accommodation (p11): *Homelessness (Suitability of Accommodation) (England) Order 2012 – Government's response to consultation* (Department for Communities and Local Government (DCLG), November 2012).[2]

New supplementary statutory guidance for authorities in England, issued under HA 1996 s182, addresses the issue of location as an aspect of suitability and advises on the application of the new Order: *Supplementary guidance on the homelessness changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) Order 2012* (DCLG, November 2012).[3]

Housing and eligibility

In *Zambrano v Office national de l'emploi (ONEM)* C-34/09, 30 September 2010, the European Court of Justice held that some non-EU nationals have the right to reside in the UK while their children who are EU nationals are being educated here (see *Pryce v Southwark LBC* below). This right has now been recognised in domestic immigration law: the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 SI No 2560.[4]

However, with effect from 8 November 2012, the new Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 SI No 2588 add the people who enjoy that particular right of residence to the categories who are ineligible for an allocation of housing accommodation or homelessness assistance in England: reg 2. That is achieved by amending the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 regs 4 and 6. The change does not have effect in relation to an application for an allocation of housing accommodation or homelessness assistance which was made before 8 November 2012: reg 3. A letter has been sent to each local housing authority in England explaining the change.[5]

Social housing fraud

The Prevention of Social Housing Fraud Bill has completed all its stages in the House of Commons, where it received all-party support. The bill passed through its Committee Stage scrutiny in a single day (24 October 2012). Its scope was enlarged significantly by government amendments designed to enhance local authority powers to obtain and use personal information data to detect and investigate a wide range of social housing fraud.

In addition to introducing new criminal offences relating to subletting, the bill will add HA 1988 s15A in respect of the effects of subletting an assured tenancy. A helpful briefing note on the background to the bill and its provisions has been published: *The Prevention of Social Housing Fraud Bill* [Bill 16 of 2012–13] SN/SP/6378 (House of Commons Library, November 2012).[6] Advisers minded to suggest amendments must expect the bill to make swift progress in the House of Lords.

The latest report on activity to tackle fraud against local authorities records that housing tenancy fraud, including unlawful subletting, is costing £900 million per year: *Protecting the public purse: Fighting fraud against local government* (Audit Commission, November 2012).[7] This is the most significant area of loss to fraud in local government, but councils recovered nearly 1,800 homes last year with a total replacement value of nearly £264 million.

Private rented sector

The House of Commons Select Committee on Communities and Local Government has launched an inquiry into the private rented sector.[8] The committee has invited written submissions by 17 January 2013 from interested parties covering the quality and regulation of private rented housing, and levels of rent within the sector.

Empty homes

With effect from 15 November 2012, the Housing (Empty Dwelling Management Orders) (Prescribed Period of Time and Additional Prescribed Requirements) (England) (Amendment) Order 2012 SI No 2625 has changed the conditions local authorities must satisfy to make successful applications to residential property tribunals in respect of

empty properties. Article 2 amends HA 1996 s134(2)(a) to prescribe at least two years as the period a house must remain wholly unoccupied before an interim empty dwelling management order can be sought (in substitution for the period of at least six months). Article 3 prescribes additional requirements to be met before a residential property tribunal can authorise the interim empty dwelling management order.

Housing Ombudsman

The Housing Ombudsman has published a draft of the new scheme that will govern complaints made about social housing management, in respect of all types of social landlords (especially councils and housing associations), from April 2013: *Housing Ombudsman Scheme* (October 2012).[9] The draft scheme is accompanied by a consultation paper: *Consultation on the Housing Ombudsman scheme*.[10] Any responses should be made by 15 December 2012.

Mobile home sites

The Mobile Homes Bill has been introduced in the House of Commons and is passing through the legislative process. The bill is backed by the UK government and is intended to implement many of the proposals contained in the DCLG consultation paper *A better deal for mobile home owners* (April 2012) and recommendations made by the House of Commons Communities and Local Government Select Committee in its report *Park Homes* (June 2012). A useful summary of the measures in the bill has been published: *Mobile Homes Bill*: Bill No 12 of Session 2012–13 SN/SP/6438 (House of Commons Library, October 2012).[11]

HUMAN RIGHTS

Article 6

■ Pelipenko v Russia

App No 69037/10,
2 October 2012,
[2012] ECHR 1779

In 1989, Ms Pelipenko and her son were given housing rights to two rooms in a former administrative building in a state-owned seaside health resort. The resort was transformed into a private joint-stock company, 'Golden Beach Resort' ('the company'). The company issued a possession claim but the Anapa Town Court ordered 'the company … at its next general meeting of shareholders, to determine the issue of purchasing a flat for the applicants in accordance with the requirements of the Russian Housing Code in order to resettle them from the premises they had occupied in the resort' (para 8). The court issued a writ of execution, but the bailiffs did not enforce it. The court then amended its judgment to order the company to purchase 'before 1 January 2005, a two-room flat in the town of Anapa. In the event of its failure to comply with the judgment, the company was to pay the applicants 1,168,800 Russian roubles' (para 12). In 2010, the bailiffs closed the enforcement proceedings because the company had been declared bankrupt in March 2009. Ms Pelipenko then lodged an action against the Anapa Town Bailiffs Service, complaining that they had failed to enforce the final judgment. The court accepted her complaint and declared the bailiffs' inactivity to be unlawful. In 2009, a third party lodged an action seeking annulment of Ms Pelipenko's registration as a resident in the premises and her eviction. The court found that Ms Pelipenko's registration had become unlawful and should have been annulled. Ms Pelipenko was evicted. The Supreme Court of the Russian Federation allowed Ms Pelipenko's appeal, but the third party then destroyed the building. She removed the roof, the windows and disconnected the services. Ms Pelipenko complained to the European Court of Human Rights (ECtHR) that there had been a breach of article 6.

The ECtHR stated that its task was to determine whether the measures taken by the bailiffs 'were adequate and sufficient'. It noted that 'the bailiffs remained passive most of the time' (para 53). The court decided that the bailiffs did not employ adequate efforts to secure the execution of the judgment. It found that 'by refraining for years from taking adequate and effective measures required to secure compliance with the enforceable judicial decision, the national authorities deprived the provisions of article 6(1) of the Convention of all useful effect' (para 56). There was accordingly a breach of article 6. It also found a breach of article 8 but decided that the claim for compensation was not ready for decision.

Article 8

■ Thurrock BC v West

[2012] EWCA Civ 1435,
8 November 2012

In 1967, Thurrock granted a weekly joint tenancy to George and Violet West. They were Aaron West's grandparents. In 2007, Aaron West, his son and his partner moved in to live with his grandparents. George West died in 2008. The tenancy automatically vested in Violet West as successor under the provisions of the HA 1985 ss87 and 89(2). She died in 2010. As she was a successor, section 87 precluded any further right of succession. Accordingly, the weekly tenancy vested in Violet's estate. It was terminated in October 2011 by notice to quit served on the Public Trustee. In November 2011, the council issued a claim for possession on the ground that Aaron West had never been a tenant or sub-tenant and had no right to statutory succession. He defended the claim, arguing that, since he, his partner and his son had lived in the property and paid rent for four years, an order for possession would be disproportionate and so an infringement of his right to respect for his home under article 8. The case was assigned to the multi-track. District Judge Hodges dismissed the claim. Thurrock appealed.

The Court of Appeal allowed the appeal. The threshold for establishing an arguable case that a local authority is acting disproportionately and so in breach of article 8 is a high one which will be met in only a small proportion of cases. The reason for that lies in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource. Local authorities, like other social landlords, hold their housing stock for the benefit of the whole community and they are best equipped, certainly better equipped than the courts, to make management decisions about the way such stock should be administered. Unless there is some good reason not to do so, courts must, at the earliest opportunity, summarily consider whether an article 8 defence, as pleaded, and on the assumption that the pleaded facts relied upon are correct, reaches that threshold. It was quite clear that the article 8 defence in this case did not even reach the threshold of being reasonably arguable. It should have been struck out summarily at the earliest opportunity. There was nothing exceptional about the housing needs of a couple who had limited financial means and were the parents of a young child. The case should not have been assigned to the multi-track.

■ Stokes v UK

App No 65819/10,
18 October 2012,
[2012] ECHR 1862

Ms Stokes was an Irish Traveller. In 2007 she moved with her children into an empty mobile home on a pitch in a Brent Council Traveller site. The council refused to grant her a licence to occupy the pitch and brought possession proceedings. She sought to defend the claim by relying on her article 8 rights, but a judge found that the claim was not seriously arguable and made a possession order on a summary basis. Ms Stokes said that she was entitled to disclosure of the documents outlining the council's reasons for seeking possession so that she could know how to frame her defence. The High Court rejected an appeal against the possession order. The Court of Appeal refused permission for a second appeal, and the

applicant left the site. She complained to the ECtHR.

The court has posed the following questions for the parties:

■ Did Ms Stokes's residence engage article 8(1)? In particular, did her mobile home constitute a 'home' for the purposes of that provision?

■ Has there been a breach of the procedural aspect of article 8?

■ Did the absence of any domestic law obligation on the public authority landlords to give a detailed statement of reasons in connection with possession proceedings brought against a trespasser violate Ms Stokes's rights under articles 6 and/or 8 of the convention?

■ Southend-on-Sea BC v Armour

(2012) 18 October, QBD

Mr Armour was an introductory tenant. Southend alleged that he had verbally abused a neighbour, a contractor and a member of its staff. They also claimed that he had switched on the electricity while the contractors were working and that a workman suffered an electric shock. A possession claim was issued, but the trial was delayed for over 11 months. In the meantime, Mr Armour was found to have Asperger's syndrome and to be suffering from depression. He did not have capacity to defend the claim and a litigation friend was appointed. There were no further incidents before trial and Mr Armour had the support of a number of agencies and family members. Recorder Davies found that it had been proportionate and lawful to seek a possession order but that it would now be disproportionate to grant a possession order, having regard to the absence of complaints since the claim was issued and the effect that eviction would have on Mr Armour and his 14-year-old daughter. Southend appealed.

Cranston J dismissed the appeal. Each case had to be considered on its own facts. Proportionality has to be decided as at the date of the hearing. Subsequent behaviour, even good behaviour, could be a relevant consideration when studying proportionality. The recorder was entitled to examine the absence of recent complaints. There was no error in her approach.

■ South Lanarkshire Council v McKenna

[2012] ScotCS CSIH 78,
10 October 2012

Ms McKenna was a secure tenant. As a result of her anti-social behaviour, the tenancy was demoted to a short Scottish secure tenancy. The council later gave statutory notice to end that tenancy and sought possession. The statutory scheme required that the court hearing the claim for possession 'must make an order' if the requisite notice had been served. The statute did not require the landlord to give reasons for seeking possession in the notice or in the claim.

The Court of Session held that in order to be compatible with article 8 the statute had to be read (1) as enabling the court to consider the proportionality of any eviction and (2) as requiring reasons to be given. The court said this about reasons:

We are of the opinion that such an obligation can, and should, be read into the Scottish legislation, simply as an aspect of procedural fairness which underlies all questions in relation to the vindication of human rights. We would stress, however, that only if the application is being sought to be challenged on the basis of proportionality would the authority need to give reasons beyond what is said, as a matter of course in the statutory notice and then, only, if their decision was based on reasons which go beyond what is stated in the statutory notice (para 12).

■ Ivanova v Ukraine

App No 74113/10,
[2012] ECHR 1733,
24 September 2012

Ms Ivanova was a civil servant allocated a room in a building let to public officials. The local municipal company began renovation works and sought a possession order requiring her to leave. A court granted possession on the basis that she would have to leave permanently because of the nature of the works and would be granted other housing. On appeal, the order was modified so that she would only need to leave temporarily. Ms Ivanova established that the company had no valid permit to undertake the development but, despite court orders for suspension of the works, they continued around her. She complained of an infringement of her right to respect for her home.

The ECtHR posed this question for the parties: has there been a violation of the applicant's right to respect for her home, contrary to article 8 of the convention? In particular, regard being had to the fact that the issue of the applicant's relocation and its temporary or permanent character had not been decided before the deployment of the reconstruction works, have these works been carried out in accordance with the law and, if so, did the applicant suffer an individual and excessive burden in connection with the works at issue?

■ Cazacliu v Romania

App No 63945/09,
17 September 2012

Mr Cazacliu and 75 other nationals of Roma origin were living in an abandoned building. They included women, children, elderly and disabled people. The owner obtained a possession order and all were evicted. The local council relocated some in an abandoned army barracks on an industrial site and others, initially with no place to stay, were relocated to a site which was a former rubbish tip. None was granted proper social housing. They complained to the ECtHR, which has posed several questions for the parties, including: was there a violation of article 3 and/or of article 8 of the convention on account of the applicants' living conditions in the accommodation provided by the authorities as social housing?

Article 1 of Protocol No 1

■ Tunyan v Armenia

App No 22812/05,
[2012] ECHR 1799,
9 October 2012

Ms Tunyan owned a flat in Yerevan. In 2002, the government adopted a decree approving the expropriation of land, including the flat, so that construction projects could be carried out. Ms Tunyan was evicted. She claimed that there was a violation of article 1 of Protocol No 1.

The ECtHR found that the deprivation of property and the termination of the right of use were not carried out in compliance with 'conditions provided for by law' (para 38). There was accordingly a violation of article 1 of Protocol No 1. It awarded pecuniary damage of €30,000 and non-pecuniary damage of €1,500 for each applicant.

POSSESSION CLAIMS

Assured tenancies

■ Liverpool Mutual Homes v Nugent

[2012] EWCA Civ 1245,
9 August 2012

Mr Nugent was an assured tenant. Liverpool Mutual sought possession on the ground that there had been a breach of the terms of the tenancy. It relied on HA 1988 Sch 2 Grounds 12, 13 and 14. It alleged that Mr Nugent did not keep the property in a clean condition; allowed it to fall into disrepair; and that there were various acts of nuisance. HHJ Bird made an outright possession order. He found that Mr Nugent had failed to co-operate with the landlord about the repairs and had shouted obscenities at children and neighbours. Mr Nugent sought permission to appeal, disputing the judge's findings and claiming that he had not dealt with all the medical evidence.

Mummery LJ refused a renewed application for permission to appeal. The appeal did not have a real prospect of success. There was evidence on which the judge could make findings against the defendant. He was entitled to find that the ground for possession had been

made out and that it was reasonable to make the order.

ASSURED SHORTHOLD TENANCIES

Deposits

■ Ayannuga v Swindells

B5/12/0804,
6 November 2012

Mr Ayannuga was an assured shorthold tenant. In accordance with the tenancy agreement, he paid a deposit of £950. It was held by the administrator of an authorised custodial scheme. Mr Swindells, the landlord, claimed possession based on rent arrears. Mr Ayannuga counterclaimed, denying any arrears and seeking repayment of the deposit. He alleged that the landlord had breached HA 2004 s213(5) and (6) by failing to provide him with information about the tenancy deposit scheme as prescribed by the Housing (Tenancy Deposits) (Prescribed Information) Order ('the Prescribed Information Order') 2007 SI No 797. During the hearing, the landlord provided additional information concerning the deposit scheme. The judge dismissed the counterclaim, deciding that the landlord had substantially complied with the section 213 obligations. He held that the information in the tenancy agreement and the additional information had substantially the same effect as the information prescribed by the Order. Mr Ayannuga appealed.

The Court of Appeal allowed the appeal. The judge had reached a decision which fell outside the proper exercise of judicial judgment and evaluation. Although the tenancy agreement and additional information addressed the procedure in the event that the tenancy agreement ended and a deposit had to be returned, the provisions of the tenancy agreement did not address the procedural provisions of the deposit scheme itself. Articles 2(1)(e) and 2(1)(f) of the Prescribed Information Order were not to be regarded as mere matters of procedure or of subsidiary importance. They were of real importance to a tenant as they defined the circumstances in which a tenant could recover his/her deposit and the means by which disputes regarding deposits could be resolved, including resolution without recourse to litigation. The court granted a declaration that Mr Ayannuga was entitled to repayment of the deposit within 14 days and ordered the landlord to pay a sum equal to three times the amount of the deposit within 14 days.

LONG LEASES

Service charges

■ Crosspite Ltd v Sacheev

[2012] UKUT 321 (LC),
25 September 2012

Landlords found that tenants had underlet the whole of the demised premises in breach of the terms of their lease. They required an application for retrospective consent to underlet and demanded payment of their standard £165 charge to cover their costs of consenting to underletting. The tenants applied to the Leasehold Valuation Tribunal (LVT) seeking a determination that the £165 charge was unreasonable under Commonhold and Leasehold Reform Act (CLRA) 2002 Sch 11 para 1. The LVT decided that the landlord was not entitled to charge for its costs of consenting to underletting and in any event £165 was unreasonable.

HHJ Gerald allowed the appeal. The LVT had no jurisdiction to consider an issue which had not been raised (Sch 11 para 5(4)(a)). Furthermore, there was no evidential basis on which it could conclude that the sum of £165 was unreasonable.

■ Birmingham City Council v Keddie and Hill

[2012] UKUT 323 (LC),
25 September 2012

Birmingham undertook window replacement and balcony works to a flat as part of a programme of major works to the block. Mr Keddie and Mr Hill then bought the flat. They had no knowledge of the condition of the old windows which had been replaced. Birmingham sought to recover £5,909.57 as the costs of the works via the service charge. Mr Keddie and Mr Hill applied to the LVT for a determination that the amount claimed was not reasonable under Landlord and Tenant Act 1985 ss27A and 19(1). The LVT found that Birmingham did not act reasonably in concluding that the window replacement works should be carried out. Accordingly, it found that the cost of the window replacement was not reasonably incurred. Birmingham appealed on the basis that the LVT had breached natural justice by reaching a decision on grounds not raised in the application without giving it an opportunity to make submissions, and that in any event the decision was perverse, as there was no evidence before it about the condition of the old windows which were replaced.

HHJ Gerald allowed the appeal. Mr Keddie said that he was surprised that the LVT had made the decision it did because only the standard of work was being challenged, not that the old windows needed to be replaced. As far as he was concerned, the LVT had misconstrued his argument which only related to the standard of work. He felt that the LVT by its decision had put Mr Hill and him in an 'unfair position' (para 10). The parties then agreed a sum that was recoverable. HHJ Gerald said:

It is regrettable that it appears to be a developing practice within some leasehold valuation tribunals to take it upon itself to identify issues which are of no concern to the parties and then reach a decision on issues they have not been asked to which then results in an appeal and all the waste of time and money and attendant general aggravation (para 13).

It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve … To do so would be inimical to the party-and-party nature of applications to the LVT and would greatly increase the costs (frequently recoverable from the tenant through the service charge) and difficulties attendant to service charge disputes which by their nature are frequently fractious, involving relatively small sums within a complex matrix of divers items of expenditure (para 17).

In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT (para 20).

■ Wales and West Housing Association Ltd v Paine

[2012] UKUT 372 (LC),
22 October 2012

The housing association sought to recover service charges from one of its right-to-buy leaseholders. The service charge had several elements including a management charge, which itself contained an element for administration. The lessee applied to the LVT challenging the service charges and wrote that 'administration should not be included' (para 4). The LVT decided that the housing association was entitled to recover that element but that it was unreasonably high and reduced it.

The Upper Tribunal allowed the housing association's appeal. The LVT had acted without procedural fairness in taking a point (reasonableness of the charge) which the

lessee had not raised and on which it had invited no evidence. The charge was payable as claimed.

■ **Gala Unity Ltd v Ariadne Road RTM Company Ltd**

[2012] EWCA Civ 1372, 23 October 2012

Tenants established a management company to take over the management of two blocks of flats. An issue arose with the freeholder as to the management of common parts of the development of which the blocks formed part. The Upper Tribunal (Lands Chamber) decided that the company could manage property 'appurtenant' to the blocks (CLRA 2002 s71), including car parking spaces allotted with the leases of the flats and the common areas over which the tenants had rights. The freeholder appealed on the basis that this would lead to both it and the management company managing the common parts because it would retain management functions for properties on the development which were not in the blocks.

The Court of Appeal dismissed the appeal. The tribunal had correctly identified the statutory rights. The parties would need to work out joint management on a practical basis.

HOUSING ALLOCATION

Local Government Ombudsman

Complaints

■ **Newham LBC**

11006128, 29 October 2012

A council tenant applied for an emergency housing transfer. She had been subjected to domestic violence. Her application would normally have resulted in a direct offer of alternative accommodation, but the council's allocation scheme provided that if an applicant had a 'property-related debt' they would only have a reduced priority and that this provision could only be waived in 'exceptional circumstances' (para 9).

The tenant had former tenant arrears in respect of earlier accommodation from which the council had rehoused her. After her rehousing, the council had allowed the tenancy to run on for 18 months, leading to very significant rent arrears. Those arrears were taken into account in making the decision under the housing allocation scheme and operated to block the transfer.

The tenant complained under the council's complaints procedure and her complaint was upheld. The council accepted that it should have terminated the earlier tenancy no later than about two weeks after she was rehoused. The effect of that decision was to reduce the arrears to under £140, but the complainant was still not awarded a management transfer and complained to the Local Government Ombudsman.

The ombudsman decided that, but for the council's error in failing to end the old tenancy earlier, the arrears would have been modest and would have been cleared by the tenant in order to secure the transfer. The error had been maladministration and had caused injustice. The ombudsman recommended that the council:

- issue an apology;
- pay £250 compensation; and
- reconsider the management transfer application in light of the reduced arrears.

■ **York City Council**

11 018 683, 16 October 2012

The complainant, his wife and their two daughters (then aged nine and ten) were homeless in March 2010. The council accepted that it owed the main housing duty: HA 1996 s193. It made an offer under its housing allocation scheme of a two-bedroom property which was accepted. In January 2012, the complainant complained that his family had been overcrowded for the whole period they had been in occupation. The second bedroom was only 7.7 square metres and the girls had been sharing it.

The council rejected suggestions that the home was statutorily overcrowded on the basis that it had a living room which could be used for sleeping accommodation. However, following a complaint to the ombudsman, the council eventually conceded that because the living room also had a gas fire and a back boiler, it could not be used for sleeping in.

The council apologised for the error and agreed to backdate priority status under the allocation scheme to the date when the tenancy had been accepted. The ombudsman found that it was maladministration for the council to have offered a property which would be statutorily overcrowded from the outset. Each day that the family had occupied it, the council had been committing an offence. Compensation of £2,000 was agreed. The council also agreed to provide guidance and training to its staff on overcrowding rules.

HOMELESSNESS

Applications

Public Services Ombudsman for Wales

Complaint

■ **Cardiff CC**

2011/02310, 24 October 2012

The complainant was a secure tenant of the council. In August 2010, his ex-partner smashed the glass of his front door and stabbed him with a knife. He left the property and went to stay temporarily elsewhere. In January 2011, he sent the council a letter explaining what had happened and wrote that he had 'great difficulty in residing' at his address, and asked for a transfer to alternative accommodation as a matter of 'great urgency'. The council failed to treat the letter as an application under both HA 1996 Part 6 (Allocation) and HA 1996 Part 7 (Homelessness) even though the complainant was seeking assistance in obtaining (other) accommodation and the letter must have given the council reason to believe that he may be homeless: HA 1996 s183.

The Public Services Ombudsman for Wales said that he 'was concerned that this case yet again reflected a series of similar cases where the council has not only failed to recognise when its homelessness duty to make enquiries is engaged, but has failed to appreciate that a [formal] homelessness application is not necessary to trigger that duty'.

He recommended the following:

- an apology;
- payment of £5,750; and
- an audit of 'front-line services to identify any significant problems in the identification of when its homelessness duty is triggered'.

Eligibility

■ **Pryce v Southwark LBC**

(2012) 7 November, CA

Ms Pryce was in the UK unlawfully. Her two dependent children were British citizens. On her application for homelessness assistance, the council decided that she was not eligible for assistance: HA 1996 s185. That decision was upheld on review, and she appealed unsuccessfully to the county court.

The Court of Appeal allowed a second appeal. As a result of her children's need for her to remain in the UK as their carer, Ms Pryce also had a right to reside in the UK under article 20 of the EU Treaty as explained by the European Court of Justice in *Zambrano* (see above). It followed that she was eligible for assistance.

Comment: This decision will only assist applicants who applied for homelessness assistance or social housing allocation before 8 November 2012. On that date, regulations took effect specifically to provide that those solely relying on article 20 would not be eligible (see above).

■ **R (TJ) v Birmingham City Council**

[2012] EWHC 2731 (Admin), 3 September 2012

The applicant applied to the council for homelessness assistance. It decided that she was a person subject to immigration control and not eligible for such assistance: HA 1985 s185. The applicant's solicitors applied for a

review – and for accommodation pending that review – on the basis that one of her dependent children was an EU citizen and that accordingly, in reliance on *Zambrano*, the applicant was entitled to the provision of accommodation. The council declined to provide accommodation pending the review on the basis that no regulations had been made under HA 1996 s185(2) prescribing those with derived rights based on *Zambrano* as eligible, notwithstanding their being subject to immigration control.

The applicant sought a judicial review on the basis that the effect of *Zambrano* was that the applicant was no longer subject to immigration control at all and did not need to rely on exempting regulations. HHJ Robert Owen QC refused a renewed application for permission to apply for judicial review because it did not follow, just because a person asserted that they enjoyed derived rights under *Zambrano*, that they were necessarily eligible and entitled to homelessness assistance. The council had directed itself in accordance with the *Mohammed* test (*R v Camden LBC ex p Mohammed* (1998) 30 HLR 315) in deciding not to accommodate pending review.

Intentional homelessness

■ Ali v Wandsworth LBC

[2012] EWCA Civ 1337,
18 October 2012

The claimant was a private rented sector tenant. She decided that she needed to travel abroad to visit relatives. She ended her tenancy and used the refunded deposit money to meet the air fare. When she returned to the UK, she had no funds and applied to the council for homelessness assistance. It decided that she had become homeless intentionally. HHJ Welchman dismissed an appeal from that decision.

Rimer LJ refused the claimant's application for permission to bring a second appeal. While it may have been correct that the claimant was mistaken, in good faith, about her entitlement to continuing housing benefit during a temporary absence, that was irrelevant to her deliberate act in terminating the tenancy which had been motivated by the need to obtain the return of the deposit.

Offences

■ Luton BC v Jackson and Mahia

Luton Magistrates' Court,
20 September 2012

The defendants applied to the council for homelessness assistance. They said that they had lived in private rented accommodation in Ireland and had been given notice to leave their home when the landlord defaulted on the mortgage. They gave the council a false address for the property in Ireland and a false name for the landlord.

The council traced the real landlord who denied that he had required them to leave. The council brought a prosecution and the defendants pleaded not guilty to offences contrary to the Fraud Act 2006 and HA 1996 s214. They were convicted following a trial. Each received a suspended sentence order with 26 weeks' imprisonment suspended for 18 months and a requirement to perform 100 hours' unpaid work. The defendants were also each ordered to pay £500 towards the council's costs.

HOUSING AND COMMUNITY CARE

■ R (Sunderland City Council) v South Tyneside Council

[2012] EWCA Civ 1232,
9 October 2012

Two councils could not agree which of them would be responsible for providing accommodation and other aftercare services, under Mental Health Act (MHA) 1983 s117. The duty was owed to a young woman who was in a mental hospital but was about to be discharged. Before being admitted for treatment, she had lived in a hall of residence in Sunderland's area. In 2009, she was moved to a hospital in South Tyneside's area where she remained for two years before moving again to a hospital in Sunderland's area. While she had been in South Tyneside, her placement in the hall of residence in Sunderland had been ended.

The Court of Appeal held that South Tyneside was the authority responsible for her aftercare. The judgment gives guidance on how authorities should decide which council has responsibility under the MHA 1983.

1 Available at: http://www.legislation.gov.uk/uksi/2012/2601/pdfs/uksi_20122601_en.pdf.
2 Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11314/homelessness_sor.pdf.
3 Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9323/121026_Stat_guidancewith_front_page_and_ISBN_to_convert_to_pdf.pdf.
4 Available at: http://www.legislation.gov.uk/uksi/2012/2560/pdfs/uksi_20122560_en.pdf.
5 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11348/2252992.pdf.
6 Available at: www.parliament.uk/briefing-papers/SN06378.pdf.
7 Available at: http://www.audit-commission.gov.uk/fraud/protecting-the-public-purse/Pages/protecting-the-public-purse-2012.aspx.
8 See: http://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/inquiries/parliament-2010/private-rented-sector/.
9 Available at: http://www.housing-ombudsman.org.uk/downloads/HousingOmbudsmanScheme-DRAFT.doc.
10 See: http://www.housing-ombudsman.org.uk/downloads/HOS-SchemeConsultationDocument.doc.
11 Available at: http://www.parliament.uk/briefing-papers/SN06438.pdf.

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Employment tribunals: striking out claims

Sally Robertson considers strike-out applications and the current approach to cases with no reasonable prospects of success.

In a jurisdiction in which recovery of costs is unusual, getting a technical knock-out through a procedural short-cut can look particularly inviting. The reality is that unless there is no serious dispute or the fairness of a trial seems in jeopardy, the possibilities are more limited. Robust case management generally has to give way to the right to have the case heard. There is also the catch-22 that going for a strike-out is akin to asking for further particulars: it forces the other side to get their case in order. Yet avoiding the temptation may generate a downside when the omission is used to help defend a costs application.

The Employment Tribunals (Constitution and Rules of Procedure) Regulations (ET(CRP) Regs) 2004 SI No 1861 Sch 1 r18(7) sets out five heads under which strike-out may be considered. Each head raises different considerations but common to all is a recognition that the power is a draconian one, described as 'not to be readily exercised' by Lord Justice Sedley in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA; [2006] EWCA Civ 684, 25 May 2006 at para 5.

Part or all of a claim or response may be struck out because:

- 'it is scandalous, or vexatious or has no reasonable prospect of success' (r18(7)(b));
- 'the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent … has been scandalous, unreasonable or vexatious' (r18(7)(c)) (see *Blockbuster v James* at para 5 for the overall approach to strike-out under this rule);
- of 'non-compliance with an order or practice direction' (r18(7)(e)).

A claim, but not a response, may also be struck out where:

- the claim 'has not been actively pursued' (r18(7)(d));
- the employment judge or tribunal considers 'it is no longer possible to have a fair hearing' (r18(7)(f)).

General points

ET(CRP) Regs Sch 1 r18(8) provides that a claim or response or any part of one can be struck out only on the grounds set out in rule 18(7)(b)–(f). Sch 1 r17(2) provides that orders and judgments made under rule 18(7) cannot be made at a case-management discussion. It follows that case-management powers cannot be used to circumvent rule 18(7): see *Sood v Governing Body of Christ the King School and others* EAT/0449/10, 20 July 2011 at para 15. No more general provisions under the ET(CRP) Regs can be used to effect strike-out. Only specific provisions may be used, so rule 18(8) does not prevent claims being dismissed on jurisdictional grounds, for example because of specific provisions relating to time limits or employee or worker status.

A grey area is the effect of rule 18(8) on background matters included in a claim or response. In *HSBC Asia Holdings v Gillespie* [2011] IRLR 209, 19 November 2010, the Employment Appeal Tribunal (EAT) found that the employment judge had misdirected himself in holding that he was unable to restrict the number of background matters on which the claimant sought to rely. In deciding the issue himself and deploying the concept of 'insufficient relevance', Mr Justice Underhill excluded 'background' allegations as not relating to the people or department at issue in the claim. The effect of rule 18(8) and the restrictions imposed by the judicial interpretation of higher courts in potentially limiting such robust case management was not considered. In *Sood*, for example, there was no need to do so as the employment judge had decided that the question of whether the historic allegations of race discrimination amounted to a 'continuing act' should be considered at a full merits hearing (see para 10).

Note that each 'conduct' case is inevitably fact-sensitive, with findings dependent on (and to an extent limited by) the type of conduct at issue. Although guidelines may be useful and help ensure consistency, at issue is whether on the facts rule 18(7)(c) applies, and whether strike-out is an appropriate response to the misconduct at issue when exercising discretion in accordance with the overriding objective. Whether or not a fair trial is still possible is not the only factor relevant to that exercise of discretion. In *Masood v Zahoor* [2010] 1 WLR 746; [2009] EWCA Civ 650, 3 July 2009, at para 71, the Court of Appeal agreed that where the misconduct is so serious that it would be an affront to the court to permit someone to continue to prosecute his/her claim, it may be struck out for that reason.

Strike-outs are normally a part of preliminary case management. Rule 18 itself deals with pre-hearing reviews (PHRs). Unless the parties agree to shorter notice, 14 clear days' notice of a PHR must be given, as well as the information that they have the opportunity to submit written representations and advance oral argument (Sch 1 r14(4)). In addition Sch 1 r19 provides that notice must be given of the order or judgment to be considered, although notice is not required if the party has been given an opportunity to give oral reasons as to why the order should not be made. If, however, a new point is sprung on a party, fairness would generally require at least a short adjournment to consider whether it can be dealt with adequately at that time. These requirements apply irrespective of whether the matter is raised on an employment judge's own initiative (Sch 1 r12) or by the other party's application (Sch 1 r11).

Rule 18 provides for all types of PHR. Rule 18(2)(d) enables an employment judge to 'consider any oral or written representations or evidence'. However, the authorities take a different view over whether or not this power may be restricted where rule 18(7)(b) is in play. One view is represented by His Honour Judge Serota QC who observed in *QDOS Consulting Ltd v Swanson* EAT/0495/11, 12 April 2012, that applications that involve:

> *prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under rule 18(7)(b) but must be determined at a full hearing … Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days* (para 49).

In contrast, in *Eastman v Tesco Stores Ltd* EAT/0143/12, 5 October 2012, where a PHR had heard live evidence and resolved two core factual disputes against the claimant, His Honour Judge Peter Clark held that the employment judge was entitled to do so. He distinguished *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126; [2007] EWCA Civ 330, 7 March 2007 and *Balls v Downham Market High School and College* [2011] IRLR 217; EAT/0343/10, 15 November 2010, on the basis that neither had heard live evidence, nor had the factual disputes at issue been resolved. In *Eastman*, the two factual disputes

were essentially simple: had the claimant been guaranteed a return to her old job and had she completed a career break form. The Court of Session's judgment in *Tayside Public Transport Co Ltd v Reilly* [2012] CSIH 46, 30 May 2012, now reported at [2012] IRLR 755 (see below), was not cited, but this is arguably an example of a case where having decided to hear live evidence, 'no serious dispute' that required a full hearing was left to resolve (see *Tayside* para 30).

Rodrigues v Co-operative Group Ltd EATS/0022/12, 17 July 2012, is an earlier example of exploring what amounts to 'rare and exceptional circumstances' justifying strike-out without a full hearing (para 52). In *Rodrigues*, the time bar and whether a series of incidents amounted to a 'continuing act' were at issue at a PHR. The employment judge had heard full evidence: it was not an 'impromptu trial' (para 54). Having resolved the time bar issues against the claimant, only one act remained in time. Lady Smith found that the employment judge's reasoning went well beyond simply being a matter of his own view of what facts a full tribunal might find. The problems with the claimant's case and with the claimant as a witness were insurmountable: if there was no reasonable prospect of his evidence being believed, his case was doomed to failure and strike-out was justified.

The area of uncertainty for litigants is whether or not the nature of the central factual disputes in their case can be resolved simply and whether or not a PHR is really likely to result in saving costs. So far no authority has involved a timeous challenge to an employment judge's exercise of discretion to hear, or not hear, live evidence at a PHR. If an employment judge decides against live evidence, that does not mean it is wrong to consider written statements. They help an employment judge understand the issues in the case and what the evidence is likely to be (see *Pillay v Inc Research UK Ltd* EAT/0182/11, 9 September 2011 at para 37).

If no live evidence is heard on a rule 18(7)(b) strike-out application, the facts pleaded in the claim or response should, except in exceptional cases, be taken to be true 'unless the opposite can be shown by clear evidence which is not seriously disputable' – see *A v B and C* [2010] EWCA Civ 1378, 8 December 2010 at para 11 and also *Reilly v Tayside Public Transport Co Ltd* EATS/0065/10, 27 May 2011 at paras 4 and 10 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, 4 April 2003 at para 10. To the extent that there seems to be a need to hear oral evidence, the existence of a live factual dispute becomes increasingly probable.

Although rule 18(7) powers may be exercised at any time, the design of the rules shows their principal use is intended to be at the pre-hearing stage and requires notice, as noted by Mr Justice Langstaff in *Williams v Real Care Agency Ltd* EATS/0051/11, 13 March 2012 at paras 8 and 19. As with any power or discretion, 'such a power must be exercised in accordance with reason, relevance, principle and justice' (para 18). Although some of the other grounds for strike-out may be appropriate during a hearing, as in *Force One Utilities Ltd v Hatfield* [2009] IRLR 45, EAT; EAT/0048/08, 22 April 2008, where during an adjournment a respondent's witnesses had made a serious threat of physical harm to the claimant, Langstaff J considered that:

> *... it would be very exceptional indeed, to the point of the instances of it being vanishingly small, that a claim could ever legitimately be struck out mid-hearing on the grounds of evidential insubstantiability* (*Williams,* para 21).

Note that repackaging a mid-hearing strike-out argument as one of 'no case to answer' does not work – see *Timbo v Greenwich Council for Racial Equality* EAT/0160/12, 2 October 2012.

Rule 18(3) requires the hearing to be before a full tribunal if a party applies in writing not less than ten days before the hearing and an employment judge considers that one or more substantive issues of fact are likely to be determined and that it would be desirable for the PHR to be conducted by a tribunal. If unfair dismissal only is at issue, the norm is for a judge alone to hear the full merits hearing. As such, the parties will also have to consider whether a full tribunal is desirable in any event, for example, in career-ending, whistle-blowing or other dismissals where the 'reason why' is at issue.

No reasonable prospect of success

A strike-out application under rule 18(7)(b) on the grounds that a claim has 'no reasonable prospect of success' is usually accompanied by one for a deposit under Sch 1 r20 as 'a condition of being permitted to continue to take part in the proceedings' in relation to a particular matter. The rule 20 test is the less stringent one of 'little reasonable prospect of success'. Changes to the employment tribunal system since 6 April 2012 are likely to result in an increase in the use of combined strike-out and deposit applications by employers.

For employees who start new employment on or after 6 April 2012, the exclusion from the right to complain to an employment tribunal about ordinary unfair dismissal, by the increase to a two-year qualifying period, increases the chances of turning to causes of action that do not require a qualifying period. More claims about automatically unfair dismissals, including whistle-blowing, or that dismissal is for a reason prohibited by the Equality Act 2010 because of the employee's protected status, may be anticipated. With such an increase comes the prospect of claims that employers would perceive as unmeritorious. Adding to the usual armoury for tackling such claims comes a doubling from £500 to £1,000 of the maximum amount that may be ordered as a security deposit and another doubling, in this instance from £10,000 to £20,000, of the maximum amount a tribunal may award in costs to a legally represented party.[1]

Counteracting an employer's enthusiasm for strike-out is a consistent message from the courts that in a normal case, whatever the jurisdiction, whether it be unfair dismissal, whistle-blowing or race discrimination, if there is a 'crucial core of disputed facts', as in *Ezsias*, it is an error of law for a tribunal to pre-empt the determination of a full hearing by striking out.

Helping to emphasise that when considering strike-out there is no material distinction in treatment based on the cause of action, the EAT's *Bundle of familiar authorities* includes just one authority on striking out, *Tayside* in the Court of Session (see above).[2] This was a claim for unfair dismissal where the driver of a double-decker bus had had to take a diversion from the normal route. He had taken the wrong diversion and his bus had collided with an overhead pedestrian walkway. The top of the bus was sheared off but no one was injured. The Court of Session observed that:

> *In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED&F Man Liquid Products Ltd v Patel *(2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED&F Man Liquid Products Ltd v Patel, *supra;* Ezsias v North Glamorgan NHS Trust*, supra). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias v North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)* (para 30).

In *Tayside*, the Court of Session recognised as live factual issues ones that are standard in many unfair dismissal cases. These are:

- **adequacy of investigation**: whether the

employer had failed to follow up on matters raised during the disciplinary proceedings, whether the change in route had been properly brought to the driver's attention, and whether he had been innocently misled by a colleague;
- **consistency**: whether there were other drivers who had had accidents or committed disciplinary offences and had not been dismissed;
- **misconduct**: whether the accident constituted gross misconduct and whether the cost of the damage done was a relevant measure in assessing the degree of misconduct.

In *Tayside*, the reason for dismissal was not in dispute. In *Ezsias*, it was – both the EAT and the Court of Appeal considered that at the heart of that case was a dispute of fact, namely what was the true reason for the dismissal. Mr Ezsias said it was because he was a whistle-blower. The hospital said it was because he was impossible to work with and that he unreasonably jeopardised the proper functioning of the hospital. The Court of Appeal held it was 'legally perverse' to consider that this 'head-on conflict of fact could be resolved without a trial' (paras 27 and 28).

Ezsias leaves open the possibility of 'exceptional' cases which can be struck out even where the central facts are in dispute. Lord Justice Maurice Kay gives the example of 'where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29).

Respondents should exercise caution here. Even where the documentation looks incontrovertible, the factual and legal arguments underlying the dispute may nevertheless show a factual dispute that cannot properly be resolved at a preliminary stage. In *A v B*, for example, the real reason for dismissal was at issue on a claim for unfair dismissal and sex discrimination. The higher education institution employer said it was for gross misconduct because of academic fraud: the claimant had claimed qualifications she did not hold. The claimant said it was because she had lodged a grievance four months before her dismissal complaining of sexual harassment by the institution's principal. Her case was that the issue of academic qualifications was used as an excuse to get rid of her because of that previous history, and not for its own sake: in essence the principal's alleged involvement in all of the institute's decisions made the disciplinary process a sham (see paras 57 and 58). This is a classic 'ulterior motive' argument based on *Associated Society of Locomotive Engineers and Firemen v Brady* [2006] IRLR 576; EAT/0057/06 and EAT/0130/06, 31 March 2006.

What tipped the balance in *A v B* was the effect of the reverse burden of proof. The claimant had enough of an argument to demonstrate a prima facie case to show:
- that the outcome of the determination on the factual dispute could not properly be foreseen at the strike-out stage; and
- that 'there remains a prospect which is more than fanciful that [the alleged discriminator] might not succeed in discharging the reverse burden of proof' (para 61).

It is only if there is some prospect, going beyond the fanciful, of the alleged discriminator failing to provide an explanation that excludes discrimination that the claim should not be struck out, as was the case in *A v B*. The converse of this is where the facts relied on by the claimant in respect of any particular discrimination claim do not establish a prima facie case.

In *ABN Amro Management Services Ltd and Royal Bank of Scotland v Hogben* EAT/0266/09, 20 November 2009, Underhill J found that the employment judge was wrong not to strike out a claim of discriminatory selection for redundancy which was 'prima facie implausible to the point of absurdity', as one claim rested on an age difference of nine months, the other on a difference of seven years (para 11). He described the prospect of proving a prima facie case of age discrimination in relation to non-appointment to either role as 'fanciful' (para 15). Apart from the interviewer thinking that the claimant was a year or two younger than he in fact was, Underhill J saw 'nothing else to indicate even a possibility of age discrimination'. He felt entitled to substitute his own assessment for that of the employment judge because the 'absence … of any basis for supposing that cross-examination could advance the claimant's case means that the judge ought not to have attached any weight to that factor' (para 15).

Respondents are likely to be keen to exploit the effect of *Madarassy v Nomura International plc* [2007] ICR 867; [2007] EWCA Civ 33, 26 January 2007, that the bare facts of a difference in status and a difference in treatment:

> *only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination* (paras 56–58).

Without a hint of that 'something more' factor, a discrimination claim could properly be struck out. However, the role of unreasonable behaviour in helping provide that 'something more' is arguably back in play. In *Hewage v Grampian Health Board* [2012] IRLR 870; [2012] UKSC 37, 25 July 2012, the Supreme Court upheld the Court of Session's decision, and without adverse comment.[3] A female consultant orthodontist of Asian origin had received a different response to her white male comparator to their complaints about a hostile and abusive employee. The 'something more' needed to make out a prima facie case looks suspiciously close to ordinary unreasonable behaviour. The factors included the failure to discipline the hostile colleague; the undue delay in issuing a final investigative report; and, having delayed, then deciding to take no action on that report.

The Northern Ireland Court of Appeal in *Rice v McEvoy* [2011] NICA 9, 16 May 2011; [2011] EqLR 771 provides part of an answer:

> *If an employer acts in a wholly unreasonable way that may assist in drawing an inference that the employer's purported explanation for his actions was not in fact the true explanation and that he was covering up a discriminatory intent. However it is not in itself determinative of the issue* (para 44).

As such, it would be reasonable to point to unreasonable behaviour as being sufficient to show that the prospect of proving a prima facie case would not be fanciful.

However, even if a clear factual dispute can be identified, that is not determinative. It depends on how it relates to the claim(s). The more relevant or central to the claims, the more exceptional it would be to strike out that element (see *Ezsias* and the discussion in *HSBC Asia Holdings* at para 13).

Conway v Community Options Ltd EAT/0034/12, 6 July 2012, provides an example of an exceptional case in which the employment judge was entitled to strike out claims of unfair dismissal and disability discrimination. The claimant was disabled because of depression and anxiety. He was off sick because of that condition during the 15 months before his dismissal on ill-health capability grounds. The medical evidence was plain and unchallenged: it was inadvisable for him to return to his former role, he was not yet fit to return in any other role, a phased return was inappropriate, and the occupational health doctor, after considering a report from the treating specialist, could not give a timescale for a return to work even if adjusted duties and a phased return were considered. There was no dispute about the facts. Irrespective of the validity of the identified provision, criterion or practice, there were no reasonable adjustments that could be made to enable him to return to work. In these circumstances there was no error in determining that the reasonable adjustments claim had no reasonable prospect of success. As the factors identified in *East*

Lindsey DC v Daubney [1977] ICR 566, 20 April 1977, had been covered without challenge by the claimant, the unfair dismissal claim similarly had no reasonable prospects of success.

Finally, as Lady Smith for the EAT made clear in *Balls* (see above) the test for strike-out is a high one. On a careful consideration of all the available material, can the tribunal properly conclude that the claim, or part of it, has *no* reasonable prospects of success? The word 'no' is stressed 'because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail' (para 6). Nor can it be decided by considering the likelihood of the other party establishing as facts their assertions about disputed matters. To reiterate, there must be no reasonable prospects but that is not as high a requirement as showing there were no prospects at all. Reasonableness is at issue and that will inevitably vary depending on the nature of the factual and legal disputes.

1 Both are limited to claims presented on or after 6 April 2012.
2 See *EAT practice in relation to familiar authorities,* 17 July 2012, available at www.justice.gov.uk/downloads/tribunals/employment-appeals/familiar-cases.pdf.
3 See also *Pace Telecom Ltd v McAuley* [2011] NICA 63, 5 October 2011; [2012] EqLR 148.

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Support for migrants update

Sasha Rozansky and **Sue Willman** continue their updates on welfare provision for asylum-seekers and other migrants, supplementing the third edition of LAG's handbook, *Support for Asylum-seekers and other Migrants*, 2009. The last update appeared in June 2012 *Legal Action* 13.

POLICY AND LEGISLATION

EU law

Changes to the legislation affecting the right to reside

The Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003 were amended by the Immigration (European Economic Area) (Amendment) Regulations 2012 SI No 1547, which came into force on 16 July 2012. The I(EEA) Regs 2006 now give effect to a number of rulings by the Court of Justice of the European Union (CJEU) concerning EU citizens and their family members' right to reside in the UK, including:

- the right of entry and residence for the primary carer of an EEA national who is (a) under 18 years old and (b) residing in the UK as a self-sufficient person, where the denial of such a right would prevent the EEA child from exercising his/her right of residence, as decided in *Zhu and Chen v Secretary of State for the Home Department* C-200/02, 19 October 2004 (reg 15A(2));
- the right of entry and residence for (a) a child of an EEA national who is in education and who had begun residing in the UK when his/her EEA national parent was residing in the UK as a worker, and (b) the primary carer of a child of an EEA national where requiring the primary carer to leave the UK would prevent that child from being able to continue his/her education in the UK, as decided in the cases of *Harrow LBC v Ibrahim and Secretary of State for the Home Department* C-310/08, 23 February 2010 and *Teixeira v Lambeth LBC and Secretary of State for the Home Department* C-480/08, 23 February 2010 (reg 15A(3)–(4));
- periods of lawful residence for the purpose of the acquisition of the right of permanent residence include periods of lawful residence that ended before Directive 2004/38/EC (known as the Residence Directive and also as the Citizenship Directive) came into force on 30 April 2006, as decided in *Secretary of State for Work and Pensions v Lassal and Child Poverty Action Group (intervener)* C-162/09, 7 October 2010 (Sch 4 paras 6(1)–(2)); lawful residence will include periods where a person only had leave under domestic law but s/he was complying with Residence Directive article 7(1), for example as a worker or self-employed person, as decided in *Ziolkowski v Land Berlin and Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (intervener)* C-424/10, 21 December 2011 and *Szeja and others v Land Berlin and Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (intervener)* C-425/10, 21 December 2011 (Sch 4 para 6(3));
- periods of absence abroad of less than two years before the Residence Directive came into force can be ignored for the purpose of the acquisition of the right of permanent residence, also as decided in *Lassal* (Sch 4 para 6(4));
- a person will not be regarded as the spouse, civil partner or durable partner of an EEA national where the EEA national was already residing in the UK, and a person will not be regarded as an EEA national where s/he is also a UK national, as decided in *McCarthy v Secretary of State for the Home Department* C-434/09, 5 May 2011 (reg 2(1)).

The I(EEA) Regs 2006 now also provide rights of entry and residence to the dependant of a primary carer where a refusal to grant such a right would prevent the primary carer from exercising his/her rights of residence under regulation 15A(2) or (4) (reg 15A(5)).

Changes were also made to the definition of 'worker' and 'student', and to introduce a residence card for people who have a derivative right of residence under regulation 15A.

Comment: In September 2012, the Department for Work and Pensions issued

DMG Memo 34/12, which provides guidance on the above changes to the I(EEA) Regs 2006.[1]

Following the CJEU's decision in *Ruiz Zambrano v ONEm* C-34/09, 8 March 2011, the government laid down various regulations, which came into force on 8 November 2012, affecting the right to reside of the primary carer of a British child:

- The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 SI No 2560, amending the I(EEA) Regs 2006, provide a right of residence and entry, and the right to work, to a 'Zambrano carer' – defined as the primary carer of a British citizen child residing in the UK, where the child would be unable to continue to live in the UK if the primary carer were not granted a right of residence (regs 11 and 15A(3));
- The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 SI No 2588, amending the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI No 1294, provide that 'Zambrano carers' are ineligible for housing and homelessness assistance under Parts VI and VII of the Housing Act (HA) 1996 (regs 4 and 6). The amendments made by these regulations do not apply to applications for housing and homelessness assistance made before 8 November 2012.
- The Social Security (Habitual Residence) (Amendment) Regulations 2012 SI No 2587 and the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 SI No 2612 amend the relevant regulations affecting eligibility for income support (IS), jobseeker's allowance (JSA), pension credit, housing benefit, council tax benefit, employment and support allowance (ESA), child benefit and child tax credit. A 'Zambrano carer' will not have a right of residence for the purpose of these benefits and so will not be habitually resident in the UK and is therefore ineligible for the benefit.

UKBA policy on contacting other government departments regarding EU permanent residence rights

On 15 August 2012, in a response to a request for information under the Freedom of Information Act (FoIA) 2000, the UK Border Agency (UKBA) provided its policy on contacting other government departments in order to establish whether the estranged EEA family member of an applicant for a permanent residence permit continues to be a qualified person, the *European Operational Policy Notice 10/2011 'Pragmatic Approach (revised)'*, 4 August 2011.[2]

In its response, the UKBA confirmed that an applicant for a permanent residence card would need to provide evidence to show that s/he had acquired five years' lawful residence under the I(EEA) Regs 2006. However, the policy provides that the UKBA should treat certain applications from estranged spouses pragmatically, since it may not always be possible for the applicant to provide the required documents to support his/her application. Where the applicant has provided evidence that s/he was the victim of domestic violence and s/he has not been able to provide evidence that his/her estranged EEA spouse is a qualified person, the UKBA would try to obtain supporting evidence from other government departments. The policy also provides details of when the pragmatic approach should be taken in relation to applications on the basis of having a retained right of residence. The UKBA confirmed in its reply that it would comply with directions from the First-tier Tribunal or Upper Tribunal for it to contact another government department to obtain evidence on whether or not someone is a qualified person, but that it hoped such directions would not be given if the applicant had not made attempts to get this evidence his/herself.

Comment: It is unclear whether the DWP and the Department for Communities and Local Government have a similar policy, but presumably a pragmatic approach would also need to be taken when considering the eligibility of the estranged spouse of an EEA national for welfare benefits and housing.

Asylum support

New guidance following court's decision that policy of delay on section 4 was unlawful

Following the High Court's decision in *MK and AH v Secretary of State for the Home Department and Refugee Action (intervener)* [2012] EWHC 1896 (Admin), 10 July 2012 (see below), that the UKBA's policy of not considering a refused asylum-seeker's application for Immigration and Asylum Act (IAA) 1999 s4 support until it had considered his/her fresh asylum claim was unlawful, the UKBA has amended the section 4 support instruction.[3]

The new instruction states that, as a general rule, caseworkers should make a decision on an application for section 4 support, based on there being an outstanding fresh claim, within five working days. In cases where there are additional factors that require that an application should receive higher priority for support, every reasonable effort must be made to decide that application within two working days. A non-exhaustive list of such cases includes people who are street homeless, families with minors, disabled people, elderly people, pregnant women, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, and potential victims of trafficking.

Dispersal guidance for people with healthcare needs and pregnant women

The UKBA has published its new instruction, *Healthcare needs and pregnancy dispersal guidance*, which replaces *Policy Bulletin 85: Dispersing asylum seekers with health care needs* and *Policy Bulletin 61: Pregnancy*.[4] The new instruction provides details of the role of the Asylum Support Medical Advisor in the dispersal decision-making process, as well as the role of dispersal accommodation providers in relation to healthcare needs, which includes briefing the supported person in a language s/he understands about local healthcare services, and, depending on his/her need, registering him/her with a GP within one or five working days. Guidance is also given on when dispersal is appropriate for people with HIV, TB, or mental health needs, as well as for pregnant women and new mothers.

Lack of UKBA guidance regarding section 4(1)(a) support

On 29 June 2012, in a response to a request for information under the FoIA made by the Asylum Support Appeals Project, the UKBA provided information on support provided under IAA s4(1)(a).[5] The UKBA stated that caseworkers may refer to a template letter when deciding whether an applicant is eligible for section 4(1)(a) support. However, apart from this letter, there was no other policy, guidance or instruction on the use of section 4(1)(a) support. The template letter suggests that an applicant must demonstrate compelling or exceptional circumstances in order to be eligible for section 4(1)(a) support.

Comment: The lack of a policy on section 4(1)(a) may be unlawful, since applicants will not know how they may qualify for this support (see a similar decision below by the First-tier Tribunal (Asylum Support) on section 4(1)(b), where there is also no policy).

Home Office statistics[6]

Initial asylum applications in the second quarter of 2012 remained stable, at 4,954, up from 4,801 in the second quarter of 2011. In the second quarter of 2012, there were 195 fresh claims from people who had previously made an asylum claim, down 11% from the second quarter in 2011 (220).

At the end of June 2012, 20,639 asylum-seekers, including dependants, were receiving support under IAA s95, down slightly from 20,855 in June 2011. Of these, 2,657 were receiving subsistence-only support and 17,982 were also receiving accommodation. The largest nationality group supported

continued to be nationals of Pakistan (4,117; 20% of all supported applicants). At the end of June 2012, there were 2,360 refused asylum-seekers, excluding dependants, recorded as receiving support under IAA s4.

In the second quarter of 2012, asylum applications from unaccompanied asylum-seeking children continued to decrease, to 244, a fall of 35% from the second quarter of 2011 (373). In the second quarter of 2012, 96 individuals had their age disputed, an increase of 20% compared with the first quarter of 2012 (80). Of the 96 individuals, 25% (24) were nationals of Afghanistan.

In the second quarter of 2012, 7,006 people entered detention, an increase of 10% since the second quarter of 2011 (6,360), but a decrease of 7% since the first quarter of 2012 (7,516). The number of people entering detention in the second quarter of 2012 included 60 children, and, of these, 24 were under five years old. Out of the 60 children, 29 were removed from the UK and 31 were released and/or granted temporary admission.

Children

Destitute migrant children

On 4 July 2012, the House of Commons Education Select Committee held an evidence session on destitution among migrant and asylum-seeking children.[7] The witnesses providing evidence included representatives from the Children's Society, the West Midlands Destitution Project, Kent CC and the Counter Human Trafficking Bureau, as well as then children's minister, Sarah Teather MP and then immigration minister, Damian Green MP. The committee heard that there are very young migrant children in the UK experiencing severe hardship, and that the causes of this include parents not being allowed to work, the low rates of asylum support and unaccompanied asylum-seeking children not receiving adequate support from social services. Following this, on 30 October 2012, a parliamentary Inquiry into Asylum Support for Children and Young People in the UK was launched. The inquiry will consider whether the current asylum support system meets the needs of children and families. The inquiry has asked for evidence from individuals and organisations working with asylum-seeking children and families in the form of answers to specific questions, which must be provided by 7 December 2012.[8]

Age-dispute research

In May 2012, the Refugee Council published its report *Not a minor offence: unaccompanied children locked up as part of the asylum system*.[9] The report focuses on unaccompanied asylum-seeking children who are not believed to be their stated age and are detained as adults, and also provides details of the number of children who have been wrongly detained as adults since the coalition government pledged to end child detention. The report makes a number of recommendations to ensure that no unaccompanied children are detained, including that:

- the UKBA refer all age-disputed applicants for a local authority age assessment;
- if there is any doubt about a person's age s/he should not be detained;
- no age-disputed person should be dealt with in the Detained Fast Track.

The Children's Commissioner commissioned research to look at whether decision-making in local authority age assessments had improved since the Supreme Court's judgment in *R (A) v Croydon LBC* [2009] UKSC 8, 26 November 2009, in which the commissioner was an intervener.[10] The report, *The fact of age* (July 2012) by Laura Brownlees and Zubier Yazdani, also considered whether the new regime of the fact-finding role of the courts had improved the outcomes for children and young people. It found that, despite some improvements, there were still many deficiencies in the decision-making and judicial review processes. A number of recommendations were made, including that:

- there should be a presumption that the age-disputed young person is a child throughout the appeal;
- a Guidance Note for tribunal judges on the conduct of age-dispute hearings should be provided;
- all judicial office holders should have training on age-dispute cases before they hear these cases;
- age assessments should be carried out by trained social workers;
- age assessments should be carried out within 'child in need' assessments, including adhering to statutory timeframes to respond to referrals and in conducting assessments;
- the UKBA and local authorities should work together to ensure that no asylum-seeker is left without support as a result of the two agencies being unable to agree on the age of that person.

CASE-LAW

EU law

Right to reside

No right of residence conferred on child of self-employed EU national

■ Secretary of State for Work and Pensions v Czop

C-147/11,
6 September 2012

■ Secretary of State for Work and Pensions v Punakova

C-148/11,
6 September 2012

C was a Polish national who arrived in the UK in 2002. From 2003 to November 2005 she was self-employed. C had four children, three of whom were born in the UK. None of her children were in education while she was self-employed. C's Polish partner was self-employed between 2002 and 2007, after which he was imprisoned and extradited. In May 2008, C claimed IS, but in June 2008 this was refused on the ground that she did not have a right to reside in the UK. She appealed, and the First-tier Tribunal allowed her appeal on the grounds that she had acquired a right to permanent residence; that she had retained her worker status; and so had a right to reside based on *Baumbast and R v Secretary of State for the Home Department* C-413/99, 17 September 2002.

P was a Czech national who arrived in the UK in March 2001. From November 2007 to September 2008 she was self-employed. She had three children, the eldest of whom entered education a week before she ceased to be self-employed. His father, a Lithuanian national, was 'a worker' for EU law purposes during 2004, 2005 and 2008. Following the cessation of P's employment, in September 2008, she applied for IS. In October 2008 this claim was refused on the ground that she did not have a right to reside in the UK. She appealed, and the First-tier Tribunal allowed her appeal on the ground that she had a right to reside under article 12 of Regulation (EEC) No 1612/68 as the primary carer of her eldest child, who had entered education while she remained self-employed.

The Work and Pensions Secretary appealed against the tribunal's decisions. The Upper Tribunal referred several questions to the CJEU (see July 2011 *Legal Action* 44). The CJEU held that article 12 cannot be interpreted as conferring a right of residence on a primary carer of a child of a self-employed or former self-employed EEA national. However, both C and P had a right to reside: C based on her having acquired the right to permanent residence as the partner of a self-employed person for five years; and P based on her being the primary carer of her eldest child who had entered education while his father was a worker.

Comment: This decision highlights the contrast between the position of primary carers of children of self-employed people and of workers, as set out in *Teixeira* (see above).

Motive for pursuing employment relevant to worker status

■ MDB (Italy) v Secretary of State for the Home Department

[2012] EWCA Civ 1015,
24 July 2012

MDB was an Argentinian national who had

been living in the UK since September 2001. Her children, MADB and GRDB, were born in the UK in November 2001 and December 2004 respectively, and started education in December 2006 and February 2008. Both children were Italian nationals through their father, LDB. He had been in the UK since 1999, but had only been in employment in 2007 for ten weeks, working eight hours a week. MDB and her children appealed against the Upper Tribunal's decision to dismiss their appeals against the Home Office's refusal to grant them a document certifying their permanent residence status and the finding that they did not have an extended right of residence. They sought to rely on LDB's work in the UK to demonstrate that they had a right of residence under article 12 of Regulation (EEC) No 1612/68, which confers a right of residence on a child who is in education and his/her primary carer. For each child to benefit from article 12, it was necessary to show that LDB had been a worker after his/her birth.

The Court of Appeal considered that it was entitled to look at the history of LDB's residence in the UK, over an 11-year period, as well as his motives for pursuing employment. The First-tier Tribunal had made a finding that LDB's ten-week period of employment seemed to have been carried out for the purposes of maintaining his JSA claim. The Court of Appeal did not disrupt that finding and upheld the decision that he had not been a worker. It therefore followed that the appellants could not rely on article 12. However, the parties had agreed that the family's rights under article 8 of the European Convention on Human Rights ('the convention') should be reconsidered, and the court remitted this issue to the Upper Tribunal for further consideration.

Loss of 'worker' status and pregnancy

■ Saint Prix v Secretary of State for Work and Pensions

[2012] UKSC 49,
31 October 2012

P was a French national who worked in the UK from September 2006 to August 2007. In September 2007, she began a one-year postgraduate course but, in February 2008, withdrew from the course because of her pregnancy. In January 2008, she had started doing agency work but had to stop in March 2008 because she was nearly six months' pregnant and the type of work she was doing was incompatible with the pregnancy. She claimed IS, but this application was refused on the ground that she did not have a right to reside, as she had not retained her worker status when she had to stop her work because of her pregnancy. Her appeal was refused by the Upper Tribunal ([2010] UKUT 131 (AAC), 7 May 2010; December 2010 *Legal Action* 13). The Court of Appeal refused her appeal as it decided that a person who ceases to work for reasons other than those set out in article 7(3) of the Citizenship Directive, ceases to be a worker; pregnancy was not one of the reasons set out in article 7(3), nor was it an illness or an accident within the meaning of article 7(3) ([2011] EWCA Civ 806, 13 July 2011; December 2011 *Legal Action* 19).

P was given permission to appeal to the Supreme Court. The court decided that the relevant issues of law were unclear and referred the following questions to the CJEU:

1. Is the right of residence conferred upon a 'worker' in article 7 of the Citizenship Directive to be interpreted as applying only to those (i) in an existing employment relationship, (ii) (at least in some circumstances) seeking work, or (iii) covered by the extensions in article 7(3), or is the article to be interpreted as not precluding the recognition of further persons who remain 'workers' for this purpose?

2. (i) If the latter, does it extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)?

(ii) If so, is she entitled to the benefit of the national law's definition of when it is reasonable for her to do so?

A *Zambrano* beneficiary is not a person subject to immigration control

■ Pryce v Southwark LBC

Court of Appeal,
B5/2012/1226,
7 November 2012

P was a Jamaican national who arrived in the UK in 2002 and overstayed her visitor's visa. She had two British citizen children, and was their primary and sole carer. She became homeless and made an application for homelessness assistance under HA 1996 Part VII. This application was refused, as was her review, on the ground that she was a person from abroad and ineligible for assistance. She appealed, on the ground that she was not a person from abroad as she derived an EU right of residence from the Treaty on the Functioning of the European Union (TFEU) article 20, as applied by the CJEU in *Zambrano*. The county court refused her appeal, and she made a second appeal to the Court of Appeal, in which the Home Secretary was granted permission to intervene.

The court allowed the appeal. Southwark had conceded that P was a *Zambrano* beneficiary – she was the sole and primary carer of her British citizen children, and if she was not given a right of residence her British children would have to leave the EU. As a *Zambrano* beneficiary, the court agreed that she was a person with an EU right of residence and was therefore not a person subject to immigration control. The court quashed Southwark's decision and held that P was and is eligible for homelessness assistance.

Comment: This is the first time the Court of Appeal has considered the effect of TFEU article 20, and the application of *Zambrano*, in the social welfare context. The judgment benefits all persons who meet the *Zambrano* criteria who applied for homelessness assistance and/or an allocation of social housing before 8 November 2012, when new regulations came into force (see above). It also helps *Zambrano* beneficiaries establish eligibility for benefits and tax credits, as well as to secure healthcare treatment in hospitals. In addition, *Zambrano* beneficiaries should not be excluded from social services support, for example, under the National Assistance Act (NAA) 1948 or the Children Act (CA) 1989, on immigration grounds because they are not unlawfully present in the UK. This case is important for confirming the principle that an EU right of residence confers substantive and not merely procedural benefits. *Zambrano* beneficiaries do not have to apply for or be granted a derivative residence card before being granted social assistance.

Effect of imprisonment on permanent right to reside

■ Onuekwere (imprisonment – residence)

[2012] UKUT 269 (IAC),
11 July 2012

O, a Nigerian citizen, had arrived in the UK in 1999 as a visitor. On 2 December 1999 he married an Irish national, and they subsequently had two children. In September 2004 he was sentenced to two years and six months' imprisonment, and was released in November 2005. Between his marriage and imprisonment there was therefore a period of four years and ten months. In May 2008, O was sentenced for another offence to two years and three months' imprisonment. He was released in February 2009. His subsequent application for a permanent residence card was refused, as was his appeal, on the ground that he had not resided lawfully in the UK for a continuous period of five years – his period in prison not being taken into account as lawful residence. He appealed to the Upper Tribunal. It was common ground between the parties that periods spent in custody do not count for the purposes of acquiring the right to permanent residence. The Upper Tribunal referred the following questions to the CJEU for a preliminary ruling:

(i) In what circumstances, if any, will a period of imprisonment constitute legal residence for the purposes of the acquisition of

a permanent right of residence under article 16 of the Citizens Directive 2004/38?

(ii) If a period of imprisonment does not qualify as legal residence, is a person who has served a period of imprisonment permitted to aggregate periods of residence before and after his imprisonment for the purposes of calculating the period of five years needed to establish permanent right of residence under the Directive?

Effect of hospital order on retaining worker status

■ JO (qualified person – hospital order – effect) Slovakia

[2012] UKUT 237 (IAC), 13 July 2012

JO was a Slovakian national who arrived in the UK in January 2005. In July 2006 he violently attacked a pensioner. He was arrested on the day of the attack and charged with attempted murder. He was found not guilty by reason of insanity, following a diagnosis of paranoid schizophrenia. In April 2007 a Hospital Order was made under Mental Health Act (MHA) 1983 s37.

In April 2011, JO was made subject to a deportation order. He appealed against that decision on the ground that he had acquired the right to permanent residence, which meant that the conditions for deportation were more stringent, and that these conditions were not met. The First-tier Tribunal allowed that appeal. The Home Secretary appealed against the decision, arguing that:

■ worker status is not retained under regulation 5(7)(b) of the I(EEA) Regs 2006 during periods of inactivity that are due to a mental, rather than physical, illness, and/or any illness is limited to temporary indisposition or illness for a short period of time; and

■ detention in a secure mental health unit under a Hospital Order made by a criminal court is to be treated in the same manner as detention during a prison sentence, with the result that periods of detention in the unit cannot count towards lawful residence for the purpose of acquiring permanent residence.

The Upper Tribunal dismissed the appeal. It decided that JO retained his worker status while he was unable to work due to his mental illness, and that this status was not disrupted as a result of him being detained in a hospital pursuant to an order of the court under the MHA 1983.

Worker status not retained if less than 12 months' registered work

■ Secretary of State for Work and Pensions v LS

[2012] UKUT 207 (AAC), 14 June 2012

S, a Slovakian national, had arrived in the UK in 1996 and claimed asylum. His claim was never determined. In 1997 he was given permission to work and he was self-employed from 2000 to May 2006. In September 2006 he became 'a worker', but this work ended in November 2006 due to S's illness. This work was registered under the Worker Registration Scheme after it had ended, and the registration card was issued in April 2007.

S claimed IS in January 2007. His claim was refused on the ground that he did not have a right to reside in the UK. His appeal to the First-tier Tribunal was successful, and the Work and Pensions Secretary appealed to the Upper Tribunal. The Upper Tribunal decided that he could not retain his worker status because he had not completed 12 months' registered work and allowed the appeal.

Cash in hand work and worker status

■ JA v Secretary of State for Work and Pensions

[2012] UKUT 122 (AAC), 16 April 2012

JA was a Dutch national who arrived in the UK in April 2008 and started to work shortly afterwards. This job lasted until June 2008. His second job, from July to October 2008, was paid cash in hand, with no deductions made for income tax or national insurance contributions. From November to December 2008 he claimed JSA. Following an assault, JA was unable to work and in January 2009 he claimed ESA. This claim was refused on the ground that he did not have a right to reside. He appealed against this decision. The First-tier Tribunal assumed that JA's employer had failed to account for the tax and contributions based on JA being paid cash. It concluded that the contract of employment was illegal and unenforceable, and that prevented JA from being a 'worker'. This meant that he was unable to retain his worker status while he was temporarily unable to work following the assault.

JA appealed to the Upper Tribunal. It considered that there was no other evidence to support the First-tier Tribunal's assumption regarding the employer not accounting for tax and national insurance, there being no findings of fact or inferences drawn on this issue. In any event, the Upper Tribunal decided that being a worker means performing services under the direction of another for remuneration, such services being genuine and effective, not marginal and ancillary. It therefore set aside the tribunal's decision; even if the contract was illegal and unenforceable, that would not have prevented JA from being 'a worker' for EU law purposes.

Housing

Council tax exemption for non-British spouses of students

■ Harrow LBC v Ayiku

[2012] EWHC 1200 (Admin), 9 May 2012

A had leave to enter the UK and permission to work as the spouse of a foreign student. She was treated as liable to pay council tax (CT) and challenged that decision. The Valuation Tribunal decided that a non-British spouse of a student was covered by an exemption from paying CT under Council Tax (Exempt Dwellings) Order 1992 SI No 558 article 3 Class N if s/he was either prevented from taking paid employment or from claiming benefits. Harrow appealed that decision as it considered that the exemption only applied if the non-British spouse of a student was prevented from taking paid employment *and* prevented from claiming benefits.

The court refused the appeal, deciding that it was sufficient for the non-British spouse of a foreign student to satisfy only one of these conditions to qualify for the exemption.

Asylum support

Policy on delay in considering section 4 support claims unlawful

■ MK and AH v Secretary of State for the Home Department and Refugee Action (intervener)

[2012] EWHC 1896 (Admin), 10 July 2012[11]

The claimants were refused asylum-seekers who had submitted further representations to the UKBA seeking leave to remain in the UK on asylum or human rights grounds. They subsequently applied for accommodation under IAA s4. The Home Office failed to process the section 4 applications promptly and so they issued a judicial review application and applied for interim relief. In their claim, they sought to challenge the Home Office policy or practice, introduced on 14 October 2009, of not considering a refused asylum-seeker's section 4 application until his/her further representations have been considered, unless 15 working days have elapsed and there will be a 'further justifiable delay' in deciding on the further submissions.

The court decided that the policy was unlawful and allowed the application. The court concluded:

that the blanket instruction … does involve a significant risk that the article 3 rights of a significant number of applicants for section 4 support will be breached … [the instruction] also has the effect of denying the applicant any independent review of the merits of his or her claim for support whilst the substantive 'fresh' claim application is considered (para 184).

Comment: See above for the changes the UKBA has made to the asylum support instruction following this judgment.

UKBA cannot dispute nationality in immigration claim while accepting it in asylum support claim

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

[2012] EWHC 2415 (Admin), 9 August 2012

Following a period of imprisonment, G was detained in immigration detention. He claimed to be a French national, and in December 2010 he was made subject to a deportation order under the I(EEA) Regs 2006. He appealed against the deportation decision. The Home Secretary submitted to the First-tier Tribunal that he should not have permission to appeal because he could not prove he was an EEA national, and permission was refused on this ground. G later applied to the Home Office for bail accommodation under IAA s4(1)(c). This application was refused on the ground that an EEA national is excluded from section 4 support by Schedule 3 to the Nationality, Immigration and Asylum Act 2002, G being a French national. G made an application for a judicial review of that decision.

The Administrative Court decided that it was clear that the Home Secretary had not made a definite decision as to G's nationality and allowed his application. The court considered that the Home Secretary had made a clear error of law by relying on French nationality to refuse section 4(1) support while simultaneously questioning this nationality to undermine his right to a statutory appeal of the deportation order.

Split household section 4 support may not breach articles 8 and 14

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

[2012] EWHC 2531 (Admin), 14 September 2012

C was a refused asylum-seeker from China. She had remained entitled to support under IAA s95 because her child was born before her asylum claim had been finally refused. She was in an on/off relationship with W, also a refused asylum-seeker from China and the father of her child. W would have been entitled to be treated as C's dependant on her section 95 claim if he were her spouse or if they had been living together as a couple for at least two out of the three years pending the application for support. Her application for W to be treated as her dependant in her section 95 claim was refused, as was her appeal to the First-tier Tribunal (Asylum Support). She made an application for judicial review.

C argued that the requirement that she and W must either be married or living together for two out of three years was incompatible with their rights under articles 8 and 14 of the convention, since they were arbitrarily excluded from support available to other couples, and that their exclusion from support constituted unfair treatment and a breach of article 8 of the convention because she was forced to choose between W having to leave her accommodation or having her support terminated.

The court observed that article 8 did not give a free-standing right to accommodation or other welfare assistance. The court considered that article 8 was not engaged simply by C and W having to live separately, but, if it was wrong about that, it considered that any breach would be proportionate in the interests of immigration control and preventing abuse of the asylum support system. The court noted that W was still able to enjoy family life with C and their child through visits and spending time outside the accommodation.

The court also decided that article 14 was not engaged since the difference in treatment between a person who had lived with an unmarried partner for the two-year period and those who had not was not based on a person's 'status' and could not amount to discrimination under article 14. In any event, the difference in treatment was justifiable because the 'two out of the last three years' requirement is a 'sensible factor' to work out the nature and permanence of a relationship and to minimise the scope for abuse of the asylum scheme (para 58).

Decisions of the First-tier Tribunal (Asylum Support)

Asylum support should only be discontinued following receipt of immigration status documents

■ AS/12/07/28626

18 July 2012[12]

The appellant was a Jamaican national who was sent a letter dated 22 June 2012 confirming that she had been granted discretionary leave to remain in the UK. On 2 July 2012 the UKBA wrote to her, giving her notice that as she was no longer an asylum-seeker her support provided under IAA s95 would end on 25 July 2012. She appealed against that decision on the ground that her support could not be withdrawn until 28 days after she had received 'notification' of the decision to grant her leave, such notification being receipt of her immigration status documents, which had not yet been provided. She received her immigration status documents on 6 July 2012.

The tribunal decided that notification means receiving the immigration status documents. The tribunal allowed the appeal and found that support should continue until 3 August 2012.

Section 4(1)(b) support

■ AS/12/05/28619

6 August 2012[13]

The appellant was a refused asylum-seeker from Afghanistan. She became street homeless and approached the police for help. She was detained in custody and then notified that she was being detained under immigration powers. She was subsequently granted temporary admission and released to an address provided by the UKBA. However, on the following day she was given three days' notice to leave the accommodation. She approached some charities for help and, shortly afterwards, she applied for accommodation under IAA s4(1)(b) on the ground that she had been released from detention and had been granted temporary admission. She applied on the form used for section 4(1)(c) bail accommodation applications, since there is no specific form for section 4(1)(b) support. The UKBA refused her application and she appealed.

The tribunal decided that A's application for section 4(1)(b) support lacked clarity and the UKBA could not be criticised for refusing it. However, in the meantime, A had made another application on the section 4(1)(c) application form, in which it was clear and unambiguous that this was an application for section 4(1)(b) support, and the tribunal remitted the appeal for the UKBA to make a decision on the outstanding application (see *AS/12/08/28780* below).

■ AS/12/08/28780

26 September 2012[14]

Following the remittal of *AS/12/05/28619* (see above), the UKBA refused A's application for section 4(1)(b) support and she appealed. In response to the tribunal's directions, the UKBA stated that the Home Secretary had not published any guidance on applications under section 4(1)(b). Despite this, the Home Secretary submitted that as section 4(1)(b) support was discretionary, A would need to show that there were exceptional and compelling circumstances for her to be granted this support.

In a landmark decision, the Tribunal Principal Judge stated that:

A lawful system requires legal certainty. As a matter of principle, the SSHD must provide sufficient information to the public on how she intends to operate her discretionary power to grant accommodation under s4(1)(b) to enable the persons affected to know what the law is and how they can comply with it (para 23).

She noted that:

Currently, the SSHD has failed to identify in

an open and transparent document which class of persons can apply for s4(1)(b) accommodation and which cannot. If failed asylum-seekers fall within the latter group [then] she should say so. She also needs to specify the criteria for the grant of accommodation under this provision so that if it is refused, the persons concerned will know why they have been refused and what they must do to exercise an effective right of appeal. That would also assist this tribunal to determine the appeals fairly rather than having to speculate on what may or may not have been taken into consideration by the SSHD in assessing exceptional and compelling circumstances. No doubt it would also be welcomed by UKBA caseworkers responsible for writing refusal letters who currently refuse s4(1)(b) applications for entirely the wrong reasons – because there is no guidance in place directing them to the correct approach (para 25).

The Principal Judge considered that the availability of support under section 4(2) did not preclude a failed asylum-seeker from applying for support under section 4(1) and that there was no destitution test to satisfy for section 4(1)(b) support. Since the UKBA had to provide A with an address in order to release her from detention, and did not do so on bail but under temporary admission, A had a legitimate expectation that she was being provided with section 4(1)(b) support on her release from detention. Until the UKBA sets out a policy on section 4(1)(b) support, it would not be lawful for it to refuse support on the ground that the applicant was not taking steps to return to his/her country of origin, or on other conditions. The Principal Judge decided that A's circumstances were sufficiently exceptional and compelling to merit the Home Secretary exercising her discretion to grant section 4(1)(b) support and allowed her appeal.

Comment: The judge did note that ordinarily the issue of form IS96 granting temporary admission is not an indication that section 4(1)(b) support has been or will be granted.

Community care

Adults

■ SL v Westminster City Council and Medical Foundation and Mind (interveners)

[2011] EWCA Civ 954, 10 August 2011[15]

The listing of this appeal, concerning the meaning of 'care and attention' in relation to the eligibility of a refused asylum-seeker who is mentally ill for accommodation under NAA s21, has been moved and will now be heard by the Supreme Court on 28 and 29 January 2013. See January 2012 *Legal Action* 35 for more details of the Court of Appeal's decision in this case.

Children

Age assessments

Detention of a child may not be unlawful if child assessed as an adult

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

[2012] EWCA Civ 1383, 26 October 2012

AA was an Afghan national. He arrived in the UK as an unaccompanied child and claimed asylum. He was assessed by Hampshire Social Services to be an adult, and this decision was accepted by the Home Secretary. His asylum claim was refused and he had exhausted his appeal rights. The Home Secretary made a decision to detain him, with a view to his removal from the UK. Had the Home Secretary accepted that AA was a child, she would not have detained him, as her policy was only to detain children in exceptional circumstances; it was agreed such circumstances would not have applied to AA. After AA was detained, Cardiff Social Services reassessed his age and accepted that he was a child. The Home Secretary accepted the decision in Cardiff's reassessment. AA sought to challenge the lawfulness of the 13 days he had spent in immigration detention, arguing that it was unlawful for him to have been detained since he was in fact a child.

AA's application for judicial review was refused, and he appealed to the Court of Appeal. The court refused AA's appeal on the grounds that:

- at the date of his detention it had not been established that AA was a child as his age had been assessed as that of an adult;
- the Home Secretary's statutory power of detention was wide enough to permit the detention of a person not established to be a child, and her duty to treat the best interests of a child as a primary consideration did not apply; and
- the policy of the Home Secretary permitted the detention of a person not established to be a child, and the principle giving an individual the benefit of the doubt did not apply in the circumstances of this case.

The court held that the Home Secretary's duty under Borders, Citizenship and Immigration Act 2009 s55, to treat the best interests of a child as a primary consideration, did not apply in circumstances where a person had been assessed to be an adult.

Benefit of doubt may not apply after assessed as adult

■ KA (Afghanistan) v Secretary of State for the Home Department

[2012] EWCA Civ 1420, 6 November 2012

The Upper Tribunal found that KA was not a child at the date of the decision being appealed. Although the tribunal had found that the local authority age assessment determining KA's age was flawed, it decided that it could not place any weight on an independent age assessment. It concluded that KA was not a child on the basis of KA's own evidence, it having been determined that he was not a credible witness. KA was granted leave to appeal the Upper Tribunal's decision to the Court of Appeal. He sought to argue that as the Asylum Policy Instruction, *Assessing age*, affords a benefit of doubt to age-disputed asylum applicants pending their age assessment, and as the local authority assessment was flawed, the Home Secretary's reliance on that assessment must also have been flawed and the benefit of doubt should have continued to apply. He argued that it should therefore follow that he should have been granted discretionary leave to remain until he was 17-and-a-half years old.

The Court of Appeal dismissed the appeal. The court held that although the Asylum Policy Instruction affords a benefit of doubt to age-disputed asylum applicants, this benefit of doubt no longer applies after a person's age has been assessed. Additionally, KA was not entitled to automatically be treated as a child in the legal proceedings in the lower courts, as he had been assessed to be an adult, and no particular requests or objections had been raised in relation to the way in which KA's evidence was given. The Upper Tribunal was therefore entitled to reject the local authority and independent age assessments and make a finding on age based on KA's credibility.

Local authorities not bound by UKBA or immigration judge's age assessments

■ R (Kadri) v Birmingham City Council and Secretary of State for the Home Department (interested party) and others

[2012] EWCA Civ 1432, 7 November 2012

K's asylum appeal was dismissed by the First-tier Tribunal. However, the tribunal accepted his stated age and found that he was a child. Subsequently, Birmingham carried out an age assessment, which concluded that he was an adult. K sought a judicial review of this decision. He was granted permission and the High Court decided that his age should be determined by the Upper Tribunal. He made an application to the Court of Appeal for permission to appeal the High Court's decision. In *JS* and *YK*, appeals which were being heard together with *K*, Birmingham had assessed them to be adults despite there being a judgment from an immigration judge at the

time of Birmingham's decision that each had been a child. Their judicial reviews of Birmingham's assessments were allowed on the ground that Birmingham had failed to follow the joint working protocol between the UKBA and the Association of Directors of Social Services for the United Kingdom Local Government and Statutory Childcare Agencies ('the protocol'), the purpose of which was 'to support a co-operative approach to age assessment between the [UKBA] and the local authorities' (para 5). The age assessments were quashed and Birmingham appealed these decisions. A fourth appellant, MWA's, judicial review of Birmingham's decision that he was an adult was refused and he appealed.

The Court of Appeal considered two issues in relation to age assessments carried out by local authorities and the Home Secretary:

■ Did Birmingham act unlawfully in failing to apply paragraph 14 of the protocol in that it did not (i) attempt a reconciliation of its age assessments with those of the Home Secretary or (ii) agree to refer the disputed age assessments to the binding adjudication of a nominated third party?

■ Is, as a matter of EU law, a local authority bound to accept and apply the decision of the Home Secretary (or on appeal the tribunal) as to the age of an individual?

The court held that there was no evidential finding to support the fact that the protocol was part of Birmingham's own policy, nor was the protocol binding on the local authority. Birmingham was granted permission to appeal and the tribunal's decisions were quashed. Similarly, K and MWA were refused permission to appeal in relation to their submissions on the protocol.

The court considered the provisions contained within Council Directive 2003/9/EC ('the Reception Directive'), Council Directive 2004/83/EC ('the Qualification Directive') and Council Directive 2005/85/EC ('the Procedures Directive') relating to age assessments and the treatment of children in the asylum process. The court decided that:

■ *If the local authority disagrees with the [Home Secretary's] assessment of the age of the applicant, this has no necessary effect on the [Home Secretary's] decision on the asylum application. An applicant's age may be an important (and in some cases a decisive) element in the [Home Secretary's] reasoning that leads her to conclude that refugee status should be granted or revoked ... But even where (i) age assessment is an important (or even decisive) element in the [Home Secretary's] decision and (ii) the local authority disagrees with the [Home Secretary's] age assessment when it discharges its own statutory functions, the local authority is plainly not taking a decision on the asylum application* (para 39).

■ A remedy limited to judicial review of the local authority's decision to refuse accommodation under CA 1989 s20 would not unfairly place the burden on the child of requiring him/her to prove his/her minority for a second time, as there is access to national law procedures for an appeal against a negative decision relating to the grant of benefits under the Reception Directive.

■ There is nothing inherently oppressive or unfair about the current system in the UK for determining the age of a person. Although it is undesirable that a person's age should be subject to examination successively by the Home Secretary (and the tribunal on appeal) and then by a local authority, that does not mean that the EU principle of effectiveness is breached. The principle of effectiveness is breached only if the exercise of the rights conferred by EU law is rendered virtually impossible or excessively difficult. Therefore the requirement that an applicant must prove that s/he is a child on the balance of probabilities if s/he is to enjoy the benefits prescribed by the Directives does not make the exercise of those rights virtually impossible or excessively difficult.

The court held that EU law does not require a local authority to be bound by an age assessment by the Home Secretary or an immigration judge and therefore refused K and MWA permission to appeal and allowed Birmingham's appeal in *YK* and *JS*.

The court also considered a number of other issues relevant to age assessments. It held that in most age assessment judicial reviews where there is a challenge both on the facts and on some orthodox public law ground, it would be better for the court to decide all issues in one hearing, or transfer the case to the Upper Tribunal for that purpose, rather than only considering the public law ground. The court declined to give guidance to avoid the risk of inconsistent age assessments by tribunals on appeals from decisions of the Home Secretary and local authorities. The court confirmed that a local authority is not bound by a decision of the tribunal on an appeal against a decision of the Home Secretary about an applicant's age, as decided in *R (PM) v Hertfordshire CC* [2010] EWHC 2056 (Admin), 4 August 2010; December 2010 *Legal Action* 16.

1 Available at: www.dwp.gov.uk/docs/m-34-12.pdf.
2 Available at: www.whatdotheyknow.com/request/123146/response/304168/attach/2/UKBA%20FOI%2023592%20response.pdf. Colin Yeo, barrister, London.
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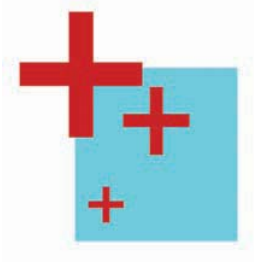
11 Platt Halpern, solicitors, Manchester; Martin Westgate QC and Ranjiv Khubber, barristers, London; Sonal Gelani, Migrants Law Project, London; and Mark Henderson and Alison Pickup, barristers, London.
12 Tim Shotton, TRP Solicitors, Birmingham.
13 Asylum Support Appeals Project, London.
14 Asylum Support Appeals Project, London.
15 Joanna Thompson, solicitor, Deighton Pierce Glynn Solicitors, London and Stephen Knafler QC, barrister, London.

Sasha Rozansky is a solicitor and Sue Willman is a partner at Deighton Pierce Glynn Solicitors. Readers are encouraged to forward relevant cases to Sasha Rozansky at: SRozansky@dpglaw.co.uk in time for the next update in June 2013. The authors would like to thank the colleagues at notes 2 and 11 to 15 for transcripts or notes of judgments.

Legal aid round-up



Katie Brown and **Connor Johnston** from Young Legal Aid Lawyers (YLAL) report on YLAL's autumn programme of events.

An introduction to legal aid

Autumn saw the return of two regular features of the YLAL calendar. The first was our annual 'Introduction to legal aid' seminar geared at students considering a career in legal aid. The seminar aimed to convey the realities of life as a legal aid lawyer covering the areas of immigration, housing, family and crime as well as providing an overview of forthcoming legal aid cuts.

The second event was our regular workshop on starting a career in legal aid at the Legal Aid Practitioners Group (LAPG) annual conference (see November 2012 *Legal Action* 31). The workshop combined the practical experiences of a pupil barrister and a trainee solicitor, with tips on the recruitment process from a sole practitioner.

The most striking characteristic of both these events was simply the number of attendees; a sizeable contingent of new lawyers just starting out on their training, enthused about social justice and willing to commit to a career in legal aid. It goes without saying that legal aid is facing a difficult time. Yet for us, events like these are a heartening reminder that, however severe the cuts to legal aid, there will continue to be a core of lawyers willing to stand up for access to justice for the vulnerable and marginalised.

Cuts and challenges

Also at the LAPG conference, YLAL hosted a second workshop entitled 'Cuts and challenges', exploring the role of legal challenges in a time of cuts to public funding (see November 2012 *Legal Action* 30). Laura Janes, of Scott-Moncrieff and Associates LLP (SCOMO), set out her experience, as a prison lawyer representing young children in custody, of local authorities and government departments often refusing to provide these children – many from abusive backgrounds – with the support they needed for rehabilitation. Cost was frequently and openly the driving factor behind these decisions. She then spoke about the ways in which such cost-driven decisions can be challenged, and highlighted her experience as a mother (and service-user) in challenging successfully Hammersmith and Fulham Council's decision to stop funding its local Sure Start centre.

The baton was then taken up by Mitchell Woolf, also of SCOMO, who focused on resource decisions in the community care area of law. He discussed the case of *R v Gloucestershire CC and another ex p Barry* [1997] AC 584, 20 March 1997, which held that local authorities can take cost into account when deciding whether to provide ill or disabled people with the support they require to meet their day-to-day needs. The effect of this decision is being felt now more keenly than ever as local authorities seek to rein in their budgets.

Mitchell Woolf decried the false economy behind the *Barry* approach; frequently, the result of denying support to those who are ill or disabled is that their problems escalate until they become so critical that they qualify for funding, costing more in the long term and causing untold misery along the way. He expressed his hope that a successful challenge to *Barry* may yet be seen.

Exceptional funding

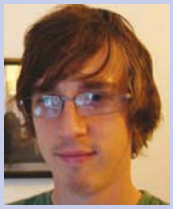
The final part of our autumn programme of events was a seminar led by Paul Bowen QC and Alison Pickup of Doughty Street Chambers: 'Challenging legal aid cuts post LASPO – ensuring access to justice in the brave new world of legal aid'. The seminar reprised Paul's and Alison's talk in November 2010, the day after the legal aid green paper (which then led to the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012) was published. Respectively, Paul and Alison spoke of the circumstances in which the state is obliged to provide legal aid to avoid a breach of the European Convention on Human Rights ('the convention') and the Charter of Fundamental Rights of the European Union ('the charter').

In some ways the seminar served to emphasise the unbridled cynicism which underpins the LASPO Act. The areas of law that remain in scope mirror closely the bare minimum which is required to avoid a breach of rights under the convention and the charter. This is nowhere more apparent than in LASPO Act s10 – the mechanism for exceptional funding – which begrudgingly allows for the provision of legal aid to avoid a breach of fundamental rights, but not, for example, in cases where there is 'only' a wider public interest. It can be seen that the legal aid part of the LASPO Act has been drafted with a single political question in mind: how much can we get away with cutting?

On a more positive note Paul and Alison provided guidance on the types of cases which may qualify for exceptional funding and gave their thoughts on the potential for legal developments in this area (see also November 2012 *Legal Action* 16). In respect of the charter, Alison analysed the right to public funding under article 47. Member states of the EU are bound by the charter when they are acting within the scope of EU law. The right to legal aid under the charter could, therefore, provide a crucial safety net in cases involving EU law which do not involve a determination of an individual's civil rights for the purposes of article 6 of the convention. Examples, Alison suggested, might include immigration cases, welfare benefits cases involving the right to reside and certain consumer cases.

In relation to the convention, Paul focused on situations where civil legal aid will be required in order to avoid a breach of article 6. Interestingly, Paul also hinted at an emerging right to legal aid to avoid a breach of article 8. Such a development might allow for legal aid to be provided outside of the limited situations which involve a determination of civil rights. This could be invaluable in cases involving disputes over housing or disability benefits where the home, dignity and independence of the individual are at stake.

The theme that emerged was that the circumstances in which legal aid will be required in order to avoid a breach of the convention and the charter have not yet been set in stone. In this respect, the seminar provided a timely reminder that even working within the constraints of the LASPO Act there are still important battles to be fought.



Katie Brown is a housing solicitor at Philcox Gray & Co, London and Connor Johnston is a barrister at Garden Court Chambers, London. They are co-chairpersons of YLAL.

Recent developments in practice management

Vicky Ling provides information and advice on preventing the audit compliance nightmare.

There is no doubt that for many organisations the Legal Services Commission's (LSC's) complex contractual requirements can be an Achilles heel. Surprisingly few have a systematic approach to internal audit beyond the supervisory file reviews inherent in Lexcel and the Specialist Quality Mark. Even then, most organisations do very little with the information generated. This can mean that LSC audit results come as a nasty shock.

Audits

The LSC has published a non-exhaustive list of 16 different types of audit and validation process.[1] A feature which most of them share is that they can result in recovery of money and the issue of a Contract Notice. However, if you use the information you gather from your file reviews in the right way, you can minimise the chances of this happening.

Most costs assessment issues start with a contract manager (CM) visit. The LSC has published a briefing paper on current audit trends, *Controlled work – contract compliance and audit trends* (March 2012).[2] The LSC intends CM visits to become a regular occurrence to ensure compliance against contractual requirements. They are conducted on the organisation's premises, usually taking 4–5 hours. If compliance is established, there will be no further action. However, if even one file is found to be non-compliant, the CM is likely to ask the organisation to self-audit a further sample where the same problem is likely to occur. The current approach seems to be to try to identify every single misclaimed file, sometimes going back to the advent of fixed fees for controlled work cases in 2007. If a further sample shows problems, the LSC is likely to ask the organisation to audit another sample, in an effort to identify all instances where claims have been made incorrectly. This puts you in a difficult position, since if the sample is large, it will drain your resources and impact on contract performance. You are not obliged to self-audit large numbers of files, but most organisations do as they want to co-operate with the LSC.

If you disagree with your CM on a costs point, you can use the costs appeal process in the 2013 Standard Civil Contract (Specification, paragraph 6.68 onwards). However, before the formal process kicks in, the CM will refer the matter to the Provider Assurance Department at the LSC, and it will carry out an internal review. If you still disagree, you can make representations which will go to an independent costs assessor.

The solution: internal audit?

File reviews should identify any problem areas, for example:

- Are all forms completed correctly?
- Has the LSC returned any forms due to incorrect completion?
- If a police station case – is the Duty Solicitor Call Centre reference recorded on the file?
- Is the client financially eligible?
- Does the evidence of means cover the computation period?
- If a friend or family member is supporting the client, is the letter specific about the amount of support and when it started?
- If the client is in detention and apart from his/her spouse/partner, should his/her means be taken into account if the relationship is continuing?
- If a controlled work case – has the sufficient benefit test been met? Was this matter start justified?
- Is funding in place? If a certificated case, is the work within the limitations?
- If an expert has been instructed, is the work within scope and has prior authority been applied for (where possible)?
- Are disbursements supported by vouchers?
- If a private car was used, is there justification for why public transport was not?

It is advisable to include some closed files in the supervisors' file review samples as they will enable you to check whether:

- the correct fees were claimed;
- in family cases, there is evidence to justify a level 2 fee (before May 2011, this required at least two meetings; after that date 'substantive negotiations' (para 7.58 of the Family Specification));
- the correct codes were used;
- claims were submitted in time (six months after the end date for controlled work and three months after the right to claim for licensed work).

Feedback from those involved in drafting bills is valuable and capturing information about why bills were not paid in full is also helpful.

Making best use of your information

If you have a practice manager, s/he would normally take operational responsibility and gather information from all departments. Information needs to be co-ordinated from all relevant sources within the organisation and reported back to teams and members/partners on a regular basis.

It may seem like a big task, but once the system is in place you will be able to tackle inefficiencies and reduce wasted effort, leading to better use of resources and increased profitability. An internal audit system is an essential part of risk management and will give you confidence before any assessment or audit, even at short notice.

1 *Holistic approach to contract management and assurance activities. List of compliance, assurance and audit activities*, August 2011, available at: www.legalservices.gov.uk/civil/auditing.asp.
2 Available at: www.legalservices.gov.uk/civil/cciwg.asp.

Vicky Ling is a consultant specialising in legal aid practice and a founder member of the Law Consultancy Network. She is also co-editor, with Simon Pugh, of the *LAG legal aid handbook 2011/12*, May 2011, £40. E-mail: vicky@vling.demon.co.uk.

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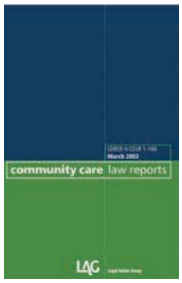

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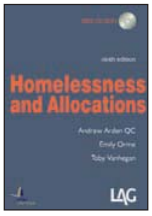

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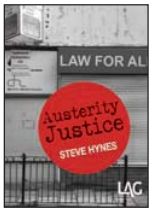

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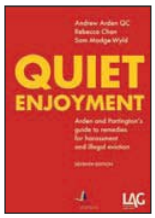

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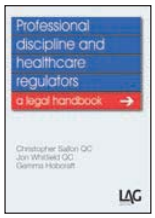

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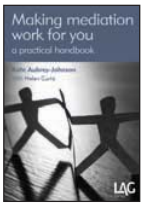

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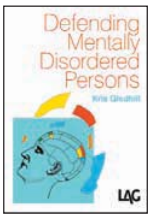

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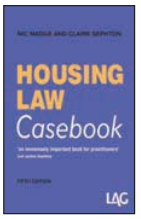

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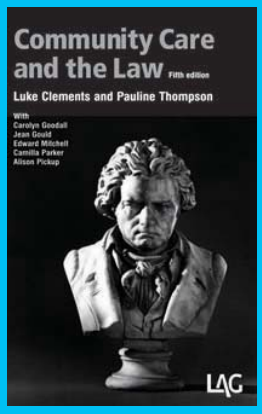

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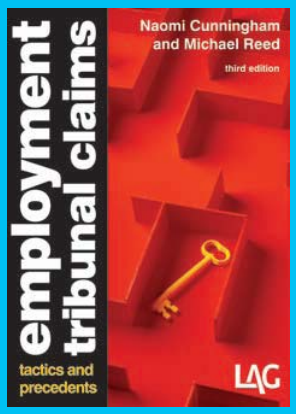

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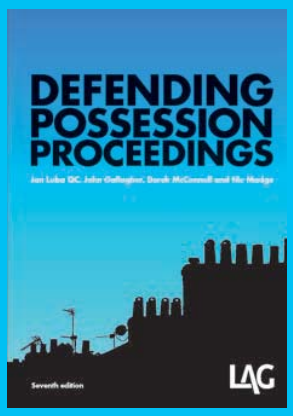

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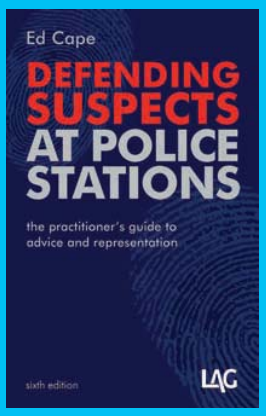

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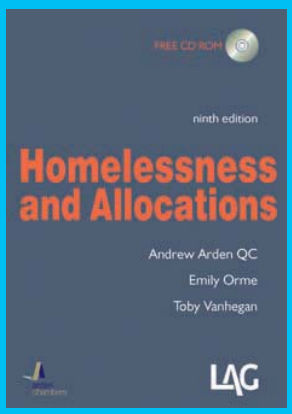

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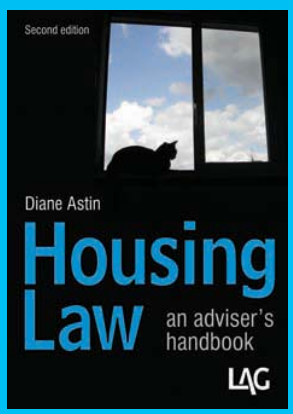

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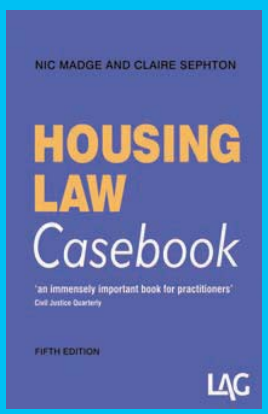

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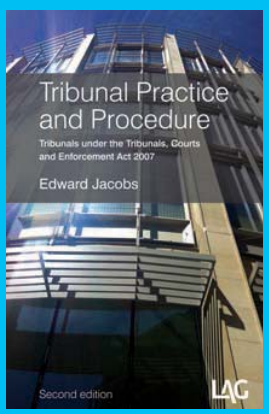

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